

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

SIERRA CLUB, INC. and)
CONSERVATION LAW)
FOUNDATION, INC.,)

Plaintiffs,)

v.)

Civil Action No. 1:19-cv-00216-JL

GRANITE SHORE POWER LLC;)
GSP MERRIMACK LLC; and)
PUBLIC SERVICE COMPANY OF)
NEW HAMPSHIRE d/b/a)
EVERSOURCE ENERGY,)

Defendants.)

**MOTION OF DEFENDANTS GRANITE SHORE
AND PSNH TO STRIKE DECLARATION OF STEVEN WINNETT**

Defendants Granite Shore Power LLC, GSP Merrimack LLC (collectively, “Granite Shore”) and Public Service Company of New Hampshire d/b/a Eversource Energy (“PSNH”) (collectively the “Defendants”) move to strike the Declaration of Steven Winnett filed with the Court on July 30, 2019, purporting to demonstrate Plaintiffs’ standing.¹

1. On August 13, 2019, the Defendants learned that Mr. Winnett is employed by the United States Environmental Protection Agency on the EPA’s Region 1 New England NPDES Permitting Staff, the group within EPA presently evaluating the new NPDES permit for Merrimack Station.²

2. The Defendants have no knowledge as to whether Mr. Winnett has any direct involvement with the permit or the ongoing permit proceedings. Regardless, Mr. Winnett did

¹ In response to the Court’s Procedural Order of July 26, 2019, the Plaintiffs filed three declarations.

² <https://www3.epa.gov/region1/npdes/permits/NPDESPermittingStaff.pdf>

not reveal his dual role as an EPA employee and as a plaintiff, or at least a representative plaintiff, in his Declaration. He states that “CLF represents my interest in ensuring that the Merrimack Power Station is doing everything possible to limit its thermal discharge into the Merrimack River and end the damage it is causing to the environment and ecology of the of the River.” Declaration ¶ 4. In addition, his Declaration states that he “understand[s] that the Merrimack Power Station operates a once-through cooling system” and that “with a background in biology, I know that thermal pollution can damage a waterbody.” *Id.* ¶ 8. Mr. Winnett’s Declaration offers no facts based on personal knowledge that he has actually observed any impact of the discharge of heated water into the River—a discharge which is permitted by the Permit. Plainly, given his role at the EPA, if there were such impacts, Mr. Winnett would have knowledge of the facts (undisclosed in this Declaration) relating to this issue.

3. Apart from the plain conflict of interest created by serving as a plaintiff involving a permit issued by the agency for which he works,³ Mr. Winnett’s declaration violates EPA regulations. 40 CFR § 2.401 sets out “procedures to be followed when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee’s official status,” including Federal civil proceedings.” 40 CFR § 2.401 (a)(2). In such cases, the employee “must state for the record that their testimony does not necessarily represent the official position of the EPA.” 40 CFR § 2.401. And where EPA employees “voluntarily testify as private citizens with respect to environmental matters” they must provide the same disclaimer. 40 CFR § 2.401 (a)(4). Those same rules further provide that except with the approval of the “cognizant Assistant Commissioner” or other

³ See 5 CFR § 2635.101 (“Basic obligation of public service” require government employees to: “act impartially and not give preferential treatment to any private organization or individual,” § 2635.101(b)(8); “not engage in outside . . . activities. . . that conflict with official Government duties and responsibilities,” *id.* at (10); and, “endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part,” *id.* at (14)).

officials of the EPA, “no EPA employee may provide testimony or produce documents in any proceeding to which this subpart applies concerning information acquired in the course of performing official duties or because of the employee’s official relationship with EPA, unless authorized by the General Counsel.” 40 CFR § 2.402. Defendants are unaware of whether Mr. Winnett sought such approval, but even if he had done so, he was required to make a disclosure of his EPA employment and of the appropriate disclaimer in his Declaration.

4. Mr. Winnett purports to testify as a private citizen without revealing his status as an EPA employee. In addition to the fact that it is virtually impossible to separate his testimony here from his job at the EPA and that this proceeding involves an NPDES permit issued and overseen by his department, the Declaration violates the EPA rules by failing, at a minimum, to provide the necessary disclaimer.

5. The undersigned counsel attempted to obtain the assent of counsel for the Plaintiffs to the relief sought in this Motion. Counsel for the Plaintiffs do not assent. LR 7.1(c).

6. No memorandum of law is necessary because the relief requested is within the discretion of the Court. LR 7.1(a)(2).

7. For all these reasons, the Court should strike the Declaration.

WHEREFORE, the Defendants respectfully request the Court enter an order:

- (A) Striking the Declaration of Steven Winnett; and
- (B) Granting such further relief as may be just, equitable and appropriate.

Respectfully submitted,

GRANITE SHORE POWER LLC, GSP
MERRIMACK LLC, and PUBLIC SERVICE
COMPANY OF NEW HAMPSHIRE d/b/a
EVERSOURCE ENERGY

By their attorneys,

McLANE MIDDLETON, PROFESSIONAL
ASSOCIATION

Date: August 14, 2019

By: /s/ Jennifer L. Parent

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Certificate of Service

I hereby certify that on August 14, 2019, I served the foregoing Reply to Opposition to Defendants' Motion to Dismiss electronically through ECF upon the following counsel of record: Thomas F. Irwin, Esq., Daniel J. Mullen, Esq., Edan Rotenberg, Esq., and Reed Super, Esq.

/s/ Jennifer L. Parent

Jennifer L. Parent