

March 4, 2020

Melanie A. Bachman  
Executive Director  
Connecticut Siting Council  
10 Franklin Square  
New Britain, CT 06051

**BY EMAIL PDF AND HAND DELIVERY**

**Re: Petition No. 983 - Request for party status and notice of intervention under CEPA**

Dear Ms. Bachman:


Enclosed for filing please find an original and 15 copies of Grant Swamp Group's request for party status and notice of intervention under the Connecticut Environmental Protection Act ("CEPA"). Grant Swamp Group owns property that abuts 45 Flagg Hill Road in Colebrook, upon which BNE Energy, Inc. is for the first time asking the Council to site a new wind turbine by way of its D&M Plan modification, submitted on January 9, 2020. A copy of this request and notice is also being delivered to the service list.

I ask that all communications and filings concerning this matter be directed to me by email. My full contact information is as follows:

Emily Gianquinto  
EAG Law LLC  
21 Oak Street, Suite 601  
Hartford, CT 06106  
Tel: (860) 785-0545  
Fax: (860) 838-9027  
Email: emily@eaglawllc.com

If you have any questions, please do not hesitate to contact me.

Sincerely,

  
Emily A. Gianquinto

Enclosures

**STATE OF CONNECTICUT  
CONNECTICUT SITING COUNCIL**

**Petition of BNE Energy Inc. for a  
Declaratory Ruling that no Certificate of  
Environmental Compatibility and Public Need  
is Required for the Construction, Maintenance,  
and Operation of a 4.8 MW Wind Renewable  
Generating Facility Located on Flagg Hill Road  
in Colebrook, Connecticut (“Wind Colebrook South”).**

**Petition No. 983**

**March 4, 2020**

**REQUEST FOR PARTY STATUS AND NOTICE  
OF CEPA INTERVENTION BY GRANT SWAMP GROUP**

The Grant Swamp Group (“GSG”) is the owner of property located at 246 Danbury Quarter Road in Winchester, Connecticut (the “GSG Property”). Based on the “modification” BNE Energy, Inc. (“BNE”) has proposed to make to its Development and Management (“D&M”) Plan, the GSG Property would abut the new site for the project, as it sits right on the Colebrook-Winchester town line, adjacent to the southernmost new Flagg Hill Road property that BNE proposes to acquire and “merge” into its current project site.

GSG hereby seeks party status in the Petition of BNE Energy Inc, ("BNE") for a Declaratory Ruling for the Location, Construction and Operation of a 4.8 MW Wind Renewable Generating Project on Flagg Hill Road in Colebrook, Connecticut (“Wind Colebrook South”), including its D&M Plan Modification, filed January 9, 2020. GSG also hereby intervenes in this proceeding under the Connecticut Environmental Protection Act (“CEPA”).

As an abutter only to the new project site proposed by BNE, rather than the site previously approved by the Council, this is the first opportunity for GSG to weigh in on the project, which BNE now seeks to “modify” to site a 646-foot high turbine on entirely different parcels of land. GSG only received notice of the proposed new site a few weeks ago, and BNE

only revealed the exact proximity of the turbine to abutters by way of interrogatory responses 11 days ago. The Council must permit GSG to participate in this proceeding.

**Contact information for proposed party:**

Proposed party: Grant Swamp Group  
Mailing address: c/o Adair Mali, 458 Winchester Road, Norfolk CT 06058  
Phone: (860) 542-5806  
Email: toucan22@gmail.com

**Contact information for representative of proposed party:**

Name: Emily Gianquinto  
Address: 21 Oak Street, Suite 601, Hartford, CT 06106  
Phone: (860) 785-0545  
Email: emily@eaglawllc.com

**I. Manner in which proposed party claims to be substantially and specifically affected**

The proposed “modification” will substantially and specifically affect GSG because, according to BNE’s own submissions in response to the Council’s first set of interrogatories, the third turbine would be located on a piece of property that abuts the GSG Property.

The proximity of the GSG Property to the third turbine location now being proposed by BNE is not included anywhere in BNE’s initial request for modification of its D&M Plan, and was revealed only in BNE’s February 21, 2020 responses to the interrogatories issued by the Council. In Exhibit A to those interrogatory responses, the Adjacent Property Owners Location Map, the GSG Property is clearly marked as directly adjacent to the new proposed turbine site, though to date, BNE still has not provided measurements of the proximity of the turbine to the GSG Property line. As an abutter, GSG’s property rights will clearly be substantially and specifically affected by the Council’s decision with respect to BNE’s request. GSG’s focus on conservation, described in more detail below, also gives it an interest in the proceeding, both as a party and as a CEPA intervenor.

## **II. Contention of the proposed party**

GSG contends that the modification BNE submitted is so substantially different from its petition and even from the D&M Plan approved by the Council in December 2013 that it is in substance a new project — a new proposal to construct a new wind turbine facility on an entirely different site. The proposed “modification” would add two new parcels of land to the site, and in doing so, would increase the size of the project site by more than 37 acres. (BNE Narrative at 1.) The added parcels bring into the mix different abutters, implicating the due process rights of GSG and others like them – property owners who suddenly find themselves immediately adjacent to a parcel of land that may host a wind turbine that was never before proposed, reviewed or approved by the Council. That alone is such a significant and fundamental change that demonstrates this proposal is not a mere “modification” but instead a new project that requires full review by the Council.

Accordingly, the “modification” is not properly before the Siting Council, as it only has jurisdiction over siting energy projects pursuant to statute. At present, the Council simply lacks jurisdiction over the proposed project because of the scope of the “modification.” The Council exists to *site* projects, and it already did so. It issued a decision and order, opinion and findings of fact siting a three-turbine project on a 79.74-acre property located at 29 and 17 Flagg Hill Road. It did *not* site a three-turbine project on a 116.64-acre site located at 29, 17, 45 and 53 Flagg Hill Road. This so-called “modification” is a thinly disguised new facility and as such requires the filing of a new petition. This would require the filing of a new petition, which would not only ensure the Council had jurisdiction to consider it, but would ensure that all interested parties have appropriate due process protections and that the Council has the information necessary to fulfill its obligation of balancing the need for adequate and reliable public utility services at the lowest

reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to the scenic, historic, and recreational values while also assuring the welfare and protection of the people of the state. Significantly, the project being proposed by BNE would not be permissible under the state's wind regulations, as it does not even come close to complying with, among other things, the regulatory setback requirements.

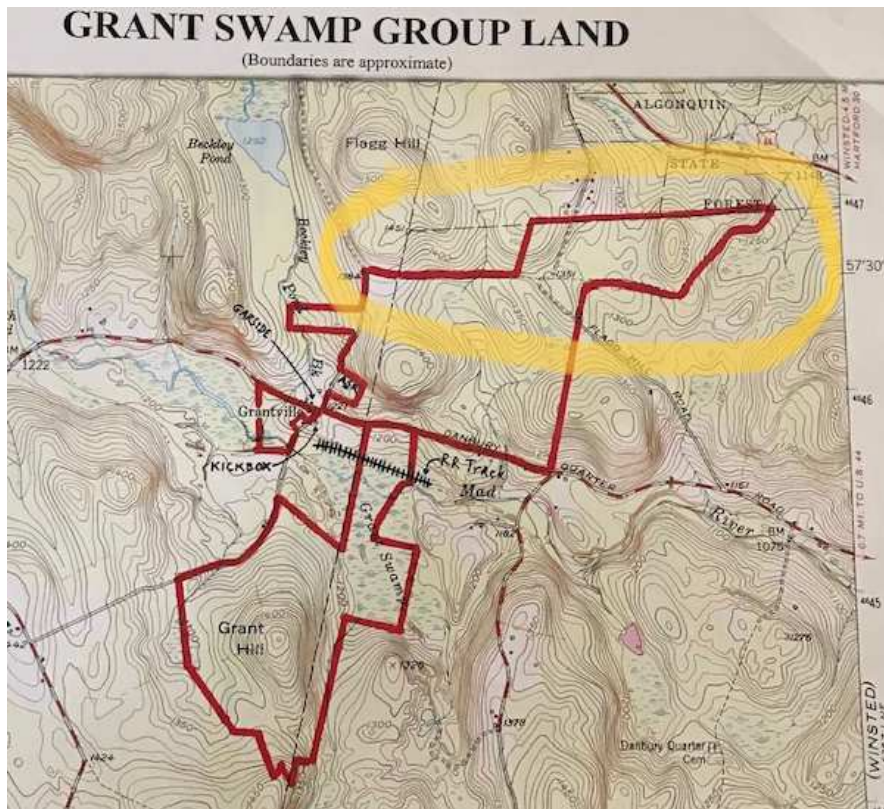
The Council does not have the authority to site this new project by way of a "modification" in the D&M process. "[T]he D & M plan functions to 'fill up the details' in the siting council's final decision. ...The D & M plan cannot provide a substitute for matters not addressed during the application process." *Middlebury v. Conn. Siting Council*, No. CV010508047S, 2002 WL 442383, at \*5 (Feb. 27, 2002, Cohn, J.). Here, GSG contends that BNE is trying to use the D&M modification to bootstrap the Council's approval over a host of matters that were neither presented nor addressed during the initial proceeding, including the impact of the project on additional abutters, the environmental impact on two new parcels of land and the properties that abut them, the impacts with respect to shadow flicker, noise, viewshed and ice throw, and more.

One simple example is BNE's claims with respect to the impact of the new turbine on vernal pools and wetlands on the original Wind Colebrook South site. BNE claims that the impact will be decreased from the previously approved D&M Plan because a third turbine will be placed further away from the two high-value vernal pools located at 29 Flagg Hill Road. However, the GSG partners believe that the GSG Property is home to vernal pools, which could mean the impacts would actually be greater. The same is true for wetlands. BNE claims the new turbine would reduce the impact on wetlands, but that claim is again made without providing any information on the wetlands present at 45 and 53 Flagg Hill Road or on any new abutters' properties. The GSG Property certainly contains wetlands. None of these issues were addressed

during the petition process because (1) 45 and 53 Flagg Hill Road were not included in the originally proposed and approved 79.74-acre Wind Colebrook South site; and (2) were not immediately adjacent to the originally proposed and approved 79.94-acre Wind Colebrook site.

GSG also contends that BNE’s proposed modification would have significant adverse impacts on its partners’ ability to enjoy and use the GSG Property and would interfere with the partnership’s focus on conservation. The GSG partners are four siblings: Adair Mali, Peter Mali, Taylor Mali and Kate Pingeon. The original partnership was formed in 1964, and the current partners have been the sole partners since 1999.

As shown in the below map, GSG owns approximately 600 acres in Winchester and Norfolk, outlined in red. The GSG Property, i.e., the portion of GSG’s land holdings that abuts the site of the proposed “modification,” is roughly the northern third of that acreage, circled in yellow. (Boundaries are approximate.)



GSG is strongly conservation oriented. In 1994, it donated 45 acres to The Nature Conservancy (“TNC”) to expand and protect the Beckley Bog, the southernmost sphagnum heath bog in New England and a National Natural landmark. This 45-acre parcel provides an upland buffer for the bog, helping TNC to maintain it in its natural state. In 2008, GSG put 207 acres that it owns on Grant Hill Road into a conservation easement with the Norfolk Land Trust. That area is approximately the southernmost third of the property shown on the map above. The easement protects approximately 20 acres of wetlands, preserves over 5,000 feet of scenic forest views along public roads, and helps protect the upper watershed of the Town of Winsted’s public water supply.

GSG owns land along Schoolhouse Road, Beckley Road, and Danbury Quarter/Grantville Road that it has chosen not to develop, preferring to leave it in its natural state. This is a departure from the development pattern along Danbury Quarter Road, with many houses on small lots. Undeveloped land adjacent to the roads is an important part of South Norfolk’s rural character and to protecting the unique wildlife habitats present in this corner of the state.

The GSG Property, which borders the new proposed site for a third turbine, is the northernmost piece of GSG’s overall property holdings. It is predominantly forested. In 2016, GSG hired Scotland Hardwoods to do a timber cut to improve the quality of the forest. An old road (Skinner Road) cuts through part of the forest, making a nice walking path that the GSG partners and their guests use for recreation. The GSG partners planted an orchard on the GSG Property, consisting of mostly peaches, directly south of the property owned by Julia and Jonathan Gold (who are also immediately adjacent to new site BNE is asking the Council to approve). The GSG partners and their guests regularly forage for edible mushrooms in those woods.

The GSG partners have always enjoyed that the woods in that part of their property feel remote and wild. Although GSG is focused on conservation, each of the partners have at times also considered building a house on some part of the GSG Property, in proximity to the features discussed above; that is no longer an option. The installation of the two turbines at 27 and 19 Flagg Hill Road in 2015 has also already changed the GSG partners' enjoyment of the GSG Property. They have all spent less time there, because on windy days, when the turbines are spinning faster, their presence disturbs the remote and wild feel of the area. That impact would be significantly magnified and would further interfere with GSG's property rights were the Council to permit BNE to site a third turbine immediately adjacent to the GSG Property.

GSG notes that the proposed location of the new turbine is so close to property lines that it would not be permissible under the wind regulations. BNE's interrogatory responses indicated that the turbine would be sited just 523 feet from one property lines and 321 feet from another property line. The wind regulations would require a distance of approximately 971 feet from property lines.<sup>1</sup> GSG still does not know, based on BNE's submission or its interrogatory responses, how far the new turbine would be located from the GSG Property line.

Overall, the BNE submission, even as supplemented by the contents of its interrogatory responses, simply does not provide GSG – or any interested party, let alone the Council – with enough information to otherwise assess the impacts of the “modification.” As noted above, there is nothing in the submission about setbacks to other property lines. There is nothing about the wetlands or vernal pools or wildlife that may be present at 53 and 45 Flagg Hill Road, or on any of the abutters' properties, including the GSG Property. The “ice throw risk assessment”

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<sup>1</sup> The wind regulations require that turbines be sited at least 1.5 times the wind turbine height from any property lines. Regs. § 16-50j-95(a)(1)(B). Here, the wind turbine height is 197.3 meters (128 hub height + (183.6 blade diameter/2)). Under the regulations, then, the turbine must be at least 295.95 meters, or just under 971 feet, from adjacent property lines.



provided by BNE in response to the Council's interrogatories is of little assistance in assessing safety, as it does not include property lines, but it does appear that a significant portion of a residential property owned by GSG's neighbors will be in the potential ice fall zone. The cursory noise evaluation submitted by BNE with its interrogatory responses does not include any assessment of noise levels at any property lines, as would be required by the wind regulations. *See* Regs. § 16-50j-94(d). Similarly, the viewshed analysis submitted by BNE in response to the interrogatories does not appear to show how the view from the GSG Property will be impacted by the siting of the new turbine in such close proximity, especially given the significant increase in the height of this new turbine. BNE did not submit a shadow flicker analysis and instead responded to interrogatories on that issue by claiming that a consultant did some kind of work and determined that the flicker would be negligible. Nor has BNE submitted any technical documentation from the manufacturer of the new turbine with respect to siting its turbines, including setback recommendations, noise level data and the like.

If the Council refuses to reject this "modification" so that BNE would be forced to file a new petition, thereby ensuring that all of this information is on the record and available to parties, GSG should at least be entitled to participate in this late stage of the petition proceeding and to ask questions of BNE. It is simply unreasonable and unfair to permit BNE to use the Council's approval of a project on different pieces of property more than eight years ago to avoid the regulatory requirements, violate abutters' due process rights and fundamentally change the project in this manner. BNE's proposed "modification" should be rejected and it should be directed to file a new petition for declaratory ruling for its proposed new single-turbine facility. That is the only way the Council and the new abutters will have an adequate opportunity to

review the potential impacts of the project, and it is the only way to ensure that the new abutters, including GSG, are provided with due process.

**III. Relief sought by the proposed party**

GSG seeks to have the Council reject the proposed D&M “modification.” GSG intends to argue that BNE is improperly attempting to circumvent the regulatory framework that applies to wind energy development projects by asking the Council to piggyback this third turbine into its existing project. The “modifications” are nothing of the kind. This is a proposal for a turbine to be located on two new properties, to be accessed by a brand-new road, to abut new residential properties and a new town, and to include significantly different technology, such as a much taller turbine manufactured by a different company and capable of generating more energy. All of these facts and more demonstrate that BNE’s proposal should be rejected and it should be required to come back to the Council with a properly filed petition that would permit all interested parties to fully participate in a hearing, present evidence and to have the right to appeal from the Council’s decision if that is warranted. If the Council permits BNE to proceed with this “modification,” it will be denying GSG and other interested parties of their due process rights.

**IV. Statutory or other authority therefore**

GSG is entitled to party status pursuant to Sections 4-177a, 16-50l, 16-50n, 22a-14 through 22a-20 of the Connecticut General Statutes and Sections 16-50j-13 through 17, 16-50j-40 and 16-50j-43 of the Regulations of the Siting Council. In particular, as abutter to the two new Flagg Hill Road properties that BNE proposes to acquire and “merge” into its own Flagg Hill Road property, GSG would unquestionably be required receive notice of the filing *had BNE actually filed a new petition*. See Conn. Gen. Stat. §§ 16-50l(b), 16-50n(a); Regs. § 16-50j-40(a).

GSG is also requesting party status as an intervenor under the Connecticut Environmental Protection Act (“CEPA”), which permits any person to “intervene as a party upon the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state.” *See* Conn. Gen. Stat. §§ 22a-19, 22a-20.

V. **Nature of the evidence that the petitioner intends to present**

If granted party status, GSG intend to present evidence including, but not limited to:

- Testimony by GSG partners about matters concerning GSG and its conservation efforts; the GSG Property; its proximity to the new turbine that BNE proposes to install; the impact that such installation in violation of setback recommendations and the State of Connecticut’s regulations concerning wind turbine facilities would have on their safe use and enjoyment of the GSG Property and their conservation goals;
- Testimony by an appropriate expert about the adverse impact of the proposed new development on the wetlands and other natural resources located on the GSG Property;
- Evidence, whether by testimony or otherwise, that the proposed “modification” will unreasonably impair and/or destroy the public trust in the water of the state and in the natural resources of the state by causing the clear cutting of acres of land, thereby disturbing or destroying wetlands and watercourses and wildlife habitats; and

- Evidence, whether by testimony or otherwise, of the numerous ways in which BNE’s “modification” is actually an attempt to avoid the application of the wind regulations, which would result in siting a third turbine in unsafe proximity to residential property and would permit BNE to escape its burdens with respect to environmental, noise and visual surveys that now apply to wind turbine facilities.

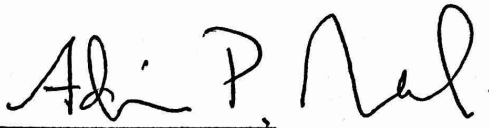
**PROPOSED PARTY  
GRANT SWAMP GROUP**

By: /s/ Emily A. Gianquinto  
Emily A. Gianquinto  
EAG Law LLC  
21 Oak Street, Suite 601  
Hartford, CT 06106  
Tel: (860) 785-0545  
Fax: (860) 838-9027  
emily@eaglawllc.com

**VERIFICATION**

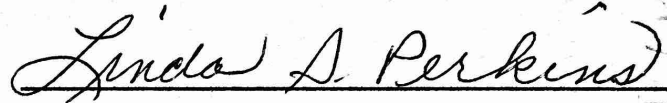
I, Adair Mali, being duly sworn, depose and say that I am a partner of the Grant Swamp Group and therefore authorized to act on its behalf, that I have read the foregoing Request for Party Status and Notice of Intervention, and that the allegations contained therein are true to the best of my knowledge.

By:



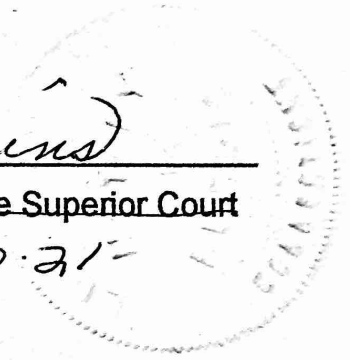
Adair Mali

Subscribed and sworn to before me this 4 day of March, 2020.



Notary Public / Commissioner of the Superior Court

My Commission Expires: 4-30-21-



## CERTIFICATION

I hereby certify that a copy of the foregoing document was delivered by first-class mail and e-mail to the following service list:

Lee Hoffman  
Pullman & Comley LLC  
90 State House Square  
Hartford, CT 06103-3702  
lhoffman@pullcom.com  
bheiple@pullcom.com

Christopher R. Bernard  
Manager-Regulatory Policy (Transmission)  
The Connecticut Light & Power Company  
P.O. Box 270  
Hartford, CT 06141-0270  
bernacr@nu.com

Joaquina Borges King  
Senior Counsel  
Eversource  
P.O. Box 270  
Hartford, CT 06141-0270  
borgej@nu.com

The Honorable Thomas D. McKeon  
First Selectman  
Town of Colebrook  
Town Hall  
562 Colebrook Road  
P.O. Box 5  
Colebrook, CT 06021  
tommckeon@colebrooktownhall.org

David R. Lawrence, M.D.  
Jeannie Lemelin LPN  
30 Flagg Hill Road  
Colebrook, CT 06021  
wnstddoc@yahoo.com

Walter M. Zima and Brandy Grant  
12B Greenwood Turnpike  
Winsted, CT 06098  
blkmgrant@yahoo.com

Paul Corey  
BNE Energy, Inc.  
17 Flagg Hill Road  
Winsted, CT 06098  
pcorey@bneenergy.com

John R. Morrisette  
Manager – Transmission Siting and Permitting  
Northeast Utilities Service Company  
PO Box 270  
Hartford, CT 06141-0270  
morisjr@nu.com

David M. Cusick  
Howd, Lavieri & Finch, LLP  
682 Main Street  
Winsted, CT 06098  
dmc@hlf.com

Eva Villanova  
28 Flagg Hill Road  
Colebrook, CT 06021  
evaraku@aol.com

Kristin M. Mow  
Benjamin C. Mow  
12 A Greenwoods Turnpike  
Colebrook, CT 06021  
kmow@hcc-global.com

Susan Wagner  
P.O. Box 118  
Norfolk, CT 06058-0118  
sukeyonly@gmail.com

Stella and Michael Somers  
19 Rock Hall Road  
Colebrook, CT 06021  
casasomers@aol.com

/s/ Emily A. Gianquinto  
Emily Gianquinto