Testimony of Annette Smith, Vermonters for a Clean Environment
S. 52, Senate Finance Committee
Feb. 7, 2016

My name is Annette Smith. I am Executive Director of Vermonters for a Clean Environment. Thank you Madam Chair and the Committee for inviting my testimony today. For the last two years I have worked with Vermonters involved with solar projects to assist them in participating in the process at the Public Service Board. For nearly eight years I have worked with Vermonters involved with wind projects and have assisted towns and neighbors with their participation at the PSB. I have also worked with Vermonters on biomass plant applications to the PSB.

Senators Lyons, MacDonald, and Sirotkin may recall I asked to testify to this committee last year, after the Attorney General's investigation -- following up on a complaint that I was engaged in the unlicensed practice of law by assisting Vermonters in participation at the PSB -- was closed. The summary of my testimony was that the AG's investigation proved that the PSB is a legal process and the public gives up rights when they attempt to participate without a lawyer, and the public needs a lawyer.

The day after my testimony, the PSB Working Group was added to S.230, which became S.260 and enacted as Act 174. I was invited to present to the Act 174 Working Group and offered substantive input on problems and solutions.[1] S.52 proposes amendments related to PSB proceedings based on the recommendations of the Working Group. The purpose of S.52 relates to the public's access to PSB proceedings.

Before I comment on the specifics in S. 52, I would like to offer some new perspective on the challenges that Vermonters who are neighbors of proposed renewable energy projects face when confronted with a project in their community. These challenges extend to towns and regions, not just neighbors.

My thinking on this topic has evolved in the last year, and especially in recent days because of a recent PSB Order. I have realized that the problems the Vermont public experiences with the PSB process go beyond the specifics of what happens during PSB proceedings, and are much more extensive due to the statutes put in place by this legislature, the way the PSB is interpreting those statutes, and the PSB's ability to make a finding of "the public good", which is not defined.

Senators Campion and MacDonald may recall my testimony two years ago on H.40 -- which became Act 56 -- to the Natural Resources and Energy Committee, in which I pointed out that the PSB had come up with its own version of the aesthetics analysis known as "the Quechee Test". Act 250 and legal precedent include neighbors as "the average person" when evaluating the undue adverse aesthetic impact of a project. The PSB's standard as applied to solar and wind projects has excluded neighbors based on an opinion of two experts paid for by Green Mountain Power in the 1996 Searsburg wind project, a case that was not contested or appealed. Yet the PSB adopted the opinions as their standard, deciding that the neighbors cannot constitute the "average person" because they are the most likely to be impacted and "therefore have an individualized perspective which is different from the viewpoint of the average person."[2]

The legislature has attempted to fix that problem for net metering systems that exceed 150 kW in plant capacity[3] and the new net metering rule may also address the problem, but as it stands now, neighbors of non-net metered systems will continue to be excluded from consideration under the aesthetics analysis as it is being carried out by the PSB.

The PSB and the legislature have set up a Catch-22 circumstance for neighbors of energy projects, whereby the only way Vermonters can participate at the PSB is to show that they have a substantial interest[4] which may be adversely affected by the outcome of the case, and they must show they have a particular interest[5], which the PSB has consistently interpreted to be primarily a property interest. But then the PSB has concluded that neighbors of solar projects should not have their aesthetic interests considered and most recently, that neighbors of wind projects are considered individuals who "do not collectively raise a public health concern."[6] The PSB directs neighbors of wind projects who cannot sleep at night to seek "any individual relief that may be available to them in a forum that has the requisite authority to review their personal circumstances and to take action as may be warranted."[7]

On Friday, VCE filed comments on the PSB's draft rule to establish sound standards for wind generation projects, in which we said, "The Board has created a deceptive and dishonest situation for neighbors of wind turbines in Vermont. On the one hand, neighbors who have a particularized or individualized interest are invited to move to intervene and their right to intervene is based almost entirely on their property interests. On the other hand, when neighbors complain about wind turbine noise trespassing on their property and disrupting their sleep, the PSB tells neighbors that the PSB has no legal interest in protecting the neighbor's health or property interests.[8]

Under the PSB's construct, it is possible that every community in Vermont could host wind turbines that negatively affect nearly every Vermonter, yet each of those Vermonters would be considered "individuals" and not "the public."

The role of the Vermont public as it concerns neighbors of energy projects and their participation in the PSB stands in contrast to the PSB's determination of "the public good". In its 2011 decision approving the GMP Lowell Wind project, PSB Chairman Volz dissented on his fellow board members' attempt to address the problem caused by wind turbine noise trespassing on developable land owned by neighbors, in which he wrote, "balancing the state's renewable energy goals with the impacts on surrounding property owners is a broad public-policy decision that should be made by the legislature, not this Board."[9]

Due to ongoing frustration with the PSB's handling of noise complaints from wind project neighbors, last month I wrote a letter to the PSB. In response, PSB staff responded, "With respect to your more general comments and concerns, the Board takes the issues surrounding sound from wind facilities very seriously and is fully engaged in its efforts to produce a rule for regulating such sound emissions in a manner that is consistent with protecting the public health, but at the same time does not create an impossible barrier to the deployment of wind-powered generation facilities consistent with the State's policy objectives regarding the deployment of in-state renewable energy generation as set forth in several Vermont statutes.[10]

I wrote and asked what statutes were being referenced, and received this response:

> "I had in mind when I wrote the letter 10 V.S.A. § 578 and 30 V.S.A. §§ 8001, 8004, 8005, 8005a, and 8007." -- Email from Board Staff, John Cotter, Jan. 11, 2017

Further compounding the problem for Vermonters who find themselves in the role of neighbors of an energy project is the statute that enables renewable energy plants built in Vermont to serve the New England region, not Vermont. Right now Ranger Solar's four 20 MW projects and Swanton and Irasburg Wind are all proposing to sell their power to Connecticut. This is deemed, by statute, to be in "the public good" of the state of Vermont, even if Vermonters do not use the power.[11]

The question then becomes, what role do Vermonters play in the PSB's process for approving energy projects? Is there any point in intervening as a neighbor, when each neighbor is viewed as an "individual" and not a member of the "public" as it pertains to the finding of "the public good"? This problem extends to towns and regions, as they, too, are not incorporated into any consideration by the PSB as they apply "the public good." Indeed, the planning criteria and process being carried out as part of Act 174 may be an exercise in futility as the PSB's "public good" will always be able to trump the "substantial deference" given to town and regional plans that have been crafted to meet the DPS criteria for certification.

This committee is the committee of jurisdiction of the PSB, along with the House Energy and Technology Committee. It would have been best if the PSB Chair had come to this committee years ago to seek changes in statute that would enable neighbors, towns, and regions to have a say in the consideration of renewable energy projects. Since that did not happen, we are now in a situation where the PSB says "we are just doing what the legislature has told us to do." It is up to you, the legislature, to make those changes to assure that Vermonters are considered when energy projects are evaluated by the PSB, and that the participation is meaningful.

The dynamic now, as set up by this legislature, is one that has left nearly every Vermonter who has participated in the PSB as a neighbor or town saying when it's over, "it's as though we weren't even there." Neighbors and towns are trapped in a nightmarish circle with the PSB using the legislature as an excuse for their rulings that consistently ignore or trample on the rights of the Vermont public, while the legislature has steadfastly defended the PSB and refused to make that broad public-policy decision as recommended by the PSB chair or consider any changes to the process.

What is the point of Vermonters raising tens of thousands of dollars necessary to participate at the PSB when the PSB will always find that "the public good" is served by building energy projects, even if they don't serve Vermont but provide power to the New England region? If it is the intention of this legislature to exclude all Vermonters from meaningful participation in the PSB's consideration of approval of energy projects and the impacts of their operations after construction, it should be clearly spelled out in statute so that Vermonters are fully informed about their rights and options.

In the alternative, this legislature and the PSB must stop pointing to each other as the reason Vermonters are being disenfranchised by the process, and take responsibility for changing the

statutes that are guiding this Catch-22 circumstance so that the PSB incorporates the people of Vermont into their consideration of "the public good".

Comments on S. 52

p. 2 (1)(A)(B) This sounds good, except that the Department works for the Governor and depending on who the governor is, the experts hired can be biased, as has occurred with the noise experts hired by DPS under Governor Shumlin, all of whom work exclusively for the wind industry. The time frames may or may not work for municipal and regional planning commissions, depending on when 45 day notices are filed. There is not a lot of time to warn a public hearing. Many regional planning commissions do not meet in Dec., July and Aug.

p. 3 § 246
Meteorological stations now can also use LIDAR or SODAR boxes with no towers. NextEra put a SODAR box up on a mountain in Vershire, and no PSB CPG was required. Please add LIDAR and SODAR to this section.

Met towers and the lack of connection to wind turbines in the PSB process is a recurring problem, as the met towers are always precursors to wind turbines, yet the PSB treats them as entirely separate projects. Met tower data is used to prove the financial viability of the project to potential funders, but it plays no role in the PSB application for wind turbines. Vermonters have been asking the PSB to require that the met tower data be made public, and connect met towers to wind turbines in the application process. Currently, the PSB is not looking at the data and has no idea if a wind project can actually produce what the developer says it will.

There are currently two examples of wind developers who have erected met towers without obtaining a CPG. The PSB has opened investigations in both cases, and the developers are applying for wind turbine CPGs while the PSB process for the met tower investigation has not yet been resolved. This creates undue burdens on neighbors who must participate in both processes concurrently.

See this log of the Swanton developer's met tower without a CPG docket, which has dragged on since July 2015 as the applicant challenges the party status of the neighbor who filed the complaint. https://swantonwindvt.org/met-tower-psb-process/

The PSB issued the scheduling order for the met tower case on Feb. 2, 2017
http://vce.org/SwantonMetTowerSchedule.pdf

The PSB issued the scheduling order for the Swanton wind turbine project on Jan. 20, 2017
http://vce.org/SwantonWindTurbineSchedule.pdf

The Langs, who filed the complaint about the Swanton met tower without a CPG are currently the only neighbors of the Swanton wind project who have hired an attorney and intervened in that docket. It is unfair to Vermonters to allow wind developers who have flouted the law requiring obtaining a CPG for the met tower to benefit from the data gathered and move forward with an application for wind turbines while the met tower violation is unresolved.

A similar situation is occurring with David Blittersdorf's met-tower-without-a-CPG in Irasburg, where the Town of Irasburg has intervened. Mr. Blittersdorf has filed a 45 day notice for two wind turbines on the same site as the met tower, and his wind turbine application is expected soon.

The statute should be changed to require resolution of met tower violations prior to acceptance of applications for associated wind turbines, and require the data from the met towers to be part of the application for the wind turbines.

p. 7, § 248a. Certificate of Public Good for Communications Facilities
This is primarily a land use issue that should return to Act 250 jurisdiction. The PSB's process is a virtual rubber stamp, and when parties intervene it can be unnecessarily expensive.

p. 11, § Penalties
The PSB recently ignored this statute when issuing a fine on Jan. 13, 2017 to Georgia Mountain Wind for violating its winter operating protocol by running the turbines under icing conditions.[12] Sen. Campion was a witness to the icing event in March 2016. On Jan. 30, 2017, DPS filed a motion to reconsider which details the failure of the PSB to comply with the statute.[13] The neighbors also filed a noise complaint as the noise was the loudest ever experienced, which the PSB has ignored entirely.

Nothing in this process provides relief to neighbors who are being harmed by the violations. Fines go to the general fund and as levied recently by the PSB, are not a deterrent to future violations. GMW is majority owned by David Blittersdorf who has been the subject of four investigations at the PSB over alleged violations, and he is proceeding with two more turbine projects. VERA, his consultant, was the consultant to the Swanton Wind landowner and did not advise him to get a CPG for his met tower. This section needs to require meaningful enforcement that addresses these problems.

New section beginning on p. 14 is a long process that will not provide relief to neighbors in a timely manner, if at all. Enforcement officers are needed with capabilities similar to those of ANR, where field staff can issue immediate tickets with fines. The statute needs to include a mechanism to address issues that arise for neighbors, and not just paperwork leading to penalties payable to the general fund.

p. 17, lines 16 and 17 don't make sense.

p. 18. § 3 Name Change to Public Utility Commission. VCE supports this name change *only* if siting is moved to Act 250. The Act 174 Working Group heard from the Public Advocate that Vermont is the *only* state that has the equivalent of a PUC doing siting. The name change is an opportunity to remove land use from the PSB, something very much needed as the PSB is raising the costs unnecessarily and creating adversarial situations through expensive contested case proceedings, enriching lawyers, with a record of decisions that are causing backlash against renewable energy due to poorly sited projects.

Act 250 is a land use law that has made it possible for neighbors, towns and regions to participate without lawyers, and for their interests to be considered. The PSB is a utility regulatory process that requires expensive lawyers and experts to participate and excludes the interests of neighbors, towns and regions due to the PSB's interpretation of "the public good" as prescribed by the legislature. Vermonters want a say in how renewable energy is sited and Act 250 is the appropriate vehicle, with modifications to the process to enable cooperation rather than contested cases.

p. 21 Sec. 12, Citizens to PSB Hearings from Remote Locations
VCE supports this provision. However we remind this committee that Vermonters routinely complain that public hearings are meaningless because the comments are not considered by the PSB in their decision-making.

p. 22 Sec. 13, Implementation of Working Group Recommendations.
The Working Group recommendations are more like a Band-Aid when what is needed is major surgery. Moving siting to Act 250 is a good first step, leaving utility regulation, rates, interconnection and the typical functions of a PUC with the Board. For full participation at the PSB, Intervenor Funding and Counsel for the Public are necessary, and can serve as an incentive for developers to work in collaboration with communities through Act 250 to resolve issues prior to litigation.

Endnotes

[1] http://vce.org/1234.pdf

[2] http://vce.org/NM-1646_MammolitiObjtoPFD_011615.pdf
The Hearing Officer [incorrectly] stated that the neighbors cannot constitute the "average person" because they are the most likely to be impacted and "therefore have an individualized perspective which is different from the viewpoint of the average person."

[3] http://legislature.vermont.gov/statutes/fullchapter/30/089
(D) With respect to net metering systems that exceed 150 kW in plant capacity, the rules shall apply the so-called "Quechee" test for aesthetic impact as described by the Vermont Supreme Court in the case of In re Halnon, 174 Vt. 515 (2002)(mem.). The rules and application form shall state the components of this test.

[4] http://psb.vermont.gov/sites/psbnew/files/doc_library/rule-2000-rules-of-practice.pdf
2.209 Intervention (A) Intervention as of right. Upon timely application, a person shall be permitted to intervene in any proceeding (1) when a statute confers an unconditional right to intervene; (2) when a statute confers a conditional right to intervene and the condition or conditions are satisfied; or (3) when the applicant **demonstrates a substantial interest** which may be adversely affected by the outcome of the proceeding, where the proceeding affords the exclusive means by which the applicant can protect that interest and where the applicant's interest is not adequately represented by existing parties.

[5] http://psb.vermont.gov/public-participation/frequently-asked-questions/glossary-

terms#intervention
A motion to intervene must address the following standards, as described in Board Rule 2.209(A) and (B):
1 the person demonstrates a substantial interest which may be adversely affected by the outcome of the case
2 whether the applicant's interest will be adequately protected by other parties
3 whether alternative means exist by which the applicant's interest can be protected
4 whether intervention will unduly delay the proceeding or prejudice the interests of existing parties or the public
Please read Board Rule 2.209 before you file a motion to intervene. You must make sure your motion to intervene **describes your particular circumstances** and the reasons why you meet the standards for intervening.

[6] http://vce.org/OrderDenyingMcLaneMotionforRelief.pdf
[7] http://vce.org/OrderDenyingMcLaneMotionforRelief.pdf
In reaching our decision in today's Order, we do not disregard the experiences the McLanes have described. Rather, our decision today has been guided, as it must be, by the statute applicable to the construction and operation of generation facilities in Vermont - namely, 30 V.S.A. § 248. Under that statute we must consider whether a facility will have an undue, adverse impact on public health and safety. On its face, the public health standard is not intended to prevent any and all impacts to every individual. As a result, we conclude that the **individuals who have voiced complaints about sound levels from the Project do not collectively raise a public health concern** that provides a basis for reopening this proceeding to grant the relief sought by the McLane Motions. 'We are mindful of the distress the McLanes have expressed concerning their circumstances. However, the Board has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied." The Board's authority derives from statute, and not from the common law. As a result, the Board's authority does not extend to reviewing claims of personal injury or private nuisance. **Nothing in our Order today prevents the McLanes from seeking any individual relief that may be available to them in a forum that has the requisite authority to review their personal circumstances and to take action as may be warranted.** --PSB Order, Jan. 26, 2017

[8] http://vce.org/VCE_Comments_DraftWindNoiseRule5.700_020317.pdf

[9] http://vce.org/GMP_Lowell_PSBFinalOrder_VolzDissent.pdf
"balancing the state's renewable energy goals with the **impacts on surrounding property owners** is a broad public-policy decision that should be made by the legislature, not this Board." -- Lowell Wind Final Order, Dissenting Opinion of PSB Chairman James Volz, May 31, 2011

[10] http://vce.org/2017.01.09%20PSB%20JJC%20to%20AS-VCE%20letter.pdf

[11] § 8004. Sales of electric energy; Renewable Energy Standard (RES)
(a) Establishment; requirements. The RES is established. Under this program, a retail electricity provider shall not sell or otherwise provide or offer to sell or provide electricity in the State of

Vermont without ownership of sufficient energy produced by renewable energy plants or sufficient tradeable renewable energy credits from plants **whose energy is capable of delivery in New England** that reflect the required amounts of renewable energy set forth in section 8005 of this title or without support of energy transformation projects in accordance with that section. A retail electricity provider may meet the required amounts of renewable energy through eligible tradeable renewable energy credits that it owns and retires, eligible renewable energy resources with environmental attributes still attached, or a combination of those credits and resources.

[12] http://vce.org/GMW_IcingFine_011317.pdf

[13] http://vce.org/8734%20-%202017.01.30%20-%20DPS%20Memo%20re%20Reconsider%20Mot.pdf

**If your browser shows any of the above links as a series of incomprehensible text, try a different browser. For some reason, Safari does not accurately display many of these documents, while Chrome does.*

Respectfully submitted by

Annette Smith
Executive Director
Vermonters for a Clean Environment, Inc.
789 Baker Brook Road
Danby, Vt. 05739
(802) 446-2094
www.vce.org
vce@vce.org