60CSR11
RULES FOR RECLAMATION OF SOLAR AND WIND ELECTRICITY GENERATING FACILITIES
RESPONSE TO COMMENTS

The West Virginia Department of Environmental Protection's Office of the Environmental Advocate commenced the public comment period for proposed legislative rule 60CSR11 on June 28, 2022. The public comment period concluded July 29, 2022, after satisfying the 30-day period. A public hearing was held on at 6:30 p.m. on July 28, 2022. The purpose of the public comment period and hearing was to accept oral and written comments on the proposed rule.

The WVDEP received three written comments during the public comment period. The written comments received are attached as part of the formal rulemaking record. No one attended the public hearing. The public hearing transcript is provided as part of the formal rulemaking record.

After considering the comments received, the WVDEP made the following changes to 60CSR11.

1. The WVDEP removed Raleigh Solar facility from Appendix A.

2. Upon review of Mr. Hendrick's Comment 1, the WVDEP agrees with the commenter that the definition of "repowering" (located at 2.15) should be modified in the manner suggested.

3. In response to Mr. Hendrick's Comment 3, the WVDEP determined that West Virginia Code § 22-32-3(b)(2) requires that wind turbine foundations be removed without reference to depth. Accordingly, the WVDEP revised § 4.1.d.iii. to reflect the correct statutory requirement.

4. In response to Mr. Hendrick's Comment 4, the WVDEP agreed that not only is the word "updated" superfluous, but that § 3.4 in its proposed form was confusing. Accordingly, WVDEP revised the rule to delete § 3.4 in its entirety and placed the 90 day plan review time in § 3.3. The remainder of Section 3 was renumbered.

5. Upon review of Mr. Hendrick's Comment 6, the WVDEP agreed that 50% is a more reasonable figure and changed § 5.2 to reflect a requirement that acreage be expanded by 50% rather than 10%.

6. In response to Mr. Vaughan's Comment 5, the agency changed the language of § 4.1.c.i from "not a direct employee" to "qualified independent party," which appears to be more in line with the enabling statute.

7. Upon review of Mr. Vaughan's Comment 10, the agency revised § 10.2 to explicitly allow appeals of bond reduction determinations to the Environmental Quality Board.

8. In response to Mr. Vaughan's Comment 11, the agency revised § 11.1 to explicitly enumerate all allowed form of bonding.

WVDEP RESPONSE TO COMMENTER DAVE OREOLT

Upon receipt of Mr. Oreolt's comment, the WVDEP searched its files to determine whether the WVDEP has any evidence that Raleigh Solar executed a decommissioning agreement before July 9, 2021. The files do not contain such an agreement. Accordingly, the WVDEP adopted Mr. Oreolt's suggestion and removed the Raleigh Solar facility from Appendix A of the rule.

WVDEP RESPONSE TO COMMENTER DAN HEDRICK AND CLEARWAY

COMMENT 1: "In Section 2.16 [sic], Clearway suggests clarifying "repowering" to read "substantial upgrades or changes in solar or wind generation equipment that will extend the operational life."

RESPONSE 1: Upon review of Comment 1, the WVDEP agrees with the commenter that the definition of "repowering" (located at 2.15) modified the rule in the manner suggested.

COMMENT 2: In the definition of "wind generation facility (Section 2.17), Clearway suggests removing or clarifying the intent of the term "prime movers," whose plain meaning is ambiguous as it is not a term widely used or understood in the renewable energy industry.

RESPONSE 2: The definition of "wind generation facility" in § 2.17 of the proposed rule is identical to the definition provided in West Virginia Code § 22-32-3(g) and the WVDEP cannot change that definition in its rules without prior legislative approval.

COMMENT 3: In Section 2.7(b), Clearway suggests clarifying, to be consistent with the balance of the regulation (specifically, Section 4.1.d.iii), that wind turbine "foundations" are not to be removed in their entirety during decommissioning activities. Rather, Clearway suggests removal of foundation to three feet below ground surface, consistent with existing decommissioning agreements for West Virginia wind projects and wind industry standards.

RESPONSE 3: West Virginia Code § 22-32-3(b)(2) requires that wind turbine foundations be removed without reference to depth. Accordingly, the WVDEP revised § 4.1.d.iii. to reflect the correct statutory requirement.

COMMENT 4: In Section 3.4, Clearway recommends clarifying what constitutes an "updated" decommissioning plan and why such update would be required rather than submitting an original decommissioning plan. Further, the requirement to submit decommissioning plans at least one year before a bond is required is a significant administrative burden that is likely to delay project commissioning and development.

RESPONSE 4: The WVDEP agrees that not only is the word "updated" superfluous, but that § 3.4 in its current form is confusing. Accordingly, WVDEP revised the rule to delete § 3.4 in its entirety and places the 90 day plan review time in § 3.3. The remainder of Section 3 is renumbered.

COMMENT 5: Clearway suggests aligning the depths of removal stipulated in Section 4.1.d.ii with that of Section 4.1.d.iii; i.e., 36 inches below the natural grade is industry-standard depth for decommissioning.

RESPONSE 5: The WVDEP declines to make the suggested claim, based on the statutory language noted in Response 3.

COMMENT 6: Regarding Section 5.2, W. Va. Code 22-32-4(i)(3) relates to circumstances where an exempt facility would lose its exempt status if it were "substantially expanded in total disturbed acreage." The code does not provide for a definition of "substantially expanded in total disturbed acreage." The 10% threshold for disturbed acreage as proposed in the Rules is inadequate, since even a minor equipment change could easily exceed this standard when essential road improvement and temporary laydown areas are factored in. Depending on the circumstances and location, the replacement of even a single turbine (e.g., as required by a catastrophic failure) could exceed the 10% standard. Clearway suggests a threshold more consistent with a facility-wide repowering, such as 50% disturbed acreage.

RESPONSE 6: The WVDEP agrees that 50% is a more reasonable figure and changed § 5.2 to reflect a requirement that acreage be expanded by 50% rather than 10%.

WVDEP RESPONSE TO COMMENTER: EVAN VAUGHAN / MAREC ACTION

COMMENT 1: Section 2.1: We recommend changing the definition of "abandon" to "generating no electricity each month for 12 consecutive months...". If a project is producing electricity, it is being managed, the owner has not abandoned it, and the owner will seek to maximize electricity production given financial obligations to deliver electricity to customers as well as make land lease payments. Changing the threshold in this way would simplify reporting and monitoring obligations for the project owner and for the WV DEP.

RESPONSE 1: The WVDEP elects to maintain the 10% threshold out of concern that a facility could avoid reclamation by maintaining a *de minimus* level of electricity production, which would frustrate the intent of the Wind and Solar Energy Facility Reclamation Act.

COMMENT 2: Section 2.15: We request a change in the definition of "repowering" to mean "substantial upgrades or changes in solar or wind generation equipment that will extend the operational life." A repowering does not always change the cumulative nameplate capacity. For example, we are aware of wind farms that have maintained the same nameplate capacity after a repowering with fewer individual turbines thanks to advances in technology.

RESPONSE 2: The WVDEP agrees with this comment and has changed the definition of "repowering" (in § 2.16 rather than § 2.15) as noted above.

COMMENT 3: Section 3.4: We ask for clarification about what constitutes an "updated" decommissioning plan and why this would be considered an update rather than submission of the original decommissioning plan. Furthermore, we request flexibility to submit the decommissioning plan at least six months after start of commercial operations. This request is supported in W. Va. Code 22-32-4(a) and provides operators with the flexibility to finalize the decommissioning plan after clearing the hurdles required to begin operations. This should also allow WV DEP adequate time to review the plan prior to the deadline for bond submission.

RESPONSE 3: Please see WVDEP's response to Mr. Hendrick's Comment 4.

COMMENT 4: Section 3.6: We request this section be narrowed so that "the Department may, at its discretion, inspect solar and wind generation facilities that have been abandoned or that have initiated decommissioning to ensure compliance with this rule." This change and the change to 4.1.d.v below are meant to keep the rule focused on project decommissioning rather than operations—which in our view is outside the statutory authority granted to WV DEP by this law.

RESPONSE 4: The WVDEP declines to make the change requested by Comment 4. The agency believes it is the intent of the Wind and Solar Energy Facility Reclamation Act to require the WVDEP to be able to conduct inspections to "ensure compliance with [this] rule," thus limiting inspections to those relating to decommissioning and bonding.

COMMENT 5: Section 4.1.c.i: We recommend clarifying that current salvageable value is to be determined by someone who is not "a direct employee" of the project owner. Our understanding of the legislative intent was for a project owner to commission a third-party expert consultant, at the project owner's expense, to provide the estimate.

RESPONSE 5: The WVDEP agrees with this comment and changed "not a direct employee" to "qualified independent party."

COMMENT 6: Section 4.1.d.ii and iii: We appreciate the need to delineate a minimum depth for removal for cables, pipelines, and concrete foundations. It would also be helpful to provide an upper bound to the WV DEP's authority to require removal. We suggest the following language, "Removal of wind turbine and solar foundations and other concrete foundations and slabs to a minimum depth of 36 inches below the natural grade or an alternative depth up to 48 inches as approved by the department if appropriate for the post operation land use."

RESPONSE 6: Please see WVDEP's response to Mr. Hendrick's Comment 5.

COMMENT 7: Section 4.1.d.v: We request removal of the phrase "from operation" in this section. The statutory authority granted to WV DEP under this law is limited to project decommissioning. We agree it is important for WV DEP require repair of roads, etc., if they suffer damage resulting from decommissioning activities. Other agencies and governmental subdivisions have authority over roads and other infrastructure during operations.

RESPONSE 7: The WVDEP declines to change this rule because the agency believes that such damage, when related to decommission, meets the intent of the Wind and Solar Energy Facility Reclamation Act.

COMMENT 8: Section 5.1.b: We recommend removing the need for regulated public utilities to demonstrate "an acceptable showing of financial integrity and long-term viability." This will help streamline the regulations. In our view, this appears to be an unnecessary process step given that regulated public utilities are well-established and known entities in West Virginia.

RESPONSE 8: The WVDEP declines to change this rule because the agency believes that such information is necessary to determine sufficient bond amounts.

COMMENT 9: Section 5.2.c: W. Va. Code 22-32-4(i)(3) identifies circumstances where an exempt facility would lose its exempt status if it were "substantially expanded in total disturbed acreage." The code does not provide for a definition of "substantially expanded in total disturbed acreage." In our view, the 10 percent threshold for disturbed acreage as proposed in these rules is inadequate, since even a minor equipment change could easily exceed this standard when required road improvement and laydown areas are factored in. Depending on the circumstances and precise location, the replacement of even a single turbine could result in disturbed acreage exceeding the 10 percent standard. We request a threshold more consistent with a facility-wide repowering, such as 50 percent disturbed acreage. This proposed change is, in our view, consistent with the spirit of the exemption outlined in W. Va. Code—exempted facilities, even when repowered, are still bound to decommissioning agreements signed with participating landowners.

RESPONSE 9: Please see WVDEP's response to Mr. Hendrick's Comment 6.

COMMENT 10: Section 10.2: We request that the appeals process outlined in Section 6.5 (relating to the original determination of a bond amount) also be explicitly noted and made available if a bond increase is proposed according to section 10.2.

RESPONSE 10: The agency agrees with this comment and changed 10.2 to include a new provision (10.3) that explicitly allows appeals of bond adjustment decisions to the Environmental Quality Board.

COMMENT 11: Section 11.1: We request that the criteria for acceptable bond formats specifically include the criteria detailed in Sections 12, 13 and 14. The WV DEP and Attorney General would also have discretion to accept other forms of bonds not included in Sections 12, 13 and 14. "...in a form acceptable to the department and to the Attorney General of WV. Any forms that meet the requirements of Sections 12, 13 or 14 shall be acceptable."

RESPONSE 11: The agency agrees with this comment and revised § 11.1 to specifically include letters of credit and certificates of deposit.

COMMENT 12: Section 12.1, 13.1 and 14.1: These lists should be a safe harbor, we request a change from "may" to "shall" in each section.

RESPONSE 12: The WVDEP declines to make such a change because the use of "shall" in successive sections that offer different bonding mechanisms may suggest that *all* of the available forms of bonding are required.

July 28, 2022, Comment from Dave Oreolt on Title60-Series11: Background

The exemption language in 2021 SB492 §22-32-4(l)(3) and Article 60 – Series 11 §60-11-5.1.c.ii and §60-11-5.3 is consistent: **execution of a decommissioning agreement before July 9, 2021**. (refer to attached excerpts)

60CSR11 APPENDIX A Item 10 is Public Service Commission Case No. 20-0431-E-SCS Raleigh Solar 1, LLC (See Public Service Commission Order February 11, 2021). The actual Order for the Siting Certificate is dated October 5, 2020. The Order is subject to a Condition (C): Raleigh Solar entering into a decommissioning agreement with the Raleigh County Commission with an initial minimum of $50,000 security.

Raleigh County Board of Zoning Appeals approved a Conditional Use Permit (CUP#BZA705) for the Raleigh Solar facility a month later on November 10, 2020, with absolutely no conditions, even though it was a non-conforming land use and there was a requirement for a decommissioning agreement.

The 2021 SB492 (ARTICLE 32. THE WEST VIRGINIA WIND AND SOLAR ENERGY FACILITY RECLAMATION ACT) was introduced 5 months after the Siting Certificate on March 1, 2021; it was passed on April 10, 2021; and it became effective July 9, 2021.

Raleigh Solar had 9 months from receiving its Siting Certificate to execute a decommissioning agreement with Raleigh County Commission and become exempt from this law. The facility also had 90 days from the passage of the law to execute a decommissioning agreement with Raleigh County Commission and become exempt from the law.

The Raleigh Solar facility has not executed a decommissioning agreement before July 9, 2021, and there has been no agreement as of this date July 28, 2022. Therefore, this facility is not exempt, should be removed from APPENDIX A, and should follow the WV State Law requirements of 2021 SB492 and Article 60 – Series 11.

There have been two attempts by the Raleigh County administration to execute a decommissioning agreement on behalf of Raleigh Solar during regular sessions with the Raleigh County Commission since the effective date of the law, circumventing the law: September 7, 2021, and June 7, 2022. Both times the agenda item was postponed. I have provided Raleigh County Counsel with my objections and reference to the WV State Law on multiple occasions. The draft agreement is less protective than the WV State Law, for instance: bonding and oversight is with the County, there is no fee for administration (such as $9,000 required by WV DEP), no specific timing requirements (such as when to begin or finish within 24 months), 10 year review for bonding adjustment (versus 5 year review), and no requirement for the facility to even submit a "plan" for demolition and restoration.

The attorney for WV Public Service Commission (Linda Bouvette, attached email) who handled this case for the PSC has stated that the Raleigh Solar facility is not exempt and must follow the WV State Law for a decommissioning agreement. The Law supersedes the PSC Condition #C, since there was no executed decommissioning agreement before July 9, 2021.

I requested Senator Rubie Phillips (co-sponsor of WV SB492) to clarify that the intent of the exemption was only for those facilities who had executed decommissioning agreements before July 9, 2021. His assistant spoke with the Senator and confirmed that the state bonding requirement applies even if the facility was approved by the PSC before the effective date of the bill.

I requested a non-interested third party, a "guy off the street" (Keith Miller, High School Teacher Hardy County) to give his opinion based on the facts and language presented here. His conclusion is that Raleigh Solar facility is not exempt from the WV State Law.

Based on the foregoing, my comment for consideration during the rule making for RULES FOR RECLAMATION OF SOLAR AND WIND ELECTRICITY GENERATING FACILITIES Title60-Series11 is:

Comment:

Item#10 (Public Service Commission Case No. 20-0431-E-SCS Raleigh Solar 1, LLC (See Public Service Commission Order February 11, 2021) listed in Appendix A of Title60-Series11 should be removed, and any other similar referenced facility listed in Appendix A which has not executed a decommissioning agreement prior to July 9, 2021.

Attachment to Comment from Dave Oreolt: The Bill and Rule Language on Exemptions

Enrolled Committee Substitute for Senate Bill 492

§22-32-4. Bonding required.

(i) An owner of a wind generation facility or solar generation facility is exempt from the requirements of this section if:

(1) The facility has less than 1.0 megawatts in nameplate capacity;

(2) The facility is operated by a regulated public utility who can successfully demonstrate to the Public Service Commission and the DEP an acceptable showing of financial integrity and long-term viability; or

(3) The facility is legally bound by a decommissioning agreement, based upon a qualified independent party and executed before the effective date of this article; or

> is or was granted a siting certificate or other authorization to construct by the Public Service Commission, **conditioned upon the execution of such agreement before the effective date of this article**:

Title 60 – Series 11

§60-11-5. Bonding and Decommissioning Exemptions.

5.1. The owner of a solar or wind generation facility is exempt from the decommissioning and bonding requirements of this rule if:

5.1.a. The facility has a nameplate capacity of less than 1.0 megawatts.

5.1.b. The facility is operated by a regulated public utility who can successfully demonstrate to the department and the Public Service Commission an acceptable showing of financial integrity and long-term viability; or

5.1.c. The facility:

5.1.c.i. Is legally bound by a decommissioning agreement, based upon a qualified independent party and executed before July 9, 2021; or

5.1.c.ii. Was granted a siting certificate, modification waiver, order, or other authorization to construct by the Public Service Commission, **conditioned upon the execution of such agreement before before July 9, 2021.**

5.3 Appendix A sets forth an inclusive, but not exclusive, list of solar and wind generation facilities that were granted a siting certificate or other authorization to construct by the Public Service Commission, **conditioned on compliance with a legally binding decommissioning agreement that was executed** before July 9, 2021. Such facilities are therefore exempt from the requirements of this rule, except that they are required to provide decommissioning agreements to the department

Comment from Dave Oreolt: Email from Linda Bouvette, PSC Attorney

RE: [PSC Employee Contact] Raleigh Solar Case 20-0431-E-SCS

Bouvette, Linda <LBouvette@psc.state.wv.us>

To: daveoreolt@suddenlink.net; Braswell, Wendy
09/06/2021 10:39 AM

2

I have attached a copy of the enrolled version of SB 492. Section (i) sets forth the exemptions from DEP bond requirements.

I don't believe Raleigh Solar meets any of the exemptions so decommissioning bonding for your project will be subject to DEP.

(i) An owner of a wind generation facility or solar generation facility is exempt from the requirements of this section if:

(1) The facility has less than 1.0 megawatts in nameplate capacity;

(2) The facility is operated by a regulated public utility who can successfully demonstrate to the Public Service Commission and the DEP an acceptable showing of financial integrity and long-term viability; or

(3) The facility is legally bound by a decommissioning agreement, based upon a qualified independent party and **executed before the effective date of this article**; or is or was granted a siting certificate or other authorization to construct by the Public Service Commission, **conditioned upon the execution of such agreement before the effective date of this article**: Such facilities are exempt, unless or until the facility, is (A) found to be in breach of such agreement or such agreement is found to be unenforceable, (B) sold or transferred to a party or parties not bound under such agreement, or (C) substantially expanded in total disturbed acreage.

Raleigh Solar did not executed a decommissioning agreement before July 9, 2021, the effective date of SB 492, it is not less than 1.0 megawatts in capacity and it is not operated by regulated public utility

July 28, 2022

Clearway

Chance Chapman
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304
By email: chance.l.chapman@wv.gov

RE: Rules for Reclamation of Solar and Wind Electricity Generating Facilities, W. Va. Code Section 22-32-1, et seq.

Dear Mr. Chapman:

Clearway Energy Group ("Clearway") is pleased to provide comments on the West Virginia Department of Environmental Protection's ("DEP") aforementioned rules (Title-Series 60-11) (the "Rules"), as filed electronically with the West Virginia Secretary of State on June 27, 2022.

At the outset, Clearway wishes to express our appreciation to DEP, the Justice Administration and the West Virginia legislature for their support for energy investments in the state. Along with our public affiliate Clearway Energy, Inc., Clearway owns and operates more than 8 gigawatts of renewable and conventional energy assets across the country. Clearway is the largest owner-operator of wind energy generating facilities in the Mountain State. In 2021 alone, Clearway invested more than $460 million in our three wind energy plants in the state, creating short- and long-term jobs, generating new state and local tax revenues and bolstering grid reliability in the Potomac Highlands and Eastern Panhandle. Thanks to West Virginia's "all of the above" energy policy, Clearway expects to build several new facilities and expand our investments in the state in the coming years.

Clearway provides the following comments on the Rules for DEP's consideration:

- As a general matter, the Rules establish clear requirements for the decommissioning of solar and wind generation facilities and bonding to guarantee such decommissioning. The Rules faithfully implement the relevant legislative directive while making the requirements straightforward for owners of wind and solar generation to comply.
- In Section 2.16, Clearway suggests clarifying "repowering" to read "substantial upgrades or changes in solar or wind generation equipment that will extend the operational life." Repowerings may, but do not necessarily, change the cumulative nameplate rated capacity. Furthermore, "repowering" is included in the definition of "abandonment" (Section 2.1), which states that "a facility will not be considered abandoned during a period in which the facility is being repowered." In this context, there could be a situation where a wind or solar generation facility is being repowered without changing its

nameplate capacity and should not properly be considered abandoned. A clearer definition as Clearway proposes above will mitigate this ambiguity.

- In the definition of "wind generation facility (Section 2.17), Clearway suggests removing or clarifying the intent of the term "prime movers," whose plain meaning is ambiguous as it is not a term widely used or understood in the renewable energy industry.
- In Section 2.7(b), Clearway suggests clarifying, to be consistent with the balance of the regulation (specifically, Section 4.1.d.iii) , that wind turbine "foundations" are not to be removed in their entirety during decommissioning activities. Rather, Clearway suggests removal of foundation to three feet below ground surface, consistent with existing decommissioning agreements for West Virginia wind projects and wind industry standards.
- In Section 3.4, Clearway recommends clarifying what constitutes an "updated" decommissioning plan and why such update would be required rather than submitting an original decommissioning plan. Further, the requirement to submit decommissioning plans at least one year before a bond is required is a significant administrative burden that is likely to delay project commissioning and development.
- Clearway suggests aligning the depths of removal stipulated in Section 4.1.d.ii with that of Section 4.1.d.iii; i.e., 36 inches below the natural grade is industry-standard depth for decommissioning.
- Regarding Section 5.2, W. Va. Code 22-32-4(i)(3) relates to circumstances where an exempt facility would lose its exempt status if it were "substantially expanded in total disturbed acreage." The code does not provide for a definition of "substantially expanded in total disturbed acreage." The 10% threshold for disturbed acreage as proposed in the Rules is inadequate, since even a minor equipment change could easily exceed this standard when essential road improvement and temporary laydown areas are factored in. Depending on the circumstances and location, the replacement of even a single turbine (e.g., as required by a catastrophic failure) could exceed the 10% standard. Clearway suggests a threshold more consistent with a facility-wide repowering, such as 50% disturbed acreage.

Thank you for the opportunity to provide these comments. Should you have any questions, please contact me at the phone number and/or email address provided below.

Respectfully submitted,

/s/ Dan Hendrick
Head of External Affairs, East
Clearway
(917) 207-8715
dan.hendrick@clearwayenergy.com

July 28, 2022

Chance Chapman
West Virginia Department of Environmental Protection
601 57th Street SE
Charleston, WV 25304

MAREC Action comments on Rules for Reclamation of Solar and Wind Electricity Generating Facilities, W. VA. CODE 22-31-1, et seq.

Dear Mr. Chapman,

On behalf of MAREC Action, I respectfully submit the following comments pertaining to the West Virginia Department of Environmental Protection's (WV DEP) draft legislative rules for the Reclamation of Solar and Wind Electricity Generation Facilities. MAREC Action (informally "Mid-Atlantic Renewable Energy Coalition") is a 501.c4 non-profit organization representing a diverse membership of utility-scale solar, wind and energy storage developers and manufacturers active in West Virginia and across the PJM grid region.

MAREC Action and our member companies support the direction of this legislative rule and appreciate the thoughtful drafting by WV DEP. In general, this rule represents reasonable guidelines for the decommissioning of solar and wind facilities, including bonding. Under these rules, we believe our industry will be able to continue responsible growth in West Virginia—helping to diversify West Virginia's economy and strengthen its position as an all-of-the-above energy exporting state. In the following comments, we suggest changes and clarifications that would further improve the rule to enable smooth implementation.

- *Section 2.1:* We recommend changing the definition of "abandon" to "generating **no** electricity each month for 12 consecutive months…". If a project is producing electricity, it is being managed, the owner has not abandoned it, and the owner will seek to maximize electricity production given financial obligations to deliver electricity to customers as well as make land lease payments. Changing the threshold in this way would simplify reporting and monitoring obligations for the project owner and for the WV DEP.
- *Section 2.15*: We request a change in the definition of "repowering" to mean "substantial upgrades or changes in solar or wind generation equipment that will extend the operational life." A repowering does not always change the

cumulative nameplate capacity. For example, we are aware of wind farms that have maintained the same nameplate capacity after a repowering with fewer individual turbines thanks to advances in technology.

- *Section 3.4:* We ask for clarification about what constitutes an "updated" decommissioning plan and why this would be considered an update rather than submission of the original decommissioning plan. Furthermore, we request flexibility to submit the decommissioning plan at least six months after start of commercial operations. This request is supported in W. Va. Code 22-32-4(a) and provides operators with the flexibility to finalize the decommissioning plan after clearing the hurdles required to begin operations. This should also allow WV DEP adequate time to review the plan prior to the deadline for bond submission.
- *Section 3.6:* We request this section be narrowed so that "the Department may, at its discretion, inspect solar and wind generation facilities **that have been abandoned or that have initiated decommissioning** to ensure compliance with this rule." This change and the change to 4.1.d.v below are meant to keep the rule focused on project decommissioning rather than operations—which in our view is outside the statutory authority granted to WV DEP by this law.
- *Section 4.1.c.i:* We recommend clarifying that current salvageable value is to be determined by someone who is not "a direct employee" of the project owner. Our understanding of the legislative intent was for a project owner to commission a third-party expert consultant, at the project owner's expense, to provide the estimate.
- *Section 4.1.d.ii and iii:* We appreciate the need to delineate a minimum depth for removal for cables, pipelines, and concrete foundations. It would also be helpful to provide an upper bound to the WV DEP's authority to require removal. We suggest the following language, "Removal of wind turbine and solar foundations and other concrete foundations and slabs to a minimum depth of 36 inches below the natural grade **or an alternative depth up to 48 inches** as approved by the department if appropriate for the post operation land use."
- *Section 4.1.d.v:* We request removal of the phrase "from operation" in this section. The statutory authority granted to WV DEP under this law is limited to project decommissioning. We agree it is important for WV DEP require repair of roads, etc., if they suffer damage resulting from decommissioning activities. Other agencies and governmental subdivisions have authority over roads and other infrastructure during operations.
- *Section 5.1.b:* We recommend removing the need for regulated public utilities to demonstrate "an acceptable showing of financial integrity and long-term

viability." This will help streamline the regulations. In our view, this appears to be an unnecessary process step given that regulated public utilities are well-established and known entities in West Virginia.

- *Section 5.2.c:* W. Va. Code 22-32-4(i)(3) identifies circumstances where an exempt facility would lose its exempt status if it were "substantially expanded in total disturbed acreage." The code does not provide for a definition of "substantially expanded in total disturbed acreage." In our view, the 10 percent threshold for disturbed acreage as proposed in these rules is inadequate, since even a minor equipment change could easily exceed this standard when required road improvement and laydown areas are factored in. Depending on the circumstances and precise location, the replacement of even a single turbine could result in disturbed acreage exceeding the 10 percent standard. We request a threshold more consistent with a facility-wide repowering, such as 50 percent disturbed acreage. This proposed change is, in our view, consistent with the spirit of the exemption outlined in W. Va. Code—exempted facilities, even when repowered, are still bound to decommissioning agreements signed with participating landowners.
- *Section 10.2:* We request that the appeals process outlined in Section 6.5 (relating to the original determination of a bond amount) also be explicitly noted and made available if a bond increase is proposed according to section 10.2.
- *Section 11.1:* We request that the criteria for acceptable bond formats specifically include the criteria detailed in Sections 12, 13 and 14. The WV DEP and Attorney General would also have discretion to accept other forms of bonds not included in Sections 12, 13 and 14. "...in a form acceptable to the department and to the Attorney General of WV. **Any forms that meet the requirements of Sections 12, 13 or 14 shall be acceptable.**"
- *Section 12.1, 13.1 and 14.1:* These lists should be a safe harbor, we request a change from "may" to "shall" in each section.

We greatly appreciate the WV DEP's close attention to these rules and the work of West Virginia's legislature to deliver the underlaying statute. Thank you again for your consideration of these comments.

Best regards,

Evan Vaughan
Deputy Director
MAREC Action
PO Box 385
Camden, DE 19934
202-431-4640