

STATE OF VERMONT  
PUBLIC SERVICE BOARD

Petition of Green Mountain Power Corporation, Vermont )  
Electric Cooperative, Inc., and Vermont Electric Power )  
Company, Inc., for a certificate of public good, pursuant to 30 ) Docket No. 7628  
V.S.A. Section 248, to construct up to a 63 MW wind electric )  
generation facility and associated facilities on Lowell Mountain )  
in Lowell, Vermont, and the installation or upgrade of )  
Approximately 16.9 miles of transmission line and Associated )  
substations in Lowell, Westfield and Jay, Vermont )

VERMONT AGENCY OF NATURAL RESOURCES

MOTION TO ALTER OR AMEND

VERMONT PUBLIC  
SERVICE BOARD  
2011 JUL 14 PM 4:35  
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The Vermont Agency of Natural Resources, (VANR), by and through its attorney  
Judith L. Dillon, respectfully moves the Board pursuant to Board Rule 2.105 and V.R.C.P. 59(e)  
to alter or amend its May 31, 2011 decision.

Specifically, ANR asks the Board to clarify the following discussion regarding significant  
natural communities or delete the last clause of the first sentence, the italicized portion, as  
inconsistent with Board precedent.

The two montane forest natural communities are uncommon in the state, but are not rare  
natural communities; *therefore a finding that there will be no undue adverse impact is not  
required in order for the Board to issue a CPG for the proposed project.* Nevertheless,  
we find that the mitigation and decommissioning measures provided by the Natural  
Resource MOU, as discussed below as they relate to necessary wildlife habitat and  
endangered species, will limit the impacts of clearing to being adverse in nature, rather  
than unduly adverse.<sup>1</sup>

As support for its motion, VANR submits the following memorandum.

<sup>1</sup> Docket No. 7628, Decision, at 115 (emphasis added).

## MEMORANDUM OF LAW

The Public Service Board has consistently held that its review of a project's impacts is not limited to the Act 250 factors.<sup>2</sup> Instead, as the Board stated in *East Haven* and most recently held in *Georgia*, the Board must consider the impact of the project on the "natural environment" and is not confined to the Act 250 Criteria. "Accordingly, to make our determination under Section 248(b)(5), we do not need to simply address the issue of whether the Project site is a rare and irreplaceable natural area, but we must also address whether the Project will have an undue adverse impact on the natural environment."<sup>3</sup>

In *Georgia*, the Board specifically applied the "undue adverse impact on the natural environment" standard in its review of the Project's impacts on significant natural communities that were not designated as Rare and Irreplaceable Natural Areas.<sup>4</sup> The Board concluded that impacts to significant natural communities from the 3-5 turbine wind project necessitated mitigation in order to avoid an undue adverse impact on the natural environment. "[W]hile the existing natural communities may not rise to the level of rare and irreplaceable, the significant and permanent impacts to the natural communities on Georgia Mountain lead us to conclude that GMGC must mitigate the impacts of the Project on the natural communities in order to avoid an

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<sup>2</sup> See *in re East Haven*, Docket No. 6911 (7/17/2006), at 60. In *East Haven*, the Board stated::

Although in Section 248(b)(5) the General Assembly has provided the Board with guidance as to what specific environmental impacts to examine in reviewing a proposed project, *it did not limit the scope of the Board's review to only the incorporated Act 250 criteria*. The statute specifically provides that the Board must find that a proposed project will not have an 'undue adverse effect on . . . the natural environment.'

Docket No. 6911 (7/17/2006), at 60 (emphasis added)(internal citations omitted). See also *Deerfield*, Docket No. 7250, Decision on Motion to Alter at 3-4 (7/17/2009) ("While the Board must give due consideration to the Act 250 criteria, including the necessary wildlife habitat criterion . . . Our evaluation under the Act 250 criteria is not dispositive, as we must, in the end, apply Section 248 (b)(5) and determine whether the Project will have an undue adverse effect on the natural environment."); *Georgia*, Docket No. 7508, at 67 (6/11/2010).

<sup>3</sup> Docket No. 7508, at 67 (6/11/2010).

<sup>4</sup> *Id.* At 68

*undue adverse impact on the natural environment.*”<sup>5</sup> Impacts from a project to natural communities that do not qualify as RINAs, therefore, must be evaluated under Section 248(b)(5) to determine whether the project will result in an undue adverse impact to the natural environment.

In the present action, the Board discussion regarding significant natural communities may contain an incorrect recitation of this standard that may lead to confusion in future cases. In its discussion, the Board stated:

The two montane forest natural communities are uncommon in the state, but are not rare natural communities; *therefore a finding that there will be no undue adverse impact is not required in order for the Board to issue a CPG for the proposed project.* Nevertheless, we find that the mitigation and decommissioning measures provided by the Natural Resource MOU, as discussed below as they relate to necessary wildlife habitat and endangered species, will limit the impacts of clearing to being adverse in nature, rather than unduly adverse.<sup>6</sup>

The Board correctly concluded that the two state significant natural communities do not qualify as rare and irreplaceable natural areas. In reaching its conclusion that the project impacts are sufficiently mitigated to render the impacts no longer unduly adverse, the Board appears to have applied the *Georgia* standard and evaluated the project’s impacts on the state significant natural communities. Unfortunately, the italicized portion suggests that only those impacts to state significant natural communities that qualify as a RINA will be considered by the Board when evaluating whether a project will result in an undue adverse impact to the natural environment. This characterization of the Board’s scope of review is contrary to the scope outlined in *East Haven* and *Georgia*. In *Georgia*, the Board specifically held that impacts to

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<sup>5</sup> *In re Georgia Mountain Community Wind*, Docket No. 7508, at 68 (6/11/2010).

<sup>6</sup> Docket No. 7628, Decision, at 115 (emphasis added).

natural communities must be mitigated to avoid an undue adverse impact to the natural environment.<sup>7</sup> In this case, those impacts have been mitigated.

The Agency prays the Board to delete or modify the last clause of the first sentence, thus:

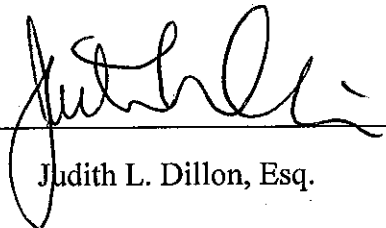
The two montane forest natural communities are uncommon in the state, but are not rare natural communities; ~~therefore a finding that there will be no undue adverse impact is not required in order for the Board to issue a CPG for the proposed project.~~ Nevertheless, we find that the mitigation and decommissioning measures provided by the Natural Resource MOU, as discussed below as they relate to necessary wildlife habitat and endangered species, will limit the impacts of clearing to being adverse in nature, rather than unduly adverse

Respectfully submitted this 14<sup>th</sup> day of June 2011.

STAE OF VERMONT

AGENCY OF NATURAL RESOURCES

BY: \_\_\_\_\_

  
Judith L. Dillon, Esq.

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<sup>7</sup> *Id.* at 68.