

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Docket No. 8816

Petition of Swanton Wind LLC for a certificate of public )  
good, pursuant to 30 V.S.A. § 248, for the construction )  
of an up to 20 MW wind-powered electric generation )  
plant powered by up to 7 wind turbines located along )  
Rocky Ridge in Swanton, Vermont

Order entered: 6/22/2017

**ORDER: DISCOVERY LIMITATIONS, EXPERT WITNESS FEES, AND SCHEDULE**

**I. Introduction**

On March 2, 2017, the Vermont Public Service Board (“Board”) issued an order that, with the exception of certain deadlines related to intervention requests and the first round of written discovery on Swanton Wind, LLC (“Swanton Wind” or “Petitioner”), suspended the schedule for the balance of this proceeding.

In today’s order, the Board initially denies a request by Swanton Wind to limit the amount of written discovery to be served going forward and to prohibit the taking of depositions, addresses the possibility of a motion from Swanton Wind seeking recovery of its expert witnesses’ fees incurred in responding to discovery, and defers establishing a schedule for the remainder of this proceeding until after Swanton Wind supplements its case, at a minimum, by filing a complete and final System Impact Study (“SIS”) along with any related prefiled testimony and exhibits.

**II. Background**

On May 24, 2017, the Board convened a status conference in this matter. The purpose of the status conference was to discuss the establishment of a schedule for the remainder of the proceeding.

Also on May 24, 2017, Swanton Wind filed its proposed schedule. Swanton Wind brought copies of its proposed schedule to distribute at the status conference. Swanton Wind included in its May 24<sup>th</sup> filing a request to limit written discovery in this matter going forward, and in a footnote raised its intent to seek recovery of its expert witnesses’ fees in responding to discovery requests pursuant to V.R.C.P. 26(b)(4)(E).

The Department of Public Service (“Department” or “DPS”) also brought copies of two scheduling proposals to the status conference, one a shorter schedule that included some initial

steps followed by another status conference, and the other a longer schedule that extended out through technical hearings.

During the status conference, it became clear that the parties would not be able to agree on a schedule for the proceeding. As a result, the Board directed the parties to submit proposed schedules and their reasons therefor by June 2, 2017.

On June 1, 2017, the Northwest Regional Planning Commission (“NRPC”) and Dustin and Christine Lang (the “Langs”) each filed a proposed schedule for the balance of the proceeding.

On June 2, 2017, the Department and Swanton Wind each filed proposed schedules. The Department’s proposal was abbreviated and contained only a few initial steps followed by the setting of a complete schedule at a later date, while Swanton Wind’s proposal extended through technical hearings. The Department’s filing also expressed its opposition to Swanton Wind’s request to limit discovery and potential future request to recover expert witness fees.

In addition, on June 2, 2017, the following parties filed scheduling comments: 1) the Towns of Swanton and Fairfield, commenting on the development of a schedule but without proposing specific dates for such a schedule, proposing dates for a site visit and public hearing, and opposing Swanton Wind’s request to limit discovery and potential future request to recover expert witness fees; 2) the Citizen Intervenors (identified in the April 6, 2017, Order on interventions) commenting in support of the Langs’ proposed schedule, proposing site visit locations, and opposing Swanton Wind’s request to limit discovery and potential future request to recover expert witness fees; 3) the Vermont Division for Historic Preservation (“DHP”) expressing no objections to either the NRPC proposal or the Department’s expected filing; and 4) Green Mountain Power Corporation (“GMP”), also expressing no objections to either the NRPC proposal or the Department’s expected filing.

On June 5, 2017, GMP filed a letter in support of the Department’s June 2, 2017, abbreviated proposal.

On June 6, 2017, the Langs filed a letter in support of the Department’s June 2, 2017, proposal, asking that the Board only consider the Langs’ June 1<sup>st</sup> proposal in the event the Board is inclined to set a schedule for the entire proceeding rather than adopt the Department’s abbreviated proposal.

On June 7, 2017, Swanton Wind formalized its earlier scheduling proposal to limit the extent of discovery going forward by filing a motion to that effect.

### III. Discussion

In today's order, the Board initially denies Swanton Wind's request to limit discovery in this matter going forward, addresses the possibility of a motion from Swanton Wind seeking recovery of its expert witnesses' fees in responding to discovery, and defers establishing a schedule for the remainder of this proceeding until after Swanton Wind supplements its case, at a minimum, by filing a complete and final SIS along with any related prefiled testimony and exhibits.

#### 1. Limitations on discovery

When the petitioner filed its May 24<sup>th</sup> scheduling proposal, it included a request for the Board to impose a 50-question limit, including subparts, per party or group of individuals functioning together (i.e., in this case, the Citizen Intervenors) when serving written discovery on another party in this proceeding.<sup>1</sup> According to Swanton Wind, the requested limit is justified given the unprecedented number of parties to the proceeding and the high number of discovery requests already served on the Petitioner in the first round of discovery. On June 7, 2017, Swanton Wind reiterated its request in the form of a motion to limit discovery procedures, this time requesting not only a limit on the number of written discovery questions, but also requesting a prohibition on the taking of depositions.<sup>2</sup> Swanton Wind contends that prohibiting the use of depositions in this proceeding is necessary because of the number of parties that may seek to participate in a given deposition, making the depositions excessively difficult to schedule and conduct.

The Department, NRPC, the Langs, the Citizen Intervenors, and Fairfield and Swanton all oppose Swanton Wind's request to limit discovery in this proceeding.<sup>3</sup> These parties variously contend that Swanton Wind has not made the required showing under V.R.C.P. 26(b)(1) for the issuance of a protective order, has not properly consulted with the opposing parties as required by V.R.C.P. 26(h), and has improperly relied on a discovery limitation from another jurisdiction to justify its request.

V.R.C.P. 26(b)(1) provides in relevant part:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by a Superior Judge if it is determined that: (i) the discovery

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<sup>1</sup> Swanton Wind proposes to exempt itself from this limitation when serving its first round of interrogatories because such a limit was not imposed on the non-petitioning parties when they served their first round of written discovery requests.

<sup>2</sup> Swanton Wind had removed any provisions for depositions from its proposed schedules in its May 24<sup>th</sup> and June 2<sup>nd</sup> filings but did not specifically address this removal of depositions from its scheduling proposals until it filed its June 7<sup>th</sup> motion to limit discovery procedures.

<sup>3</sup> This list represents those parties that filed responses specific to Swanton Wind's June 7, 2017, motion to limit discovery.

sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation.

At this time, we deny Swanton Wind's request to establish limits on the number of questions to be asked in the second round of written discovery – both the second round to be served on Swanton Wind and the second round to be served by Swanton Wind. In our judgement, Swanton Wind has not demonstrated that the limitation on discovery that it seeks meets the requirements of the rule. The application of the rule urged by Swanton Wind would require us to assume that the other parties to this proceeding will serve duplicative, cumulative, or unduly burdensome discovery prior to the discovery having been served. We realize that Swanton Wind was served with a significant amount of written discovery in the first round, but we do not believe this provides us with a sufficient basis to assume the second round of discovery will meet any of the justifications under the rule for imposing a limit, nor has Swanton Wind demonstrated that the amount of discovery to date and to be served in the next round is inconsistent with the needs of the highly public and disputed project that has been proposed by the Petitioner. If Swanton Wind believes that it has been served with unreasonable and unnecessary discovery after a new schedule has been established and the second round of requests has been served pursuant thereto, it may file a properly supported motion for an order under V.R.C.P. 26(c), after consulting with the other parties in an attempt to resolve any disputes about the discovery process.

We also decline to prohibit the use of depositions in this proceeding. However, we share the Petitioner's concern that the number of parties to this matter could make the taking of depositions difficult. Therefore, pursuant to Board Rule 2.209(C), we direct the Citizen Intervenors to select and authorize a single individual per each of the Petitioner's witnesses for the purpose of conducting that witness's deposition. The Board also notes that there still remain a significant number of parties that might want to participate in the deposition of a given witness. Therefore, the Board directs those parties to consult with each other in an attempt to maximize efficiencies in taking depositions by avoiding cumulative and duplicative lines of questions where the parties' interests are aligned. Parties should also consider whether their attendance at a specific deposition is necessary, in particular if a party is not going to actively participate in that deposition.

2. Expert witness fees

In its letter of May 24, 2017, Swanton Wind stated in a footnote that it intended to seek recovery of its expert witnesses' fees incurred in responding to discovery requests from the other parties pursuant to V.R.C.P. 26(b)(4)(E).

Several of the other parties to this proceeding have expressed opposition to such a request.

Because Swanton Wind has not yet actually sought to recover any of its expert witnesses' fees incurred in responding to discovery, we do not need to resolve any potential disagreements among the parties on this issue at this time.

3. Schedule

After careful consideration of the scheduling proposals submitted by the parties and the reasons underlying each proposal, we have decided to adopt a modified version of the Department's June 2<sup>nd</sup> proposal. Specifically, we are deferring setting any future dates for this proceeding until Swanton Wind supplements its case, at a minimum, by filing a complete and final SIS along with any related prefiled testimony and exhibits.

The Department, with the support of several other parties, believes that Swanton Wind needs to supplement its petition, prefiled testimony, and/or exhibits. According to the Department, the Board's dismissal of Swanton Wind's petition for a Board Rule 4.100 contract in Docket 8571 renders Swanton Wind's prefiled testimony on the need for the project irrelevant, leaving the Board without a basis for making the required finding on need under 30 V.S.A. 248(b)(2). The Department also asserts that Swanton Wind cannot meet its burdens of production or persuasion under 30 V.S.A. § 248(b)(3) (system stability and reliability) or (10) (existing or planned transmission facilities) in the absence of a completed SIS as part of the evidentiary record. These assertions form the basis for the Department's recommendation that the Board establish deadlines only for: 1) Swanton Wind to either file notice that it will supplement its case and identify the topics it intends to supplement and the date by which it will do so, or certify that it will not be filing any supplements; 2) the parties to file further scheduling proposals; 3) the parties to file any motions related to Swanton Wind's filing regarding potential supplementation.

We are also aware that Swanton Wind has to date stated that it does not intend to supplement its case, but does intend to supplement its discovery responses as new information becomes available as required by the Vermont Rules of Civil Procedure.

We agree with the Department that it is necessary to have the complete and final SIS as part of the evidentiary record before the Board would be able make any affirmative findings under 30 V.S.A. § 248(b)(3) (system stability and reliability) or (10) (existing or planned transmission facilities) in this particular case. While the Board in the past has made affirmative findings under these two criteria conditioned upon the completion of and compliance with a final SIS, the unique circumstances of this case compel us to conclude that the complete and final SIS must be part of the evidentiary record prior to the technical hearings. The region of Vermont where this project is proposed to be located experiences transmission capacity issues that can lead to curtailment of existing generation facilities, a situation that could be influenced by the proposed project.<sup>4</sup> As a result, the information in the SIS might also be relevant to the questions of need (30 V.S.A. § 248(b)(2)) and economic benefit (30 V.S.A. § 248(b)(4)). Given these unique circumstances, we decline to establish a complete schedule until the complete and final SIS is filed.

Pursuant to our decision today and Board Rule 2.208, Swanton Wind must file the complete and final SIS within a reasonable time. However, we decline to set a specific deadline because preparation of the SIS may be, at least in part, a matter beyond the Petitioner's control. We do require Swanton Wind to file within two weeks of the date of this order a status report on the SIS, including its expected completion and filing dates. We also direct Swanton Wind to file, every 30 days thereafter, a report updating the Board and parties on its progress towards meeting the reported completion and filing dates. These updates shall include any decision by Swanton Wind to suspend or abandon its pursuit of a complete and final SIS. Other parties may file motions as they deem appropriate, consistent with the Vermont Rules of Civil Procedure and Board Rules, in response to the reports required by this paragraph.

We are not establishing a deadline for Swanton Wind to supplement its case on the need criterion (30 V.S.A. § 248(b)(2)). However, the Department has raised significant questions as to the sufficiency of Swanton Wind's testimony on need given the Board's dismissal of the petition in Docket 8571. We remind Swanton Wind that the initial burden of production and the ultimate burden of persuasion are its responsibilities to meet if it is to receive a certificate of public good in this matter. Accordingly, if Swanton Wind decides to supplement its case on need (or any other criteria), it shall file such supplement no later than the time it files the complete and final SIS. If it decides not to supplement its case on the need criterion, it shall file a certification that it will not be supplementing its case thereon, but instead intends to rely on the

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<sup>4</sup> See GMP motion to intervene at 2-3.

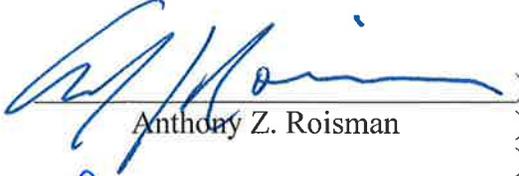
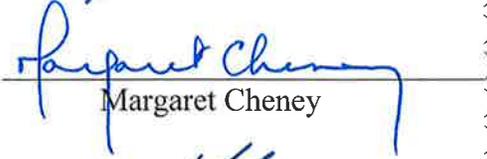
testimony filed with the petition and any rebuttal testimony that is properly responsive to testimony filed by the non-petitioning parties on the need criterion.

We decline to adopt the Department's recommendation to establish a deadline for parties to file what appear to be dispositive motions. Parties may file such motions at any time consistent with Board rules and the Vermont Rules of Civil Procedure.

Given our decision to defer scheduling at this time, it is not necessary for us to rule on other issues or requests submitted by some of the parties, such as suggestions related to the site visit or deadlines for motions to compel or for protective orders. If and when Swanton Wind submits the final and complete SIS, the Board will request any further input from the parties regarding moving this proceeding forward

**SO ORDERED.**

Dated at Montpelier, Vermont this 22<sup>nd</sup> day of June, 2017.

 Anthony Z. Roisman	) PUBLIC SERVICE
 Margaret Cheney	) BOARD
 Sarah Hofmann	) OF VERMONT

OFFICE OF THE CLERK

Filed: 6/22/17

Attest: Lars Bang-Jensen  
Acting Clerk of the Board

*Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) or any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@vermont.gov)*

PSB Case No. 8816 - SERVICE LIST

Parties:

Edward Adrian, Esq.  
Monaghan Safar Ducham PLLC  
156 Battery Street  
Burlington, VT 05401  
eadrian@msdvt.com

(for Selectboard and Planning Commission of  
the Town of Swanton) (for Town of Fairfield)

Dale Azaria, Esq.  
Vermont Division for Historic Preservation  
1 National Life Drive  
Davis Building, 6th Floor  
Montpelier, VT 05620-0501  
dale.azaria@vermont.gov

(for Vermont Division for Historic  
Preservation)

Jennifer Belanger, *pro se*  
4 Marcel Drive  
St. Albans, VT 05478  
stott.brad@yahoo.com

Diane Bell, *pro se*  
P.O. Box 1603  
Williston, VT 05495  
Diane.lizzyb@gmail.com

Erynn Boudreau, *pro se*  
13 Rocky Ridge Road  
Saint Albans, VT 05478  
erynn.hale@gmail.com

Tyrell Boudreau, *pro se*  
13 Rocky Ridge Road  
St. Albans, VT 05478  
erynn.hale@gmail.com

Mark Bushey, *pro se*  
2499 Highgate Road  
Saint Albans, VT 05478  
markb12@comcast.net

Mary Bushey, *pro se*  
2499 Highgate Road  
Saint Albans, VT 05478  
marybushey@comcast.net

David Butterfield, *pro se*  
1954 Sheldon Road  
Saint Albans, VT 05478  
Dave@vttireonline.com

Leslie A. Cadwell, Esq.  
Legal Counselors & Advocates, PLC  
P.O. Box 827  
Castleton, VT 05735  
lac@lac-lca.com

(for Swanton Wind LLC)

Bruce Collopy, *pro se*  
157 Swizler Point  
Fairfield, VT 05455  
collopyfamilyfarm@gmail.com

Sally Collopy, *pro se*  
157 Swizler Point  
Fairfield, VT 05455  
collopyfamilyfarm@gmail.com

Geoffrey Commons, Esq.  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601  
geoff.common@vermont.gov

(for Vermont Department of Public Service)

Jessica Decker, *pro se*  
2 Marcel Drive  
Saint Albans, VT 05478  
jess\_decker@yahoo.com

Lance Desautels, *pro se*  
2 Marcel Drive  
St. Albans, VT 05478  
wyrman2012@yahoo.com

Luc Deslandes, *pro se*  
1914 Sheldon Road, Apt. A  
Saint Albans, VT 05478  
mdandld@comcast.net

Michelle Deslandes, *pro se*  
1914 Sheldon Road, Apt. A  
St. Albans, VT 05478  
mdandld@comcast.net

Brian Dubie, *pro se*  
770 McKenzie Road  
Fairfield, VT 05455  
briandubie@gmail.com

Penny Dubie, *pro se*  
770 McKenzie Road  
Fairfield, VT 05455  
pennydubie@gmail.com

Timothy M. Duggan, Esq.  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601  
tim.duggan@vermont.gov

(for Vermont Department of Public Service)

John K Dunleavy  
Vermont Agency of Transportation  
One National Life Drive  
Montpelier, VT 05633  
John.Dunleavy@vermont.gov

(for Vermont Agency of Transportation)

Daniel Dunne, *pro se*  
1185 Davis Avenue  
Dunedin, FL 34698  
dan.m.dunne@gmail.com

Nancy Dunne, *pro se*  
1185 Davis Avenue  
Dunedin, FL 34698  
nanadd100@gmail.com

William F. Ellis  
McNeil, Leddy & Sheahan  
271 South Union Street  
Burlington, VT 05401  
wellis@mcneilvt.com

(for City of Burlington Electric Department)

Edward Ferguson, III, *pro se*  
19 Rocky Ridge Road  
Saint Albans, VT 05478  
sarahferguson333@gmail.com

Sarah Ferguson, *pro se*  
19 Rocky Ridge Road  
St. Albans, VT 05478  
sarahferguson333@gmail.com

Kenneth Fox, *pro se*  
1736 Reynolds Road  
Fairfield, VT 05455  
lumar@myfairpoint.net

Danielle Garrant, *pro se*  
1 Tremblay Road  
Saint Albans, VT 05478  
savinggrace9@yahoo.com

Ian Garrant, *pro se*  
1 Tremblay Road  
St. Albans, VT 05478  
savinggrace9@yahoo.com

David A. Goodrich, *pro se*  
2717 Nodyne Drive  
Nashville, TN 37214  
xkejagman68@aol.com

Dennis Hendy, *pro se*  
P.O. Box 1603  
Williston, VT 05495  
djhendy1@gmail.com

Cindy Ellen Hill, Esq.  
Hill Attorney PLLC  
144 Mead Lane  
Middlebury, VT 05753  
lawyerhill@yahoo.com

(for Dustin Lang) (for Christine Lang)

Hans G. Huessy  
Murphy Sullivan Kronk  
275 College Street  
Burlington, VT 05401  
hhuessy@mskvt.com

(for Marianne Dubie) (for Mark Dubie)

Mary Hunter, *pro se*  
87 Lebel Drive  
Saint Albans, VT 05478  
catlovntexn@aol.com

Paula J. Kane, *pro se*  
12 Farrar Street  
Saint Albans, VT 05478-1540  
paula@pkanelaw.com

Aaron Kisicki, Esq.  
Vermont Department of Public Service  
112 State Street  
Montpelier, VT 05620-2601  
aaron.kisicki@vermont.gov

(for Vermont Department of Public Service)

Judith Luneau, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

Patrick Luneau, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

Sara Luneau-Swan, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483

hillandale@gmail.com

Owen McClain, Esq.  
Sheehey Furlong & Behm P.C.  
30 Main Street  
P.O. Box 66  
Burlington, VT 05402  
omclain@sheeheyvt.com

(for Green Mountain Power Corporation)

Karen McLaughlin, *pro se*  
90 Lebel Drive  
St. Albans, VT 05478  
lkbmclaughlin@comcast.net

Leo McLaughlin, *pro se*  
90 Lebel Drive  
Saint Albans, VT 05478  
lkbmclaughlin@comcast.net

Joseph S. McLean, Esq.  
Stitzel, Page & Fletcher, P.C.  
171 Battery Street  
P.O. Box 1507  
Burlington, VT 05402-1507  
jmclean@firmspf.com

(for Northwest Regional Planning  
Commission)

Frank B. Mehaffey, *pro se*  
32 Lebel Drive  
St. Albans, VT 05478  
kmehaffey@enosburgk12.net

Kaye Mehaffey, *pro se*  
32 Lebel Drive  
Saint Albans, VT 05478  
kmehaffey@enosburgk12.net

Patricia Messier, *pro se*  
70 Sholan Road  
Saint Albans, VT 05478  
patlovesgardening@gmail.com

Dolores Nichols, *pro se*  
15 Rocky Ridge Road  
St. Albans, VT 05478  
doloresN81@comcast.net

Kevin Nichols, *pro se*  
15 Rocky Ridge Road  
Saint Albans, VT 05478  
doloresN81@comcast.net

Carolyn Palmer, *pro se*  
63 Swanton Hill Road  
Fairfield, VT 05455  
palmcb@gmail.com

Clark Palmer, *pro se*  
63 Swanton Hill Road  
Fairfield, VT 05455  
palmcb@gmail.com

Paula Pearsall, *pro se*  
64 Lamoille Terrace  
Milton, VT 05468-3964  
paulapearsall@myfairpoint.net

Robert Perkins, *pro se*  
573 Simone's Road  
Fairfield, VT 05455  
perkinsrp@yahoo.com

D. Gregory Pierce, *pro se*  
12 Farrar Street  
St. Albans, VT 05478-1540  
greg.pierce9@myfairpoint.net

Gonzalo Pinacho  
Vermont National Guard  
Vermont National Guard  
789 Vermont National Guard Road  
Colchester, VT 05446  
gonzalo.pinacho.mil@mail.mil

(for Vermont National Guard)

Katherine L. Pohl  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609-1001  
katherine.pohl@vermont.gov

(for Vermont Agency of Agriculture, Food and  
Markets)

Todd W. Poirier, *pro se*  
1992 Sheldon Road  
Saint Albans, VT 05478  
TPoirier@DEWCORP.com

Patricia Rainville, *pro se*  
1952 Sheldon Road  
St. Albans, VT 05478  
hihopes@together.net

Jeanne Royer, *pro se*  
2066 Sheldon Road  
Saint Albans, VT 05478-9704  
jeanneroyer25@gmail.com

David W. Rugh, Esq.  
Stitzel, Page & Fletcher, P.C.  
171 Battery Street  
P.O. Box 1507  
Burlington, VT 05402-1507  
drugh@firmspf.com

(for Northwest Regional Planning  
Commission)

Suzanne Seymour, *pro se*  
448 White Camps Road  
Fairfield, VT 05455  
planetmassagevermont@gmail.com

Kane Smart, Esq.  
Vermont Agency of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05620  
kane.smart@vermont.gov

(for Vermont Agency of Natural Resources)

Annette Smith  
Vermonters for a Clean Environment, Inc.  
789 Baker Road  
Danby, VT 05739  
vce@vce.org

(for Vermonters for a Clean Environment, Inc.)

John A. Smith, *pro se*  
1952 Sheldon Road  
Saint Albans, VT 05478  
johna.smith@newtecgroup.net

Terrance Smith, *pro se*  
2070 Sheldon Road  
Saint Albans, VT 05478  
terryshistorichome@gmail.com

Alison Milbury Stone, Esq.  
Legal Counselors & Advocates, PLC  
PO Box 194  
Burlington, VT 05402  
Alison@lac-lca.com

(for Swanton Wind LLC)

Bradley Stott, *pro se*  
4 Marcel Drive  
Saint Albans, VT 05478  
stott.brad@yahoo.com

Curtis Swan, *pro se*  
141 Sweet Hollow Road  
Sheldon, VT 05483  
hillandale@gmail.com

Gilbert Tremblay, *pro se*  
4 Tremblay Road  
St. Albans, VT 05478  
gilmarie@comast.net

Marie Tremblay, *pro se*  
4 Tremblay Road  
Saint Albans, VT 05478  
gilmarie@comcast.net

Leslie A. Welts, Esq.  
Office of General Counsel, Vermont Agency  
of Natural Resources  
1 National Life Drive, Davis 2  
Montpelier, VT 05620-3901  
leslie.welts@vermont.gov

(for Vermont Agency of Natural Resources)

Steven Woodward, *pro se*  
2040 Sheldon Road  
Saint Albans, VT 05478  
casewood123@gmail.com