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March 4, 2009

Thomas S. Burack, Chairman
Site Evaluation Committee
NH Department of Environmental Services
29 Hazen Drive
Concord, New Hampshire 03301

Re: Application of Granite Reliable Power, LLC
Docket No. 2008-04

Dear Chairman Burack:

Enclosed for filing with the New Hampshire Site Evaluation Committee with reference to the above-captioned matter please find an original and nine copies of the following:

- *Fish and Game Department's Objection to the Applicant's Motion in Limine Regarding Evidence Concerning RSA 212-A and*
- *Fish and Game Department's Objection to the Applicant's Motion to Strike Prefiled Testimony of Will Staats and Jillian Kelly*

Thank you for your attention to this matter.

Very truly yours,

Evan J. Mulholland
Assistant Attorney General
Environmental Protection Bureau
(603) 271-3679

Enclosure
cc: Service list via electronic mail with the exception of:
Louise Cote
A. Bradford Wyman
Coos County Commissioner's Office
Richard C. Erwin

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

RE: Application of Granite Reliable Power, LLC for Certificate of site and facility to construct up to 99 MW of wind electric generation in Coos County, New Hampshire and operate the same	)	**Docket No. 2008-04**

FISH AND GAME DEPARTMENT'S OBJECTION TO THE APPLICANT'S MOTION *IN LIMINE* REGARDING EVIDENCE CONCERNING RSA 212-A.

The New Hampshire Fish and Game Department ("Fish and Game"), by and through its attorneys, the Office of the Attorney General, hereby objects, pursuant to N.H. Admin. Rule Site 202.14(f), to the motion filed by the Applicant and titled Applicant's Contested Motion *In Limine* Regarding Testimony, Comments, Reports and Any Other Evidence Concerning Matters Relating to the Provisions of RSA 212-A. In support of this Objection, Fish and Game submits the attached Memorandum of Law and respectfully states as follows:

1. RSA 212-A:13, III does not forbid the New Hampshire Site Evaluation Committee ("Committee" or "SEC") from considering the impact of a proposed energy facility on the state's endangered or threatened animal species, or on any other species of plant or animal that lives in the state. As described in the attached Memorandum of Law, the requirement that an applicant for a site and facility permit, under RSA Ch. 162-H, prove that the site and facility "will not have an unreasonable adverse effect on... the natural environment..." need not conflict with RSA 212-A:13, III. 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). The more reasonable interpretation of

RSA 212-A:13, III is that it serves only to bar the core provisions of RSA 212-A (which prohibit the taking of endangered or threatened species) from blocking the siting or construction of energy facilities. In other words, a site and facility permit would not violate state law if the construction of a facility resulted in the killing of an endangered species. However, this does not mean that the SEC can or should simply ignore evidence of rare animal species at a proposed project site. See RSA 162-H:1, II (stating the purpose of Chapter 162-H to include the "full and timely consideration of environmental consequences" as well as the integrated resolution of environmental issues); and RSA 212-A:9, III (All other state departments and agencies, to the extent possible, consistent with their authorities and responsibilities, shall assist and cooperate with the executive director [of Fish and Game] in the furtherance of the purposes of [RSA Ch. 212-A] for the conservation of endangered or threatened species.").

2. Even if it can be argued that there is an ambiguity in the law as to the proper interpretation of RSA 212-A:13, III by the SEC, the doctrine of administrative gloss would prohibit the SEC from altering, without direction from the legislature, its historic practice of interpreting RSA 212-A:13 and RSA Ch.162-H to allow it to consider the effect of proposed facilities on threatened, endangered, or otherwise sensitive species in the state. An administrative gloss is placed on an ambiguous clause in a statute when the agency responsible for its implementation interprets the statute in a consistent manner over a period of years without legislative interference. Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007). The SEC has consistently admitted evidence regarding a project's potential impacts on threatened or endangered species, or lack thereof. See, e.g., Re: Tennessee Gas Pipeline Co., SEC 2000-01, Order on Motion to Amend and Clarify at 7 ("Tennessee has confirmed with the United States Department of the Interior, Fish and Wildlife Service, that there are no threatened

or endangered species in the area of the proposed alternative route."); Re: Portland Natural Gas Transmission System, SEC 96-01, 96-03, Decision at 20 ("The areas reviewed [by the state and federal agencies] included wildlife habitats, state fisheries, river and stream crossings, threatened, endangered and rare plant and animal species, sensitive and wetland habitats. The New Hampshire Heritage Program, the Fish and Game Department, and the DES have developed suitable mitigation measures for these areas."); Re: Lempster Wind, LLC, SEC 2006-01, Decision at 32 ("There is no full time residency of endangered species or bird species of conservation concern.").

3. Interpreting the two provisions to bar the SEC from considering threatened or endangered species, or from considering any species listed in the New Hampshire Wildlife Action Plan[1] (as argued by the Applicant) would lead to the absurd result of allowing the consideration of impacts to common species, such as the American robin, but not rarer ones, such as the bald eagle. See State v. Duran, 157 N.H. ___, 960 A.2d 697, 705 (2008) (The Court will not "interpret statutory language in a literal manner when such a reading would lead to an absurd result."). This has not been the interpretation of the SEC and, as evidenced by the applicant's submission of testimony regarding threatened and endangered species, and submission of a winter tracking study of American marten in the area of the proposed facility, has not been the interpretation of the Applicant in this proceeding until the date of its Motion *in Limine*.

4. 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.

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[1] The N.H. Wildlife Action Plan lists 49 bird species, including the bald eagle. The plan is available online at http://www.wildlife.state.nh.us/Wildlife/wildlife_plan.htm

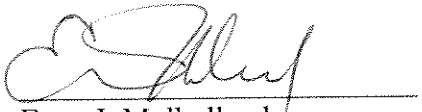
WHEREFORE, in view of the foregoing and in view of the attached Memorandum of Law, the New Hampshire Fish and Game Department respectfully requests that the Committee deny the Applicant's Motion *in Limine* Regarding RSA 212-A, and grant such other and further relief as may be just.

NEW HAMPSHIRE
FISH AND GAME DEPARTMENT

By its attorneys

KELLY A. AYOTTE
ATTORNEY GENERAL

Dated: March 4, 2009



Evan J. Mulholland
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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 for this docket.

Dated: March 4, 2009

Evan J. Mulholland

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

RE: Application of Granite Reliable Power, LLC for Certificate of site and facility to construct up to 99 MW of wind electric generation in Coos County, New Hampshire and operate the same	)	**Docket No. 2008-04**

FISH AND GAME DEPARTMENT'S
MEMORANDUM OF LAW
IN SUPORT OF ITS
OBJECTION TO THE APPLICANT'S MOTION *IN LIMINE* REGARDING EVIDENCE CONCERNING RSA 212-A.

The New Hampshire Fish and Game Department ("Fish and Game"), by and through its attorneys, the Office of the Attorney General, submit this memorandum of law in support of its objection to the motion filed by the Applicant and titled Applicant's Contested Motion *In Limine* Regarding Testimony, Comments, Reports and Any Other Evidence Concerning Matters Relating to the Provisions of RSA 212-A.

I. Introduction

Granite Reliable Power, LLC, (the "Applicant") has requested that the New Hampshire Site Evaluation Committee ("Committee" or "SEC") exclude from the record in this matter all testimony, comments, reports, and any other evidence relating to the provisions of RSA Ch. 212-A (the N.H. Endangered Species Conservation Act.). In the alternative, the Applicant has requested that the SEC allow such testimony as part of the record, but not rely on it in taking any action on the Applicant's application for a site and facility permit. The Applicant's motion is based on an overly broad and inappropriate interpretation of RSA 212-A:13, III. This statutory provision should be read to be consistent with the SEC's charge as described in RSA Ch. 162-H

and to allow due consideration of a proposed project's impacts on rare and sensitive species. This way of reconciling RSA 212-A:13, III with RSA Ch. 162-H is consistent with SEC precedent and does not lead to the odd result of permitting the SEC to asses a project's potential impact on common species, yet ignore its potential impact on rare and sensitive species.

II. N.H. Endangered Species Conservation Act Exempts the Siting and Construction of RSA 162-H Energy Facilities from the Prohibitions Contained in the Act, but Does Not Forbid the Site Evaluation Committee from Assessing the Impacts of Proposed Energy Facilities to Endangered, Threatened or Sensitive Species in New Hampshire.

A. The New Hampshire Endangered Species Conservation Act (RSA 212-A)

The Endangered Species Conservation Act (the "Act") was enacted in 1979 to protect endangered animal species in New Hampshire. RSA 212-A:3. The core provisions of the Act are contained in RSA 212-A:7, Prohibited Acts. This section states that it is unlawful to export, take[2], possess, process, or sell any state-listed threatened or endangered species. RSA 212-A:7, I. RSA 212-A:10, II provides that a violation of RSA 212-A:7, I is a misdemeanor.

The Act, however, includes three exemptions, none of which have yet been construed by the N.H. Supreme Court. The section at issue here, RSA 212-A:13, contains those exceptions. First, the provisions of the Act are not applicable to marine or estuarine species. RSA 212-A:13, I. Second, any rules promulgated under the provisions of the Act "shall [not] cause undue interference with the normal agricultural or silvicultural practices. RSA 212-A:13, II. Finally, the provisions of the Act, or any rule promulgated under the Act, "shall not interfere in any way with the siting or construction of any bulk power supply facility or any energy facility as defined in RSA 162-H:2." RSA 212-A:13, III.

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[2] "Take" is not defined in the statute, but the federal endangered species act (first passed in 1973) defines "to take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). See also RSA 207:1, XXVII defining "take."

The Applicant contends that this language, "shall not interfere in any way," renders the SEC unable to receive or consider information regarding the likely impacts of a proposed project on threatened and endangered species. This reading is unnecessarily overbroad and leads to incongruous results. Instead, RSA 212-A:13, III ought to be read in concert with RSA 162-H to allow the SEC to give due consideration to endangered species, but not be compelled by the Act to deny a site and facility permit for the sole reason that a proposed facility may kill or displace one or more individuals members of a particular endangered species. See Appeal of City of Portsmouth, 151 N.H. 170, 174 (2004). ("When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes.").

B. Energy Facility Evaluation (RSA 162-H)

The overriding purpose of the SEC, and of the RSA 162-H siting process, is to "maintain a balance between the environment and the possible need for new energy facilities in New Hampshire," and to resolve "all environmental, economic and technical issues…in an integrated fashion." RSA 162-H:1, I. Further, the legislature explicitly specified that the 162-H process was instituted, along with other complementary goals, to "provide full and timely consideration of environmental consequences" of a proposed project. RSA 162-H:1, II.

In order to meet these goals, RSA Ch. 162-H established an integrated process for the review of proposed energy facilities prior to construction. The SEC is tasked with reviewing both information submitted by an applicant for a certificate and information submitted by the public and by other state agencies. The SEC is required to incorporate into any certificate terms and conditions as may be specified by any other state agency having jurisdiction to regulate the construction or operation of the proposed facility. RSA 162-H:16, I. Additionally, the SEC may

add its own terms and conditions to the certificate, as it deems necessary. RSA 162-H:4, I(b); RSA 162-H:16, V and VI.

No provision of RSA Ch. 162-H forbids the SEC from considering a proposed project's effects on threatened, endangered or otherwise sensitive species. On the contrary, the integrated process outlined in the statute authorizes the SEC to consider every aspect of a proposed project, and then add terms and conditions, as it deems appropriate, to any permit issued.

III. Even If the Proper Interpretation of RSA 212-A:13, III is Ambiguous, the Doctrine of Administrative Gloss Prohibits the SEC From Altering, Without Legislative Direction, Its Past Interpretation That It Can Consider Threatened and Endangered Species.

As described above, RSA 212-A:13, III is not inconsistent with the provisions of RSA 162-H requiring the SEC to consider potential impacts of a proposed project on the natural environment. Although, it does not forbid the SEC from considering the impacts of a project on threatened or endangered species, RSA 212-A:13, III does exempt the SEC and those applying for a site and facility permit under 162-H, from the provisions prohibiting any "take" of a threatened or endangered species. See RSA 212-A:7. Construing these statutes in concert, it is evident that this is the most reasonable interpretation of existing law.

Even if it were determined that the phrase "interfere in any way" in RSA 212-A:13, III is ambiguous in its relation to RSA Ch. 162-H, the doctrine of administrative gloss prohibits the SEC from changing its past view that it *is* permitted to consider a proposed project's impacts on state threatened and endangered species. An administrative gloss is placed on an ambiguous clause in a statute when the agency responsible for its implementation interprets the statute in a consistent manner over a period of years without legislative interference. See Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 502 (2007). If an administrative gloss is placed on an ambiguous clause, the agency's consistent interpretation of that clause cannot be altered

without a clear directive from the Legislature. See id. In this case, the SEC's consistent interpretation, without legislative interference, that it has the authority, and the duty, to assess a proposed project's impacts on threatened and endangered species, is evidence that its construction conforms to the legislative intent. See id.; New Hampshire Retail Grocers Association v. State Tax Commission, 113 N.H. 511, 514 (1973).

The SEC has consistently admitted evidence regarding a project's potential impacts on threatened or endangered species, or lack thereof. See, e.g., Re: Lempster Wind, LLC, SEC 2006-01, Decision at 32 ("There is no full time residency of endangered species or bird species of conservation concern."); Re: Tennessee Gas Pipeline Co., SEC 2000-01, Order on Motion to Amend and Clarify at 7 ("Tennessee has confirmed with the United States Department of the Interior, Fish and Wildlife Service, that there are no threatened or endangered species in the area of the proposed alternative route."); Application of Newington Energy, LLC, SEC 98-01, Decision at 21 ("[State] agencies have examined and studied the Applicant's Environmental Construction Plan and have advised, informed and directed the Applicant to take certain measures to eliminate or mitigate, environmental impacts, ...[including impacts on] state fisheries, [] the river, threatened endangered, and rare plant and animal species, sensitive and wetland habitats."); and Re: Portland Natural Gas Transmission System, SEC 96-01, 96-03, Decision at 20 ("The areas reviewed [by the state and federal agencies] included wildlife habitats, state fisheries, river and stream crossings, threatened, endangered and rare plant and animal species, sensitive and wetland habitats. The New Hampshire Heritage Program, the Fish and Game Department, and the DES have developed suitable mitigation measures for these areas."). Further, the applicant in this case, Granite Reliable Power, LLC, has submitted testimony regarding threatened and endangered species, and a number of appendices addressing

the proposed wind park's effect on the threatened and endangered species of the State. See, e.g., Direct and Supplemental Testimony of Adam J. Gravel and Steven K. Pelletier; Applicant's Appendix 25, 2007 Winter Track Survey ("mainly target[ing] marten and lynx use of the Project area ridgelines"); Appendix 45, Compensatory Wetland Mitigation Plan Analysis, (referring to an assessment of impacts to State and Federally listed threatened high elevation species). This evidences the applicant's implicit agreement with the SEC's consistent and historic interpretation of RSA 212-A:13, III.

IV. Conclusion

RSA 212-A:13, III and RSA Ch. 162-H are not in conflict. The SEC's duty, pursuant to RSA 162-H:16, IV(c), to assess the proposed project's effect on the natural environment, is not diminished by the RSA 212-A:13, III exemption. The SEC is not prohibited from inquiring into the potential impacts on sensitive species.

RSA 212-A:13, III does exempt energy projects from the RSA 212-A:7 prohibitions on taking threatened and endangered species. However, the most reasonable interpretation of the law is the construction that permits the SEC to assess possible impacts on sensitive species, as it has for many years. Interpreting the two provisions to bar the SEC from considering threatened or endangered species, would lead to the absurd result of allowing the consideration of impacts to common species, but not rarer ones.

For the above reasons, the Applicant's Motion *in Limine* should be denied.