

- The EFSB’s statutory and jurisdictional scope of review includes consideration of Mr. Cabral’s testimony; testimony that is therefore, not only relevant, but also probative of the jurisdictional issues before the EFSB.

I. ARGUMENT

A. MIDDLETOWN IS NOT ONLY ALLOWED TO REVIEW THE PROJECT AS DISCUSSED IN THE SUBJECT TESTIMONY, IT IS MANDATED TO BY THE EFSB’S OWN ORDER

1. The EFSB Ordered Middletown to Review the Issues National Grid now Objects to and Seeks to Have Stricken

If the scope of Middletown’s review of the Aquidneck Island Reliability Project was to be narrowed as National Grid now requests, the EFSB could have limited the scope in the Notices. National Grid attempts to characterize Mr. Cabral’s testimony as “challenging RIDEM’s ability to properly determine the Project’s conformance with the RISDISM.” Motion, p.4. However, there is no such “challenge” here. Middletown and RIDEM have separate review obligations, criteria, and processes. National Grid’s characterization of Mr. Cabral’s testimony is nothing more than its most recent attempt to undermine and disregard Middletown’s duty to comply with directives from the EFSB.

On May 2, 2016, the EFSB issued its Preliminary Decision and Order in this matter (the “Preliminary Order”). Contained in the Preliminary Order were a “Notice of Designation to the Town of Middletown Planning Board to Render an Advisory Opinion” and a “Notice of Designation to the Town of Middletown Zoning Board of Review to Render an Advisory Opinion” for this docket (the “Notices”). In the Notices, the EFSB directs that “[i]n accordance with Rule 1.11(a) of the [EFSB’s] Rules of Practice and Procedure (Rules), the designated agency shall render its advisory opinion, to the extent possible, pursuant to the procedures that would be followed absent [EFSB] designation of the agency.”

National Grid's Motion objects to Mr. Cabral's testimony regarding "the project's conformance with the 'Standards' created within the [Rhode Island Stormwater Design and Installation Manual] located on page 5 line 143 through page 7 line 233." Motion, p.3. The objection cites relevance, as that term is defined by the Rhode Island Rules of Evidence, because certain Rhode Island Department of Environmental Management permits and licenses are exempted from EFSB jurisdiction. However, Middletown's review of the Aquidneck Island Reliability Project was conducted pursuant to its customary procedures "that would be followed absent [EFSB] designation of the agency." *See* Notices.

To be sure, if the EFSB were inclined to limit the scope of review of Middletown's Advisory Opinion as National Grid would like, the EFSB would have included directions in the Notices, pursuant to Rule 1.11b of the EFSB's Rules of Practice and Procedure:

"1.11(b) Limitation of Agency Investigation - The Board shall limit the scope of any designated agency's investigation of any issue to be considered by the Board when it finds that more than one agency has jurisdiction over the issue in the hearing process. Such limitation shall be expressly stated in writing, shall identify the agency which shall address the issue in its advisory opinion and shall be based on the Board's consideration of the relative expertise and resources of the agencies having concurrent jurisdiction and any other pertinent matter."

The EFSB never limited Middletown's investigation as National Grid is attempting to do now. Instead, the EFSB mandated that Middletown follow its regular procedures when rendering its Advisory Opinions. Middletown did, in fact, follow those procedures.

2. Middletown Followed its Regular Review Processes and Requirements of its Ordinances, as the EFSB Ordered

Middletown followed its regular procedures, as the EFSB ordered, including meetings and hearings for the Aquidneck Island Reliability Project, held by the Middletown Planning Board and Zoning Board of Review, as well as other municipal bodies. As part of this process, Middletown hired the services of Crossman Engineering, Inc. (Steven M. Cabral) to assist with the highly

technical review of National Grid’s applications and filings with the Planning Board and Zoning Board of Review. During the application review process, it became clear that National Grid was refusing to comply with Middletown’s ordinances that govern stormwater and freshwater wetlands design requirements, as well as water quality standards.

Section 516 of Middletown’s Subdivision Regulations require conformance to Section 153 of the Middletown Code of Ordinances, entitled “Stormwater Management.” In general, Section 153 was developed to protect water quality, flooding, hydrologic balance, wildlife habitat, and public health, safety and welfare.

Specifically, Section 153.01 of Middletown’s Code of Ordinances, “Purpose” states:

“The purpose of this chapter is to protect, maintain and enhance the public health, safety and general welfare by establishing minimum requirements and procedures to control the adverse impacts associated with increased stormwater runoff. Proper management of stormwater runoff will minimize damage to public and private property, reduce the effects of development on land, control stream channel erosion, reduce local flooding, minimize adverse water quality impacts and maintain after development, as nearly as possible, pre-development runoff characteristics. This chapter requires stormwater management controls that are consistent with the *State of Rhode Island Stormwater Design and Installation Manual* (as amended), and is intended to minimize water quality impacts and maintain pre-development runoff conditions.”

Clearly, Middletown adopted the State of Rhode Island Stormwater Design and Installation Manual (“RISDIM”). Simply because the Rhode Island Department of Environmental Management is reviewing application materials submitted to it by National Grid does not preempt Middletown’s review process and/or standards contained in its own ordinances.

B. MR. CABRAL’S TESTIMONY IS RELEVANT, PROBATIVE, AND CONSISTENT WITH THE EFSB’S JURISDICTIONAL SCOPE OF REVIEW

Mr. Cabral’s testimony provided in this matter makes obvious the fact that Middletown struggled, throughout its review processes, to obtain necessary information from National Grid.

This information, if provided, would have assisted Middletown in analyzing compliance with its ordinances related to stormwater and freshwater wetlands design requirements, as well as water quality standards. As it stands, National Grid consistently refused to provide this information. Mr. Cabral's testimony discusses how National Grid's refusal resulted in negative Advisory Opinions from Middletown. The refusal, by National Grid, in this case is a basis for EFSB jurisdiction at the final hearing.

The Energy Facility Siting Act, R.I.G.L. §42-98-10, discusses the procedures required of Middletown when rendering its Advisory Opinions as follows:

“Agency procedures – Advisory opinion. (d) Failure or refusal of the applicant to provide requested information may be considered as grounds for recommending denial.”

The Energy Facility Siting Act then provides the parameters of the EFSB's final hearing and decision process:

“(a) [w]ithin forty-five (45) days after the final date for submission of advisory opinions pursuant to § 42-98-10, the board shall convene the final hearing on the application. The purpose of this hearing shall not be to rehear the evidence which was presented previously in hearings before agencies designated under §42-98-9, but rather to provide the applicant, intervenors, the public, and all other parties in the proceeding, the opportunity to address in a single forum, and from a consolidated, statewide prospective, **the issues reviewed, and the recommendations made in the proceedings before the agencies designated under §42-98-9...**

(b) The board shall issue a decision granting a license only upon finding that the applicant has shown that:

(2) The proposed facility is cost-justified, and can be expected to produce energy at the lowest reasonable cost to the consumer consistent with the objective of ensuring that the construction **and operation of the proposed facility will be accomplished in compliance with all of the requirements of the laws, rules, regulations, and ordinances, under which, absent this chapter, a permit, license, variance, or assent would be required**, or that consideration of the public health, safety, welfare, security and need for the proposed facility justifies a waiver of some part of the requirements when compliance cannot be assured.

(3) The proposed facility **will not cause unacceptable harm to the environment** and will enhance the socio-economic fabric of the state.

(c) ...The board's **decision shall explicitly address each of the advisory opinions received from agencies, and the board's reasons for accepting, rejecting, or modifying, in whole or in part, any of those advisory opinions.**" R.I.G.L. §42-98-11 (emphasis added).

There are four (4) distinct and separate references that apply to Mr. Cabral's scope of testimony in this matter: Middletown's proceedings and recommendations, non-compliance with Middletown's ordinances, unacceptable harm to the environment, and of Middletown's Advisory Opinions. The EFSB is tasked with the statutory obligation of reviewing these four areas. Thus, Mr. Cabral's testimony is not only relevant to the EFSB's jurisdiction, but is also highly probative of the scope of review contained in R.I.G.L. §42-98-11. The hearing currently scheduled for April 13th is defined in state law as giving "the public, and all other parties in the proceeding, the opportunity to address in a single forum, and from a consolidated, statewide prospective, the issues reviewed, and the recommendations made in the proceedings before the agencies designated under §42-98-9." *See* R.I.G.L. §42-98-11. The EFSB can and should hear the issues presented by Middletown, as the Energy Facility Siting Act declares.

II. CONCLUSION

For the reasons hereinbefore stated, Middletown respectfully requests that National Grid's Objection to and Motion to Strike a Portion of Testimony of Steven M. Cabral be denied.

Respectfully submitted,
Town of Middletown
By its Attorney



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CERTIFICATION

I hereby certify that I filed an original and five (5) copies of the within Response and Objection with the EFSB and sent a true copy, via electronic mail, of the within document to the parties listed on the docket service list, on this 31st day of March, 2017.

