

ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

KELLY A. AYOTTE
ATTORNEY GENERAL



ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

May 14, 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 Fish and Game Department's Response to the May 8, 2009 Order.

Thank you for your attention to this matter.

Very truly yours,

Colleen E. Mulholland
for 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

Kelsey and Dixville peaks and described the likely effects of the project on the high-elevation spruce fir habitat found there, an uncommon habitat in New Hampshire.

3. Subsequent to the submission of the testimony of Mr. Staats and Ms. Kelly, Fish and Game, along with the Appalachian Mountain Club, entered into a High Elevation Mitigation Settlement Agreement (the "Agreement") with GRP. It is the professional opinion of Fish and Game staff, based on their experience and knowledge of the North Country's ecosystems, that the provisions of the Agreement provide sufficient mitigation to compensate for the project's impacts to high elevation ecosystems, habitats and species. With the inclusion of the mitigation as described in the Agreement, Fish and Game does not oppose the project.

4. During the hearings in this matter, Mr. Staats and Ms. Kelly were questioned in depth on the Agreement and specifically on the protections that will be extended to the lands to be transferred, as well as on the current condition of the lands. See Tr. at 150-53 and 170-183 (March 13, 2009); and Tr. at 60-63 (March 17, 2009)¹. Each of the parties, each member of the Subcommittee, and the Subcommittee's attorney had an opportunity at the hearings to ask questions of the Fish and Game witnesses (and of any of the other witnesses) regarding the lands to be transferred through the Agreement.

5. As indicated by the letter submitted by Fish and Game on April 27, 2009, the parcels to be transferred are comprised of spruce-fir forest in various age classes based on the timing of forest management activities. See *Settlement Agreement Habitat Assessment* (April 27, 2009). What is more important than the precise current status of the forests is (i) that they are above

¹ For instance, Mr. Staats testified that "portions of [Mt. Kelsey (the largest of the parcels to be transferred to Fish and Game)] appear to be primary forest," but that "portions of [Mt. Kelsey] appear not to be as well." Tr. at 150 (March 13, 2009). Further Mr. Staats testified that that his prediction that the parcels to be transferred would provide habitat for Bicknell's thrush was a prediction "based on the habitat" that exists on those parcels. See Tr. at 174 (March 13, 2009).

2700' in elevation and are suitable for spruce-fir forest growth, and (ii) that they will be perpetually protected from commercial timber harvests and motorized vehicle access. See Mitigation Agreement at ¶ A.3. With time, it is expected that these parcels will support complex, mature spruce-fir habitat in those areas that do not already support such habitat. See Tr. at 196, line 22 (March 13, 2009); Tr. at 182, lines 1-4. (March 13, 2009).

6. In addition to the parcels to be transferred, Fish and Game will receive:

a) \$750,000 for future land acquisitions of comparable habitat outside the project area, with priority given to the conservation of habitat for American marten or other species of conservation concern, with a focus on high elevation spruce-fir habitat in Coos County, and

b) \$200,000 for post-construction wildlife studies.

In combination with the land transfer, these payments balance the impact of the Project on the high elevation ecosystems where it will be built. See Tr. at 172, lines 20-22 (March 13, 2009).

7. Once the project is permitted and the land is transferred, Fish and Game intends to conduct a review of the conditions on the parcels, as resources and circumstances allow. Further, the post-construction studies, funded by the \$200,000 contributed by GRP pursuant to the Agreement, will help to inform Fish and Game staff of the effect of the Project on the behavior of American marten, three-toed woodpecker, Bicknell's thrush and Canada lynx.

8. Fish and Game has provided all the information it currently possesses regarding the five numbered issues in Part III of the May 8, 2009 Order, with one exception, namely the most recent aerial photographs of the project area, taken mid-summer 2008. This data is available to the public and can be downloaded at

ftp://ftp.granit.sr.unh.edu/pub/GRANIT_Data/2008NAIP_Preliminary. Further, it is reasonable to infer

that GRP has access to the most recent information regarding the condition of the parcels to be transferred, considering GRP's ongoing relationship with the current landowners.

9. In addition, regarding the fourth numbered issue in Part III of the May 8, 2009 Order, an objective and scientific determination of whether or not the almost 1,300 acres of mitigation lands on Mt. Kelsey will support viable populations of marten, three-toed woodpeckers and Bicknell's thrush, cannot be made until after the project is constructed because there is no way to know for certain to what extent the species of concern will continue to use the Mt. Kelsey parcel once the turbines are constructed on the ridge.

10. Fish and Game appreciates that the Subcommittee values the opinions and expertise of Fish and Game staff, especially concerning forest quality and animal behavior. However, in this instance, the Subcommittee's most recent inquiry is misplaced. As previously stated, GRP has the burden to produce sufficient documentary and testimonial evidence for the SEC to make its required findings. If that evidence is insufficient, RSA 162-H:10, V, allows the SEC and counsel for the public to jointly conduct any "reasonable studies and investigations as they deem necessary or appropriate" to assess whether an applicant has met its burden under RSA 162-H:16.

11. The research and analysis necessary to comply with the Subcommittee's May 8, 2009 requests would take significant time and would be a drain on Fish and Game's limited funds and personnel resources. The applicant, and not Fish and Game, should bear these costs.

12. Based on the foregoing, Fish and Game submits that the Subcommittee should either direct GRP to respond to its requests or employ a consultant to do so, pursuant to RSA 162-H:10, V.

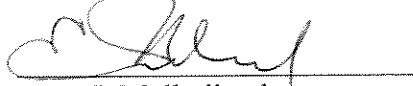
Respectfully submitted,

NEW HAMPSHIRE
FISH AND GAME DEPARTMENT

By its attorneys

KELLY A. AYOTTE
ATTORNEY GENERAL

Dated: May 14, 2009



Evan J. Mulholland
Assistant Attorney General
Environmental Protection Bureau
33 Capitol Street
Concord, New Hampshire 03301-6397
Tel. (603) 271-3679

Certificate of Service

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

Dated: May 14, 2009



Evan J. Mulholland