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## **The Quixote Wind Energy Matter: The Library**

**The library is open to all attorneys. You will receive your law-firm and client-specific instructions separately. You may discuss the contents of the library with any other student, but you may discuss the client-specific instructions ONLY with the other members of your firm. Firm assignments will be provided shortly.**

New York State policy has since 2004 provided financial incentives for the construction of renewable sources of electricity: wind power, hydropower, solar power, biomass. The state set a goal in 2004: by the year 2013, 25% of the electricity consumed in the state should be generated from renewable fuels. That goal was recently expanded to 30% by 2015. In addition, New York, like many other states, adopted a long-term goal of an 80% reduction (below 1990 levels) in greenhouse gas emissions by the year 2050.

Developers, attracted by the incentives, have come to the state with proposals to build wind generating stations: “windfarms” in the areas best suited to that technology – primarily mountaintop, ridgeline, or hilly farmland areas where the force and consistency of the wind best matches available wind turbine capacity.

Developer Quixote Wind Energy, LLC, has applied for and been granted a special use permit by the Town of Mohican, Mohican Country, New York, for the siting of a 100-turbine, 200 megaWatt project in the Town of Mohican. Turbines are very large: over 400 feet tall (the height of a 20-story building), with blades approximately 350 feet in length, which turn slowly in the wind, and which require red lights at the top to comply with aviation safety requirements. Although the bases of the turbines are not large, they are spaced roughly 1000 feet apart, so the project as a whole takes up a lot of land.

To accommodate these turbines, Quixote has entered into land lease agreements with the owners of the land. These owners are primarily farmers, who, faced with the decline in price for farm products and the rising prices of land with the growth of tourism in the area, are delighted to have the wind project come to town. They expect construction and other temporary jobs and, once the turbines are operating, revenues ranging as high as 50,000 per year for the larger land owners. Many feared they would have to sell their farms altogether, to real estate developers who would be turning their farmland and hills into subdivisions. Some are supporters of renewable energy and concerned about global warming, including the local impacts on their part of the state.

Mohican is a lovely town, surrounded by rolling hills, woodlands, and spotted with ponds and lakes. Particularly beautiful in the fall, Mohican boasts an exquisite mountain lake, Lake Fenimore, famed in song and story, with a lively theatre and classical music tradition, home to many artists. The Town was assured that the configuration of windmills would not be visible at all from the more populated sections of the Lake, and would simply be blade tips on the horizon from the more remote portions. The Town and the buildings on the Lake have been placed on the National Register of Historic Places.

There is considerable opposition to the siting of the wind farm from others in and surrounding the Town, however. Many citizens fear the view shed, noise, and other

environmental impacts of the project, and are convinced the bucolic and historic nature of the area will be forever destroyed by the presence of these huge structures dotting the landscape. The opponents have organized themselves into a coalition to stop the project: Tilting @ Windmills. Tilting includes local landowners, neighbors of the proposed site, and the leaders of a local Zen monastery, which is a renowned Zen meditation spot, visited by thousands each year who come for the natural beauty of the land and surroundings.

After the approval of the special use permits by the Town, the project was reviewed by the New York State Public Service Commission for grant of a certificate of public convenience and necessity; Town and Quixote argued for granting of the certificate. They were supported by Friends of the Wind and NRDC. Tilting and Zen Monastery opposed.

When the Commission ruled, it issued the attached decision on the project. Under Commission rules, a party aggrieved by its decision has 30 days to petition for rehearing. Petitioning for rehearing is a precondition to seeking judicial review.

**Your first assignment will be to review the Commission decision carefully, and prepare a memo to your client counselling as to whether or not you should file a petition for rehearing.**

### **How are wind farms sited?**

#### **Public Service Law Article X.**

Public Service Law Article X, recently reenacted, provides what is known as a “one-stop shopping” opportunity for the siting of electric generation facilities greater than 25 MW in New York State. Article X preempts any local laws, including zoning laws, and allowed developers to seek all permits from state agencies, the PSC and the DEC, jointly. However, although the statute has been reenacted, it will not take effect until regulations are promulgated by the state Department of Environmental Conservation and Department of Public Service. Absent Article X, a developer seeking to site a substantial electric generation facility must obtain local land use permits from towns, satisfy towns as to the environmental impact of its project, and obtain state certificates of public convenience and necessity under §68 of the Public Service Law.

Section 5(2) of the New York State Public Service Law requires the Public Service Commission to consider environmental concerns and the protection of the environment in making its determinations.

#### **State Environmental Quality Review Act (SEQRA)**

These sections of the NYS Environmental Conservation Law (ECL), and the implementing regulations of the Department of Environmental Conservation (DEC) are the foundational law governing government decision-making. For any government decision that may have a significant adverse effect on the environment, one decision making agency is designated the lead agency. The lead agency must do an environmental review before it acts. This environmental review consists of: (1) an assessment: if the proposed action is unlikely to cause environmental harm, the lead agency issues a negative declaration. If it may cause such harm, the lead agency must (2) have an environmental impact statement prepared, examining alternatives to the action, allowing comments, and taking a “hard look” at possible impacts. Only then can the lead agency

act. The regulations require that an environmental impact statement (EIS) contain a description and evaluation of the range of reasonable alternatives to the action that are feasible considering the objectives and capabilities of the project sponsor. *See, [6 NYCRR 617.9\(b\)\(5\)\(v\)](#).*

**The Town of Mohican Grant of the Special Use Permit:**

The Town granted the special use permit to Quixote Wind over the public and vocal objection of a coalition of citizens called the Tilting @ Windmills Coalition, represented by the law firm of Abner & Clark. The terms of the permit reached between the Town and Quixote included:

- (1) Quixote was given permission to use roads and Town rights-of-way in construction and operation.
- (2) Quixote agreed to payments to 40 landowners (mostly local farmers) of \$5000/month in rent for the use of portions of their land for the construction and maintenance of the wind turbines
- (3) The Town Board members, unused to much controversy in a small town, closed the meetings concerning the project to the public whenever discussions became too heated
- (4) The Town Board requested unsuccessfully that Quixote re-site some of its turbines, the ones that residents thought impinged on the historic view from Lake Fenimore or from the nearby Zen monastery; or eliminate some turbines. When Quixote represented that those changes were financially damaging, the Town issued the special use permits
- (5) With the Town permit in hand, Quixote sought a certificate of public convenience and necessity from the State PSC under state Public Service Law §68. The Commission granted the Certificate but imposed certain conditions.

**New York State Municipal Home Rule Law:**

**§10. General powers of local governments to adopt and amend local laws.**

- (1) In addition to powers granted in the constitution, the statute of local governments or in any other law,

(i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property, affairs or government...

**Parks, Recreation and Historic Preservation Law § 14.09:**

1. ...Prior to an action of approval or entitlement of any private project by a state agency, ...the agency ...shall ...consult with the commissioner [of parks] concerning the impact of the project if it appears that any aspect of the project may or will cause any change, beneficial or adverse, in the quality of any historic, architectural, archeological, or cultural property that is listed on the national register of historic places...Generally, adverse impacts occur under conditions which include ... (C)introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting...Every agency shall fully explore all feasible and prudent alternatives ...and give due consideration to feasible and prudent plans which avoid or mitigate adverse impacts on such property.

**The law firms and parties:**

**The Green Law Firm**

**Attorneys for Quixote Wind Energy**

**Abner & Clark**

**Attorneys for Tilting @ Windmills and the Zen Monastery**

**Main Street Law Firm**

**Attorneys for the Town of Mohican**

**Friends of the Wind**

**THE GREEN LAW FIRM**  
**Attorneys for Quixote Wind Energy**

**FROM: Managing Partner**

**TO: Associate**

**RE: Quixote Wind Energy matter**

As you are aware, our firm has been representing Quixote Wind Energy, a domestic subsidiary of a large European renewable energy firm. Their specialty is developing wind farms around the world, a business that of course makes a great contribution by adding renewable energy to the mix of energy sources currently dominated by fossil fuel. Wind is a small slice of the energy business in the US, but is fairly dominant in parts of Europe.

The Mohican project, like most US projects, depends on a federal tax credit (the production tax credit) and state subsidies that electric customers pay through their utility bills (renewable portfolio standards). In New York the RPS is implemented by NYSERDA, a state agency that puts out RFPs (Requests for Proposals) and awards contracts for the purchase of a certain amount of energy at a certain cost. Our client was awarded a contract to construct a project in the Mohican area, in the beautiful Fenimore Lake country. The contract expires in December of this year if the project is not complete – that is, generating electricity.

We billed hundreds of hours over the last year guiding the client through the very dangerous wilderness of permitting, negotiating with local landowners, wooing town residents and staving off opposition. We thought the worst was behind us with the Town granted the special use permits, but with the ruling that just came down from the state agency the project is in serious jeopardy.

I am particularly shocked to find the Commission is undermining the Town decision and looking for alternatives that don't exist – what do they want our client to do, build a wind farm in the deep woods? The Commission allows 30 days for a petition for rehearing – You will have a chance to argue that they should reconsider. Bear in mind that their own policy is supposed to encourage the construction of renewable energy facilities.

**Abner & Clark****Attorneys for the Tilting @ Windmills Coalition****FROM: Managing Partner****TO: Associate****RE: Quixote Wind Energy matter**

As you are aware, our firm has been representing a citizens group called Tilting @ Windmills, a coalition of several community constituencies in the Mohican area. The coalition is united in its opposition to the siting of the Quixote Wind Energy project in or near the Town, and has been the principal opponent of its construction. The two main members of the coalition are the Original Residents Committee – a group of fairly well-to-do residents, many of whom are descended from families influential in this area for the last two hundred years; and the Zen Monastery, which for 75 years has provided a retreat in a rural setting for practitioners from all over the world, and which enjoys a lovely view of the surrounding rural area and lake.

At every stage, on behalf of Tilting, our firm has made Quixote's efforts to obtain a special use permit from the Town and to obtain a certificate of environmental compatibility and public need from the state Public Service Commission more difficult, more expensive, and more time-consuming.

What we know about Quixote is that it is a domestic subsidiary of a large European renewable energy firm. Their specialty is developing wind farms around the world, a business that of course makes a great contribution by adding renewable energy to the mix of energy sources dominated by fossil fuel. Wind is a small slice of the energy business in the US, but is fairly dominant in parts of Europe. The Mohican project, like most US projects, depends on a federal tax credit and state subsidies that electric customers pay through their utility bills (renewable portfolio standards or RPS). In New York the state agency that awards RPS subsidies to renewable developers awarded Quixote a contract to construct a project in the Mohican area, in the beautiful Lake country. The contract expires in December of this year if the project is not complete - that is, generating electricity.

Unfortunately, the Quixote project has succeeded in negotiating leases with town residents (mostly farmers in need of ready cash), and in getting the special use permits from the Town. The latest development is the decision that just came down from the Public Service Commission, the state agency that must award a certificate for the project to be built. The good news about that decision is that they require Quixote to do a study of the impacts on the historical nature of the town and they cut the size of the project down to 75 turbines. The bad news is: they gave Quixote the certificate to build. You will have a chance to argue for reconsideration: to try to get them to revoke the certificate.

**Main Street Law Firm**  
**Attorneys for the Town of Mohican**  
**FROM: Managing Partner**  
**TO: Associate**  
**RE: The Town of Mohican**

Our firm represents the Town of Mohican, which has voted a strong support for the building of the wind farm. We expect significant financial and other benefits to the town: in the first place, the property tax revenues for the first year alone will enable us to hire two additional music teachers.

The Mohican project, like most US projects, depends on a federal tax credit (the production tax credit) and state subsidies that electric customers pay through their utility bills (renewable portfolio standards). In New York the RPS is implemented by a state agency that asks for bids – our client was awarded a contract to construct a project in the Mohican area, in the beautiful Lake country. The contract expires in December of this year if the project is not complete – that is, generating electricity.

We spent hundreds of hours over the last year guiding the client through the very dangerous wilderness of permitting, negotiating with local landowners, wooing town residents and staving off opposition. We thought the worst was behind us with the Town granted the special use permits, but with the ruling that just came down from the state agency the project is in serious jeopardy.

I want you to talk to you about the Commission decision – I am particularly shocked to find they are undermining the Town decision and looking for alternatives that don't exist – what do they want our client to do, build a wind farm in the deep woods? The Commission allows 30 days for a petition for rehearing – you will get to argue to them that they should reconsider their decision. Bear in mind that their own policy is supposed to encourage the construction of renewable energy facilities.

## **Friends of the Wind Natural Resources Defenders**

**FROM: Managing Partner**  
**TO: Associate**  
**SUBJECT: Friends of the Wind and that Mohican wind farm project**

As you know, Natural Resources Defenders (NRD) is representing a local environmental organization in Central New York, the Friends of the Wind. We are appearing for Friends because, as a small local volunteer organization, they lack the resources to put into a proceeding as labor-intensive as a Public Service Commission case on the siting of a wind farm, and we bring a lot of experience. Next week you will be counseling our client on the potential for getting the Commission to reconsider their decision on this wind farm. I have sent you the Commission decision separately, and in it you will see that they seem to have attempted to make everyone happy-with the predictable result that no one is happy.

The Commission granted a certificate to build to the windfarm developer, Quixote Wind. However, they placed conditions on the certificate which will make it very unlikely that the project will ever come to fruition: they burdened the developer with additional studies about the historic nature of the town; and they reduced the number of wind turbines from 100 to a mere 75. Given that there is a December deadline to have the turbines operational in order to receive essential funding, it is not clear to me why the develop doesn't just walk away.

Town of Mohican, which has voted a strong support for the building of the wind farm. They expect significant financial and other benefits to the town. Opposing the project is a local group of not-in-my-backyarders called Tilting@Windmills. They have the usual arguments: windmills ruin the view, overdevelop our area, kill bats and birds. In this case, they are a very smooth and well-financed organization – there is a big community of old wealth in Mohican, who wield a lot of power.

In my view our principal argument at the Commission is that its decision contravenes the state's own policies, including state subsidies that electric customers pay through their utility bills (renewable portfolio standards) to finance building solar, wind, hydropower and other renewable energy facilities. In fact New York recently increased its target from 25% renewable by the year 2013, to 30% by the year 2015. There is no way the state can meet an aggressive target like that without having the guts to site projects like these.

I want you to raise these considerations, and any other that may occur to you, in your memo to the client.

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany

COMMISSIONERS PRESENT:

Camilla Center, Chairwoman  
Linda Lowe  
James Kunstler  
Clare Michaels

CASE 12-E-1946 - Petition of Quixote Wind, LLC  
for a Certificate of Public Convenience and  
Necessity Pursuant to Section 68 of the Public  
Service Law

ORDER GRANTING CERTIFICATE OF  
PUBLIC CONVENIENCE AND NECESSITY  
(issued and effective February 21, 2012)

BY THE COMMISSION:

INTRODUCTION

By petition filed March 16, 2011, Quixote Wind, LLC (Quixote or the Company) requested a Certificate of Public Convenience and Necessity (CPCN), pursuant to §68 of the Public Service Law (PSL), authorizing the construction and operation of a wind energy generating project proposed to be located in the Town of Mohican, Mohican County, New York (the Town).

On April 11, 2011, Quixote filed the first supplement to the petition, in response to questions on the petition asked by Department of Public Service (DPS) Staff. The Supplement provided information regarding design and management of the facility, various plans, analyses, drawings, schedules, a list of applicable codes, criteria, procedures and standards for project design, construction, operation and management.

Several organizations and persons have entered into a coalition and filed a petition seeking party status late in this proceeding, including project opponents Global Zen Monastery and Tilting @ Windmills. The Friends of the Wind, supporters of the project, seeks party status as well.

## THE PETITION

Quixote is a marketer and developer of wind energy generation, with marketing arrangements with 18 investor-owned and municipal utilities. Quixote intends to commence construction in the Spring of 2012 and anticipates that its project will begin commercial operation by the end of 2012.

### 1. Description of Project

Quixote originally proposed to develop a 200 megawatt (MW) wind-powered generating facility in the Town. This project was anticipated to include 100 wind turbines, each with a generating capacity of 2.0 MW; two permanent meteorological towers; an operation and maintenance building; a system of 17.7 miles of gravel access roads; 25.3 miles of buried and overhead 34.5 kilovolt (kV) electric lines; a collection substation; a 0.7 mile long 230 kV overhead electric transmission line; and an interconnection substation. Upstate Power Corporation (Upstate) will provide for interconnection to its existing Mohican 230 kV bulk transmission line.

The array of 100 turbines is proposed to span portions of the Town in a generally random arrangement, with turbines spaced over 1000 feet apart. Each wind turbine will have a total maximum height of approximately 399 feet. The turbine field will be lighted pursuant to Federal Aviation Administration standards for aviation hazard warning. The Quixote project land area (Site) includes approximately 7,500 acres of private land on approximately 70 separate parcels.

The single circuit 230 kV transmission line will connect the collection substation with the proposed interconnection substation. The transmission line will be approximately 0.7 miles in length, with conductors carried on steel and wood pole structures in a vertical configuration.

In supplements to its petition, the Company provided additional details and descriptions of its proposed electric facilities, including features for facility security and public safety, a plan for quality assurance and control measures for facility design and construction, utility notification and coordination plans for work in close proximity to other utility transmission and distribution facilities, emergency response plans for construction and operational phases, and complaint resolution measures.

Quixote has not yet provided final transmission line design or construction plan and profile details, as requested by DPS Staff. Before the start of clearing or construction of the transmission line or substation facilities, we will

require that Quixote provide additional details of substation facility security, as well as additional plans, standards and practices for transmission line construction and vegetation maintenance.

#### COMMENTS AND RESPONSES

Comments in opposition to the Quixote Project were submitted by Tilting @ Windmills and several concerned citizens. Comments in favor of the project were received from Friends of the Wind, which identified itself as comprised of individuals interested in promoting renewable energy resources, and includes landowners who will directly benefit from the siting of turbines on their property, and the Town.

Tilting @ Windmills requested party status, explaining their participation in State Environmental Quality Review Act (SEQRA) proceedings and local permitting proceedings, their interest in a range of environmental matters including in particular regional impacts beyond the towns, and their concern for historic resource impacts. Additionally, they expressed concerns regarding the conduct and results of the SEQRA proceedings. Tilting @ Windmills presented report that is a representation of the predicted visibility of specific proposed turbines on the Fenimore Lake landscape, and characterizes the nature and extent of each turbine's visibility. The report focused primarily on the specific turbines, which it characterizes as having the greatest degrees of significance within the Fenimore Lake viewshed. Tilting @ Windmills also submitted a report which provides an analysis of the Company's Alternatives Analysis. The August 7 Tilting @ Windmills report points out that the Alternatives Analysis is not sufficient to fully analyze the alternatives.

The Company responded to the request for party status, arguing that Tilting's intent is to re-open the "completed" SEQRA process and that it would not contribute to the development of a complete record. The Company believes that Tilting's request should be denied.

This analysis relates to the consultation with the Office of Parks, Recreation and Historic Preservation (OPRHP) that we have undertaken pursuant to §14.09 of the Parks, Recreation and Historic Preservation Law (PRHPL), as implemented by 9 NYCRR Part 428.

Tilting replied to the Company's response, indicating that the lead agency did not inquire into several issues including the fiscal need for the project to be developed at the size proposed and the failure to acknowledge or resolve the adverse impacts on historic and cultural

resources. They pointed out that historic and cultural resource impacts and alternative scale projects were matters raised by both OPRHP and DPS Staff and that the Company itself had recently submitted related materials to DPS and OPRHP on these very issues.

The Town requested party status, indicating that its participation would contribute to the development of a complete record, and would be in the public interest. The Town cited its understanding of the requested intervention by Tilting and stated their request that "party status be granted to all or to none." The Town indicated its support for the Quixote petition and the grant of a CPCN.

In its petition for party status, Friends of the Wind reported that it is a local citizen's group based in Mohican County, affiliated with the national environmental organization Natural Resources Defense Council. Friends of the Wind cited the group's commitment to "uniting public awareness on the issues of renewable energy options" in the area, and otherwise indicated its support for the project, including the economic and environmental benefits of project development and operation. It asserted its support for the Town decisions and efforts and thorough examination of the project impacts and benefits. Friends suggested that the project will bring significant local economic benefits, including payments to the municipalities, schools, and the lessors and landowners on which project components are proposed to be located. In addition, it expressed its support for the state Renewable Portfolio Standard (RPS) and efforts to advance indigenous renewable energy resources.

In addition, several residents filed comments expressing concerns with turbine operations including equipment failure, ice throw, lightning strikes, and additional matters, finding disturbing the lack of depth of research conducted by the Town, particularly regarding the potential health hazards of the project. Global Zen master Bernard Cook of the Zen Center of Mohican reported that the Project would devastate the Center's unique religious setting.

#### DISCUSSION AND CONCLUSION

##### Procedural Matters

We grant permission to intervene as a party "if the intervention is likely to contribute to the development of a complete record or is otherwise fair and in the public interest".<sup>1</sup> In deciding whether to grant a CPCN, we consider

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<sup>1</sup> See 16 NYCRR §4.3(c) (1), 6 NYCRR §617.6(b) (3) (iii), and 6 NYCRR §617.11(c) and (d).

issues relating to public convenience and necessity. Because of our approval authority under PSL §68, moreover, we are an involved agency for purposes of SEQRA review. As such, we may not generally require the preparation of SEQRA documents in connection with proposed actions; however, we must make a written findings statement that, inter alia, weighs and balances relevant environmental impacts with social, economic, and other considerations and provide a rationale for our decision. Furthermore, as a State agency, we must consult with the Office of Parks, Recreation, and Historic Preservation (OPRHP) regarding the impacts of proposed projects on cultural resources, pursuant to PRHPL §14.09. Because these broad responsibilities relate to our PSL §68 review, we will allow those seeking party status to intervene, believing that their participation is helpful in completing the record and in the public interest.

#### State Environmental Quality Review

Environmental review of the proposed facilities was conducted pursuant to SEQRA, Article 8 of the Environmental Conservation Law, with the Town of Mohican acting as lead agency. The purpose of SEQRA and its implementing regulations (6 NYCRR Part 617 and 16 NYCRR Part 7) is to incorporate consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQRA requires that agencies determine whether the actions they are requested to approve may have a significant impact on the environment. If it is determined that an action may have a significant adverse impact, an environmental impact statement must be prepared by the lead agency or the applicant.<sup>2</sup>

On November 14, 2011 a Full Environmental Assessment Form (EAF) and application for a wind energy facility permit addressing the proposed wind power project was submitted by Quixote to the Town Board. A solicitation of lead agency status was forwarded to involved agencies by the Mohican Town Board, along with a copy of the EAF document. No agency objected to the Board assuming the role of lead agency. In that role it issued a positive declaration,

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<sup>2</sup> See 16 NYCRR §4.3(c) (1); 6 NYCRR §617.6(b) (3) (iii). See 6 NYCRR §617.11(c) and (d).

requiring the preparation of a Draft Environmental Impact Statement (DEIS). The DEIS was submitted to the Lead Agency. The DEIS was accepted as complete on January 31, 2012. Upon acceptance of the DEIS, copies of that document (along with a copy of the public notice) were distributed to all interested and involved agencies and made available to the public. The public comment period ran from May 31, 2012 to August 4, 2012. Public hearings were held in the Town.

The EIS for the project analyzed potential environmental impacts on land use and zoning, visual resources, socioeconomic issues, traffic and transportation, air quality, noise, soils, geology, terrestrial and aquatic ecology including threatened and endangered species, effects on communications facilities, stormwater management, impacts of construction, and proposed general and specific mitigation measures. The Lead Agency determined that a large-scale wind power-generating project will result in benefits to the area, as well as certain environmental impacts if not mitigated, avoided or offset. While we acknowledge the environmental concerns of the several commenters, it is clear that under SEQRA the lead agency has the responsibility to give careful consideration to such issues. As noted above, we may not require the preparation of SEQRA documents, though we may take appropriate action to ensure that we may make the findings statement required by 6 NYCRR §617.11(c). Except where specifically noted herein, the lead agency has appropriately analyzed the environmental impacts associated with QUIXOTE's project. The findings, as extensively discussed in the Findings Statement adopted by the lead agency, are generally reasonable and appropriate. The additional impact mitigation requirements we will impose will insure that impacts are minimized to the extent practicable, and that required SEQRA findings may be made.

PRHPL §14.09(Historic resources) Review

The DEIS did not include an evaluation of historic resources, and the visual impact analysis was inadequate in addressing certain areas, most notably the Fenimore Lake area and surrounding environs, which constitute the Fenimore Historic District listed on the National and State Registers of Historic Places. These areas and similar resources had been indicated as warranting attention in comments to the Lead Agency filed by DPS Staff, both in response to the request for lead agency designation and in comments on the DEIS. Conservation groups, including Tilting @ Windmills had raised similar issues.

Thus, DPS Staff and others attempted from very early in the SEQRA review to have historic resources identified, analyzed and addressed and project impacts mitigated in accordance with the requirements of PRHPL §14.09. Impacts to historic and cultural resources were not addressed until the SDEIS was developed. Fenimore Lake and the surrounding area are well known for their significance as a scenic and cultural resource and focal point of public interest. The SDEIS included analysis of a broader study area and an initial review of cultural resources, including historic sites and archeological resources evaluations. The resource investigation included several viewpoints from Fenimore Lake representing views northerly toward the Project area from the Fenimore Historic District. The SDEIS depicted the proposed turbines as introduced mechanical features emerging above a generally wooded ridgeline north of the Historic District. The visual contrasts here, as elsewhere, will vary depending on ambient lighting and atmospheric conditions.

DPS Staff requested that OPRHP's Historic Field Services Bureau issue an impact determination based on archeological and historic resources and visual impact assessments in the SDEIS. The Historic Field Services Bureau issued an "Adverse Impact" determination regarding historic resources in a letter dated January 22, 2012. The letter pointed out that the significance of the Fenimore Historic District, acknowledged as "a nationally significant resource" is to a large degree related to the natural setting, "an outstanding scenic environment that survives with a high degree of integrity today, retaining substantial evidence of its long and multi-layered history." OPRHP stated that it "believes that views from this district must be an integral component of the final assessment of alternatives to be discussed regarding impacts associated with this project. Although beyond the five-mile limit established for most wind energy projects, the clear and defined national significance of this resource warrants its full consideration in the process." In addition to comments on this resource of national significance, reference to other historic resources listed or eligible for listing on the State or National Registers of Historic Places that would be adversely affected by the Project was provided. OPRHP concluded "We now encourage the project sponsor to continue the consultation process under §14.09 by fully exploring all feasible and prudent alternatives and by giving due consideration to feasible and prudent plans that avoid or mitigate the adverse impacts."

The Company provided additional analyses of alternatives, including identification of individual turbine visibility from various locations on Fenimore Lake within the Fenimore Historic District. In correspondence, the Company presented information indicating the extent of turbine visibility, and potential effects of alternative smaller-scale projects. Quixote reported that reducing the scale of the project to remove the extent and number of turbines visible from the Historic District would reduce the benefits of the project in terms of energy produced, emissions offset, and payments to the taxing jurisdictions, host communities and landowners. The reduction of project size by 25 turbines would reportedly reduce the return on investment rate and lead to project delays. None of the three alternative scale projects analyzed, in the Company's opinion, was feasible or prudent.

In informal comments sent to DPS Staff, the Town indicated that a reduction in turbines threatens to leave the host communities all of the local visual impact, while dramatically cutting the economic benefit to their residents and family farms. The benefit, if any, of a reduced visual impact will go to distant vantage points in neighboring towns in another county, according to the Town. The Town asserted that the assessment made in the SEQRA process and the findings made by the Town fully considered visual effects, and that consideration of reduced project scale in the consultation and decision-making process required by PRHPL §14.09 threatens to "make a mockery" of the SEQRA process.

The analysis by Tilting@Windmills indicated that: economic analysis of smaller alternative projects were not provided in the Quixote analysis. That the analysis was incomplete as to financing assumptions and most operating costs; and potentially overstates project benefits and projected emissions displacements.

Unfortunately, these undocumented and unsupported claims do not reflect the simple fact that the identified pollutants are regulated in New York under cap and trade programs. While the wind project may displace fossil fuel generation and some associated emissions, the displaced source will be free to sell any unused credits to another source. Therefore, any displaced emissions are not avoided. Second, with the New York RPS standard, the true comparison of emissions should be among the other projects that are competing with the Quixote project in the special set-aside RPS market. If not Quixote, the generation would come from another renewable project that would have a similar

emissions profile. Bottom line is that there would be no difference in avoided emissions between the project as proposed, any of its claimed alternatives or if it were not built at all.

The history of events in this case shows that DPS staff recommended that the Lead Agency require that cultural and historic resources study and analysis be included in the DEIS, that the study area be expanded to include the Fenimore Lake area and Historic District, and that a public scoping document be provided for consideration by involved agencies. Other commenting parties in the SEQRA review made similar requests. The comments of parties on the DEIS reflect the perceived shortcomings of that document, that a cultural and historic resources study and impact assessment was not included, that the study area and content had not been expanded as recommended, and that consideration of alternatives and mitigation measures would need to be revisited upon provision of additional baseline evaluations of cultural and historic resources. Comments on the SDEIS reflect similar lingering concerns regarding the impact assessments and shortcomings of the consideration of mitigation and alternatives to reduce adverse impacts. The FEIS provided limited consideration of alternatives in this regard, concluding that the perceived impacts were not significant and were otherwise unavoidable, and that no reasonable alternatives were available that would provide the reported benefits to the Town, the region and the State. The FEIS states that "a down-sized project is not essentially different from the project as proposed and therefore does not warrant further evaluation".

#### CONCLUSION

Weighing all of these factors, we conclude that the size of Quixote's project must be reduced in order to avoid adverse environmental impacts on the scenic quality of the Fenimore Historic District. Therefore, to protect the District's view shed, we authorize 25 fewer turbines than Quixote proposed. The 25 excluded turbines, are identified by both Quixote and Tilting as those that would be most visible from the District.

The adverse effects attending such a reduction in project scope are not sufficient to justify foregoing the environmental benefits that will be realized as a result. The smaller project will be sized at 75 turbines and 150 MW, instead of 100 turbines and 200 MW, as proposed by Quixote. A smaller-sized project will yield less revenue for its owner. Nevertheless, Quixote should still have a

reasonable opportunity to earn a reasonable return, given the tax credit and other benefits available to developers of renewable wind generation, and the fact that the smaller size will entail a smaller investment.

While the smaller project will produce fewer emissions offsets, the contribution of the project to meeting RPS targets will nonetheless remain significant. And other wind developers can be found who would be willing to replace the contribution to RPS lost because of the reduction in the project's size. As to the taxing jurisdictions and land owners, again, they will receive lower payments from a smaller project, but those payments will, in the aggregate, remain significant. As a result, preventing the harms to the Fenimore Historic District can be achieved upon impacts to the project and its beneficiaries that are acceptable. We recognize the allegation that delays in project implementation and local permitting decisions will occur because of our decision to authorize a smaller scale project. Such delays, however, are not inevitable. In any event, proper consideration of cultural resources impacts from the beginning of the SEQRA review would have avoided the extended time for record development that has occurred. In addition to the direct mitigation of impacts to historic resources just discussed, we will require that the Company cooperate in and fund the development and implementation of a Historic Resources mitigation plan that will include measures to specifically address effects of the project on resources near or along the Scenic Heritage Route, resources that can be linked to the Heritage Route and the Heritage Corridor Management Plan goals and objectives, and resources that will provide continuing community benefits.

#### Public Convenience and Necessity

We are authorized to grant certification to an electric corporation pursuant to PSL §68, after due hearing and upon a determination that the construction of electric plant is necessary and convenient for the public service. The company intends to provide electricity to the wholesale competitive market and has proposed to site the facilities to utilize a portion of the wind energy potential in New York State. The facilities are based on renewable resource technology, providing clean and renewable supplies of electricity to the wholesale energy market. We find, as required by PSL §68, that the construction of the proposed

Quixote Wind Project, as modified herein, is necessary and convenient for the public service.