

**STATE OF VERMONT
DEPARTMENT OF PUBLIC SERVICE**

24 V.S.A. § 4352 Determination No. 1

**DETERMINATION OF ENERGY PLANNING COMPLIANCE PURSUANT TO
24 V.S.A. § 4352 FOR BENNINGTON COUNTY REGIONAL COMMISSION'S
REGIONAL PLAN AND ENERGY PLAN**

I. INTRODUCTION

Today, in my capacity as the Commissioner of the Vermont Department of Public Service (“Department”), I have issued the attached certificate memorializing my affirmative determination pursuant to 24 V.S.A. § 4352(a) that the Bennington County Regional Plan (“BCRP”) and the Bennington County Regional Energy Plan (“BCREP”) comply with the requirements of 24 V.S.A. § 4352 for enhanced energy planning.¹ This determination is made solely as to whether the BCRP and BCREP comply with the statutory planning requirements of 24 V.S.A. § 4352. This determination does not mean that the Department endorses the substantive policy judgments contemplated or promoted in these plans. Additionally, I hereby record the procedural history leading to the compliance determination, as well as a report of the public comments the Department received. Finally, some observations are offered that may prove helpful to other regional planning commissions and municipalities that choose to seek an enhanced energy planning compliance determination under 24 V.S.A. § 4352.

¹ The BCRP was duly adopted on March 19, 2015, and amended on March 23, 2017; the BCREP was duly adopted on March 23, 2017.

II. PROCEDURAL HISTORY

On April 21, 2017, the Bennington County Regional Commission (“BCRC”) submitted the BCRP and BCREP (collectively the “Plans”) for a determination of compliance with the enhanced energy planning standards set forth in 24 V.S.A. § 4352.

On May 10, 2017, notice of a public hearing scheduled for May 31, 2017 was posted on the Department’s website and mailed directly to the BCRC.

On May 13, 2017, notice of the May 31st public hearing was also published in the Bennington Banner.

On May 17, 2017, the Department solicited recommendations from the Secretaries of Agriculture, Food and Markets, Commerce and Community Development, Natural Resources and of Transportation as to whether BCRC's Plans should be certified as compliant with the requirements of 24 V.S.A. § 4352.

The Department received responses from the Agencies of Agriculture, Food and Markets (“AAFM”), Commerce and Community Development (“ACCD”), Natural Resources (“ANR”), and Transportation (“AOT”). All of their responses supported issuance of an affirmative compliance determination. ACCD stated it had already provided comments to the BCRC that were addressed prior to BCRC’s request for a determination of compliance. ANR and AOT supported an affirmative determination of compliance. AAFM requested that future plans, include, among other things: measures to mitigate invasive species, information regarding agricultural soil usage, biofuels and anaerobic digesters, and measures for siting solar resources in a manner that minimizes farm management costs. As AAFM provided these recommendations for consideration in a future regional plan they did not form part of the

compliance determination that was made today. That said, BCRC is encouraged to coordinate with AAFM regarding these issues in future planning activities.

On May 31, 2017, the Department convened a public hearing in the Bennington Firehouse in Bennington, Vermont. The hearing was attended by numerous members of the public, many of whom expressed dissatisfaction with the planning process, while others expressed support for the Plans themselves.

III. PUBLIC COMMENTS

I thank the members of the public who took the time to provide me with feedback on the Plans and this review process, whether in writing or by speaking at the May 31st public hearing. These comments highlight the importance of this planning process to the residents of Bennington County. It has been both my duty and privilege to listen to and consider these public comments. This determination decision I am statutorily charged with making affects the lives of the citizens of Bennington County and I have not undertaken it lightly. What follows is a summary description of the comments the Department received:

A. Several people requested that the Department either delay the issuance of a determination or issue a negative determination in order to afford municipalities' additional time to complete their planning process, thereby creating an opportunity for the siting priorities of the municipalities to be included in the Regional Energy Plan.

I sympathize with the timing concerns expressed by many members of the public. It is certainly troubling to contemplate the possibility that the Bennington County Regional Energy Plan is seen by some members of the public as not reflecting the will of all of the municipal communities within the region. However, by law I have no discretion to delay the determination I am required to make by virtue of BCRC's decision to request such a determination on April 21, 2017. Section 4352 of Title 24 requires the Commissioner to issue a determination within two

(2) months of receipt of a request for such a determination. Therefore, this determination must be made on or before June 21, 2017.² Nor am I permitted to issue a negative determination as a means of delay if the Plans otherwise meet the planning requirements contained in the law.

I would observe the BCREP includes a provision that recommends that deference be given in Section 248 proceedings to the municipal-level resource maps of communities that have completed the enhanced energy planning process of 24 V.S.A. §4352.³ This strikes me as a mechanism by which the Bennington Regional Planning Commission has afforded municipalities an opportunity to make their planning preferences known and felt in Section 248 proceedings. Therefore, I strongly encourage the citizens of the municipalities in Bennington County to avail themselves of this opportunity to influence the Public Service Board's interpretation of the regional mapping resource, by (1) engaging in the enhanced energy planning process to create a municipal plan and (2) seeking a determination of energy planning compliance from the BCRC as soon as possible.

Commenters identified areas on the BCREP resource maps, such as the headwaters of the Battenkill River, where they believe solar or wind development should be restricted, as an illustration that the siting priority of an individual municipality was not included. The BCREP addresses this concern by stating that the resource maps should “not be thought of as ‘siting maps’”⁴ and encourages individual municipalities to “refine these renewable energy resource maps by adding additional locally identified constraints.”⁵ BCRC states that the “wind and resource maps, and the corresponding data, should be used to inform energy planning efforts by

² The BCRC submitted its request for a determination to the Department on April 21, 2017. Two (2) months after April 21, 2017 is June 21, 2017.

³ The BCREP at page 83 reads as follows: “enhanced municipal-level resource maps should be given deference at Public Service Board Section 248 proceedings unless there is a clear conflict with the energy goals of this Regional Energy Plan”.

⁴ *Id.*

⁵ *Id.*

municipalities and regions.”⁶ Again, in light of this language in the Plans, I reiterate my encouragement for citizens to engage in the enhanced energy planning process to create a municipal plan and to seek a determination of energy planning compliance from the BCRC as soon as possible.

B. Members of the public expressed concern regarding the outcome in a Section 248 proceeding when there is a conflict between a Regional Plan and Municipal Plan.

Some members of the public expressed concern as to what would happen in the event of a conflict between the Bennington County Regional Energy Plan and any energy plan adopted by a municipality in Bennington County. For example, the BCREP solar resource map identifies an area in the Town of Bennington as prime solar (meaning the land is potentially suitable for solar generation after a site-specific review) that the Town has identified, through the local planning process, as inappropriate for a certain scale of solar development.

Act 174 does not address how such a conflict would be resolved by the Public Service Board. 24 V.S.A. § 4348(h) provides some statutory guidance regarding which provisions of a regional plan or a municipal plan are to be given effect in the case of a conflict. The law states that provisions of the regional plan shall be given effect **to the extent that they are not in conflict with the provisions of a duly adopted municipal plan.**⁷ To the extent that such a conflict exists, the Public Service Board is required to give effect to the regional plan **if it is demonstrated that the project under consideration in the proceedings would have a “substantial regional impact.”**⁸ 24 V.S.A. § 4345a(17) requires a regional planning commission to define “substantial regional impact” in its plan.⁹ This statute, in turn, requires

⁶ *Id.*

⁷ 24 V.S.A. § 4348(h)(1)(emphasis added in bold).

⁸ 24 V.S.A. § 4348(h)(2)(emphasis added in bold).

⁹ BCRC’s plan states that a development is considered to have a substantial regional impact when it is determined by the BCRC to have one or more of the characteristics enumerated on pages 196-197 of the BCRP.

that this definition be afforded “due consideration” when applicable in state regulatory proceedings such as a Section 248 review. In the event of a dispute that involves the application and reconciliation of these legal rules, the Board will be required to decide the dispute. In turn, the resolution of any such conflict will hinge on the details of a proposed project, whether the BCRC has determined a proposed facility would have a “substantial regional impact” and how the Board exercises its discretion in assessing whether there is a “substantial regional impact.”

The BCREP appears directed at creating some predictive clarity with respect to any potential conflict between the BCREP and any applicable municipal plan by including a provision that recommends deference be given in Section 248 proceedings to the municipal-level resource maps of communities that have completed the enhanced planning process of 24 V.S.A. § 4352. Specifically, the BCREP states that “enhanced municipal-level resource maps should be given deference at Public Service Board Section 248 proceedings unless there is a clear conflict with the goals of this Regional Energy Plan.”¹⁰ Therefore, in the case of municipalities in the Bennington County Regional Planning area, it is in the interests of those municipalities to complete the enhanced energy planning process by crafting a municipal plan and seeking a determination of energy planning compliance from the BCRC as soon as possible.

C. Criticism of the Department’s Public Hearing Notice

Some members of the public commented that the Department provided inadequate notice of the May 31st public hearing. The Department publicized the public hearing in the following manner:

¹⁰. BCREP at page 83.

- On May 10, 2017, notice of the public hearing scheduled for May 31, 2017 was posted on the Department's website and was mailed directly to the Bennington County Regional Commission.
- On May 13, 2017, notice of the public hearing was also published in the Bennington Banner.

These measures correspond to the express requirements of 24 V.S.A. § 4352. That said, the public comments have shown me that this hearing process would benefit from the Department taking additional steps to provide further public notice, such as working with Regional Planning Commissions and municipalities to post broader notice via electronic and traditional bulletin boards.

D. Several people expressed disappointment regarding the notice associated with the BCRC's development and adoption of the Bennington County Regional Energy Plan.

In response to this concern, the Department followed up with the BCRC about the steps BCRC took to provide public notice of the planning activities that produced the Plans.

- The BCRC held twelve public meetings discussing the draft Regional Energy Plan (from June 2015 to March 2017).
- The BCRC included information and updates regarding the plan and planning process in six of its newsletters (from March 2015 to March 2017).
- BCRC staff met with the following town plan commissions, per the request of the planning commissions, to discuss the draft plan: Dorset, Manchester, Shaftsbury, Bennington, Stamford, Pownal, Sunderland, and Landgrove.
- All of the regional public meeting notices and newsletters were sent to the local newspaper, posted at the BCRC and on their website, and sent to town and village clerks for posting in local communities. In addition, the materials were sent via direct

email to a list including: BCRC commissioners (municipal and interest group representatives), area legislators, municipal administrators, managers, community development and planning staff, municipal road foremen, chairs of municipal planning commissions, zoning and development review boards, the regional energy committee and people in the region requesting information on energy issues, regional economic development organizations and committees, regional conservation organizations, and a list of people who have asked to receive BCRC meeting notices and newsletters.

IV. DEPARTMENT OBSERVATIONS

Act 174 created a new energy planning process in Vermont for regional planning commissions and municipal planning bodies. Pursuant to this process, a regional planning commission has the option of submitting its duly adopted regional plan to the Commissioner of the Department of Public Service for an affirmative determination of compliance with the statutory standards of 24 V.S.A. § 4352.¹¹ When regional plans and municipal plans have received affirmative compliance determinations under Section 4352, the Vermont Public Service Board is required to afford substantial deference in Section 248 proceedings to the land conservation measures and specific policies contained in such duly-adopted regional and municipal plans when reviewing any proposed electric generation facility in the region covered by those plans.

¹¹ Act 174 provides an option for municipalities as well to receive affirmative compliance determinations for their energy plans under the planning standards of Section 4352. However, the compliance determination for a municipal plan is made by the regional planning commission for the municipality, and not by the Department Commissioner, unless the municipality qualifies for and seeks a compliance determination under Section 4352(g) before July 1, 2018.

While a regional plan that has received an affirmative determination of energy planning compliance must be given substantial deference by the Public Service Board when reviewing the siting impact of a project under the “orderly development” criterion of Section 248(b)(1), that does not mean that the regional plan automatically or ultimately decides whether a project will receive a Section 248 permit. Rather, a regional plan that has been determined to comply with 24 V.S.A. § 4352 will inform only one of the several statutory criteria the Board must apply when considering whether a proposed project should receive a Section 248 permit.

Pursuant to 24 V.S.A. § 4348b(a), regional plans must be amended or updated and adopted or readopted every 8 years. In turn, every six years, the Department is required to adopt a Vermont Comprehensive Energy Plan (CEP),¹² which must include recommendations for regional and municipal energy planning and standards for issuing a determination of energy compliance.¹³ During these intervals of time new statutes, rules, technologies, and policies may be adopted that could substantially affect the standards and the goals in the CEP. The analysis, targets and goals presented by the BCRC to meet the planning standards developed by the Department pursuant to Section 9 of Act 174 represent one potential path for achieving energy goals; this potential path is not a directive or a prescription for what must be done or where specific resources must be located. The specific targets and measures should be viewed as aspirational and should not be interpreted as mandatory requirements. For example, a specific area that is marked on a regional planning map as “prime solar” does not mean that the entire area will be filled in with solar panels; rather it simply indicates an absence of specific restrictions such as vernal pools or agricultural soils. Any proposed solar project will still need to be reviewed by the Public Service Board and affected neighbors and communities will still

¹² 30 V.S.A. § 202b(c)

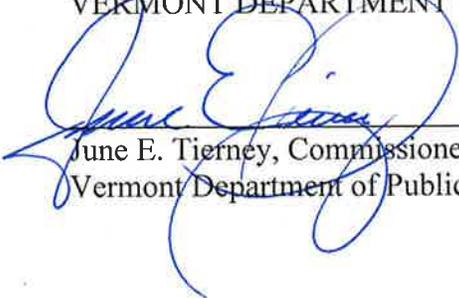
¹³ 24 V.S.A. § 4352(d)(1)

have the opportunity to provide comments on any proposal and to explain why they do or do not support the proposed construction or siting of that particular project.

The BCRC has developed regional targets for renewable energy generation; these are included in Table 3.1 on page 57 of the Energy Plan. These regional targets are not mandatory for the Bennington County Regional Commission's member municipalities nor does the following statement on page 78 of the Energy Plan constitute an obligation that must be acted on: "The Bennington Region will need to develop over 100MW of new generating capacity from hydro, wind and solar resources within the region over the next 35 years." In other words, to the extent that individual municipalities wish to develop enhanced energy plans, these targets developed by the BCRC may serve as tools or guides, but they in no way restrict how individual municipalities develop their own targets for energy planning purposes.

Dated at Montpelier, Vermont this 21st day of June 2017.

VERMONT DEPARTMENT OF PUBLIC SERVICE



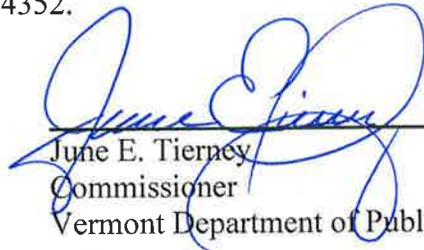
June E. Tierney, Commissioner
Vermont Department of Public Service

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CERTIFICATE OF ENERGY COMPLIANCE

On this 21st day of June, 2017, I affirmatively determined that the Bennington County Regional Plan duly adopted on March 19, 2015, and as amended on March 23, 2017, and the Bennington County Regional Energy Plan duly adopted on March 23, 2017, comply with the energy planning requirements set forth in 24 V.S.A. § 4352.


June E. Tierney
Commissioner
Vermont Department of Public Service

Pursuant to 24 V.S.A. § 4352, a regional planning commission aggrieved by an act or decision of the Commissioner of Public Service may appeal to the Natural Resources Board established under 10 V.S.A. chapter 151 within 30 days of the act or decision.