

New York State Department of Environmental Conservation

Office of General Counsel, Region 3

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Alexander B. Grannis
Commissioner

June 7, 2010

Larry Wolinski, Esq.
Jacobowitz and Gubits, LLP
158 Orange Avenue
PO Box 367
Walden, NY 12586-0367

Re: Hudson River Valley Resorts

Dear Mr. Wolinski:

Thank you for your letter of May 10, 2010 requesting that DEC reconsider the grounds upon which it determined that the submitted Draft EIS has deficiencies and is incomplete. Your letter indicated concerns regarding the protocols, concerns about the time frame for DEC review, and concerns about whether further investigation, if warranted under an "assumed presence" policy, could be incorporated in an Final EIS. Your letter also raised questions about retaining a karst expert, reviewing of protocols used by the applicant in its hydrogeological investigations, and alternatively whether the karst review would more appropriately be the subject of comment on the DEIS. Questions were also raised regarding the timing of the demand for a karst expert and whether the Department has sufficient expertise to assess completeness of the DEIS regarding that issue. Finally, you raised concern that the April 20, 2010 letter from the DEC advises that submissions should be copied to the Town of Rosendale and other involved agencies. Your letter also referred to 6 NYCRR 617.9(b)(8) regarding revisions and supplements to the Draft EIS being incorporated in the Final EIS, after acceptance and completion of the Draft EIS. Department staff's letter of April 20 stated that the Draft EIS was unacceptable and was not adequate for the purpose of commencing public review. These reasons included protocol review and acceptance and the karst issue. Therefore 6 NYCRR 617.9(b)(8) does not apply to this situation. I will address your letter in the order of issues raised.

Wildlife

As indicated in the April 20th letter, wildlife protocols for the Indiana bat, Eastern small-footed Bat, Jefferson's salamander, Allegheny woodrat, pied-billed grebe, timber rattlesnake, and red shouldered hawk must meet the requirements of the Scope prior to the Department's determination of whether to accept the Draft EIS.

Department staff offer the following comments on the applicant's proposed protocols for the required review for Indiana bats and Eastern small-footed Bats:

1. The applicant should conduct presence/absence mist net surveys for bat species following the USFWS protocol with some modifications (related to the amount of effort and tracking of individuals) in areas that will be developed, and also in areas that will not be developed under the proposed plan. Final net locations, and final protocols must be approved by the Department prior to DEC determining whether the Draft EIS is adequate for public review. This survey is needed in part to compensate for mortality of bats related to /caused by White Nose Syndrome, and because of the uniqueness, importance and significance of the area to this species. The protocol is available at: <http://www.fws.gov/northeast/nyfo/es/2007Mistnetting.pdf>.
2. An assessment of present roost sites in the areas of planned disturbance based on the USFWS NY fact sheet should be conducted to help characterize impacts. The fact sheet is available at: <http://www.fws.gov/northeast/nyfo/es/Ibat%20fact%20Sheet%20July%202006.pdf>.
3. The applicant is reminded that an analysis of lighting impacts on bats for full build out and occupancy is required per Section III.G.2.d. of the Final Scope. Methodology for this analysis should be included in the protocol.
4. An in-depth analysis of blasting by a qualified geologist is needed based on the site specific characteristics and potential impacts on hibernacula. If this has already been performed this should be included and/or referenced in the section on impacts to bat species.

The reasoning for the intensive study and analyses for these species is because of the importance of this unique area around the hibernacula and the need to have more information to characterize the impacts. The following is an excerpt, taken from the USFWS Indiana Bat Draft Recovery Plan, which outlines the importance of areas around hibernacula.

The habitat surrounding hibernacula may be one of the most important habitats in the annual cycle of the Indiana bat. This habitat must support the foraging and roosting needs of large numbers of bats during the fall swarming period. After arriving at a given hibernaculum, many bats build up fat reserves, making local foraging conditions a primary concern (Hall 1962). Migratory bats may pass through areas surrounding hibernacula, apparently to facilitate breeding and other social functions (i.e., bats that utilize the area for swarming may not hibernate at the site) (Barbour and Davis 1969; Cope and Humphrey 1977). Modifications of the surface habitat around the hibernacula can impact the integrity, and in turn the microclimate, of the hibernacula. Areas surrounding hibernacula also provide important summer habitat for those male Indiana bats that do not migrate, which is thought to be a large proportion of the male population. Loss or degradation of habitat within this area has the potential to impact a large proportion of the total

population.

The May 13, 2010 protocols submitted by Mike Fishman, Stearns & Wheeler GHD that described a calling survey to determine presence of Northern Cricket Frogs for project DEC # 3-5146-00063/00007. These protocols, in combination with work already completed by the applicant, are adequate to determine the current presence of Northern Cricket frogs on the project site.

DEC is still reviewing the protocols for the Jefferson's salamander, Allegheny woodrat, pied-billed grebe, timber rattlesnake, and red shouldered hawk. Responses will be sent shortly.

Karst Review


Your letter suggested that karst review should be a part of the Final EIS. However, the Final EIS is not the appropriate vehicle to address the karst issues raised by the Department for a number of reasons. Karst issues are required to be addressed by the scope. Department staff's April 20 letter discussed the karst expert retention not for a purpose of review of the potential impacts, but rather for the purpose of determining if there is sufficient information, and if the methods used were appropriate for meeting the requirements set forth in the Scope. The karst issue is an important one and a full and open review subject to full public comment and response is necessary. A review of these issues in the Final EIS will not meet this requirement.

Finally, Department staff's letter stated that the applicant should consider - but did not mandate - copying pertinent sections of SEQRA documents to involved agencies. For example, it would have been helpful for the Department of Health to have been copied on the section regarding wastewater treatment prior to meeting on the topic. Since copying of the pertinent sections and distributing is not required. Department staff appreciate the applicant's willingness to copy the Town of Rosendale on the EIS submissions, and encourages electronic document transmission where appropriate.

If you have any questions on the above, please feel free to contact me at 845-256-3038.

Thank you.

Very truly yours,


Carol Krebs
Assistant Regional Attorney
Region 3

cc: Hon. Patrick McDonough, Supervisor, Town of Rosendale

bcc: A. Ciesluk/R. Crist
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