



DESAUTEL LAW

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August 9, 2022

VIA USPS AND ELECTRONIC MAIL

Emma Rodvien, Coordinator  
Energy Facility Siting Board  
89 Jefferson Boulevard  
Warwick, RI 02888

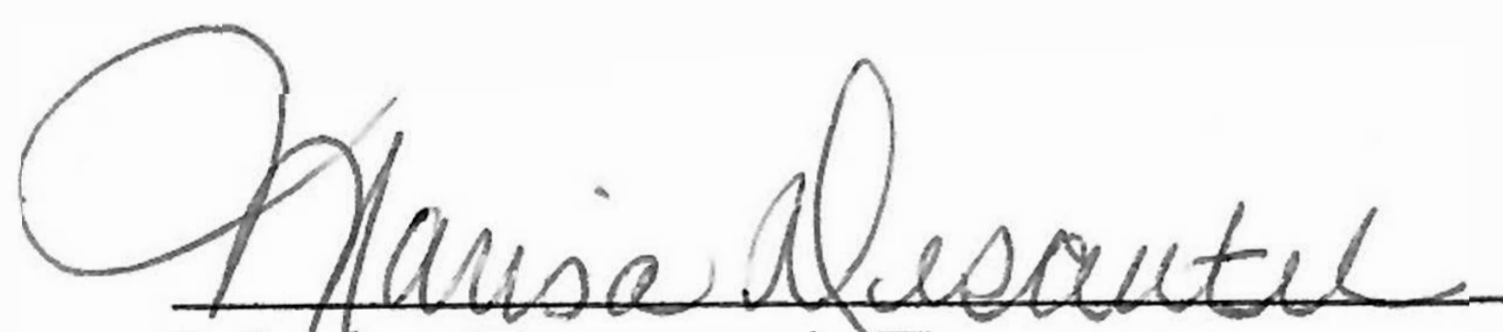
**RE: Docket No. SB-2022-02 – Mayflower Wind Energy LLC Application  
For a License to Construct Major Energy Facilities**

Dear Ms. Rodvien:

Enclosed herewith please find an original and nine (9) copies of the Town of Middletown's Objection and Supplemental Memorandum in Support of its Motion to Intervene for filing in the above-entitled matter.

Please be advised that an electronic copy of this document has been sent to the Service List Updated August 4, 2022. Thank you for your attention to this matter.

Sincerely,

  
Marisa Desautel, Esq. (md)

Enclosures

Cc: Service List Updated August 4, 2022

**Docket No. SB-2022-02 – Mayflower Wind Energy LLC’s Application for a License to Construct Major Energy Facilities (Portsmouth, RI)**

**Service List – Updated August 4, 2022**

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**STATE OF RHODE ISLAND  
BEFORE THE ENERGY FACILITY SITING BOARD**

**IN RE: MAYFLOWER WIND ENERGY LLC :  
APPLICATION FOR LICENSE TO : Docket No. SB-2022-02  
CONSTRUCT MAJOR ENERGY FACILITIES :**

**OBJECTION AND SUPPLEMENTAL MEMORANDUM OF THE TOWN OF  
MIDDLETOWN IN SUPPORT OF ITS MOTION TO INTERVENE**

NOW COMES the Town of Middletown (“Town” or “Middletown”), by and through its undersigned counsel, and hereby responds to the Energy Facility Siting Board’s (“Board” or “EFSB”) request for a memorandum of law in support of the Town’s Motion to Intervene.

While the information requested by the EFSB in its Procedural Directive Regarding Briefing of Issues Relating to Motions to Intervene, dated August 1, 2022, is provided herein, the Town hereby objects to the EFSB’s request as it is counter to proper procedure pursuant to RIGL §42-98-9(a) entitled “Applications — Procedures for review — Preliminary hearing,” which states that Motions to Intervene are to be heard by the EFSB during the Preliminary Hearing.

Specifically, RIGL §42-98-9(a) states that: “[w]ithin sixty (60) days following the board's docketing of an application the board shall, on not less than forty-five (45) days' notice to all agencies, subdivisions of the state, and the public, convene a preliminary hearing on the application to determine the issues to be considered by the board in evaluating the application, and to designate those agencies of state government and of political subdivisions of the state which shall act at the direction of the board for the purpose of rendering advisory opinions on these issues, and to determine petitions for intervention.” (emphasis added). For this reason, the Town requests a hearing on the Town’s motion and an opportunity to be heard at the Preliminary Hearing.

## **Background**

On May 31, 2022, the Applicant, Mayflower Wind Energy LLC (“Applicant”), filed an application to construct transmission facilities necessary to connect Applicant’s offshore wind generation facility to a regional transmission system that will be located in Somerset, Massachusetts. Specifically, the Applicant seeks approval of two HVDC 20-mile submarine export cables to be installed in the Sakonnet River, passing just offshore. As indicated in Figure 7-1 of the Application, the Applicant’s proposed cable route is located less than one (1) mile off the coast of the Town. (*See* Application at p 292, Figure 7-1). Additionally, the Applicant’s proposed Route Siting Alternatives (“Noticed Variation”) consider actual landfall in Middletown.

In response to the Town’s Motion, the Applicant filed an Objection. Subsequently, the Board requested a memorandum of law from the Town to further explain the Town’s position. While the Town objects to this request on the grounds stated above, that Rhode Island General Law requires a hearing on this matter and an opportunity for the Town to be heard at the Preliminary Hearing, this Memorandum is being provided in response to the Board’s request.

### **EFSB’S Standard For a Motion to Intervene Has Been Met**

The Energy Facility Siting Board Rules of Practice and Procedure §1.10(B) states that:

“[A]ny person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate may intervene in any proceeding before the Board. Such right or interest may be:

1. A right conferred by statute;
2. An interest which may be directly affected, and which is not adequately represented by existing parties and as to which petitioners may be bound by the action in the proceedings;
3. Any other interest of such nature that petitioner’s participation may be in the public interest.”

The Town’s interest will be directly affected by the outcome of these proceedings and because the Town’s interests are not adequately represented by existing parties, the Town’s Motion

to Intervene should be granted. Intervention is necessary and appropriate here because the Town will be directly affected by the construction, operation, maintenance, and decommissioning of the Applicant's proposal, such that existing parties cannot adequately represent the Town's interests in these proceedings. Any determination by the EFSB, in consideration of the close proximity to the Town and the Town's use of the waterway and shoreline to be affected will be bound by the outcome of these proceedings. Further, the Town's participation is in the public interest as the construction, operation, maintenance, and decommissioning of the proposed project is in the public interest of the citizens residing, working, providing services, using the shoreline, and fishing and boating within the Town.

### **Discussion**

The EFSB as a state agency has the sole authority to render a final licensing decision on major energy projects. *See* RIGL §42-98-2(4). The Board is the "licensing and permitting authority for all licenses, permits, assents, or variances which, under any statute of the state or ordinance of any political subdivision of the state, would be required for siting, construction, or alteration of a major energy facility in the state." *See* RIGL §42-98-7(a). Additionally, "[n]o person shall site, construct, or alter a major energy facility within the state without first obtaining a license from the [Board]." RIGL §42-98-4. The Board is the ultimate decision maker. As it is the EFSB that will ultimately hear all the evidence, and decide the matter, after review of information from other state agencies in an advisory capacity (as requested), the Town should be allowed to intervene.

Even if DEM, CRMC, or another state agency is involved in this matter, under Rhode Island law, these agencies sit at the direction of the Board. Instead of issuing a permit, license, assent, or variance the agencies "shall forward its findings ... and a recommendation for final

action to the [Board].” *See* RIGL §42-98-7(2). Ultimately, the other state agencies “sit and function at the direction of the siting board.” *Id.* The Board has wide discretion with respect to DEM and CRMC’s participation. For this reason, the Town must be allowed to intervene in proceedings which have ultimate decision-making authority, especially since there are issues that affect the Town which DEM and CRMC do not oversee or license. To be sure, RIGL §42-98-7 includes language that state agencies shall provide recommendations to the EFSB for those statutory and regulatory approvals and licenses within its jurisdiction only. State agencies do not have jurisdiction to enforce or implement the Town’s ordinances, nor do they have the expertise to do so.

No state agency can fully opine on or license Town-specific issues without Town involvement. Rhode Island state law supports an interpretation that municipalities have a unique role in overseeing issues specific to them. RIGL §42-98-2 states, “the construction, operation, and decommissioning of the facility shall produce the fewest possible adverse effects on the quality of the state’s environment; most particularly ... the health and safety of its citizens, ... and its aesthetic and recreational value to the public.” (emphasis added).

Issues related to health and safety of citizens, aesthetic and recreational value to the public, cost to the community, and measures to protect the same, are uniquely within the Town’s purview. Applicants must include a “[c]omplete ... estimated cost to the community such as safety and public health issues,” and a “complete life-cycle management plan for the proposed facility, including measures for protecting the public health and safety and the environment during the facilities operations...” RIGL §§42-98-8(A)(5-6) (emphasis added).

Only by intervening in these proceedings may the Town adequately represent the health and safety and the public interest of the citizens living within its borders and provide comment on behalf of its citizens.

**The Interests of the Town’s Citizens Will Be Directly Affected by the Outcome Here**

First, the Town is an ocean community, and recreational activity along its shores and adjacent waterways is uniquely and solely within the public interest of the Town, its economy, and its residents. The Applicant has indicated that disturbances during cable installation under the seabed along the coast of the Town are likely to affect the Town’s shoreline, recreational activities, navigation related infrastructure (buoys, etc.), and the environment, (Application Sections 6; 7; 4.5.2; and 2.6.2), such that the Applicant has already identified the Town as a stakeholder. (Application at Pg. 4-19; Section 4.7.1–Agency and Stakeholder Engagement; Table 4-9; Applicant has highlighted “the importance of engagement with government agencies and community stakeholders,” such that Mayflower Wind identified Middletown as a stakeholder and initiated engagement with the Harbormasters of Middletown. (Application section 4.7.1.)

The anticipated impacts to recreation will affect the Town’s shoreline use and planned activities, including but not limited to: town mooring fields, sunbathing and swimming from the shore, boat ramp access, recreational fishing, hunting activity, retail use along the shoreline including but not limited to paddleboard and kayak rentals, and kite surfing. Further, Town events will be directly affected by the outcome of these proceedings. Such events include but are not limited to: beach use, kids’ camps, and coastal sanctuaries.

Rhode Island Courts have held that “[h]arms to aesthetic and recreational interests are cognizable interests.” In re Narragansett Elec. Co., 276 A.3d 363, 372 (R.I. 2022). Because the Town has a recognized “cognizable interest” that is unique to it as a Town, there is a public interest

in protecting it along with its economy, its shoreline, and the recreational value its citizens receive from activities such as fishing and boating along its shores. For these reasons, the Town and the public interest of its citizens will be directly affected by these proceedings, such that intervention is necessary and appropriate.

Neither DEM or CRMC have jurisdiction over issues unique to a municipality and which do not require a state license. These particularized issues are unique to the Town and will be directly affected by the outcome of these proceedings. For this reason, the Town's Motion to Intervene should be granted so that the Town has a voice at the ultimate decision-making proceedings before this Board.

The particularized issues mentioned above are not adequately represented unless the Town is allowed to intervene. The Rhode Island Supreme Court held that when an intervenor's interests are not identical to that of one of the present parties then "the proponent of intervention need only establish some tangible basis to support a claim of purported inadequacy of representation by the current parties and such burden is minimal." Verizon New England Inc. v. Savage, 267 A.3d 647, 654 (R.I. 2022). Neither DEM or CRMC have jurisdiction over issues unique to a municipality, such as a Town's economy, recreational values, and unique interests of its residents.

Impacts from electromagnetic fields (EMF) is another credible and Town-centric issue. In Section 7.10 of the Application, the Applicant states that it "understands that EMF produced by the transmission of electricity can be a concern to communities where transmission infrastructure is sited." (*See* Application section 7.10). Because neither DEM nor CRMC have jurisdiction over impacts to the Town's infrastructure, the Town's interests are not adequately represented and the minimal burden to demonstrate inadequacy of representation is satisfied.



While it is correct that the Town has identified numerous environmental concerns including seafloor disturbance, sedimentation, and potential environmental harm to wildlife and large eelgrass bed, the environmental interest of the Town may be identical to that of DEM and CRMC. However, that does not necessarily mean the Town's interests are adequately represented.

In such an instance as this, the Rhode Island Supreme Court held that an intervenor can establish inadequate representation by “provid[ing] a tangible basis for intervention, and an adequate explanation as to why their interests were not adequately represented.” Verizon New England Inc. v. Savage, 267 A.3d 647, 655 (R.I. 2022). Here, the Town's environmental interests are not adequately represented because DEM and CRMC are tasked to preserve, protect, and restore coastal resources of the state. Meanwhile, both agencies are supportive of offshore wind energy because of the potential benefits the state will receive. (See <http://www.dem.ri.gov/programs/marine-fisheries/offshore-wind.php>); (See also CRMC's Ocean SAMP §11.6 which similarly states its goals as including the encouragement of, “marine based economic development that ...[is] complementary to the state's overall economic development, social, and environmental needs and goals.”) Contrast this with the Town's environmental interests, which are focused on the potential impacts to its citizens' use of the coastline and immediate waterways. As DEM and CRMC are not in the same statutory or factual position as the Town, the Town's interests are not adequately represented, and therefore, intervention is warranted.

### **The Town's Motion to Intervene is Warranted Where Alternatives Are Being Considered**

Granting the Town's motion is especially warranted here because there is the potential for consideration of project amendments that could, if incorporated or considered, affect the Town's interests. As part of the application, the Applicant must provide a study of alternatives to the

proposed facility. *See* EFSB Rules of Practice and Procedure §1.6(B)(16). The Applicant, in this case, has requested consideration of alternative “Route ID 9 – 11” which would make landfall at Second Beach in Middletown. (Application Table 5-2 Offshore and Onshore Export Cable Routes Considered; Application sections 5.3.5.1.1-3). Alternatives “Route ID 9 – 11” all “would make landfall at the parking lot for Second Beach in Middletown via HDD under the municipal public beach from Sachuest Bay. (Application sections 5.3.5.1.1-3

Second beach in Middletown is a popular recreational beach. Recently, news headlines reported an uncovered windfarm cable from the Block Island windfarm that surfaced at the town’s beach after the CRMC ignored staff recommendations and allowed the developer to lay the cables in only a few feet of water. This scenario is uniquely a municipal concern. (*See* Exhibit A; National Grid Pauses Effort to Rebury Block Island Wind Farm Cable, *ecoRI News*, May 4, 2021). The Board may require any manner of modification or alteration to a proposed facility (*see* RIGL §42-98-11(c)), and as such, alternatives are discussed and evaluated. The Town should be allowed to participate in these discussions. For this reason, the Town’s motion should be granted.

### **Participation by the Town is in The Public Interest**

The EFSB Rules of Practice and Procedure §1.10 (B)(3) provides that intervention may be permitted when “any other interest of such nature that petitioner’s participation may be in the public interest.” Participation by the Town as an intervenor is in the public interest because the Application will directly affect the public interest of the citizens within its borders.

Middletown is governed by a seven-member town council that is elected by a local election. In contrast, CRMC and DEM are made up of officials selected by the Governor and hired employees. Coastal communities, like the Town of Middletown, will suffer the greatest impacts by the proposed Application including disruption to coastal and waterway use, impacted viewsheds

and recreational impacts. Because the adjacent coastal communities are most at risk for harm, and the Town represents the public interest of its residents, the Town's motion should be granted.

In its response to the Town's Motion to Intervene, the Applicant argues that the Town alleges insufficient interest to establish standing as an intervenor. When interpreting issues related to standing, the Rhode Island "Supreme Court has emphasized time and again that "[t]he line is not between a substantial injury and an insubstantial injury. The line is between injury and no injury." Roch v. Garrahy, 419 A.2d 827, 831 (R.I. 1980) (quoting Matunuck Beach Hotel, Inc. v. Sheldon, 121 R.I. 386, 396, 399 A.2d 489, 499 (1979)); *see also* Cummings v. Shorey, 761 A.2d 680, 684 (R.I. 2000). Determining whether a party has standing "the Court focuses not on the magnitude of the injury alleged, but whether there is any injury alleged at all." Roch, 419 A.2d at 831.

And in certain instances, "courts will 'overlook[] the standing requirement to determine the merits of a case of substantial public interest.'" Burns v. Sundlun, 617 A.2d 114, 116 (R.I. 1992) (citing Sennott v. Hawksley, 103 R.I. 730, 731, 241 A.2d 286, 287 (1968))." A substantial public interest exists where "[b]ased on the number of people affected, it is almost unfathomable to conclude that such an issue does not address the public interest in a significant way." *See* Town of Burrillville v. Clear River Energy, LLC and Town of Johnston, et als (C.A. No. PC-2017-1039) (Consolidated) *citing* Gagnon v. Benoit, C.A. No. PB 05-5964, 2006 WL 2868658, at \*3 (R.I. Super. Oct. 5, 2006) (Silverstein, J.) (noting that "given the large number of persons who will be affected by the requested relief and the likelihood that a similar case would be brought in the near future, the Court would be justified in overlooking the standing requirement under the substantial public interest exception").

The Town asserts that its Motion to Intervene falls within the language from Burns and Town of Burrillville in that the Town has “raise[ed] a question of statutory interpretation of great importance to citizens in localities” that access and use the Sakonnet River. *See Burns*, 617 A.2d at 116. For this reason, the Town’s Motion to Intervene should be granted. The Town alleges harm that it will experience; this much is even supported by the Application.

### **Conclusion**

The EFSB’s threshold for a Motion to Intervene is not a rigorous one, and the EFSB’s enabling act favors more input, not less. RIGL §42-98-9.1 (e) states, “[p]ublic input shall be a part of the decision making process.” (emphasis added) In this case, the Town has met the necessary threshold. The Town’s interest will be directly affected by the outcome of these proceedings and the Application is in the public interest of its citizens.

Further, and given state law bias toward more, not less public participation, and the fact that the proposed project is of statewide importance, cities and towns directly abutting the proposed project location should be encouraged to intervene. There is no reason that the Town should be prevented from intervening to provide comment on behalf of its citizens, to keep its citizens informed, and to represent the Town’s interests during complex regulatory consideration. The Town’s interest is not necessarily as an objector but as an intervening stakeholder and an expert in the Town’s uses of the shoreline, recreation, access, and fishing.

For these reasons, and as the Town’s interests are of such nature that intervention is necessary and appropriate, the Town respectfully requests that its Motion to Intervene be granted.

Dated: August 9, 2022

Respectfully submitted:

/s/ Marisa A. Desautel  
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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that an original and (9) copies of the within Objection and Memorandum was mailed to Emma Rodvien, Energy Facility Siting Board Coordinator, 89 Jefferson Boulevard, Warwick, RI 02888, for filing, and a true copy of the within was served via electronic mail upon all parties set forth in the attached Service List Updated August 4, 2022 on the 9<sup>th</sup> day of August, 2022.

/s/ Michele A. Dewey

**Exhibit A**

**EcoRI News, May 4, 2021**

**National Grid Pauses Effort to Rebury Block Island Wind Farm Cable**

ENERGY

# National Grid Pauses Effort to Rebury Block Island Wind Farm Cable

By Staff / ecoRI News  
May 4, 2021

*Keeping portions of the Block Island Wind Farm cable buried at New Shoreham's Crescent Beach to the north of Fred Benson Town Beach has been a struggle since the cable was laid in 2016. (National Grid)*

Unexpected construction complications are delaying the completion of the reburial of the undersea Block Island Wind Farm cable from New Shoreham, R.I., to the mainland, according to National Grid. The multinational utility said it's pausing construction for the summer tourism season, will conduct a detailed assessment, and resume work in the fall.


The power line from the five-turbine offshore wind facility reaches shore at Fred Benson Town Beach and leaves New Shoreham for Narragansett at Crescent Beach to the north. But keeping portions of the cable buried at Crescent Beach has been a [struggle](#).

National Grid, which owns the high-voltage power line from Block Island to Narragansett, expects to pay about \$30 million for its share of the [reconstruction](#). The state's primary electric utility is likely to recover the expense through an undetermined surcharge on ratepayers' bills.

The cable was to be reburied this spring through a new underwater conduit pipe that was built this past winter. As final preparations for the installation were being completed, unexpected material causing partial obstructions was discovered within the pipe, according to National Grid. The London-based corporation worked with the pipe installer and cable installer to remove the material, but National Grid determined that a more detailed assessment is needed to understand the source of the material and to ensure a successful cable installation.

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“This was an extremely difficult decision, but we recognize the importance of the summer tourism season for the Block Island community,” Terry Sobolewski, president of National Grid Rhode Island, said. “We need to assess what is causing these obstructions, how best to get the pipe cleared, and ultimately complete the installation with confidence in the fall. We’re disappointed we won’t be able to get the cable completed by Memorial Day as we planned, but this is a very complex construction project. We’d rather get it right in the fall than try to rush completion of it now.”

The transmission cables were originally installed in 2016, after National Grid and Deepwater Wind, now Ørsted, were given a break by Rhode Island’s Coastal Resources Management Council (CRMC) when the agency granted the use of a cost-saving method for burying the power cables. Approval of the lower-cost jet plow to bury the cable at Crescent Beach was granted against the advice of CRMC staff and former executive director Grover Fugate.

CRMC’s governing board gave the process the green light and even allowed the cable to be buried at a depth of 4 feet; CRMC staff recommended a depth of 8-10 feet. Within months of completion, portions of the cable were exposed close to the Block Island shore.

National Grid and Ørsted were eventually issued enforcement orders by CRMC to fix the problem.

Last fall and winter, National Grid and Ørsted conducted a horizontal directional drill and installed a conduit for the new length of onshore cable, including a new access pit. The unexpected material in National Grid’s conduit was discovered during the past few weeks, just prior to the cable being pulled through the conduit.

With the project delayed, National Grid contractors will begin cleaning up the areas where construction has occurred to date, including parking lots around Town Beach. Crews and barges will also be removed by Memorial Day weekend, according to National Grid.

Block Island and Rhode Island have continued to receive electricity from the wind facility during construction.

National Grid will seek to secure extensions on permits to allow work in the fall.



Ørsted said it's nearly finished with its work to replace the transmission line from the turbines to Block Island. Spokesperson Meaghan Wims said, "we will be wrapped up in time for the summer season, as planned."

"The new cable connecting the wind farm with Block Island has been replaced and spliced with sections of the existing cable," she said. "All that remains in our scope is removing sections of the previous cable that are no longer in use."