CONSERVATION LAW FOUNDATION'S PETITION FOR RULEMAKING TO THE ENERGY FACILITY SITING BOARD

I. INTRODUCTION

Conservation Law Foundation (CLF) respectfully requests that the Energy Facility Siting Board (EFSB) commence a rulemaking in order to consider, decide, and describe how the EFSB intends to address the provisions of the Resilient Rhode Island Act, R. I. Gen. Laws § 42-6.2-1, et seq.

II. LEGAL AUTHORITY

The Energy Facility Siting Act, the organic statute that created the EFSB, expressly confers on the EFSB the power to conduct rulemaking pursuant to Rhode Island's enactment of the Administrative Procedures Act (APA). Specifically, R.I. Gen. Laws §42-98-7(c) states: "The siting board is empowered to issue any orders, rules, or regulations as may be required to effectuate the purposes of this chapter."

This provision of the Energy Facility Siting Act is reflected in EFSB Rule 1.33. EFSB Rule 1.33(a) states, in its entirety:

> 1.33(a) General – Petitions for relief under any statute or other authority designated to the Board shall be in writing, shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon, and the relief sought, and shall cite by appropriate reference the statutory provision or other authority relied upon for relief. Fifteen (15) copies shall be filed with the original.

A. CLF's Grounds Of Interest

CLF is New England's leading environmental advocacy organization. Since 1966, CLF has worked to protect New England's people, natural resources and communities. CLF is a

nonprofit, member-supported organization with offices throughout New England. The Rhode Island CLF office is located at 55 Dorrance Street, Providence.

CLF promotes clean, renewable and efficient energy production throughout New England and has an unparalleled record of advocacy on behalf of the region's environmental resources. CLF is a full Market Participant in the New England Power Pool (NEPOOL), and CLF staff participate regularly in a number of committees of both NEPOOL and the Independent System Operator-New England (ISO-NE). ISO-NE (licensed by the Federal Energy Regulatory Commission under the Federal Power Act) both runs the New England electricity grid in real time and oversees the New England markets for energy, capacity, and ancillary services that ultimately set electricity prices for all ratepayers in New England.

As part of its 40-year legacy, CLF was a party in the landmark case in which the U.S. Supreme Court ruled that the U.S. Environmental Protection Agency has an obligation under the Clean Air Act to consider regulating tailpipe emissions that contribute to global warming, Massachusetts v. E.P.A., 549 U.S. 497 (2007). CLF regularly litigates matters pertaining to carbon emissions, climate change, and electricity-generation facilities in New England.

CLF members helped to draft the Resilient Rhode Island Act, and CLF staff and members lobbied actively in the Rhode Island General Assembly in favor of its passage.

B. Facts Relied Upon

In 2014, Rhode Island enacted the Resilient Rhode Island Act, R. I. Gen. Laws § 42-6.2-1, et seq.

That statute announced that it is the public policy of the state to reduce statewide carbon emissions by 10% below 1990 levels by 2020, 45% by 2035, and 80% by 2040. R. I. Gen. Laws § 42-6.2-2(a)(2). See Allstate v. Fusco, 101 R.I. 350, 356, 223 A.2d 447 (1966) (It is well settled that public policy is what the legislature says it is through the statutes it enacts).

The Resilient Rhode Island Act made it the job of all state agencies and boards, including the EFSB, to carry out this ambitious agenda. For example, the statute expressly said that all state agencies "shall[,]" inter alia, "[d]evelop short and long-term greenhouse gas emission reduction strategies and track the progress of these strategies[,]" R. I. Gen. Laws § 42-6.2-3(2); and "[i]ncrease the deployment of in-state generation of renewable energy and energy efficiency[.]" R. I. Gen. Laws § 42-6.2-3(5). The EFSB has not yet announced how it intends to comply with these provisions in the Resilient Rhode Island Act; but it can and, respectfully, should do so now in an APA rulemaking.

Another section of the Resilient Rhode Island Act states: "Consideration of the impacts of climate change shall be deemed to be within the powers and duties of all state departments, agencies, commissions, councils, and instrumentalities, including quasi-public agencies, and each shall be deemed to have and to exercise among its purposes in the exercise of its existing authority, the purposes set forth in this chapter pertaining to climate change mitigation . . . ." R. I. Gen. Laws § 42-6.2-8.

While the Resilient Rhode Island Act, by its plain terms, applies to all state departments, agencies, and commissions, it may be impossible to find a Rhode Island agency to which the

statute applies more concretely or more directly than the EFSB, because the EFSB is the statutory center "for a coordinated decision on any major energy facility;" R.I. Gen. Laws §42-98-1(d).

C. The Relief Sought

Current EFSB Rule 1.6(b) sets forth twenty-one specific components that must be included in all applications to the EFSB. These include things such as the name of the applicant (Rule 1.6(b)(1)); a site plan (Rule 1.6(b)(5)); and identification of federal agencies which may exercise licensing authority over the facility (Rule 1.6(b)(17)).

With this Petition for Rulemaking, CLF respectfully requests that the EFSB add a twenty-second sub-paragraph to the existing Rule 1.6(b), thereby adding one additional component to be included in applications:

> (22) Specific and detailed information on the anticipated annual greenhouse gas emissions that would result from the proposal for the anticipated life of the project, and an analysis of the cumulative impacts of these greenhouse gas emissions on climate change for Rhode Island, the United States, and the world.

III. DISCUSSION

CLF is proposing the insertion of one additional criterion – exactly one sentence in length – to an existing EFSB Rule. Making this simple addition would be helpful to all concerned: present and future applicants to the EFSB, the EFSB itself, and the general public.

This point is powerfully demonstrated by the pendency of EFSB Docket SB 2015-06,[1] in which Invenergy seeks a permit to construct a $700 million carbon-emitting fossil-fuel facility that Invenergy says could be in operation – and emitting carbon – for 40 years. In its permit application to the EFSB, Invenergy discussed a variety of expected environmental impacts of its proposal, including air quality, impacts to ground water, stormwater issues, terrestrial ecology, and impacts on wildlife. Invenergy October 29, 2015, Filing, Docket SB 2015-06, at pages 29 to 82. In all of this text, Invenergy did not once mention climate change – despite the fact that it proposes to build a fossil-fuel generating facility that it says could emit carbon for decades.

Invenergy's omission, while unfortunate, is hardly surprising. No current EFSB Rule expressly mentions climate,[2] and Invenergy may not have understood clearly what its obligations under the newly enacted Resilient Rhode Island Act were.[3]

Adding the additional criterion that CLF is proposing would fix this problem. Adding this criterion would put all permit applicants on notice of what they need to file to comply with the Resilient Rhode Island Act, and would ensure that that the EFSB gets the information it needs to carry out the public policy of the state with regard to climate mitigation.

Adding the additional criterion that CLF is proposing would also be in the public interest. Members of the public have a keen interest in matters pertaining to climate change and fossil fuel

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[1] CLF is participating in the EFSB's Invenergy Docket, SB 2015-06, having filed a Motion To Intervene on November 18, 2015.

[2] EFSB Rule 1.6(b)(12) does require a "detailed description and analysis of the impact, including cumulative impact . . . on the . . . environment t on and off site . . . ." But this subsection predated the Resilient Rhode Island Act, and does not expressly require a discussion of climate impacts.

[3] Indeed, Invenergy's 471-page filing fails even to mention the Resilient Rhode Island Act.

plants, and adding the criterion that CLF is proposing would give members of the public information that they have an avid interest in having.

Finally, adding the additional criterion that CLF is proposing is very much in keeping with the underlying public-policy purposes of the APA, both at the federal level and here in Rhode Island. The reason that the APA contemplates rulemaking in circumstances like the one here is to ensure that agency policies can be determined ex ante in a careful, deliberate manner, rather than through ad hoc determinations which are inherently arbitrary. Morton v. Ruiz, 415 U.S. 199, 232 (1974). See, generally, Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 421 Mass. 570, 588 (1996) (Agency rules allow courts to compare the agency's action in particular cases with its rules, thus preventing arbitrariness).

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, Conservation Law Foundation respectfully requests that the Energy Facility Siting Board commence a rulemaking pursuant to Rhode

Island's enactment of the Administrative Procedures Act, in order to consider, decide, and describe how the EFSB intends to address the provisions of the Resilient Rhode Island Act, R. I. Gen. Laws § 42-6.2-1, et seq.

CONSERVATION LAW FOUNDATION,
by its Attorneys,

Jerry Elmer (# 4394)
Max Greene (# 7921)
CONSERVATION LAW FOUNDATION
55 Dorrance Street, Suite 202
Providence, RI 02903
Telephone: (401) 228-1904
E-Mail: JElmer@CLF.org
E-Mail: MGreene@CLF.org

CERTIFICATE OF SERVICE

EFSB Rule 1.33(b) does not require service of the within Petition for Rulemaking on any person. However, because the Invenergy Docket, SB 2015-06, is referenced herein, CLF is electing to serve this Petition for Rulemaking on the entire service list of the Invenergy Docket. CLF is doing this by first-class mail, postage prepaid, and electronically via e-mail, both on January 4, 2015. My signature below certifies the accuracy of the statements in this paragraph.