

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7628

Joint 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 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)

Order entered: 6/28/2012

ORDER RE MOTION FOR RECONSIDERATION

INTRODUCTION

On May 31, 2011, the Public Service Board ("Board") issued an Order (the "Order") and Certificate of Public Good ("CPG") in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility. Among other things, the Order required the Petitioners to make a number of post-certification compliance filings. Condition 17 of the Order and CPG required Green Mountain Power Corporation ("GMP") to secure habitat fragmentation-connectivity easements pursuant to the requirements of paragraph 3.2 of a Memorandum of Understanding between it and the Agency of Natural Resources (the "Natural Resource MOU"), and file them for Board review and approval.¹ On December 7, 2011, GMP submitted its proposed habitat fragmentation-connectivity easements ("Easements") covering two parcels of land totaling approximately 1,662 acres for party

1. The Order and CPG required GMP to obtain and file the easements for Board review prior to commencing construction of the project. However, by Order dated July 12, 2011, the requirement was modified to allow GMP until December 31, 2011, to obtain and file the easements for Board review. Docket 7628, Order of 7/12/11 at 11.

comment and Board review.² On December 23, 2011, the Board issued an Order approving the Easements and on January 6, 2012, the Towns of Albany and Craftsbury (the "Towns") and Lowell Mountains Group, Inc. ("LMG") (together, the "Movants") filed a Motion for Reconsideration (the "Motion") of the Board's December 23, 2011, Order.

In this Order, for the reasons discussed below, we deny the Movants' Motion in its entirety³ and affirm our December 23, 2011, Order approving the Easements as consistent with Condition 17.

PROCEDURAL HISTORY

On December 7, 2011, GMP submitted its proposed Easements covering two parcels of land totaling approximately 1,662 acres for party comment and Board review.

On December 23, 2011, the Board issued an Order approving the Easements and directing GMP to file a map showing the boundaries of the Easements and stating that it was prepared to revisit its approval of the Easements if the map indicated any inconsistencies with comments filed by the Agency of Natural Resources ("ANR") in support of the Easements.

On December 29, 2011, GMP filed two maps showing the boundaries of the Easements, referred to as the Boomhour Brook Conservation Plan and the Eden's Echo Forest Conservation Plan.

On January 6, 2012, the Movants filed their Motion for Reconsideration.

On January 18, 2012, GMP filed an Opposition to Motion to Reconsider of Lowell Mountains Group and the Towns of Craftsbury and Albany.

On January 25, 2012, the Movants filed their Reply to GMP's Opposition to Motion for Reconsideration.

2. One parcel is located on the north side of East Hill Road in the Town of Eden and is known as the Eden's Echo parcel. The second parcel is located on the south side of East Hill Road and is known as the Boomhour Brook parcel.

3. On February 16, 2012, we issued an Order that granted the Motion, in part, in order to take evidence on two limited questions; whether the presence of East Hill Road or the activities allowed on the Easements would improperly interfere with the Easements' intended function. The February 16 Order either rejected or rendered moot all other claims raised by Movants in the Motion. Today's Order denies the Motion in its entirety. However, because the February 16 Order explains why the Movants' other arguments fail, we will not repeat that analysis here, and confine our discussion to the two questions identified in the February 16 Order.

On January 30, 2012, the Deputy Clerk of the Board issued a memorandum requesting additional information in the form of a map from GMP.

On February 3, 2012, GMP filed the map requested by the January 30, 2012, memorandum.

On February 8, 2012, the Movants filed comments in response to the map filed by GMP on February 3, 2012.

Also on February 8, 2012, LMG filed a separate Motion for Reconsideration of the December 23, 2011, Order approving the Easements.⁴

On February 10, 2012, GMP filed an Opposition to the Motion to Reconsider of Lowell Mountains Group and to the February 6, 2012, comments of the Towns of Albany and Craftsbury.

On February 15, 2012, the Towns and LMG filed a letter in response to GMP's February 10, 2012 filing.

On February 16, 2012, we issued an Order that granted in part the Movants' Motion for the purpose of taking additional evidence on the potential impacts to the intended functions of the Easement parcels from the presence of East Hill Road and the activities to be allowed within the Easement parcels themselves (the "Allowable Activities"). The February 16 Order stressed that it was not a determination that the Easements were insufficient to comply with Condition 17. Rather, it was a determination that additional evidence was necessary to determine their compliance with respect to the two limited issues identified in the February 16 Order. All other arguments advanced by the Movants were either rejected by the Board or rendered moot by its decision to hold a technical hearing.

The parties prefiled testimony on March 30, 2012, and a round of discovery followed. A technical hearing was held on May 1, 2012. Briefs were filed on May 21, 2012, by GMP, and

4. It is unclear why LMG filed its own separate motion since LMG had already joined in the Towns' Motion, and counsel for the Towns ultimately filed a Notice of Appearance as co-counsel for LMG with authorization from LMG's counsel of record. LMG confirmed its authorization and reiterated that it joined in the Motion, Reply and Towns/LMG Comments. Letter from attorney Simon to Susan M. Hudson, PSB Clerk filed February 8, 2012. Additionally, the substantive arguments in the LMG motion appear to have been taken largely verbatim from the Towns/LMG Comments, and are limited to the issue of the existence of unconserved lands between the Eden's Echo parcel and the project site. That particular issue was disposed of in our Order dated February 16, 2012.

jointly by the Towns and LMG. The Towns and LMG filed a joint Reply Brief on May 30, 2012, and GMP and the Agency of Natural Resources ("ANR") each filed Reply Briefs on June 4, 2012.

POSITIONS OF THE PARTIES

The Movants

The Movants contend that the Allowable Activities render the Easements inadequate for providing the level of connectivity required by Condition 17.⁵ Specifically, the Movants are concerned with the allowance of maple-sugaring operations, including the placement of sugar houses, and commercial-timbering operations within the Easements' Special Treatment Areas ("STAs"), and the existence of the sugar house complex within the Eden's Echo STA.⁶ The Movants also are concerned over the fact that Vermont Land Trust ("VLT") is the grantee under the Easements, that the Baseline Documentation Reports ("BDR") for the Easements do not contain the same type of information as was contained in a BDR submitted by the petitioners for a different conserved parcel earlier in this proceeding, and that hunting and rural enterprises are allowed on the Easements.⁷ The Movants further contend that greater restrictions are required for the placement of wastewater systems to serve up to five residential structures that may be located on a 10-acre exclusion from the Eden's Echo parcel, and that a second corridor is required to properly secure connectivity between the habitat blocks in the event the Easements are degraded to the point they no longer serve their intended function.⁸ Lastly, the Movants are concerned about possible thinning that may have taken place on the Boomhour Brook parcel during the winter of 2011-2012.⁹

5. The Movants originally took the position that the presence of East Hill Road interfered with the connectivity function of the Easements. However, the Movants do not address this issue in their Brief or Reply Brief.

6. Movants Brief at 9-13, 16-19, 21.

7. Movants Brief at 17-18, 22-23.

8. Movants Brief at 23-25.

9. Movants Brief at 26. In their Reply Brief, the Movants largely reiterate the arguments they made in their initial Brief.

Green Mountain Power

GMP contends that the Motion should be denied because the presence of East Hill Road does not interfere with the intended function of the Easements, which is to maintain the current level of connectivity between the Lowell Mountain and Green River Reservoir habitat blocks. GMP states that East Hill Road is part of what defines the current level of connectivity and therefore its continued presence is consistent with the purpose of the Easements.¹⁰ GMP further contends that maple sugaring and commercial-timber harvesting are common activities throughout Vermont's working forests and are generally compatible with maintaining connectivity. Additionally, GMP points out that these activities must be conducted in a manner that comports with the Easements' primary purpose, which is to maintain the current level of ecological connectivity between the two habitat blocks.¹¹ GMP also states that the construction and use of sugar houses will not interfere with the intended function of the Easements because sugaring is a seasonal activity, because restrictions on placement of new sugar houses and related infrastructure will ensure no significant interference with animal movement through the parcels, and that allowing the existing sugar house to remain in its current location was a concession that allowed ANR to maximize the overall size and quality of the Easements.¹² GMP also asserts that the existence of logging roads and the construction of a new haul road are consistent with the Easements' intended functions because logging roads are a necessary part of commercial forestry, they tend to be small, and tend to be used only sporadically, allowing for revegetation. With respect to a new forestry haul road that is allowed on the Eden's Echo parcel, GMP contends that its site has been carefully predetermined to ensure that it does not unduly impact the function of the Easements.¹³ GMP disagrees with the Movants' positions on hunting, rural enterprises and the potential for wastewater systems to serve future residences on the 10-acre exclusion, asserting that the evidence does not support the Movants' claims, and that restrictions in the Easements will prevent improper impacts from these activities.¹⁴ GMP also states that a second corridor is

10. GMP Brief at 5-6.

11. GMP Brief at 7-11.

12. GMP Brief at 10-11.

13. GMP Brief at 11-13.

14. GMP Reply Brief at 9-11.

not needed to meet the requirements of Condition 17, nor is obtaining one feasible.¹⁵ Lastly, GMP contends that the Movants' concerns over the BDRs and ANR's baseline assessment of the Easements are unfounded.¹⁶

Agency of Natural Resources

ANR contends that the Movants "ignore and misstate" the intended function of the Easements. According to ANR, the Easements are intended to help maintain the existing level of ecological connectivity between two large habitat blocks.¹⁷ ANR also believes that maple sugaring and commercial forestry, pursuant to a required forestry-management plan, are consistent with the function of the Easements because the activities must be done in a manner that does not interfere with that function. Lastly, ANR urges the Board to adopt the recommendations of its witnesses. According to ANR, its witnesses have a combined total of over forty years in the field of conservation management in Vermont, and together have dedicated years to the study, management and conservation of wildlife, habitat and natural communities in the state.¹⁸

DISCUSSION

For the reasons set forth below, we deny the Motion because we conclude that neither the existence of East Hill Road nor the Allowable Activities will interfere with the intended function of the Easements.

Condition 17 states:

GMP shall secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU, and file them for Board approval. Parties with standing on the issue shall have two weeks to file comments from the time any easements are filed. The easements must be approved, executed, and conveyed by December 31, 2011. If GMP has not met this requirement by December 31, 2011, GMP shall

15. GMP Reply Brief at 11-12.

16. GMP Reply Brief at 12-14.

17. ANR Reply Brief at 1.

18. ANR Reply Brief at 5.

cease all construction activities until such time as the fragmentation-connectivity easements are approved, executed, and conveyed.¹⁹

Paragraph 3.2 of the Natural Resource MOU requires GMP to "secure prudent conservation easements of adequate size and location . . . to provide wildlife habitat connectivity to address fragmentation."²⁰ The Natural Resource MOU requires GMP to consult with and obtain ANR's approval for any parcel that GMP seeks to acquire to satisfy the requirements of Paragraph 3.2. Further, it is left to ANR to determine the adequacy of any such parcel under the Natural Resource MOU.²¹

GMP has obtained the Easements, and has consulted with and obtained ANR's approval for those Easements. Accordingly, we conclude that GMP has complied with the terms of Paragraph 3.2 of the Natural Resource MOU, which is a component of meeting Condition 17. However, Condition 17 still requires independent review and approval of the Easements by the Board. In today's Order, we conclude, based on our review of all the evidence related to the Easements, and our consideration of the Movants' Motion and arguments submitted in support of and against that Motion, that GMP has met the requirements of Condition 17 and we accordingly deny the Motion.

1. The Intended Function of the Easements

The Movants raise concerns about ANR's assessment of the adequacy of the Easements to fulfill their intended function as part of their arguments related to maple-sugaring operations on the parcels. While the Movants raise these concerns with respect to maple sugaring, they are more generalized in nature and we will therefore address them at the outset of this Order, not only to clarify what the intended function of the Easements is, but also because it will allow us to address other issues that are directly related to the intended function of the Easements.

The Movants assert that ANR's support for the Easements is based on "an unexplained concept of landscape connectivity that disregards the habitat needs of the forest interior species that these parcels are intended to support," and that ANR justifies maple sugaring on the

19. Docket 7628, Order of 7/12/11 at 161.

20. Exh. GMP-ANR-1 at ¶ 3.2.

21. Exh. GMP-ANR-1 at ¶ 3.2.

Easements by claiming that the Easements were not targeted towards providing connectivity specifically to interior forest species.²² The Movants claim that ANR's focus on connectivity, rather than on maintaining interior forest habitat, is inappropriate in assessing the adequacy of the Easements and will result in activities taking place that could degrade interior forest habitat and drive interior forest species away. According to the Movants, the purpose of the parcels is to "mitigate the fragmentation-related impacts of the project on forest interior species."²³

The Movants appear to believe that the Easements are intended to replace interior forest habitat that will be lost due to the clearing required for project construction. However, this is not the case. The Petitioners were required to obtain a number of other conservation easements around the project site in order to conserve interior forest wildlife habitat and other critical resources to offset impacts from project-related clearing.²⁴ The Easements at issue in today's Order are intended to help maintain the existing level of landscape-scale connectivity between two habitat blocks, something different from what was required of the Petitioners in obtaining the other conserved parcels in this proceeding. Testimony in this matter indicates that the Easements are "an integral part of a suite of mitigation and restoration measures intended to help offset the impacts from the project."²⁵ The specific function of the Easements is to "help maintain the existing level of ecological connectivity" between the Lowell Mountain and Green River Reservoir habitat blocks.²⁶ The testimony demonstrates that the Easements will provide this intended function. For example, the maple-sugaring operation currently exists on the Eden's Echo parcel, and wildlife are moving through the area without any indication of significant difficulty. Also, the Easements restrict the Allowable Activities by requiring them to be conducted in a manner consistent with the primary purpose of the Easements, which is to maintain the existing level of connectivity.²⁷

22. Movants Brief at 11.

23. Movants Brief at 11.

24. Tr. 5/1/12 at 75-76 (Austin).

25. Austin/Sorenson pf. at 3.

26. Austin/Sorenson pf. at 3.

27. For example, the draft forest management plan for the Eden's Echo parcel proposes to limit maple sugaring to 350 acres out of approximately 950 acres of conserved land. Tr. 5/1/12 at 18 (Sorenson); exh. Pet.-CP-14.

The Movants' arguments on this issue are either an attempt to relitigate the intended function of the Easements, which is beyond the scope of the issues identified in our February 16, 2012, Order, or they suggest a fundamental misunderstanding regarding the Easements' intended function. This apparently mistaken underlying premise also gives rise to other claims by the Movants that are without support in the record.

First, the Movants' are incorrect that the BDRs that were performed for the Easements are inadequate because they did not contain the same level of detail as that contained in the BDRs submitted earlier in this proceeding for different parcels. This argument again indicates a misunderstanding of the intended function of the Easements. The Easements are intended to provide landscape-level connectivity between two habitat blocks. Unlike the conserved parcels surrounding the project site, they are not primarily intended to conserve a specific type of habitat. Accordingly, the BDRs do not need to contain the same type of information for ANR to assess the adequacy of the Easements. Among other things, the BDRs state that the parcels will advance the intended function of the Easements because they possess numerous relevant attributes. For example, the Eden's Echo BDR states that the parcel lies within a large forest block, is comprised largely of a variety of forest community types, has riparian forested habitat along Boomhour Brook providing high-quality linkage and connectivity habitat, has diverse habitat conditions throughout the parcel which provide important food, cover and migration habitat for a myriad of wildlife, provides habitat for an array of northern forest species, and includes a priority linkage area for connectivity along the edge of East Hill Road.²⁸ We conclude that the BDRs contain information sufficient for ANR to assess the suitability of the Easements for meeting their intended function.

Similarly, we reject the Movants' criticisms of ANR's assessment of intact forest cover. Their criticism is based on the fact that neither GMP nor ANR provided any data, photographs or field notes documenting the extent of intact cover.²⁹ What their criticism ignores is that ANR reviewed photographs of the parcels from the early 1990s through 2011 which showed the extent

28. Exh. Towns-Cross-8 at 4. The BDR for the Boomhour Brook parcel contains a similar description of the resources on that parcel, as do the Easements themselves.

29. Movants Reply Brief at 2.

of intact cover on the two parcels over time.³⁰ In reaching our conclusion today, we are relying on the testimony of ANR's witnesses that adequate intact cover exists on the two parcels. The Movants' criticism further ignores that fact that ANR, in response to a discovery request from the Movants, disclosed this information by describing the database where the photographs were publicly available for review by the Movants.³¹

Based on the foregoing, we conclude that the Easements are adequate to meet their intended function of providing ecological connectivity between the Lowell Mountain and Green River Reservoir habitat blocks. The Movants' failure to access the database and the relevant photographs after having been informed of their existence does not render ANR's review efforts inadequate.

2. The Presence of East Hill Road

The Movants originally argued that the presence of East Hill Road between the two Easements undermines the connectivity function of the two parcels and will prevent species movement between the Easements.³² However, the Movants did not pursue this argument in either their Brief or Reply Brief.

GMP asserts that the purpose of the Easements is to maintain the existing level of connectivity between the two habitat blocks, and that East Hill Road is part of that existing level of connectivity. According to GMP, the only way to address the effects of East Hill Road would be to remove the road from the landscape. GMP believes that this would go beyond what is required by Condition 17.³³

We conclude that the presence of East Hill Road is not inconsistent with the intended function of the Easements. Condition 17 requires GMP to obtain easements in accordance with the requirements of the Natural Resource MOU. According to ANR, the Natural Resource MOU envisions that easements be obtained to help maintain the existing level of ecological

30. Tr. 5/1/12 at 65-66 (Sorenson).

31. Exh. ANR-Austin/Sorenson-1.

32. Motion at 2-3. *See, also* Town/LMG Comments at 1.

33. GMP Brief at 5-6.

connectivity between the Lowell Mountain and Green River Reservoir habitat blocks.³⁴ The Easements accomplish that intended function. Nothing in Condition 17 requires GMP to improve upon the existing level of connectivity between the habitat blocks. Additionally, testimony from ANR's witnesses establish that the stretch of East Hill Road that is encompassed by the Easements' borders is the longest stretch of undeveloped road between the two habitat blocks. Preventing future residential development along that stretch of East Hill Road is key to securing connectivity between the two habitat blocks because any such development would be the most detrimental activity to the ecological connectivity value of the parcels.³⁵ Accordingly, the presence of East Hill Road is acceptable under Condition 17.

3. The Allowable Activities

A. Maple Sugaring

The Movants contend that maple sugaring activities should be barred from taking place within the STAs. They assert that the infrastructure and human activities from maple sugaring will result in an impediment to species movement by creating physical barriers, causing noises that will frighten away animals, and result in conflict among animals and humans, including the potential killing of moose by the owner of the sugaring operation when moose damage the sugaring infrastructure.³⁶ The Movants also state that allowing maple sugaring to take place within the STAs is inconsistent with past easements secured by ANR to address fragmentation impacts, and that they seek only to have the Easements provide the same level of protection that has been provided in these prior easements.³⁷

Both GMP and ANR state that maple sugaring is consistent with the intended function of the Easements, which is to help maintain the existing level of ecological connectivity between

34. Austin/Sorenson pf. at 3.

35. Austin/Sorenson pf. at 10; tr. 5/1/12 at 74-76 (Sorenson and Austin).

36. Movants Brief at 9-13; Johnston pf. at 4.

37. Movants Brief at 9-10. The Movants' arguments regarding the adequacy of the Easements to fulfill their intended function was addressed in a previous section of this Order.

the two habitat blocks.³⁸ According to ANR, all maple sugaring must be accomplished consistent with the primary purpose of the Easements, and there is evidence of wildlife usage of, and movement through, the parcels already, including moose and bear, without any indication that the current operation is restricting movement.³⁹ GMP asserts that maple sugaring is a common type of forest management practice in Vermont and is generally compatible with maintaining connectivity. GMP contends that the evidence shows that the tubing used to collect sap poses little obstruction to wildlife movement, as most species will walk beneath the tubing, and larger species, such as moose, will walk through areas of tubing.⁴⁰ GMP also points to the testimony of ANR's witness, Mr. Austin, that in his professional experience as a wildlife biologist with the U.S. Department of Agriculture working with maple sugar producers to minimize impacts on wildlife from maple sugaring, that he saw no instances where tubing created a significant barrier to species movement.⁴¹ Lastly, GMP points out that all activities on the Easements must be conducted consistent with their primary purpose.⁴²

We conclude that the evidence of record supports a determination that maple sugaring on the two parcels is consistent with the intended function of the Easements, and that the Movants' arguments are without merit. As an initial matter, we find that the Movants' arguments overlook one important and controlling factor regarding the Allowable Activities. All activities must be conducted in a manner that is consistent with the primary purpose of the Easements, which is to "conserve and protect ecological and landscape connectivity between the Lowell Mountain and Green River Reservoir habitat blocks, important wildlife habitat and natural communities on the Protected Property, and natural resource values as these values exist on the date of this instrument and as they may evolve in the future."⁴³ The terms of the Easements themselves prohibit activity that would undermine the connectivity function of the Easements. Accordingly,

38. GMP Brief at 2; Austin/Sorenson pf. at 3. ANR's witness acknowledged that having the sugaring operation in place is not necessarily ideal, but that it is compatible with the Easements' intended function. Tr. 5/1/12 at 43-45 (Austin).

39. ANR Reply Brief at 3; tr. 5/1/12 at 89-90 (Austin).

40. GMP Brief at 8.

41. GMP Brief at 9 (citing Austin/Sorenson pf. at 9).

42. GMP Brief at 9-10.

43. Easements at I.1.

if evidence is developed that maple-sugaring operations on the Easements are improperly interfering with the connectivity function of the parcels, those operations can be curtailed. Many of the Movants' arguments appear to be premised on the idea that the Allowable Activities will occur in an unchecked manner, degrading the Easements to the point they will no longer serve their purpose. This type of growth on the parcels, however, is not permissible by the express terms of the Easements themselves.

With respect to the Movants' concerns regarding infrastructure, noise and conflicts between animals and humans, we find they are misplaced. The evidence shows that maple-sugaring infrastructure and activities already exist on the Eden's Echo parcel, and all indications are that wildlife continues to utilize and move through this parcel without any significant issues.⁴⁴ The fact that the Allowable Activities will now be subject to the restrictions set forth in the Easements means that the current state of connectivity will be maintained.⁴⁵ While it is possible that the tubing may pose some degree of challenge for moose moving through areas that contain tubing, moose will still be able to move through the area encompassed by the Easements because the parcels also include significant acreage without any sugaring infrastructure.⁴⁶ We also reject the Movants' claims that there will be an unacceptable level of conflicts between humans and animals, conflicts they assert will result in the killing of moose as they damage the sugaring infrastructure. As noted immediately above, animals currently move through the parcels under the pre-existing conditions which include a large maple-sugaring operation. There is no evidence of any significant conflicts between humans and animals, and no evidence of moose being illegally killed by the property owners.⁴⁷

44. Tr. 5/1/12 at 89-90 (Austin). ANR's witnesses, Mr. Austin and Mr. Sorenson, visited the two parcels in August of 2011 to assess their adequacy for meeting their intended function. It is undisputed that the Movants' witness, Dr. Pease, has not visited the parcels at any time. And, while the Movants' witness, Dr. Johnston, may be familiar with the parcels, it is undisputed that Dr. Johnston, unlike ANR's witnesses, never visited the parcels for the specific purpose of assessing their adequacy for meeting their intended function.

45. Tr. 5/1/12 at 91 (Austin).

46. Tr. 5/1/12 at 17-18 (Austin/Sorenson).

47. On one level, the Movants' arguments appear to be premised on the mistaken idea that it is the Easements that will result in animals using the parcels, in particular the STAs, and that the Easements will result in activities that are currently not allowed on the parcels. What the evidence demonstrates is that animals are already using the parcels for movement through the landscape, because it is the topography of the Boomhour Brook corridor and the lack of

(continued...)

Lastly, we find the Movants' arguments regarding the Easements' inconsistency with prior conservation easements to be unavailing. The Movants argue that maple sugaring is shown to be inconsistent with the connectivity function of the Easements, since prior conservation easements that were established to protect wildlife corridors did not provide for maple sugaring as a permitted use.⁴⁸ However, the testimony in this proceeding indicates that maple sugaring as a potential use was never actively considered and rejected in the development of those prior easements, it simply never came up as a topic for consideration at all.⁴⁹ Accordingly, the lack of maple sugaring as a permitted use in the prior easements does nothing to demonstrate a potential inconsistency between maple sugaring and ecological connectivity.

B. Forest Management Activities

The Movants contend that forest management activities in the form of commercial logging within the STAs is inconsistent with the "use of these parcels for connectivity to allow forest interior species to move between habitat blocks."⁵⁰ The Movants assert that commercial logging will create forest openings that cause fragmentation, and that the noise associated with logging will scare away forest interior species. If the Board does allow commercial logging within the STAs, the Movants request that it only be allowed for the purpose of improving the habitat as a travel corridor.⁵¹ The Movants are particularly concerned about the lack of a limit on the number of two-acre openings that are allowed in the STAs, and the lack of any specificity in the Easements over where such openings will occur.⁵²

47. (...continued)
residential development along this particular stretch of East Hill Road that is beneficial to species movement. The Easements in and of themselves do not funnel wildlife into this area. However, what the Easements do achieve is the maintenance of the existing level of connectivity, a level that could be degraded over time absent the restrictions placed on the two parcels by the Easements. Tr. 5/1/12 at 85-86, 89-91 (Austin).

48. Movants Brief at 9-10.

49. Tr. 5/1/12 at 42 (Austin).

50. Movants Brief at 16.

51. Movants Brief at 16-17.

52. Movants Brief at 17, 19. The Movants also raise concerns with respect to the information contained in the BDRs and with the fact that VLT is the grantee under the Easements. The Movants' concerns related to the BDRs were addressed in a prior section of this Order. Their concerns related to VLT as grantee under the Easements is addressed in a later section.

GMP asserts that forest management is consistent with the purposes of the intended function of the Easements because such activities are common throughout Vermont's working landscape, are compatible with maintaining ecological connectivity, and that, unlike residential development, the effects are only temporary. GMP also states that timber harvesting can have beneficial effects such as maintenance of soil structure and site hydrology, and can have positive impacts on many wildlife species. GMP further states that any forest management activities must be conducted in accordance with an approved Forest Management Plan, and that the terms of the Forest Management Plan must be consistent with the primary purpose of the Easements.⁵³

ANR contends that the Movants ignore or distort the testimony of ANR's witnesses regarding the temporary nature of impacts from logging and other forestry practices that may take place on the Easements. ANR states that its witness, Mr. Sorenson, testified at length that the effects from forest management practices are temporary in nature and do not result in fragmentation. According to ANR, canopy gaps created by the practices will regenerate and any impacted species, including interior forest birds, will return to the area. Further, ANR contends that larger wildlife species will not avoid these cuts and instead will utilize them for feeding or hunting.⁵⁴ ANR also states that the Movants confuse the two-acre patch cuts that may be allowed on the Easements with clear cuts of 20-40 acres or more. According to ANR, patch cuts of up to two acres regenerate relatively quickly as compared to the larger clear cuts with which the Movants have confused them.⁵⁵ Lastly, like GMP, ANR points out that any timber harvest openings in the STAs must be consistent with the primary purpose of the Easements, and will therefore not detract from the ability of the Easements to provide a "high quality ecological landscape connectivity corridor with benefits including wildlife movement and plant migration."⁵⁶

We conclude that the terms of the Easements, including the requirement that all forest management activities be performed pursuant to a Forest Management Plan approved by VLT after consultation with the Vermont Fish and Wildlife Department ("VFWD"), will ensure that

53. GMP Brief at 7-8.

54. ANR Reply Brief at 4.

55. ANR Reply Brief at 4.

56. ANR Reply Brief at 4-5.

the Easements will continue to provide the requisite ecological connectivity for which they were secured.

The Forest Management Objectives of the Easements include: 1) maintaining species diversity and supporting the ecosystem health of the forest for those portions of the Easements where maple sugaring will occur; and (2) for those portions of the Easements where maple sugaring does not occur, maximizing the opportunity for high-value, large-diameter saw logs or veneer sustained over time, while maintaining a biologically healthy and diverse forest.⁵⁷ Additionally, forest management activities must be conducted pursuant to the approved Forest Management Plan and under the supervision of a qualified professional forester.⁵⁸ We view these restrictions on and oversight of forest management and timber harvesting as significant, and sufficient to ensure that the Easements will serve their intended function over time.

We also decline to restrict forest management practices to situations where the sole purpose is habitat improvement as requested by the Movants. The Movants' request is based solely on the existence of other easements with similar purposes that only allow commercial timber harvesting when it is for the purpose of improving the quality of habitat. As with maple sugaring, the lack of a more permissive basis for timber harvesting in those other easements does not establish that the terms of the current Easements are inconsistent with their intended function. There is nothing in the evidentiary record that shows a more permissive approach was considered and rejected as inappropriate in developing the earlier easements. Additionally, the differences between the various easements is a matter of degree, not a scenario of diametrical opposition. The earlier easements allow timber harvesting only for the purpose of improving habitat. The current Easements allow timber harvesting provided it does not degrade habitat in a way that interferes with the requisite ecological connectivity. The evidence shows that the Easements are currently providing sufficient connectivity and, under their terms, forest management must not degrade the usefulness of the parcels for connectivity. Additionally, according to ANR's witnesses, forests that are responsibly managed for timber and other forest products are what now

57. Easements at I.3.a.

58. Easements at III.2.

provide the majority of the ecologically connected landscape in Vermont.⁵⁹ Accordingly, we find the forest management practices, as limited by the terms of the Easements, are consistent with the intended function of providing ecological connectivity.

Lastly, we do not share the Movants' concern over the lack of specificity on the number and location of potentially allowable patch cuts of up to two acres under the terms of the Easements. First, the patch cuts are subject to all the restrictions described in the Easements, including maintaining ecological connectivity and a biologically healthy and diverse forest. Second, attempting to set forth the number and location of potential patch cuts at this time, for parcels of land that are being permanently conserved, strikes us as overly restrictive and faced with the potential for unintended consequences. A location that looks acceptable for a patch cut today may not be acceptable over time given that conditions may change. Allowing these decisions to be made on a going-forward basis, subject to the restrictions and supervision imposed by the Easements, is a more sensible approach to this issue.

C. Sugar House Complex

The Movants object to the location of the existing sugar house complex, and contend that it should be relocated somewhere outside the STA, or, at a minimum, that no additional growth should be allowed within this two-acre parcel.⁶⁰

GMP asserts that the evidence shows that, while it is not ideal to have the existing sugar house in its current location, it constitutes a pre-existing condition and requiring its removal would be unfair. Additionally, allowing the sugar house to remain, with the potential for additional infrastructure within the two-acre area, was seen as an acceptable concession by ANR that allowed ANR to maximize the size and overall quality of the Easements.⁶¹ GMP further contends that the evidence demonstrates that animals are currently moving through the area even with the existing sugar house complex, that the Movants ignore the fact that obtaining the Easements was a matter of negotiation, and that there is no evidence that additional structures in

59. Austin/Sorenson pf. at 4.

60. Movants Brief at 21.

61. GMP Brief at 11.

the current complex will impair connectivity since the Easements do not rely on this two-acre exclusion to meet their intended connectivity function.⁶²

ANR states that the evidence shows wildlife currently moves through the STA, which includes the sugar house complex as part of the existing maple-sugaring operation, and that its presence is therefore consistent with the intended function of the Easements.⁶³

We conclude that the existence of the sugar house complex on a two-acre parcel within the protected property generally, and the STA in particular, is an acceptable impact. First, the evidence shows that wildlife is currently utilizing this area for passage across East Hill Road, even with the sugar house complex in its current location. The Easements will ensure that this continues to be the case.⁶⁴ Second, the two-acre sugar house complex, while located within the STA, is outside of the Boomhour Brook riparian corridor, which is an important connectivity resource on the parcels.⁶⁵ While the existence of the sugar house complex is not ideal, the evidence demonstrates that it is not having a significant impact on connectivity across East Hill Road in the area encompassed by the parcels. The majority of the STA that parallels East Hill Road is unaffected by its presence, and the vast majority of the overall Eden's Echo parcel is also unaffected by the complex. With respect to additional structures being placed within the predetermined two-acre parcel, ANR has testified that any impacts from such an expansion are acceptable and will not unduly impair the connectivity function of the Easements.⁶⁶ We determine this is a reasonable conclusion.

62. GMP Reply Brief at 8-9. GMP's characterization of the sugar house complex as being excluded from the description of the protected property is not accurate. The two acres designated as the sugar house complex are in fact part of the protected property covered by the Easements. There is a 10-acre exclusion for potential residential development that was specifically excluded from the description of the Eden's Echo protected property. However, this is not the case with respect to the two-acre sugar house complex. Rather, the existence of the sugar house complex is a permitted use within the protected property. *See* Eden's Echo Easement at 1, 13-14 and III.14.

63. ANR Reply Brief at 3.

64. Tr. 5/1/12 at 89-91 (Austin).

65. Exh. Pet.-CP-14. Austin/Sorenson pf. at 6.

66. Tr. 5/1/12 at 58-59 (Sorenson).

D. Hunting

The Movants contend that hunting should not be allowed within the STAs, and should be restricted on the parcels during seasonal migration. According to the Movants' witness, use of the parcels as wildlife corridors will herd species into a narrow area to allow them to migrate between habitat blocks. If hunters are allowed to kill the wildlife, the wildlife will remember this and avoid using the parcels.⁶⁷

GMP asserts that there is no evidence supporting the Movants' claim regarding the funneling of wildlife into a limited area and an increase in hunting that would cause animals to avoid the parcels. GMP further claims that wildlife is already using the parcels as a travel corridor due to residential development on East Hill Road outside of the Easements, and the Easements simply preserve what is already taking place.⁶⁸

We find the Movants' position on this issue to be without merit. First, ANR's witness testified that he has seen no instances in this region of wildlife avoiding an area due to hunting.⁶⁹ Second, the evidence shows that wildlife is already using this corridor to move between the two habitat blocks. Their area of movement is limited by the presence of residential development on other parts of East Hill Road and influenced by the topography of the Boomhour Brook riparian corridor.⁷⁰ The fact that wildlife continues to pass through this somewhat defined corridor without the impacts claimed by the Movants undermines the Movants' arguments. We therefore decline to place any restrictions on hunting in the Easements, provided that it occurs in a manner that is consistent with the primary purpose of the Easements, and elect instead to rely on the restrictions imposed by Vermont statute and regulation.

E. Septic Systems

The Movants recommend that any septic systems constructed to serve residential structures built within the 10-acre exclusion on the Eden's Echo parcel be required to be built

67. Movants Brief at 22; Johnston pf. at 11.

68. GMP Reply Brief at 9-10.

69. Tr. 5/1/12 at 98 (Austin).

70. Tr. 5/1/12 at 89-90 (Austin).

within that 10-acre exclusion. Only as a last resort, the Movants state, should septic systems be allowed outside the excluded area, but never within the STA.⁷¹

GMP counters that the Movants inaccurately describe the terms of the Easements, and that all reasonable efforts must be made to locate any such septic systems within the 10-acre exclusion before a location on the protected property can be considered. Further, GMP states that the placement of any septic systems outside the exclusion must be done in a manner consistent with the purposes of the Easements and minimize the loss of agricultural soils.⁷²

The Movants overstate what is allowed with respect to the placement of septic systems under the Eden's Echo Easement. The Easement expressly excludes 10 acres from the property conserved by the Easement. However, unbridled development is not allowed on these 10-acres. No more than five single-family residential structures may be built in the exclusion, and the water and wastewater systems serving any such residences must be located within the exclusion if at all reasonably possible. In the event locating such systems on the exclusion is not possible, they may be placed on the conserved property provided that can be done in a manner consistent with the purposes of the Easement. Any such systems, whether in the exclusion or outside of it, must be designed and installed by licensed designers and installers and must comply with applicable regulations. Lastly, any proposed systems are subject to VLT's review and approval for consistency with the purpose of the Easements.⁷³ We conclude that, with the restrictions imposed by the Eden's Echo Easement, the placement of septic systems to serve up to five single-family residences on the 10-acre exclusion can only be done in a manner that is consistent with the connectivity function of the Easements.

F. Rural Enterprises

The Movants state that any rural enterprises that are to be allowed on the Easements should be more clearly defined, and their locations established now to ensure they will not have a

71. Movants Brief at 22-23. The Movants also request that it be made clear in the Easement that the allowed residential structures can only be built within the 10-acre exclusion. We need not take any action on this request because it is already clear from the plain language of the Eden's Echo Easement that this is the case.

72. GMP Reply Brief at 10.

73. Eden's Echo Easement at III.17.

detrimental impact on the connectivity value of the parcels. The Movants further state that rural enterprises that result in increased traffic and noise, such as farmstands, should not be allowed, or must be sited in locations that would limit the potential for human/wildlife conflicts and reduce noise impacts to interior forest species.⁷⁴

GMP contends that the Movants' position is unsupported because rural enterprises are allowed only to the extent they: (1) are consistent with the primary purpose of the Easements; (2) allow the economically viable use of the parcels for forestry, maple sap and sugar production and open space and conservation; and (3) must receive written approval from VLT prior to construction. GMP states that these protections are adequate to address the Movants' concerns.⁷⁵

We decline to condition approval of the Easements as requested by the Movants. The Movants again appear to overlook significant restrictions on the activities that will be allowed and appear to assume that unchecked development will result if the rural enterprise usage isn't curtailed as requested. However, while VFWD approval is not required for rural enterprises, advance approval from VLT is required for any proposed rural enterprise, and such approval may be withheld in VLT's sole discretion. Any such enterprise must not conflict with the intended connectivity function of the parcels, and it must be for the purpose of supporting the economically viable use of the parcels as envisioned by the Easements themselves. Given the restrictions already in place, we do not share the Movants' concerns with respect to the rural enterprise provisions of the Easements and decline to modify them as Movants request.

4. A Second Corridor

The Movants assert that a second corridor is required to secure adequate connectivity in the event the corridor secured by the Easements becomes unusable. The Movants contend that the allowance of maple sugaring will lead to a monoculture of maple trees that will make the parcels susceptible to "catastrophic infestation," requiring a second corridor to ensure continued

74. Movants Brief at 23.

75. GMP Reply Brief at 10-11.

connectivity.⁷⁶ The Movants suggest potential parcels for a second corridor on a map included with their prefiled testimony.⁷⁷

GMP responds that a second corridor is neither necessary nor feasible. First, GMP states that the evidence, including the opinions of the ANR witnesses that the Easements satisfy paragraph 3.2 of the Natural Resource MOU, amply demonstrates that the Easements will fulfill their required functions and there is therefore no basis to require a second corridor. GMP contends that the Movants' recommendation for a second corridor is based on the faulty premise that maple sugaring will result in a monoculture of maple trees and overlooks the fact that any maple sugaring and forest management must be conducted consistent with maintaining ecological connectivity, and a diverse and healthy forest. GMP also asserts that the Movants overstate the testimony of ANR witness Mr. Sorenson, and attempt to turn what was an aspirational statement that a second corridor is a good idea in principle, into support for a finding that the Easements in and of themselves are inadequate.⁷⁸

We conclude that the Easements are adequate to fulfill their intended connectivity function and that a second corridor is not required to meet Condition 17.⁷⁹ First, we find the Movants' premise regarding what they appear to believe will be an inevitable monoculture of maple trees throughout the parcels to be unsupported by the record. As GMP notes, the Easements require that the Allowable Activities be conducted in a manner that supports the Easements' usefulness for ecological connectivity, and equally important to Movants' argument here, supports a healthy and diverse forest. The Movants' argument is also faulty in that only portions of the parcels are suitable for maple sugaring given that they are comprised of a variety of forest community types, such as northern hardwood forest, spruce/fir forest, scrub/shrub wetlands, beaver influenced wetlands, and openings and harvested areas that are regenerating to various stages of forest habitat.⁸⁰ In addition to natural restrictions on where maple sugaring may occur, maple sugaring will also be restricted by the Forest Management Plans required under

76. Movants Brief at 24-25.

77. Exhs. KJ-4 and KJ-5.

78. GMP Reply Brief at 11-12.

79. Because we have determined that a second corridor is not required, we need not address the feasibility of obtaining one.

80. Exhs. Towns-Cross-8 and 9 at 4-5.

the Easements. For example, the draft proposed plan for the Eden's Echo parcel restricts maple sugaring to 350 out of approximately 950 acres.⁸¹ Based on the foregoing, the Movants' concerns about a monoculture of maple trees developing on the parcels is unfounded.

We also find that the Movants have taken Mr. Sorenson's testimony about a second corridor out of context.⁸² Mr. Sorenson was agreeing that, in principle, a second corridor is a good idea. He was not equating the lack of a second corridor with an inadequacy of the Easements to achieve their intended function. To the contrary, the position of both ANR witnesses throughout this phase of the proceeding has been that the Easements, as established, are sufficient to perform their intended function of ecological connectivity. While, in an ideal scenario, a second corridor might be desirable, the question at hand is not what is ideal, but what is required by Condition 17. The evidence of record demonstrates that the Easements are adequate to meet those requirements.

5. Potential Thinning on Boomhour Brook Parcel

The Movants contend that ANR should be required to investigate whether or not any thinning activities occurred on the Boomhour Brook parcel during the winter of 2011-2012, and report the results of its investigation to the Board and the parties. The parties, Movants assert, should then have an opportunity to comment on the impacts of any thinning that may have taken place on the adequacy of the Easements to meet their intended connectivity function.⁸³ The Movants' concerns are apparently based on clearing and road-building activities that occurred in July of 2011 on parcels owned by Trip Wileman which had been conserved as a condition of project approval.⁸⁴

GMP asserts that the Movants' arguments are unfounded for three reasons. First, Mr. Sorenson testified on behalf of ANR that thinning is the type of activity that is well within the types of activities that can occur while maintaining connectivity. Second, if any thinning did

81. Tr. 5/1/12 at 18 (Sorenson); exh. Pet.-CP-14.

82. This is not the first time that the Towns of Albany and Craftsbury have taken Mr. Sorenson's testimony out of context in an attempt to advance a position in this proceeding. *See* Docket 7628, Order of 9/6/11 at 10-11.

83. Movants Brief at 26.

84. Tr. 5/1/12 at 78 (statement by counsel).

occur it would need to have been done consistent with the forest management plan applicable to the parcel at that time. Third, the Movants' comparison to events that took place on the Wileman property in July 2011 is not appropriate.⁸⁵

Based on the language of the BDR for the Boomhour Brook parcel and the testimony of ANR's witness, Mr. Sorenson, we decline to require ANR to conduct the investigation and file the report as requested by the Movants. First, the BDR for the Boomhour Brook parcel states that the owner "plans to conduct some thinning in the hardwood stands" during the winter of 2011-2012. Based on the plain language of the BDR, we conclude that there will not be any significant openings created in the forest canopy as might be expected if the operative term was instead "clearing" rather than "thinning." This conclusion is supported by Mr. Sorenson's testimony that thinning is within the accepted range of activities that can be undertaken while still maintaining ecological connectivity.⁸⁶ Lastly, the clearing activities that took place on Mr. Wileman's property in July of 2011 were extreme and well beyond any ordinary understanding of the term "thinning." And while unfortunate, the impacts of those actions were addressed through a mitigation and restoration plan.⁸⁷ We make clear in today's Order that we expect the terms and conditions of the Easements to be enforced with respect to all permitted uses on the Easements, including, but not limited to, maple sugaring, commercial forestry and rural enterprises, and that any violations thereof will be brought to our attention by the entities responsible for enforcing the terms of the Easements.

6. Vermont Land Trust as Grantee

The Movants state that the Board should not permit VLT to oversee the implementation of the Easements. The Movants first contend that GMP is attempting to shift the burden of persuasion from itself to the Movants, and require the Movants to show that VLT is not qualified to oversee the Easements. Rather, the Movants assert, the burden is with GMP to demonstrate that VLT is qualified to administer the Easements. The Movants also contend that the oversight

85. GMP Reply Brief at 12.

86. Tr. 5/1/12 at 81 (Sorenson).

87. Docket 7628, Order of 8/31/11.

structure as proposed would have decisions about the Easements that could result in impacts that severely degrade the connectivity value of the parcels made by an entity that has a tendency to promote such activities, and that has not appeared before the Board to explain how its decisions would be made.⁸⁸

GMP counters that there is evidence that strongly demonstrates VLT's qualifications and capability to act as grantee under the Easements, and that the Movants have not produced any evidence to the contrary. GMP further asserts that having VLT as grantee of the Easements does not altogether divorce ANR from ongoing oversight of the Easements.⁸⁹

The question before us on this issue is, again, what does Condition 17 require, and have those requirements been met? Condition 17 requires GMP to secure prudent fragmentation-connectivity easements of adequate size and location, pursuant to the requirements of paragraph 3.2 of the Natural Resource MOU.⁹⁰ Condition 17 does not require any specific mechanism or grantee for the Easements. Accordingly, provided that VLT is qualified to appropriately administer the Easements, the requirements of Condition 17 are met.

The evidence in the record demonstrates that VLT is adequately qualified to act as grantee. ANR's witnesses have testified to VLT's qualifications and abilities, stating that VLT is a "well-qualified conservation organization that can serve as an effective partner to hold, steward, monitor, and enforce the terms of the easements in this case."⁹¹ Further, ANR's witnesses testified that VLT's mission is compatible with the goals sought to be achieved in implementing the Easements.⁹²

The Movants' argument that GMP has inappropriately attempted to shift the burden of persuasion on this question is without merit. A petitioner's burden of proof involves two concepts—the burden of production and the burden of persuasion. Under its burden of production, a petitioner has a duty to introduce enough evidence to allow the Board to find in its favor on a particular question. Under its burden of persuasion, a petitioner has a duty to convince

88. Movants Reply Brief at 8-9.

89. GMP Reply Brief at 7.

90. Docket 7628, Order of 7/12/11 at 161.

91. Austin/Sorenson pf. at 10.

92. Austin/Sorenson pf. at 9.

the Board to view the facts in a way that favors the petitioner.⁹³ And, while the burden of persuasion remains with the petitioner, the burden of production can shift. Once the petitioner has carried its initial burden of production, then the non-petitioner parties must present evidence contrary to the petitioner's evidence on the question at issue, in this case whether VLT is qualified to serve as grantee under the Easements. GMP points to clear and unequivocal testimony by ANR's witnesses that VLT is qualified and capable to act as grantee under the Easements. Thus, the burden of production shifted to the Movants to present evidence that VLT is not qualified to administer the easements. The Movants presented no such evidence, and instead make arguments not directly supported by the evidentiary record. Accordingly, the Movants have failed in their burden of production, and GMP has met both its burden of production and its burden of persuasion on the question of VLT's qualifications to act as grantee under the Easements.

We are also not persuaded by the Movants' arguments that there is a lack of information for the Board to conclude that decisions by VLT will be made appropriately. The required criteria under which VLT must conduct its reviews and decision-making processes are already set forth expressly in the Easements, examples of which have been discussed in several places in this Order.

CONCLUSION

For the foregoing reasons, the Movants' Motion is denied and we affirm our Order of December 23, 2011, finding that the Easements satisfy the requirements of Condition 17.

SO ORDERED.

93. *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 9/1/11 at 3 (citing Blacks Law Dictionary (9th ed. 2009)).

Dated at Montpelier, Vermont, this 28th day of June, 2012.

<u>s/James Volz</u>	)	
	)	PUBLIC SERVICE
	)	
<u>s/David C. Coen</u>	)	BOARD
	)	
	)	OF VERMONT
<u>s/John D. Burke</u>	)	

OFFICE OF THE CLERK

FILED: June 28, 2012

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.