

STATE OF NEW YORK
SUPREME COURT COUNTY OF JEFFERSON

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Fee Amt: \$210.00 Page 1 of 18
Jefferson County, NY
Cheryl D Lane Clerk
File **2010-00000336**

TOWN OF HENDERSON TOWN BOARD,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil
Practice Law and Rules

vs.

TOWN OF HOUNSFIELD PLANNING BOARD,
UPSTATE NY POWER CORP, and the NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents.

NOTICE OF PETITION

Index No.: _____
RJI No.: FEB - 5 2010
Hon. _____

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HANCOCK & ESTABROOK, LLP
COUNSELORS AT LAW

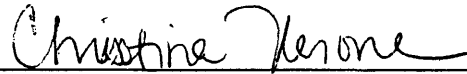
PLEASE TAKE NOTICE that upon this Notice and the annexed Verified Petition, Petitioner will move this Court at a Special Term thereof to be held at the Jefferson County Supreme Court, 317 Washington Street, Watertown, New York, on the 11 day of ~~February~~ ^{March}, 2010 at _____ o'clock in the _____ of that day, or as soon thereafter as counsel can be heard, pursuant to CPLR Article 78 for a Judgment and Order reversing, annulling and setting aside Respondent Town of Hounsfield Planning Board's approval of Respondent Upsate New York Power Corp.'s application for the Hounsfield Wind Farm Project.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR § 7804 you are directed to file with the Clerk of the Court and to serve on Petitioners attorney a certified record of the proceedings under consideration herein.

Venue is placed in Jefferson County pursuant to CPLR § 504.

DATED: February 5, 2010

HANCOCK & ESTABROOK, LLP



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STATE OF NEW YORK
SUPREME COURT COUNTY OF JEFFERSON

TOWN OF HENDERSON TOWN BOARD,

Petitioner,

For a Judgment under Article 78 of the Civil Practice
Law and Rules

vs.

TOWN OF HOUNSFIELD PLANNING BOARD,
UPSTATE NY POWER CORP, and the NEW YORK
STATE DEPARTMENT OF ENVIRONMENTAL
CONSERVATION,

Respondents.

VERIFIED PETITION
Index No.: 2010-336
RJI No.: _____

Petitioner, Town of Henderson Town Board, by and through its attorneys
Hancock & Estabrook, LLP, respectfully show to this Court that:

1. This proceeding is brought pursuant to §267-c of the Town Law in the
nature of an Article 78 proceeding under the Civil Practice Law and Rules (hereinafter
“CPLR”) and the State Environmental Quality Review Act (“SEQRA”) in Article 8 of
the New York Environmental Conservation Law (“ECL”) for a judgment reversing,
annulling and setting aside Respondent Town of Hounsfield Planning Board’s
 (“Planning Board”) approval of Respondent Upstate NY Power Corp’s (“Applicant”)
application for the Hounsfield Wind Farm Project, in which Respondent New York
State Department of Environmental Conservation (“NYSDEC”) acted as lead agency
pursuant to SEQRA, to allow the construction and operation of a wind powered electric

generation facility on Galloo Island in the Town of Hounsfield, Jefferson County, New York (the "Wind Project").

The Parties

2. Petitioner Town of Henderson Town Board was and is a body duly organized and existing pursuant to §60 of the Town Law.

3. Respondent Town of Hounsfield Planning Board was and is a body duly created pursuant to §234 of the General Municipal Law ("GML").

4. Upon information and belief, Respondent Upstate NY Power Corp was and is a domestic business corporation formed in October of 2007 in Erie County with a principal place of business in West Seneca, New York and is the applicant for the Wind Project.

5. Respondent New York State Department of Environmental Conservation was and is a New York State Governmental Agency established pursuant to ECL §3-301 to protect and enhance the environment.

The Wind Project

6. The Wind Project is proposed by the Applicant and is described as a wind-powered electric generating facility, consisting of the installation and operation of up to eight-four (84) wind turbine generators (WTG) for the purpose of generating up to 252 Megawatts (MW) of electricity.

7. The Wind Project is located on Galloo Island in Lake Ontario, approximately 6 miles from the closest mainland shoreline, Robert G. Wehle State Park in the Town of Henderson and approximately 8 miles west of the Village of Sackets Harbor, in the Town of Hounsfield, New York.

8. Petitioner will be impacted by the Wind Project in a manner different than the public at large, including, but not limited to, the use and enjoyment of their property in that the Wind Project will expose them to, among other things, significant visual impacts, noise impacts, contamination to their real property, decreased property value and other aesthetic impacts associated with the Wind Project.

9. These impacts and other aesthetic impacts are injuries-in-fact that fall within the zone of interests that SEQRA was intended to protect.

10. Upon information and belief, the Wind Project will unreasonably affect Petitioner's use and enjoyment of their property in that the normal use and operation of the Wind Project will necessarily subject them and their property to significant visual impacts, including, but not limited to approximately eight-four (84) WTGs, consisting each of a 90 meter blade rotor diameter and a hub height of 80 meters, for a total maximum height of 125 meters (410 feet) from blade tip to ground.

11. Upon information and belief, and as a result of the above, the Wind Project will unreasonably affect Petitioner's use and enjoyment of their property in that the normal use and operation of the Wind Project will necessarily subject them and their property to significant visual impacts, including, but not limited to overhead transmission lines that Applicant has proposed running through the Town of Henderson.

12. Upon information and belief, and as a result of the above, the Wind Project will unreasonably affect Petitioner's use and enjoyment of their property in that the normal use and operation of the Wind Project will necessarily subject them and their property to significant visual impacts, including, but not limited to a blocked viewshed of the lake, which is one of the very reasons why people purchase property on or near a

lake or choose to vacation at Robert G. Wehle State Park, located in the Town of Henderson.

13. Upon information and belief, majority of tourism to the Town of Henderson occurs during the summer months, in which visibility is clear and the presence of the Wind Project will greatly decrease the aesthetic beauty from the coastline within the Town of Henderson.

SEQRA

14. On October 29, 2009, Petitioner served a request to the Town of Hounsfield pursuant to the New York State Freedom of Information Law (FOIL), New York State Public Officers Law Article 6, to make available any and all records in existence relating to the Wind Project, held in the Town of Hounsfield's Clerk's Office, and offices of both the Planning Board and Zoning Board, including, but not limited to, any and all application(s) submitted, including any Site Plan applications, any and all SEQRA documents related to the applications, any and all meeting minutes when the above-referenced applications were discussed, including Planning, Zoning and Town Board Meeting Minutes, any and all public notices and mailings related to the above; and any and all decisions made by any Board in the Town of Hounsfield.

15. To date, the Town of Hounsfield has not provided documents responsive to Petitioner's FOIL requests, and therefore the basis for the following allegations is upon Petitioner's information and belief.

16. Upon information and belief, both the Planning Board and NYSDEC expressed intent to act as lead agency for the SEQRA review process.

17. Upon information and belief, on or around April 24, 2008, NYSDEC determined that it would act as the SEQRA lead agency for the Wind Project.

18. Upon information and belief, on or around May 21, 2008, a Positive Declaration was issued by NYSDEC, as the lead agency, requiring the preparation of a Draft Environmental Impact Statement (“DEIS”).

19. Upon information and belief, a draft Public Scoping Document was issued by the lead agency on May 21, 2008, and later finalized on September 17, 2008.

20. Upon information and belief, the DEIS was accepted by NYSDEC, as the lead agency, on February 27, 2009.

21. Upon information and belief, NYSDEC issued a Notice of Completion of the Final Environmental Impact Statement (“FEIS”) on December 23, 2009.

22. Upon information and belief, NYSDEC has not issued Findings.

23. Upon information and belief, the Planning Board approved the site plan for the Wind Project on or about January 6, 2010.

AS AND FOR A FIRST CLAIM FOR RELIEF
Respondent Town of Hounsfield Planning Board Failed to Comply with the Town
of Hounsfield Zoning Law and Any Other Additional Requirements Under the
Local Law Pertaining to Wind Systems

24. Petitioner repeats and realleges the allegations set forth in paragraphs 1 through 23 above, as if set forth fully herein.

25. Upon information and belief, the Respondent Applicant submitted, and Respondent Planning Board accepted, an incomplete application for the Wind Project, as the application failed to include the following information:

- a. The name and address of the applicant and owner, if different, and of the person responsible for the preparation of any drawings submitted;

- b. Written authorization from the owner that application may proceed with Site Plan Review, if the applicant is not the owner;
- c. The Property location, including street address and tax map designation;
- d. The size of the Property;
- e. All zoning districts in which the Property is located;
- f. The current use of the Property;
- g. The proposed use of the Property;
- h. A list of all current easements or restrictive covenants affecting the use of the Property;
- i. A list of all other involved agencies;
- j. A list of all other permits (federal, state, county or other Town of Hounsfield) required;
- k. The names, addresses and phone numbers of all consultants to be used before the Planning Board;
- l. The estimated cost of construction;
- m. The construction schedule;
- n. The infrastructure improvements contemplated;
- o. The representation by the applicant that applicant will be responsible for all fees established for Site Plan Review including reimbursement of the Town Planning Board for all fees incurred for Planning Board's consultants' review; and
- p. The applicant's signature and date.

26. Upon information and belief, the Site Plan was prepared by a licensed architect, engineer, landscape architect or surveyor, and Respondent Planning Board accepted an incomplete application for the Wind Project, because the application failed to include the following information:

- a. Date, north point, written and graphic scale;
- b. Boundaries of the area plotted to scale, including distances, bearings and areas;
- c. Location and ownership of all adjacent lands as shown on the latest tax records;
- d. Location, name, and existing width and right-of-way of adjacent roads;
- e. Location, width and purpose of all existing and proposed easements, set backs, reservation and area dedicated to public use or adjoining the property;
- f. Location, size, design of the following: existing and proposed Buildings, driveways, parking, outdoor storage, sidewalks or pedestrian paths, drainage facilities, sewage facilities, water facilities, signs, outdoor lighting, landscaping or screening and snow storage;
- g. Plans for grading and drainage showing existing and proposed contours of five-foot intervals;
- h. Designation of the amount of Net Floor Area proposed for each non-residential use;
- i. Inset containing location map;
- j. All zoning district boundaries or municipal boundaries; and
- k. Location of any significant natural features such as lakes, ponds, streams, rivers, waterways, wetlands, forested areas, etc.

27. Upon information and belief, payment of all required fees was not complied with.

28. Upon information and belief, the Planning Board did not comply with the requirement for a public hearing within forty-five (45) days from the date the Planning Board received a completed application.

29. Upon information and belief, the Planning Board did not provide the requisite minimum five (5) day notice of the public hearing in an official newspaper of the Town.

30. Upon information and belief, the Planning Board did not render its final decision within forty-five (45) days following the hearing, in writing, specifying the reasons for its decision, and listing any conditions attached to the approval and the vote by the Planning Board members.

31. Upon information and belief, the Planning Board did not file its final written decision in the Office of the Town Clerk.

32. Upon information and belief, the Planning Board did not mail of copy of the written, filed copy of its decision to the applicant, among others.

33. It is our understanding that a new ordinance or local law may have been enacted contemporaneously with the Site Plan Review conducted by the Planning Board.

34. Based on that understanding, it is upon our information and belief that the Planning Board's Site Plan Review was incomplete and improper, and should be re-conducted pursuant to the new ordinance or local law.

35. Upon information and belief, the Planning Board failed to consider the following factors in reaching its determination on the Site Plan Review application:

- a. Status of any federal, state, or county permits required;
- b. Environmental (including physical, social and economic factors) impact on community and adjacent areas;
- c. Compatibility with the Comprehensive Plan of the Town;

- d. Location, arrangement, size, design and general site compatibility of Buildings, lighting and signs;
- e. Adequacy and arrangement of vehicular traffic access and circulation, including intersections, road widths, pavement surfaces, dividers and traffic controls;
- f. Location, arrangement, appearance and sufficiency of off-street parking and loading;
- g. Adequacy and arrangement of pedestrian traffic access and circulation, walkway Structures, control of intersection with vehicular traffic and overall pedestrian convenience;
- h. Adequacy of storm water, drainage and erosion control facilities;
- i. Proximity to and impact on flood plain, wetland or other natural features;
- j. Adequacy of water supply and sewage disposal facilities;
- k. Adequacy, type and arrangement of trees, shrubs and other landscaping constituting a visual and/or noise buffer between the applicant's and adjoining lands, including the maximum retention of existing vegetation;
- l. Adequacy of fire lanes and other emergency zones and the provision of fire hydrants;
- m. Adequacy and impact of Structures, roadways and landscaping in area with susceptibility to ponding, flooding and/or erosion; and
- n. The conformance of the proposed use with all other provisions of the Local law.

36. Upon information and belief, the Planning Board failed to comply with procedure and substance of the Town of Hounsfield Zoning Law, and therefore the Site Plan must be invalidated.

AS AND FOR A SECOND CLAIM FOR RELIEF
Respondent Town of Hounsfield Planning Board Failed to Refer all Site Plan Materials to the Jefferson County Planning Board

37. Petitioner repeats and realleges the allegations set forth in paragraphs 1 through 36 above, as if set forth fully herein.

38. Pursuant to Town of Hounsfield Zoning Law §610(F) and the independent obligation in GML §239-M, the Planning Board must refer all Site Plan matters that fall within GML §239-m to the Jefferson County Planning Board.

39. The Wind Project falls within the parameters governed by GML §239-m.

40. Upon information and belief, the Planning Board failed to refer all applicable Site Plan materials to the Jefferson County Planning Board.

41. Failure to refer all Site Plan materials to the Jefferson County Planning Board is a jurisdictional defect.

AS AND FOR A THIRD CLAIM FOR RELIEF
Respondents Town of Hounsfield Planning Board and the NYSDEC Failed to Comply with SEQRA

42. Petitioner repeats and realleges the allegations set forth in paragraphs 1 through 41 above, as if set forth fully herein.

43. Pursuant to 6 N.Y.C.R.R. §617.11, the lead agency must file a written findings statement within thirty (30) calendar days after filing the FEIS.

44. Filing of the findings completes the SEQRA process.

45. The FEIS in the instant matter was filed on or around December 23, 2009.

46. The file date of the FEIS started the thirty (30) day window for Respondent NYSDEC, as lead agency, to file its written findings.

47. The NYSDEC therefore had until approximately January 22, 2010 to file its written findings.

48. The Planning Board issued its written findings on January 6, 2010.

49. Based upon communications on February 2, 2010, Bob Ewing, of the NYSDEC confirmed that the final findings for the Wind Project are still pending.

50. The NYSDEC, as lead agency on the Wind Project should have issued findings before the Planning Board did.

51. The NYSDEC fought hard to be appointed lead agency on the Wind Project and has undertaken all of the work required in complying with SEQRA review, yet has failed to comply with the required last step in SEQRA review.

52. The SEQRA process has not been concluded until the lead agency has provided its written findings.

53. As a result of the NYSDEC's failure to timely file its findings, the SEQRA process has not been completed, and the Planning Board's decision should therefore be annulled.

54. Upon information and belief, Respondents have also failed to comply with all procedural components of the SEQRA review.

55. Upon information and belief, NYSDEC failed to conduct a sufficient visual impact assessment.

56. Upon information and belief, Respondents failed to review the cumulative impacts of other large wind projects and the transmission lines.

57. Upon information and belief, Respondents failed to properly assess the petroleum and spill hazards.

58. Upon information and belief, Respondents failed to consider Open Spaces.

59. Upon information and belief, Respondents improperly reviewed the socioeconomic impact section of the DEIS.

60. Upon information and belief, the NYSDEC failed to take the requisite “hard look” at the following environmental concerns, among others:

- a. The temporary and permanent impacts to topography, geology and soils;
- b. The potential impacts of land and land use
- c. The potential impacts on agricultural resources and/or production;
- d. The potential impacts of surface water, including, but not limited to, the impact of discharges, sedimentation, and petroleum releases;
- e. The potential impact of sedimentation from construction of the Wind Project;
- f. The potential impacts on surrounding wetlands;
- g. The potential impacts to groundwater;
- h. The potential impacts on flora and fauna;
- i. The potential impacts on avian species;
- j. The potential impacts on bats;
- k. A post-construction monitoring plan;
- l. The potential impacts on fish and aquatic species;
- m. The potential impacts on visual resources;
- n. The potential impacts on archeological and historic resources;

- o. The potential impact on the socioeconomics;
- p. The potential impacts on public safety;
- q. The potential interference with microwave beams;
- r. Blasting issues inherent with construction;
- s. The potential impacts of decommissioning;
- t. The potential impacts on mandated FAA lighting;
- u. The potential impacts on air resources;
- v. The potential impacts of noise;
- w. Any and all viable alternatives to the Wind Project;
- x. Coastal zone consistency;
- y. The potential impact for growth inducing aspects;
- z. Cumulative impacts;
- aa. Unavoidable adverse environmental impacts; and
- bb. The irreversible and irretrievable commitment of resources;

61. Upon information and belief, NYSDEC failed to properly mitigate the impacts of the above-mentioned factors.

62. Upon information and belief, the NYSDEC has failed to address the issue of Environmental Justice in its SEQRA review, and the NYSDEC must comply with its own policy for consideration of Environmental Justice elements when acting as the lead agency under SEQRA.

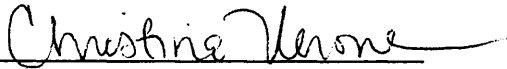
63. Upon information and belief, NYSDEC improperly segmented the SEQRA review, including but not limited to, the failure to take into account the environmental impact of the overhead transmission lines.

WHEREFORE, Petitioner respectfully requests that the Court

- a. Declare that the NYSDEC failed to comply with SEQRA;
- b. Enter a judgment pursuant to CPLR Article 78 vacating, setting aside and annulling the Town of Hounsfield Planning Board's Site Plan for the Wind Project on January 6, 2010;
- c. Granting such other relief as to this Court may deem just and proper.

DATE: February 5, 2010

HANCOCK & ESTABROOK, LLP


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ATTORNEY'S VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF ONONDAGA)

Christina M. Verone, Esq., being duly sworn, deposes and says that she is an attorney admitted to practice in the Courts of New York State and that she is an attorney of record for Petitioner, in the within action; that deponent has read the foregoing Verified Petition and knows the contents thereof; and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. Deponent further says that the reason this Verification is made by deponent and not by the Petitioner is that the Petitioner is not in the County where deponent has her office.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: conversations with the client and review of documents.

Christina Verone
CHRISTINA M. VERONE, ESQ.

Sworn to before me this
5th day of February, 2010.

Isabelle M. Vogt
Notary Public

ISABELLE M. VOGT
Notary Public, State of New York
No. 4857727
Qualified in Oswego Co.
My Commission Expires 4/28/10

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