

It is undisputed by the Applicant that the proposed wind park project will have an effect on certain state-listed threatened and/or endangered species, and their habitat (specifically the high-elevation spruce-fir habitat). See, e.g., Applicant's Supplemental Testimony of Mr. Gavel and Mr. Pelletier at 3-17 (Feb. 23, 2009). Pursuant to RSA 162-H:16, IV(c), the SEC has a duty to assess these impacts and include terms and conditions to any site and facility permit issued so that these impacts are not unreasonably adverse. Fish and Game offered the direct testimony of its two employees most knowledgeable about Coos County and the species that reside there in order to inform the SEC's assessment of the proposed wind park's probable effects on the natural environment. Both Mr. Staats and Ms. Kelly will be attending the hearings in this matter and will be available to answer questions from any party as well as questions from the Site Evaluation Subcommittee.

2. In addition to its responsibility under RSA 162-H:16, IV(c) to consider the effects of a proposed project on the natural environment, the SEC has an independent duty to comply with RSA 212-A:9, III. This section requires state agencies, "to the extent possible," to assist in furthering the protection and conservation of state-listed threatened and endangered species, and to do their best to avoid exterminating these species, and destroying their habitats. Id. The Applicant, in its Motion to Strike, argues that RSA 212-A:13, III prohibits the SEC from accepting the testimony of Mr. Staats and Ms. Kelly. This is an overbroad interpretation of the exemption provided by RSA 212-A:13, III. See generally, Memorandum of Law in Support of Fish and Game's Objection to Applicant's Motion In Limine, filed today by Fish and Game.

Fish and Game agrees that it cannot bar the SEC from issuing a site and facility permit to an energy project, even if that project will eradicate a state-listed threatened or endangered species. See RSA 212-A:13, III. However, interpreting RSA 212-A:13, III to mean that the SEC

can not even consider the testimony of two Fish and Game employees with years of relevant experience and knowledge relative to the species at risk here is wrong. The better reading is the one that leads to a reasonable result and avoids unnecessary statutory conflict. See Grant v. Town of Barrington, 156 N.H. 807, 812 (2008) (Statutes should be construed, “where reasonably possible, so that they lead to reasonable results and do not contradict each other.”) (internal quotations omitted). Here, the SEC can comply with the dual mandates of RSA 162-H:16, IV(c) and RSA 212-A:9, III by considering all the available information (including the testimony at issue) and using its discretion to impose permit conditions to protect the natural environment, to the extent appropriate.

3. The Applicant argues in its Motion that RSA 162-H:6-a bars Fish and Game from submitting the testimony at issue here. See Applicant’s Motion to Strike at 3. RSA 162-H:6-a is a procedural statute that governs the time frames for the review of renewable energy facilities. Section 6-a does not bar Fish and Game from submitting testimony in this matter.

4. The Applicant further argues that N.H. Admin Rule Site 202.05(a) bars the participation of Fish and Game. See Applicant’s Motion to Strike at 3. Site 202.05(a) refers to “staff” in the context of SEC staff.¹ This rule has no bearing on Fish and Game’s participation in this matter.

5. Finally, as indicated above, Fish and Game has offered the testimony of Mr. Staats and Ms. Kelly to fulfill its obligation to provide relevant information to the SEC, as a consequence of its unique position as the sole state agency tasked with the duty to “protect, propagate and preserve the fish, game and wildlife resources of the state.” RSA 206:10. In light of this, and in light of the SEC’s duty to comply, to the extent possible, with RSA 212-A:9, Fish

¹ Site 202.05(b) states that “[s]taff shall be designated by the chairman.” Although “staff” is not defined in the Site rules, Puc 102.20 defines “staff” as “the employees of the commission other than the commissioners.”

and Game offered the referenced testimony without formally intervening as a party in this matter.

To the extent the SEC considers the Applicant's motion to strike Fish and Game's prefiled testimony on the basis that Fish and Game lacks standing, Fish and Game points out that the Applicant waited until the eve of the hearing to file its motion, and that this controversy could have been resolved much earlier. Second, and without waiving the argument that no motion for intervention was necessary for Fish and Game to present testimony to the SEC, Fish and Game meets all of the standards for late intervention as a party under Site 202.11(b):

(1) Late-filed petitions to intervene must be submitted at least three days before the hearing; in this case, three days before March 9, 2009.

(2) Fish and Game clearly has substantial interests that might be affected by the proceeding.

(3) As evidenced by Fish and Game's compliance with all formal and informal rules in the instant matter, justice and the orderly and prompt conduct of the proceedings will not be impaired by the SEC's granting Fish and Game's late-filed petition to intervene.²

6. The following parties concur with this objection: Counsel for the Public, Appalachian Mountain Club, Industrial Wind Action Group, Kathy Keene, Robert Keene, and Jon Odell.

² To the extent it is required by the SEC, this pleading shall serve as a petition to intervene in this matter pursuant to Site 202.11.

WHEREFORE, in view of the foregoing the New Hampshire Fish and Game Department respectfully requests that the Committee deny the Applicant's Motion to Strike the Prefiled Testimony of Will Staats and Jillian Kelly, and grant such other and further relief as may be just.

NEW HAMPSHIRE
FISH AND GAME DEPARTMENT

By its attorneys

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Certificate of Service

I, Evan J. Mulholland, do hereby certify that I caused the foregoing to be served by electronic mail or first class mail postage prepaid upon each of the parties on the Service List in this docket.

Dated: March 4, 2009



Evan J. Mulholland