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October 6, 2005

OCT - 7 2005

James P. Matteau
Windham Regional Commission
139 Main Street, Suite 505
Brattleboro, VT 05301

Dear Jim:

RE: Jurisdictional Opinion #2-227 Proposed Glebe Mountain Wind Project - Londonderry and Windham

This letter is in response to your request for a jurisdictional opinion as to whether the proposed commercial wind energy development on Glebe Mountain in the Towns of Londonderry and Windham requires an Act 250 permit amendment as well as a permit under Section 248 (30 V.S.A. Section 248). It is my conclusion that construction of the wind measurement towers and the proposed wind energy project represent material and substantial changes to existing Act 250 permits and thus require an amendment. The following is my summary of the relevant facts and analysis of the legal precedent in this case.

FACTS

1. Catamount Energy Corporation (Catamount) plans an up to 50-megawatt, large-scale commercial wind facility on the ridge line of Glebe Mountain located in the Towns of Londonderry and Windham. Although final details of the entire proposal are not known, the following has been ascertained from available sources:

    - The project would involve the construction of 27 wind turbine towers located along the Glebe Mountain ridge line, access and associated improvements to expansion of the transmission grid. Each tower would have a total height of 330 feet with a blade length of 130 feet. The approximate locations of the wind turbines are shown on the map entitled "Glebe Mountain Wind Turbine Project - Catamount Energy Corporation Critical Wildlife Habitat Inventory Zone." Jurisdictional Opinion (JO) Exhibit 1.

- Access to the towers: Although "the final layout of the road is not complete, it is expected that there will be about five miles of roads to be maintained. These will be gravel roads sixteen feet in width." Catamount indicates that the turbines and the access roads will be accessible to the public and "public access will be improved to the top of the ridge top." Catamount also states that "The windfarm will not need to be manned, but will require frequent maintenance from either permanent Catamount employees or local contractors." JO Exhibit 2.

- The turbines would be located on lands owned by McGraw Family Partnership and Magic Mountain Management, LLC covered by existing Act 250 permits. Catamount's map of the proposed wind towers shows one of the towers would be located immediately adjacent to the existing 60-foot communication tower developed by Nextel WIP Lease Corp., RCC Atlantic, Inc., and Magic Mountain Management, LLC., and approved and covered by Land Use Permits #2W0524-13 and #2W0524-13A. The other proposed wind towers and the access to them would also be on property which is covered by Act 250 permits. JO Exhibits 1 and 3.

2. Catamount has installed a temporary wind measurement tower on Glebe Mountain which was approved by the Public Service Board. Docket No. 6786, Order of 1/9/04. Catamount has also recently received approval for two additional wind measurement towers. Construction of both the north and south wind measurement towers would use an existing gravel road and would require the construction of a trail using a skidder to transport the tower to the proposed site. Although a helicopter would be used to transport tower and associated parts in and out of the southern site, Catamount would use an existing gravel road and would need to construct an ATV trail to access the southern tower site for maintenance and service purposes. All three wind measurement towers are to be removed from the site no later than October 8, 2007, as per the Public Service Board approval Docket No. 6786, Order of 10/8/2004. [1]

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[1] On April 13, 2004, McGraw Family Partnership requested a Jurisdictional Opinion as to whether logging above 2,500 feet and installation of two meterological data gathering towers would require an Act 250 permit. A Project Review Sheet was issued by Assistant District 2 Coordinator Linda Matteson on April 27, 2004, indicating an Act 250 permit would be required. The Project Review Sheet was not appealed.

3. In response to concerns and a request made by the Vermont Agency of Natural Resources (ANR) in the proceedings for the Certificate of Public Good for the two additional wind measurement towers, Catamount has agreed to conduct a bird and bat carcass survey at the towers.

4. ANR also requested the Public Service Board to require Catamount to confer with ANR and the Department of Public Service concerning studies that "should be conducted prior to filing of a petition for a wind generating station at the site." The Public Service Board imposed such a condition and Catamount shows a 1,150-acre, half-mile swath following the top of the ridge where the towers would be erected and has labeled this area as "Critical Wildlife Habitat Study Area." The Department of Fish and Wildlife has requested that wildlife studies/inventories for black bear, wildlife species, uncommon communities, rare and endangered species, and birds and bats be conducted. Studies of wildlife, as requested by the Department of Fish and Wildlife, have not yet been received, but initial acoustical studies undertaken by consultants for Catamount have revealed usage of the area by bats. There is a known bat hibernaculum approximately one and one half miles away in a former Luzenac mine. Bats utilize habitat within five miles of the hibernaculum. (Personal Communication with Forrest Hammond)

5. The 1,400 acres have been held by three primary entities in the past, the Timber Ridge Ski Area owners, the Magic Mountain Ski Area owners and International Paper Corporation. The holdings of the Magic Mountain Ski Area have been held by various entities and are now primarily held by Magic Mountain Management, LLC. A three-acre parcel at the summit of the Magic Mountain Ski Area was sold to RCC Atlantic Inc. for a 60-foot communications facility after issuance of Land Use Permit #2W0524-13 or 13A. The former International Paper Company land has been acquired by McGraw Family Partnership. The major portion of the former Timber Ridge Ski Area property is now owned by Ronald McGraw and the Windham Ridge Corporation. Smaller parcels of the 1,400-acre tract have been developed for residential subdivisions and condominium projects. JO Exhibits 1 and 3.

6. Several of the permits covering the area where the wind turbines and the access roads would be located contain conditions which limit further tree cutting or additional development without an amendment to the permit. There are also exhibits which contain "material representations" (See Environmental Board Rule 51(G)) with respect to the projects approved and their impacts under the criteria. A critical portion of the analysis undertaken in this jurisdictional opinion is whether the proposed construction and operation of the wind energy project are a material or substantial change to specific permit conditions and/or material

representations made in the permit application or relied upon by the Commission during its review. The following permit history, specific permit conditions, and material representations are relevant to the analysis.

Land Use Permits

7. The Land Use Permits for the tract of land where the commercial wind facility and its access roads would be located date back to 1971 and cover a tract of land totaling 1,400 acres. There are five sets of permit numbers. The first series of permits were issued for development of the Timber Ridge Ski Area and associated residential development in the early 1970's under three different permit numbers (#700028, #2W0063 and #2W0160) The first Act 250 Permit is #700028 issued to Timber Ridge Mountain, Inc. on May 27, 1971. This permit authorized the construction of a road within an 850-acre tract of land. The hearing notice for the project described the nature of the development as "single family Residential Vacation Homesites." The tract is identified as 850 acres. The second Act 250 permit issued is Land Use Permit #2W0063 issued on June 1, 1972, to Timber Ridge Mountain, Inc. for construction of a new chairlift, terminal building, ski trails, and widening of existing trails. The tract of land is identified as 700 acres with 150 acres previously developed. The application includes a "Master Plan Map" dated March 1972 for the property. The third permit, #2W0160, was issued on July 23, 1973, to Timber Ridge Associates for an addition to an existing ski club base lodge. The tract of land is identified as 870 acres and also includes a "Master Plan Map" for the property dated March 1972, revised June 6,1973, showing the tract of land.

8. The second set of permits were issued for development of Timber Ridge under the #2W0358 series. The last permit in this series, #2W0358-4, was issued for a joint project involving Timber Ridge Ski Area, Magic Mountain Ski Area and International Paper Company and joined the contiguous tracts totaling 1,400 acres as described in the Findings of Fact for the project.

9. The third series of permits were issued under the #2W0524 series for development at the Magic Mountain Ski Area with one joint permit involving the Timber Ridge Ski Area, Magic Mountain Ski Area and International Paper Company properties (#2W0524-5) on the 1,400-acre tract of land.

10. The fourth series of permits associated with the property is Land Use Permit #2W0650, issued on August 7, 1985, to International Paper Company which covered 527 acres of land which, although not recognized by District Environmental Commission staff or acknowledged in the application, was, in fact, land already subject to Land Use Permit #2W0358-4, issued on September 14, 1983. (Also, Land Use Permit #2W0524-5 issued on July 16, 1987, covers this

property.) Land Use Permit #2W0650 is for timber harvest on 527 acres over 2,500 feet in elevation in the Towns of Londonderry and Windham. This permit will expire on October 15, 2005.

11. The fifth series of permits is Land Use Permit #2W0430 issued on June 17, 1980 to Magic Mountain Corporation for a two million gallon sewage abatement facility, sewer mains, water mains, lagoon and 150,00 gallon water storage tank. The findings for the project indicate the tract of land is 800 acres. There are five amendments to this permit for further improvements and connections to the system.

Permit Conditions, Findings, Conclusions and Material Representations Affected By the Project

Land Use Permit #2W0063

12. Land Use Permit #2W0063, which was issued on June 1, 1972, to Timber Ridge Mountain, Inc. for construction of a new chair lift, terminal building, ski trails, and widening of existing trails, contains the following relevant finding:

> #16. Other than the recreation enterprise, the applicant plans no commercial development of any type.

Land Use Permit #2W0358-3

13. Land Use Permit #2W0358-3 was issued on October 4, 1982, to Windham Ski Associates for a snowmaking pond; 20,000 +/- feet of snowmaking distribution system; a 3,500 +/- foot "T" bar lift; and 49 acres of trails for the Timber Ridge Ski area. The tract of land is listed as 581 acres with development occurring in the Towns of Windham and Londonderry. The permit contains the following relevant condition:

> 1. The project shall be completed as forth in Findings of Fact and Conclusions of Law of Amendment #2W0358-3, in accordance with the plans and exhibits stamped "Approved" and on file with District Commission, and in accordance with the conditions of this permit. No changes shall be made without the written approval of the District Commission.

Relevant Findings and Material Representations

14. The Findings of Fact for this permit state, "There will be no lights for night skiing." Exhibit 3A describes the visual impact of the project and states, "Trail clearance in the North Bowl will be visible from Routes 121 and 11. *This clearance will not affect the mountain peak* and all clearance will be done on a similar scale and in harmony with existing ski trails. (emphasis added) ... No site lighting, signage or paving is proposed under the provisions of this application."

Land Use Permit #2W0358-4

15. Land Use Permit #2W0358-4 was issued on September 14, 1983, to Windham Ski Associates d.b.a. Timber Ridge Ski Area, Magic Mountain Ski Area and International Paper Company to construct a 50-foot wide service road connecting Timber Ridge Ski Area with Magic Mountain Ski Area along the top of Glebe Mountain in Windham and Londonderry. The Findings of Fact indicate the tract of land subject to the permit was 1,430+/- acres. Although this project was apparently not built, no petition for abandonment has ever been filed and it was replaced by Land Use Permit #2W0524-5 to construct ski trails rather than the roadway to connect the two ski areas.

Land Use Permit #2W0524-5

16. Land Use Permit #2W0524-5 issued on July 16, 1987, to Magic Mountain Corp., TRD, Inc. and IP Timberland Operating Co., Ltd. for constructing "two ski trails, with snowmaking and connecting Timber Ridge Ski Area and Magic Mountain Ski Area on Glebe Mountain in the Towns of Windham and Londonderry." The permit was issued as a minor without a hearing. The application further describes the project as "approximately 10,800 feet in length and averages 50 feet in width, or approximately 12.4 acres." This permit applies to the 1,400-acre tract of land described in Land Use Permit #2W0358-4. Land Use Permit Application #2W0524-5 states, "This application is in lieu of the proposed roadway which is the subject of Permit #2W0358-4." Exhibit 3. The permit includes the following relevant permit conditions and material representations:

Permit Conditions

1. The project shall be completed in accordance with the plans and exhibits stamped "Approved" and on file with the District Environmental Commission and in accordance with the conditions of this Permit. No changes shall be made in the project without written approval of the District Environmental Commission.

3. The District Environmental Commission reserves the right to evaluate and impose additional conditions with respect to erosion control . The Commission reserves this right for a period of time commencing and expiring with the Permit. [2]

Material Representations

17. This permit, which was issued as a minor under EBR Rule 51, includes the material representations relied upon during the review and issuance of the permit. In Exhibit 2, under Criterion 8, the following statement is provided:

> The site is remote. Existing vegetation is hardwood and conifer forest. Terrain is shallow to steep. The site is not visible.

Land Use Permit # 2W0524-12

18. Land Use Permit #2W0524-12 was issued on June 26, 1996, to Glebe Mountain Ski Associates, Inc. and covers the 715-acre tract of land. This permit authorized rehabilitating "existing lifts and trails, replac[ing] one lift, install[ing] 5,000 feet of air pipe and 13,000 feet of water pipe." The permit contains the following relevant permit conditions and material representations:

Permit Conditions

1. The project shall be completed in accordance with the plans and exhibits stamped "approved" and on file with the District Commission, and in accordance with the conditions of this permit. No changes shall be made without the written approval of the District Environmental Commission.

7. There shall be no logging of any portion of the property, except areas where work is approved, without an amendment to this permit.

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[2]As per § 6090 Recording; duration and revocation of permits, the legislature automatically extended the expiration date for most categories of permits issued before July 1, 1994. The expiration date was extended for an indefinite term provided there is compliance with conditions of the permit.

14. No further subdivision, alteration, or development of any parcels of land approved herein shall be permitted without the written approval of the District Environmental Commission.

Material Representations

19. This permit, which was issued as a minor under EBR Rule 51, includes the following material representations relied upon during the review and issuance of the permit:

There will be no additional lighting in this portion of the project. Night skiing as originally planned has been dropped in order to concentrate on just getting the area opened for this coming season. (Exhibit 2 at 7)

Land Use Permit # 2W0524-13

20. Land Use Permit #2W0524-13 was issued to Atlantic Cellular Co. and Magic Mountain Equity L.P. for "replacing an existing 60-foot tower with a 60-foot self-supporting tower approximately 60 feet east of the present site, and add(ing) four omni-directional antennae, one dish antenna, a 12-foot by 15-foot equipment shelter and back-up generator system. The project also includes subdivision of the tower site into a three-acre parcel to be owned by Atlantic Cellular Company, L.P." The project site, including the proposed easement over the work road through the ski area, is shown on Exhibit 9. The permit includes the following relevant conditions:

Permit Conditions

7. The site shall be kept stable from erosion at all times. Silt fences, hay bales, water bars, and other appropriate measures shall be installed and maintained on the access road and access trail. *The trail shall be allowed to naturally revegetate when the tower and associated construction is complete. (Emphasis added).*

9. The pond and associated wetland areas on Glebe Mountain shall be flagged and protected with an undisturbed buffer strip in accordance with the recommendations of the Water Quality Division, Wetlands Section.

10. Tree cutting shall be limited to what is necessary to construct the trail and erect the communications facility, as described in the Schedule B. (Exhibit 14).

13. The powerline to the project shall be land-laid or buried.

Material Representations

21. This permit, which was issued as a minor under EBR Rule 51, includes the following material representations relied upon during the review and issuance of the permit:

> Chris Bernier, District Wildlife Biologist with the Department of Fish and Wildlife, has noted that Atlantic's project is located within a black bear production, feeding and travel area. See Letter of Chris Bernier dated April 25, 1996 attached hereto as Exhibit 12 . . . However, Mr. Bernier noted that the Department of Fish and Wildlife "feels that the proposed development will not significantly impact the quality of this habitat." No other critical wildlife habitat was identified. (Exhibit 4).

22. Under Criterion 10 the Applicants provided the following:

> The Londonderry Town Plan provides that the Town's policy is "to restrict the use of such public lands [which includes high elevation areas] so that the resource or condition is not threatened and the public good upheld." Londonderry Town Plan at 3. (Exhibit 4).
>
> The Town Plan also provides that planning for growth of new and existing villages in Londonderry shall include consideration of "[p]reservation of significant . . . landscape feature. . . ." *Id.* at 5. Glebe Mountain is one such resource, "a scenic natural resource, visible from nearly every part of the Town. (Exhibit 4).

23. The application under Criterion 4 Erosion, also describes the access and provides material representations as to the extent of the work and that the "trail" area disturbed would be allowed to "return to its natural state" as described as follows:

> The access easement reserved is 20 feet wide. The easement follows an existing Magic Mountain work road from the base of Magic Mountain to the top of the ski lift area. From there, Atlantic's access easement follows an existing trail approximately 1,000 feet to the broadcast site . . . *With respect to Atlantic's access easement to the Site, Atlantic does not anticipate doing any work on or reinforcement of the existing work road over Magic Mountain.* From the top of the work road, Atlantic will use the existing access trail that runs about 1,000 feet to reach the Site. This trail rises gradually, covering approximately 165 feet in elevation over the length of the trail from an elevation of approximately 2,795 at the top of the ski lift area to 2,960 at the edge of Atlantic's site. In addition, Atlantic will need to remove small trees along parts of the trail in order to transport the equipment building to the Site. Typically the trees to be removed will

> have a diameter of about 8 inches or less. To the extent required to control erosion along the trail, Atlantic will place silt fences and hay bales along the trail. *Once the Site has been installed, the trail will be allowed to return to its natural state.* (Emphasis added). (Exhibit 4).

24. Under the section entitled, Site Installation and Maintenance, the Applicants represented that visits to this fragile area would be limited to a "bi-monthly basis" "Once installed, Atlantic's communications facility requires little maintenance. Typically, Atlantic maintenance personnel will visit the Site on a bi-monthly basis." (Exhibit 4).

25. Under Criterion 10, Regional Plan Conformance the Applicants provided the following:

> Another key feature recognized in the Regional Plan is that "[o]ne of the Region's most valuable resources is the exceptional scenic quality of its landscapes . . . As the Region grows, its highly valued scenery will continue to evolve through small scale change. Major alterations to the landscape, however, are undesirable." *Id.* at 36. One policy supporting this feature is that development that is "in keeping with the landscape" should be encouraged. *Id.* at 38. Additionally, to manage growth in the Londonderry area, which is recognized as a resort center, a Regional Plan land-use policy is to "[e]ncourage management of important lands that are valued for . . . scenic enjoyment." *Id.* at 24. As described above, Atlantic's project was specifically designed to respect the Glebe Mountain landscape and to ensure that Atlantic's project was in keeping with the existing landscape to the greatest extent possible, while still allowing Atlantic's broadcast signals to reach customers in the area.
>
> The Regional Plan also evinces a desire to protect natural areas, including areas above 2,500 feet in elevation that commonly constitute fragile areas. As indicated above under the Criteria 8 and 8(A) analysis, Atlantic's project will be located in a black bear area, but its project will not adversely impact the bear, nor is it located in an area of known endangered wildlife or plants. Moreover, however, Atlantic's project will have a limited impact on an area above 2,500 feet. Construction will involve limited disturbance of only Atlantic's property. Once the facility is installed, it requires little maintenance and little traffic to the site. (Exhibit 4).

Land Use Permit # 2W0524-13A

26. Land Use Permit #2W0524-13A was issued on April 7, 2005, to Nextel WIP Lease Corp., RCC Atlantic, Inc., and Magic Mountain Management, LLC, for installation of twelve panel antennas, adding an equipment shelter, and associated equipment. Problems with erosion have been a significant concern at the Magic Mountain Ski area and the application process for Land Use Permit #2W0524-13A addressed these issues.

27. The District Environmental Commission attempted to process the application as a minor, but on March 15, 2005, received a letter of concern about the "serious erosion and sedimentation into Class A1 waters, observed by the Secretary of ANR in July of 2004, along the ridge and upper end of the access route to the site" from James Matteau, Executive Director of the Windham Regional Commission. The letter goes on to request additional measures be required to address erosion . A second letter dated March 23, 2005, was received from Mr. Matteau requesting a hearing. JO Exhibit 4. The letter notes the presence of "serious erosion and sedimentation in numerous locations on the access route along the ridge, and there appeared to be few if any erosion and sediment control measures in place. The problem is particularly severe between the top of the ski lifts and the communication facility site, but is also evident at other locations en route."

28. The District Environmental Commission staff worked extensively with the Applicants, ANR and the Windham Regional Commission to address the erosion control problems and proposed solutions and develop revised permit conditions to address remediation. (JO Exhibit 4).

29. The Applicants submitted extensive additional evidence including a copy of the Assurance of Discontinuance (Part of Exhibit 30) detailing violations of Water Quality statutes and Act 250, as well as information regarding the Phase II erosion control plan required by the Assurance of Discontinuance which "is a comprehensive plan *for the entire Magic Mountain property.*" (Emphasis added). The specific measures prescribed in the Phase II report are to be implemented during the nonoperational season of 2005 and 2006. (JO Exhibit 5).

30. The revised permit contained the following relevant conditions:

Permit Conditions

1. No changes shall be made in the design or use of the project without the written approval of the District Coordinator or the District Environmental Commission, whichever is appropriate under the Environmental Board Rules.

2. By acceptance of the conditions of this permit without appeal, the permittees confirm and agree that the conditions of this permit shall run with the land and the land uses herein permitted, and will be binding upon and enforceable against the permittee and all assigns and successors in interest.

5. All conditions of Land Use Permit #2W0524 and amendments are in full force and effect except as amended herein.

8. No further alteration, and/or development shall be permitted without the written approval of the District Environmental Commission.

11. The permittees shall ensure that the existing erosion on the access road to the tower site is corrected and stabilized. *Measures to be implemented shall include all measures as required by the Water Quality Division as part of the "Assurance of Discontinuance,"* the General Erosion Control Permit, and the "Exhibit Plan," prepared by Infinigy Engineering, Sheets 1-3 of 3, dated 03/23/05 (Exhibit 27). During construction, the permittees shall install and maintain effective erosion control measures between any disturbed areas and the Class A1 waters. (Emphasis added).

12. All disturbed and/or eroded areas shall be immediately stabilized with seed, mulch and erosion matting on slopes greater than 20% and where required to ensure stabilization of existing eroded areas. The permittees shall submit weekly inspection reports from a Vermont registered professional engineer beginning with commencement of the project until such time as all areas have been successfully stabilized and strong vegetation growth has been achieved.

13. Magic Mountain Management, LLC shall employ necessary measures to prevent non-Magic Mountain related all-terrain-vehicle (ATV) use which is exacerbating erosion problems.

Material Representations

31. The District Environmental Commission relied upon the application under Criterion 8(A) Necessary Wildlife which included the following material representation:

> Applicant's proposed facilities (antennas and radio equipment building) will not increase or cause mortality risks to breeding and migrating birds. (Exhibit 2 of 20)

32. In response to a letter from the coordinator, the Applicants submitted visual simulations and an analysis of visual impacts noting, "Some of the photos of the tower that were taken from a distance have zoomed in because the tower cannot be seen or is very difficult to see. Nextel Partners' antennas and radio equipment building will be extremely difficult to see away from the tower site or from any public roads. The only tower photo capable of simulation was the enclosed close-up photo because the tower and/or Nextel Partners location on the tower is not visible from a distance through the existing trees." (Commission Exhibits 19 and 24 attached to this opinion as JO Exhibit 6).

Land Use Permit #2W0524-16 and #2W0524-16A
Lighting Conditions

33. Land Use Permit #2W0524-16 was issued to Glebe Mountain Ski Associates, Inc. on November 12, 1997, and authorized the permittee to replace four ski runs and tows used for skiing with runs and tows used for snow tubing and construction of an addition to the base lodge to house a furnace. The tract of land subject to the permit is listed as 715 acres (Exhibit 2). The permit contains the following relevant condition:

> 12. The installation of exterior light fixtures is prohibited without amending this permit.

34. Land Use Permit # 2W0524-16A was issued to Magic Mountain Management LLC and Old Fashioned Skiing Company on January 4, 2002, and authorized "the permittees to illuminate the snowtubing park evenings until 9:00 p.m." The tract of land covered by the permit is listed as 713 acres (Exhibit 1). The permit contains the following relevant conditions:

> 7. The installation of exterior lights to illuminate the snowtubing slope is limited to the plan approved in Exhibit #13, and shall be mounted no more than 30-feet above ground. The approved plan includes two poles with one 320 watt pulse start metal halide, cut-off floodlight on each pole. The lights shall be directed toward the tubing park and shall be shielded in such a manner as to conceal light sources from view beyond the perimeter of the area to be illuminated. The tubing illumination shall be turned off at 9:00 p.m.
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> 8. The District Environmental Commission retains jurisdiction over Criterion 8 Aesthetics (lighting).

Land Use Permit #2W0650

35. Land Use Permit #2W0650 was issued on August 7, 1985, (and administratively amended (#2W0650-A) on September 19, 1985) to International Paper Company to conduct logging over 2,500 feet . The permit covered 527 acres of land including land where the project is proposed along the ridgeline of Glebe Mountain. The permit includes the following relevant condition:

Permit Conditions

> 7. The permittee shall leave all bear-scarred beech trees. Further, any concentrations or groups of non-scarred beech trees shall be retained in all areas over 2,500 feet. A concentration (group) group shall be defined as 4 or more beech trees greater than 8 inches in diameter (BDH) within a 20-foot diameter circle. Beech trees damaged during a timber harvest that have been designated as leave trees will remain in the woods.

Material Representations

36. This permit, which was issued as a minor under EBR Rule 51, includes the following material representations relied upon during the review and issuance of the permit:

> Wildlife can be found throughout the property, ranging from small to big game animals and fowl. It is the Company's intent to maintain current levels of wildlife or increase amounts while at the same time practicing forest management.
>
> Exhibit 5.

> The area is visible from State Route 11, Londonderry Town Road #36, and Windham Town Road #1. In most sections these views are over a mile away. We will not be doing any clear cutting and believe our cutting practices will not be discernable from any points on these public roads.
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> Exhibit 5.

ANALYSIS

The Windham Regional Commission asks whether Act 250 has jurisdiction over projects which are located on lands already subject to an Act 250 permit and which also come under jurisdiction of the Public Service Board pursuant to 30

V.S.A. Section 248. A report by the Vermont Commission on Wind Energy Regulatory Policy – Findings and Recommendations, which was prepared per Executive Order 04-04 and issued on December 15, 2004, acknowledges that there will likely be instances of overlapping jurisdiction for proposed wind energy projects. The Commission's final report recommends that there be statutory changes to Section 248 "to address the issue of overlapping jurisdiction." Vermont Commission on Wind Energy Regulatory Policy Findings and Recommendations Prepared Per Executive Order 04-04 (December 15, 2004) p. 1. While the Vermont Legislature may ultimately choose to amend either Act 250 or Section 248 to eliminate or reconcile overlapping jurisdiction, my analysis must necessarily be based on *existing* law and legal precedent. As described below, it is my conclusion that construction of the wind measurement towers and the proposed wind energy project represent material and substantial changes to existing Act 250 permits and thus require an amendment to existing Act 250 permits. It is also my conclusion that there is no provision in either Act 250 or Section 248 which prohibits the concurrent review by the two regulatory entities under the circumstances present in this case. Finally, it is my conclusion that there is not any overriding legal principle which prevents more than one regulatory body from exercising its police power with respect to its subject jurisdiction.

Development Subject To Act 250 Review

As a starting point for this analysis, it is important to make clear that, but for the fact that the projects proposed are occurring on lands covered by Act 250 permits, there would be no question that the proposed wind energy construction project is not "development" regulated by Act 250. Section 6001(D), expressly excludes certain activities as from the statutory definition of "development," including projects requiring a certificate of public good under 30 V.S.A. Section 248.[3] Development is defined under 10 V.S.A. Section 6001(3) and Section

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[3] Section 6001(D) "The word "development does not include:

(i) The construction of improvements for farming, logging or forestry purposes below the elevation of 2,500 feet.

(ii) The construction of improvements for an electric generation or transmission facility that requires a certificate of public good under *section 30* V.S.A. § 248 or a natural gas *facility as* defined in subdivision 30 V.S.A. § 248(a)(3).

(iii) The co*nstruction of, improvements to, or maintena*nce of any portion of a *statewide trail system on a t*ract of land not currently under the jurisdiction of this chapter and located below the elevation of 2,500 feet, including

6001(b) and Environmental Board Rule (2)(A). Section 6001(3) and Section 6001(b) address construction of improvements for commercial purposes, housing projects, state and municipal projects, construction over 2,500 feet, exploration of fissionable source materials, drilling of oil and gas wells and low level radioactive waste disposal facilities. EBR (2)(A)(1) includes all the definitions of development included in the Section 6001(3) and Section 6001(b).[4] EBR(2)(A)(1)(e) however, also defines development as:

> Any construction of improvements which will be a substantial change of a

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> construction and maintenance of unpaved trailhead parking facilities of two acres or less, provided that construction and maintenance take place in a manner that meets or exceeds acceptable management practices for maintaining water quality on logging jobs in Vermont, as adopted by the commissioner of forests, parks and recreation; and in the case of snowmobile trails, provided that construction and maintenance also take place in a manner that meets or exceeds practices established in the guide for the development of snowmobile trails, dated 2001-2002, as published by the Vermont Association of Snow Travelers, Inc. Jurisdiction under this chapter shall not continue to exist after a trail has been discontinued, stabilized, and suitably rehabilitated, in the determination of the district commission, or the board on appeal. The exemption created under this subdivision shall not apply to trails for motorized recreational vehicles other than snowmobiles. This subdivision (3)(D)(iii) shall be repealed on July 1, 2005. The secretary of natural resources shall evaluate and report on the experience derived under this exemption in reports to the house and senate committees on natural resources and energy, to be submitted by January 15, 2005 and by January 15, 2005.
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> (iv) The construction of improvements for agricultural fairs that are open to the public for 60 days per year, or fewer, provided that any improvements constructed do not include one or more buildings.
>
> (v) The construction of improvements for the exhibition or showing of equines at events that are open to the public for 60 days per year, or fewer, provided that any improvements constructed do not include one more buildings.

[4] In 1985, the Legislature, "in unambigious terms," ratified all Board rules related to administration of Act 250 including EBR 34 Permit Amendments and 2(G) Substantial Change. Board Rules ratified by the legislature have the same effect as would any law passed by the legislature in the first instance. *In re Barlow,* 160 Vt. 513, 520 (1993); In *re Spencer,* 152, Vt. 330, 336 (1989); see 1985, No. 52 §, and see in *re Spring Brook Farm Foundation, Inc.,* 164 Vt. 282, 285 (1995); In *re Gerald Costello Garage*, 158 Vt. 655 (1992).

> pre-existing development, and *any material or substantial change to an existing development over which the board or a district commission has jurisdiction.* (Emphasis added).

Environmental Board Rule 34 Permit Amendments addresses when permit amendments are required and reads as follows:

> (A) Amendments required. An amendment shall be required for any material or substantial change in a permitted project, or any administrative change in the terms and conditions of a land use permit. Applications for amendments shall be on forms provided by the board, and shall be filed with the district commission having jurisdiction over the project. Upon request, the district coordinator will expeditiously review a proposed change and determine whether it would constitute a substantial change to the project, or whether it involves only material or administrative changes that may be subject to simplified review procedures. Continuing jurisdiction over all development and subdivision permits is vested in the district commissions unless the board, in acting on an appeal, has specifically reserved the right to maintain jurisdiction over a development or subdivision in part or in its entirety.
>
> (B) Substantial changes to a permitted project or permit. If a proposed amendment involves substantial changes to a permitted project or permit, it shall be considered as a new application subject to the application, notice and hearing provisions of 10 V.S.A. Sections 6083, 6084 and 6085 and the related provisions of these rules. If the district commission finds that the amendment meets the qualifications of Rule 51(A) such that there is a demonstrable likelihood that the project will not present significant adverse impact under the criteria of 10 V.S.A. Section 6086(a), it shall be subject to the simplified review procedures set forth in subsection (C) of this rule.

Material and substantial changes are defined in EBR(2)(G) and EBR(2)(P) as follows:

> (G) "Substantial change" means any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. Section 6086(a)(1) through (a)(10).
>
> (P) "Material change" means any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

Minor Permits, Material Representations and Material and Substantial Changes

A number of the permits which cover the property where the wind measurement tower and the wind energy project are proposed were processed as "minor" applications under EBR 51 Minor Application Procedures. Important to this analysis of material and substantial change is the following provision of EBR 51:

> EBR 51(G)
>
> (G) Material representations. Upon issuance of a land use permit under minor procedures, the permit application and material representations relied on during the review and issuance of a district commission decision *shall provide the basis for determining future substantial and material changes to the approved project* and for initiating enforcement action. (Emphasis added.)

Precedent for Review of Activities Excluded Under Section 6001(3) Applying the Material and Substantial Change Analysis to "Excluded" Activities on Permitted Projects

The Vermont Supreme Court *In re BHL Corporation* 161 Vt. 487 (1994) addressed a claim that Act 250 jurisdiction and review of the extraction of shale was precluded because the extraction constituted construction for sheep farming and thus was an exempt activity under Section 6001(3). The Court found:

> The definition of "development" in § 6001(3)[5] does not expressly preclude the Board from parsing a given project into distinct activities that may be subject to Act 250 jurisdiction, the same holds true for the definition of "commercial purpose" in Board Rule 2(L). Without an explicit legislative mandate, the Board can rely on its own reasonable interpretation of the Act and its Rules in formulating a ruling. See In re Vitale, 151 Vt. 580, 582-83, 563 A2d 613, 615 (1989).[6]

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[5] § 6001(3) includes §6001(3)(D) – the relevant part of the statute previously cited which would exempt Act 250 review of construction of improvements requiring a certficate of public good in cases not involving material and substantial changes to the permit.

[6] In "parsing" the "distinct activities" subject to Act 250 review, the Commission would be concerned with impacts under the relevant environmental criteria and unlike the concurrent review by the Public Service Board, would not be concerned with components of the Certificate of Public Good review such as the "need for the project to

The Environmental Board, in *Keith Van Buskirk d.b.a. American Wilderness Resources, Inc.* Declaratory Ruling #302 at 8-9 (Sep. 15, 1995) applied a reasonable interpretation of its own rules and determined that amendments must be obtained pursuant to EBR 34 even for activities normally excluded from review under § 6001(3) when the activity constitutes a "material or substantial change." The Board concluded that § 6001(3) does not preclude review of logging below 2,500 feet (and by logical extension, other activities under § 6001(D)) with respect to projects already subject to an Act 250 permit. In this decision, the Board indicates the "logging exclusion only states that logging is not "development" for purposes of Act 250 jurisdiction." The Board expressly provides the logging exclusion does not exempt logging from Act 250 jurisdiction when a finding of fact is made, or a condition is imposed in that permit regarding restrictions on tree cutting or logging, and such a finding of fact or condition was the basis for a positive finding under one or more of the criteria. Further, the Board notes that the logging exclusion does not exempt tree cutting or logging from Act 250 jurisdiction "where the permittee has represented to the Board or a District Commission that tree cutting or logging will not take place as part of a permitted project."

In the *Van Buskirk* decision, the Board makes clear "competing consideration to the logging exclusion is the Board's (or the District Commission's) authority to impose conditions when granting Act 250 permits 10 V.S.A. Section 6086(C). Permits may be conditioned to the extent allowable under the police power with respect to the ten criteria of 10 V.S.A. Section 6086(a)." The Board also articulates the policy behind the exception to the logging exclusion as follows:

> The policy behind the exception to the logging exclusion is that logging and tree cutting associated with a development or subdivision has adverse effects with respect to the ten criteria of 10 V.S.A. § 6086(a). With respect to water quality, a permit may require that trees be made to serve as buffers in order to protect streams, streambanks, lakeshores, and other riparian areas. With respect to soil erosion, a permit may require that trees be kept in place to minimize the adverse effects of erosion, especially in areas with steep slopes and shallow soils. A permit may also require that trees be preserved to protect wildlife habitat such as deeryards.

The Board further states that "where findings of fact or conditions regarding tree cutting or logging are included in a permit *or a representation is made that no*

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meet present and future demands for service," "whether it would adversely affect system stability and reliability," "whether it would result in an economic benefit to the state," compliance with the "utility's approved least cost integrated plan," or "compliance with the DPS electrical energy plan."

tree cutting or logging will take place, tree cutting or logging which constitutes a material or substantial change to that permitted development or subdivision will only be allowed if the permit holder applies for a permit under EBR 34." (Emphasis added). In the *Van Buskirk case,* the Board used its discretion and determined that Section 6001(3) does not preclude review of an excluded activity if it constitutes a material or substantial change to the permitted development.

The Vermont Supreme Court has also reviewed arguments in instances where there is overlapping jurisdiction between Act 250 permits and other state permits and federal permits. *See In re Stokes Communications Corp.*, 164 Vt. 30, (1995). In the *Stokes* case, which involved construction of a communications tower which required both Act 250 and Federal Aviation Administration approval, the Court notes:

> Second, as the Board concluded, "the fact that . . . [Stokes] may have to obtain FAA approval for the light shields does not prevent the Board from exercising Act 250 jurisdiction over the tower with regard to the light shields." The Board is an independent regulatory body with supervisory powers over environmental matters. *In re Hawk Mountain Corp.*, 149 Vt. 179, 185, 542 A.2d 261, 264 (1988). Pursuant to 10 V.S.A. § 6086(C), the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria. See *In re Denio*, 158 Vt. at 239-40, 608 A.2d at 1172; *In re Quechee* Lakes Corp., 154 Vt. 543, 550 n.4, 580 A.2d 957, 961 n.4 (1990). The Board is not obligated to delay its decision to accommodate concurrent state agency rulings. See *In re Hawk Mountain*, 149 Vt. at 185, 542 A.2d at 264 (Environmental Board not bound by approval or permits of other state agencies when imposing conditions for Act 250 permits). Under these circumstances, we see no reason why the Board should not require swift compliance with its directives, when the conflict between its order and an FAA determination is purely speculative. "[S]tate law is pre-empted to the extent that it actually conflicts with federal law," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990), but there is no actual conflict where a collision between two regulatory schemes is not inevitable. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963); see also *English v. General Electric*, 496 U.S. at 90 (rejecting preemption argument that injured employees would forgo federal relief and rely solely on state remedies as too speculative). There was no evidence that compliance with both regulatory authorities would be impossible.

In the instant case, unlike many projects that the Public Service Board may review under Section 248, the tract of land where the wind towers and associated access road are proposed has a thirty-four year history of Act 250 jurisdiction with many permits issued with specific conditions and representations as to how this high elevation area would be developed. Given this history, there is a strong case for Act 250 to continue to have a supervisory role in assessing the environmental impacts of development on the tract of land. Also, there is no evidence in this case that compliance with both regulatory authorities would be impossible. It is not uncommon for a project to have to independently satisfy multiple state, local and federal review processes in order to develop a project.

Applying Precedent to the Instant Case

It is my opinion that the proposed wind measurement towers and the proposed wind towers constitute both substantial and material changes to a number of Act 250 permits and require an amendment. To allow review through Section 248 without simultaneous review of the alteration of the previous Act 250 requirements, would frustrate the 34-year history of careful and considered public review. (See *In re Wildcat Construction*, 160 Vt. 631, 632 (1993), affirming, *Re: Wildcat Construction Co., Inc.*, #6F0283-1-EB, Findings of Fact, Conclusions of Law, and Order (Nov. 4, 1991). "No provision of Act 250 allows for subsequent adoption of bylaws to remove the Board's jurisdiction over a preexisting development. The issue of Act 250 jurisdiction is determined at the commencement of the project." See also *In re Agency of Administration,* 141 Vt. 68, 79, 444 A.2d 1349, 1354 (1982). Once jurisdiction attaches, and a permit conditioning land use is issued, that permit and its conditions will remain in force even if the town subsequently adopts zoning bylaws that would have preempted Act 250 jurisdiction from attaching had the project commenced on the date of adoption. To retroactively divest the Board of its jurisdiction by automatically dissolving all Act 250 permits in existence when a town adopts bylaws, would frustrate the purposes of the protection afforded by Act 250. Doing so, would place the projects formerly regulated under Act 250 in an administrative limbo between dissolved Act 250 jurisdiction and the application of the newly enacted regulations, and would be inconsistent with the legislature's scheme of control over development.")

The various permits have specific conditions, findings, and material representations which provide the basis for determining future substantial and material changes to the permit. (See EBR 34, EBR 51(G), EBR 2(G) and EBR 2(P)). The proposed wind measurement towers would require logging and tree cutting, construction of towers visible from off-site, towers which may impact birds and bats, the addition of lighting, and the regular use of five miles of

access roads. The permits contain clear language that "No changes shall be made in the design or use of the project" and "No further alteration, and or development shall be permitted without the written approval of the District Environmental Commission." The Permittees accepted these conditions without appeal and "alterations" to the project are subject to the continuing jurisdiction of the District Environmental Commission. [7]

The permits for the tract of land make clear that logging is limited and define how and where logging may occur. Logging not approved would require an amendment. For example, Condition #7 of Land Use Permit #2W0650 which covers the 527-acre former International Paper Company tract (McGraw Family Partnership and others) requires that "any concentrations or groups of non-scarred beech trees shall be retained in all areas over 2,500 feet." Condition #7 of Land Use Permit #2W0524-12 limits logging on the 715-acre tract now owned by Magic Mountain Management LLC "except areas where work is approved, without an amendment to this permit." Logging to widen and lengthen access to the towers and to clear around each tower would meet the test for substantial change because they may result in significant impact with respect to Criteria 4 Soil Erosion, 8 (A) Wildlife, 8 Aesthetics, and 10 Town and Regional Plans. These changes also qualify as material changes as they impact material representations relied upon by the District Environmental Commission as well as specific permit conditions which affect one or more values sought to be protected by the Act.

The District Environmental Commission also relied upon representations with respect to the visibility of the development. For example, in Land Use Permit #2W0358-3, the 49 acres of trail clearing "would not affect the mountain peak and all clearance will be done on a similar scale and in harmony with existing ski trails. ... No site lighting, signage or paving is proposed under the provisions of this application." Condition 12 of Land Use Permit #2W0524-16 reads, "The installation of exterior light fixtures is prohibited without amending this permit." The only lighting allowed is in a lower mountain tubing trail and the illumination is turned off at 9:00 P.M. The lighting of the proposed towers meets the test for substantial change because it may result in significant impact with respect to Criteria 8 Aesthetics, 9(K) Impact on Public Investments (view from town and state roads and other public investments) and 10 Town and Regional Plans. These changes also qualify as material changes as they impact representations relied upon by the Commission as well as specific permit conditions which affect one or more values sought to be protected by the Act.

Erosion issues have been a very significant concern on the Magic Mountain Ski Area and are of particular sensitivity given the high elevation and the presence of Class A1 waters and wetlands. The permits contain stringent permit conditions and the issue of vehicle access by non-Magic Mountain employees is

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[7] *Wildcat Construction, id.*

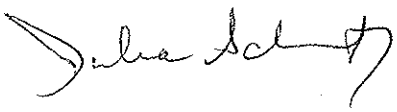
conditions and the issue of vehicle access by non-Magic Mountain employees is specifically addressed in Condition #13 of Land Use Permit #2W0524-13A. Condition #7 of Land Use Permit #2WO524-13 requires that "[t]he trail (to the 60 foot tower) be allowed to naturally revegetate when the tower and associated construction is completed." The extensive, five miles of road improvements and new construction required to access and traverse the ridgeline of Glebe Mountain as well as the self described "frequent maintenance trips" for the windfarm by Catamount employees or local contractors constitute both substantial and material changes to the relevant permits.

The Commission has conditioned permits with respect to logging which could affect wildlife (see Land Use Permit #2W0650 discussed above) and relied upon representations that wildlife would not be negatively affected. The Applicants' material representations in Land Use Permit #2W0524-13 state there will be minimal trail improvement. The application also states "As indicated above under Criterion 8 and 8(A) analysis, Atlantic's project will be located in a black bear area, but its project will not adversely impact the bear, nor is it located in an area of known endangered wildlife or plants. Moreover, however, Atlantic's project will have a limited impact on an area above 2,500 feet. Once the facility is installed, it requires little maintenance and little traffic to the site. ...typically Atlantic maintenance personnel will visit the site on a bi-monthly basis. ...Applicants proposed facilities (antennas and radio equipment building) will not increase or cause mortality risks to breeding and migrating birds." The proposed project would be both a substantial and material change as the cutting will be more extensive, "public access will be improved to the top of the ridge top" and will require "frequent maintenance from either permanent Catamount employees or local contractors." Such activities meet the test for substantial and material change because they may result in significant impacts with respect to Criteria 8(A) Wildlife and 10 Conformance with Local and Regional Plans. These changes also qualify as material changes as they impact material representations relied upon by the Commission which affect values sought to be protected by the Act.

Conclusion

In conclusion, it is my opinion that construction of the wind measurement towers and the proposed wind energy project represent material and substantial changes to existing Act 250 permits and thus require an amendment.

Sincerely,



Julia Schmitz
Acting District 2 Coordinator

cc Certificate of Service w/ enclosures (JO Exhibit List and Exhibits)

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Environmental Board Rule 3(C).

Reconsideration requests are governed by Environmental Board Rule 3(C)(2) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of $225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal in accordance with Rule 5(b)(4)(B) of the Vermont Rules for Environmental Court Proceedings.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The Environmental Court mailing address is: Environmental Court, 2418 Airport Road, Suite 1, Barre, VT 05641-8701. (Tel: 802-828-1660)

CERTIFICATE OF SERVICE
Jurisdictional Opinion #2-227

I hereby certify that I sent a copy of the foregoing Jurisdictional Opinion on October 6, 2005, by U.S. Mail, postage prepaid, to the following:

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