

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: 8/31/2011

ORDER RE GMP REMEDIATION AND SUPPLEMENTAL MITIGATION

INTRODUCTION

On August 11, 2011, the Public Service Board ("Board") issued its Order re Compliance With Condition 15(a) ("Compliance Order") to establish a process to determine whether Green Mountain Power Corporation ("GMP") had adequately remediated impacts resulting from recent unauthorized activities undertaken on certain parcels of land to be conserved pursuant to a stipulation between GMP and the Agency of Natural Resources ("ANR") dated February 23, 2011 ("Natural Resource MOU"),¹ as modified by our May 31, 2011, Order (the "May 31 Order") and Certificate of Public Good ("CPG") issued in this docket approving, subject to certain conditions, the construction and operation of the proposed wind electric generating facility.² Among other things, the Natural Resource MOU requires GMP to cause four land parcels to become subject to conservation easements ("Parcels 1, 2, 3 and 4" or the "Mitigation Parcels") to mitigate the project's impacts to wildlife habitat. Pursuant to the Natural Resource

1. The Natural Resource MOU was admitted into evidence as exhibit GMP-ANR-1.

2. Condition 15(a) of the May 31 Order and CPG requires GMP to comply with the requirements of the Natural Resource MOU.

MOU, GMP is required to have the conservation easements for Parcels 1, 2 and 3 in place prior to the commencement of project construction, and the conservation easement for Parcel 4 in place prior to commencement of commercial operations.³

The need for the Compliance Order arose when GMP and ANR noticed during a visit to the project site that the owner of the property where the project will be located, Mr. Wileman, had undertaken earthwork and logging road activity on a portion of his lands that are designated for conservation as Parcels 1, 2 and 3. GMP also noticed that one of its contractors, without authorization, had cut down trees within the area to be cleared for the project's access road. The Compliance Order directed GMP to file a number of documents with the Board explaining in detail the extent of Mr. Wileman's and its contractor's activities, any impacts to the Mitigation Parcels and their intended functions that resulted from those activities, what actions GMP has undertaken to remediate the Mitigation Parcels, the degree to which the remediation actions will restore the Mitigation Parcels and their intended functions, and any supplemental mitigation being proposed to offset the impacts to the Mitigation Parcels. GMP was ordered not to commence site preparation or project construction until after the Board found that GMP had adequately addressed the impacts to the Mitigation Parcels. Parties with standing on natural resource issues were given one week to file comments on GMP's filing.⁴

GMP undertook remediation actions pursuant to an Order issued by ANR under 10 V.S.A. § 1272 on August 5, 2011 ("1272 Order"). On August 17, 2011, GMP filed documents in response to the Compliance Order which it contends demonstrate that, through a combination of remediation actions and proposed supplemental mitigation, the Mitigation Parcels have been appropriately remediated and that their intended functions have been restored. GMP represented that ANR has found that GMP satisfactorily completed the remediation actions required by the 1272 Order, subject to on-going monitoring and maintenance, primarily regarding erosion prevention and sediment control measures. In addition to the documents filed in response to the Compliance Order, on August 17, 2011, GMP also filed a Motion Concerning Order re Compliance with Condition 15(a) (the "GMP Motion"). In its motion, GMP asks the Board to

3. Exh. GMP-ANR-1 at ¶¶ 2.1.2.f., 2.2.2.e., 2.3.2.d., and 3.1.2.b.

4. Docket 7628, Order of 8/11/11 at 12-13.

amend the Compliance Order to allow construction to proceed, subject to GMP meeting all other pre-construction requirements, pending Board review and approval of the remediation actions and the proposed supplemental mitigation.

In this Order, we find that GMP's remediation actions and proposed supplemental mitigation have adequately addressed the impacts resulting from the recent unauthorized activities undertaken on Parcels 1, 2 and 3, subject to ongoing monitoring as required by ANR pursuant to its authority under 10 V.S.A. § 1272. Because today's Order finds that GMP has adequately addressed the impacts to the Mitigation Parcels, the GMP Motion is moot and the Towns of Albany and Craftsbury (the "Towns") motion for technical hearings is denied.

POSITIONS OF THE PARTIES

Green Mountain Power

GMP contends that it has worked intensively with ANR since discovering the impacts to the Mitigation Parcels in order to identify, plan and execute the necessary remediation actions, and that it has completed all the remediation work required by ANR and filed all the documentation required by the Compliance Order.⁵ GMP argues that further postponement of construction increases the risk that the project will not be operational by December 31, 2012, thus placing the availability of the federal Production Tax Credits ("PTCs") at risk, and that it will add to the costs associated with managing and adjusting a complex construction schedule in an attempt to keep it on track for completion by December 31, 2012. GMP asserts it is therefore critical that construction be allowed to commence as soon as possible.⁶ GMP further argues that commencement of construction will not hinder the Board or parties' ability to review the effectiveness of the remediation actions and proposed supplemental mitigation, because project construction will not occur on Parcels 1, 2 or 3, where the Wileman activities and their related impacts occurred, or on the newly proposed supplemental mitigation parcels. GMP further contends that its contractor's tree-cutting activities occurred entirely within the access road corridor, an area that will be cleared as part of project construction anyway, and therefore have

5. GMP Motion at 3.

6. GMP Motion at 3-4.

no impact on the functions of the Mitigation Parcels. GMP states that the Board will have a "full opportunity to evaluate GMP's conduct and its impacts, and to issue any additional orders regarding mitigation" even if construction is allowed to commence pending this review.⁷ GMP acknowledges that it would be proceeding at its own economic risk if the Board allows it to move forward and it elects to do so prior to receiving Board approval of the remediation actions and proposed supplemental mitigation.⁸

On August 24, 2011, GMP filed comments in response to comments filed by the Towns on the same date.⁹ GMP contends that the Towns' comments regarding the adequacy of the proposed supplemental mitigation, consisting of the conservation of two additional parcels of land to offset fragmentation impacts to Parcels 1 and 2 that resulted from Mr. Wileman's activities, are deficient on their face and should be ignored by the Board because they incorrectly take the position that the new parcels must be connected to Parcels 1 and 2 to be considered adequate.¹⁰ GMP also states that the Towns do not challenge its compliance with the 1272 Order.¹¹

Albany and Craftsbury

On August 18, 2011, the Towns filed an opposition to the GMP Motion. The Towns contend that the remediation activities cannot be considered complete and in compliance with the

7. GMP Motion at 4-5.

8. GMP Motion at 6.

9. See the description of the Towns' position for a summary of their August 24, 2011, comments.

10. GMP Reply Comments at 1-2. We disagree with GMP's characterization of the Towns' argument regarding the ability of Parcels 3a and 3b to offset the fragmentation effects from Mr. Wileman's activities on Parcels 1 and 2. GMP claims that the Towns incorrectly argue that Parcels 3a and 3b are inadequate to offset the fragmentation because they are not connected to Parcels 1 and 2, and that there is no requirement that they be connected to those parcels. GMP claims that the argument is therefore facially deficient and should be disregarded by the Board. However, we read the Town's argument to say that Parcels 3a and 3b are inadequate to offset the fragmentation effects to Parcels 1 and 2 because they are located on opposite sides of the crane path and turbine pad clearing area and therefore do not provide connectivity between larger unfragmented blocks of habitat. Therefore, the Towns argue, there is no connectivity provided by Parcels 3a and 3b, and their conservation provides no offsetting value for the fragmentation impacts on Parcels 1 and 2.

11. GMP Reply Comments at 2. GMP's assertion that the Towns did not challenge its compliance with the 1272 Order in their August 24, 2011, filing is technically an accurate statement. However, it overlooks the fact that in the Towns' Opposition, filed August 18, 2011, the first argument presented by the Towns advanced their position that GMP had not fully complied with the 1272 Order.

1272 Order because the Order calls for restoration of vegetative cover on Parcels 1 and 2 and such restoration could take decades to actually occur.¹² The Towns further argue that construction cannot be allowed to commence prior to a Board determination that the impacts from the project have been properly mitigated. Mitigation for certain project impacts was to be achieved through conservation of Parcels 1, 2 and 3, but the condition of those parcels has changed since the Board issued its May 31, 2011, Order so it is now unclear if they remain sufficient to mitigate for project impacts as intended.¹³ The Towns also assert that the Board cannot rule on "this matter"¹⁴ by taking only the word of the Petitioner, as this would clearly violate the due process rights of other parties."¹⁵ The Towns note that the materials filed by GMP's consultant are not in the form of affidavits and are not in the record, and contend that the Board is therefore prohibited from relying on them in rendering its decision. The Towns assert that until sworn testimony, subject to cross-examination, is made part of the record, there is no basis for the Board to find that mitigation for project impacts is sufficient.¹⁶ And, the Towns conclude, because the Board relied on the Natural Resource MOU to mitigate project impacts to the natural environment, and because that MOU required Parcels 1, 2 and 3 to be conserved prior to construction, construction cannot be allowed until a determination is made that the remediation actions and proposed supplemental mitigation are sufficient to offset project impacts.¹⁷

On August 24, 2011, the Towns filed comments¹⁸ on GMP's August 17, 2011, filing which in large part reiterate their arguments from their August 18, 2011, filing. However, the Towns also contend that GMP's filing fails to demonstrate that GMP's remediation actions have

12. Towns' Opposition at 2-3.

13. Towns' Opposition at 4-5.

14. It is not clear from the Towns' Opposition when they refer to "this matter" whether they are referring to the GMP Motion or to the broader question of the adequacy of GMP's remediation actions and proposed supplemental mitigation.

15. Towns' Opposition at 5 (citations omitted).

16. Towns' Opposition at 5 (citations omitted).

17. Towns' Opposition at 6.

18. The Towns' filing included a motion for technical hearings and was accompanied by an affidavit executed by Justin Martin Lindholm in support of the Towns' arguments. The arguments made in support of technical hearings are essentially the same as those presented in the Towns' August 18, 2011, filing.

adequately mitigated the impacts of Mr. Wileman's activities on Parcels 1, 2 and 3 and instead simply describes the initial conservation values for the parcels and the work that has been done, without adequately explaining how the work has restored those original conservation values.¹⁹ The Towns also contend that the individual drafting the memorandum prepared by GMP's consultant, Vanasse Hangen Brustlin, Inc., ("VHB") in support of GMP's position is actually not properly qualified to render an opinion on habitat fragmentation because his resume indicates no experience or training in this field.²⁰ The Towns also argue that the reasoning underlying VHB's conclusion that there are no fragmentation impacts to Parcels 1 and 2 is flawed because it ignores the creation of new gaps in forest canopy and the amount of time the cleared areas will take to regenerate.²¹ Lastly, the Towns contend that the proposed supplemental mitigation, consisting of two additional parcels of land totaling approximately 172 acres to be subject to conservation easements, cannot be used to offset the fragmentation impacts from the clearing conducted on Parcels 1 and 2 because the new parcels are on opposite sides of the area to be cleared for the crane path and turbine pads and thus provide no connectivity between unfragmented habitat blocks, and in any event, GMP should receive no credit for their conservation since they are not amenable to logging activities or other development given their geographic features.²²

On August 29, the Towns filed comments in response to comments filed by ANR on August 25, 2011. The Towns assert that ANR's August 25, 2011, comments admit that the supplemental mitigation parcels do not provide habitat connectivity and therefore cannot be considered adequate to offset the fragmentation impacts to Parcels 1 and 2. According to the Towns, the only way to mitigate fragmentation, regardless of the scale of the impact, is through the establishment of habitat connectivity.²³

19. Towns' Comments at 5-6.

20. Towns' Comments at 6-7.

21. Towns' Comments at 7-9.

22. Towns' Comments at 10-13.

23. Towns' Reply Comments at 1-4.

Lowell Mountains Group

On August 29, 2011, Lowell Mountains Group, Inc. ("LMG") filed comments in response to comments filed by ANR on August 25, 2011. LMG contends that ANR's comments are an acknowledgment that the proposed supplemental mitigation does not offset the fragmentation impacts on Parcels 1 and 2. LMG argues that ANR's comments do not address the concerns raised by the Board in its Memorandum dated August 24, 2011, and renews its request for discovery and technical hearings.²⁴

Agency of Natural Resources

On August 24, 2011, ANR filed comments in response to GMP's August 17, 2011, filing. ANR states that it is satisfied that the proposed supplemental mitigation adequately offsets both the impacts to the intended mitigation functions of Parcels 1 through 4, as well as any habitat fragmentation resulting from the recent clearing activities on the parcels. ANR also states that the restoration activities required by the 1272 Order have been satisfactorily performed.²⁵

On August 25, 2011, ANR filed supplemental comments in response to a Memorandum from the Board Clerk's Office dated August 24, 2011. ANR states that the fragmentation impacts from the recent clearing activity on Parcels 1 and 2, while temporary, are not insignificant, and while there is "no practical way to unfragment the forest canopy, what can be done is: (1) place further restrictions on the land subject to easements for Parcels 1, 2, 3 and 4; and (2) tie up more land around the project and ensure proper stewardship of that land through new conservation easements."²⁶ With respect to habitat connectivity, ANR states the proposed supplemental mitigation is not intended to serve the same purpose as the connectivity easements required under the Natural Resource MOU. The connectivity easements are needed because of the landscape level alteration that will result from construction of the project. The recent clearing does not result in the same degree of impact to habitat connectivity or create a significant level of

24. LMG Response at 1-3.

25. ANR Comments at 1.

26. ANR Supplemental Comments at 1.

alteration to the Lowell Mountain Habitat block in the manner the project will.²⁷ ANR concludes that the proposed supplemental mitigation and the increased restrictions on allowed uses of the Mitigation Parcels results in even greater protection of wildlife within the Lowell Mountain Habitat Block than what was contemplated by the Board's May 31 Order.²⁸

DISCUSSION

For the reasons explained below, we conclude that GMP's remediation actions and proposed supplemental mitigation have adequately addressed the impacts resulting from recent unauthorized activities undertaken on Parcels 1, 2 and 3, subject to ongoing monitoring as required by ANR pursuant to its authority under 10 V.S.A. § 1272. Because today's Order finds that GMP has adequately addressed the impacts to the Mitigation Parcels, the GMP Motion is moot and the Towns' and LMG's motions for technical hearings are denied.

Parcels 1 and 2

According to the memorandum prepared by VHB, the primary impacts to Parcels 1 and 2 were associated with water quality because the logging road drainage structure construction did not conform to applicable management practices, resulting in the significant potential for soil erosion and sediment discharge.²⁹ The remediation plans for these two parcels involved removal of a newly constructed logging road to the width of a skidder trail, narrowing of the limits of clearing of an existing logging road, and stabilization and revegetation in these areas.³⁰ These efforts will ensure that there will be no permanent fragmentation effects, and reconstruction or removal of substandard drainage structures to meet ANR standards will restore the water quality functions of the two parcels. According to VHB, any temporary habitat fragmentation effects will be adequately mitigated by the proposed supplemental mitigation.³¹

27. ANR Supplemental Comments at 2.

28. ANR Supplemental Comments at 2.

29. VHB Memo dated 8/15/11 at 3-4.

30. VHB Memo dated 8/15/11 at 5-6.

31. VHB Memo dated 8/15/11 at 6.

We find that the steps undertaken to remediate the water quality impacts to Parcels 1 and 2 are sufficient to restore those parcels and their intended mitigation functions to the levels that existed prior to Mr. Wileman's activities. We base this conclusion on our review of GMP's documentation as well as ANR's statement that GMP has satisfactorily completed the restoration activities required by the 1272 Order. The removal or improvement of sub-standard drainage features, coupled with the revegetation and stabilization activities undertaken along the two logging roads, convince us that these parcels will retain the water quality functions and values that led us to conclude that they were part of an appropriate mitigation plan for overall project impacts to the natural environment.

With respect to the temporary gaps in the forest canopy, we conclude that the proposed supplemental mitigation will adequately offset these impacts. The clearing associated with Mr. Wileman's logging road work on Parcels 1 and 2 totaled approximately 11.9 acres, including 41 bear scarred beech ("BSB").³² To offset these temporary impacts, GMP has proposed, and ANR has agreed, to placement of an additional approximately 172 acres under conservation easements. The land consists of two parcels, one of approximately 50 acres of forested land lying approximately between 2,100 feet to 2,300 feet above mean sea level and occupying a west aspect of the ridgeline ("Parcel 3a"). Parcel 3a includes streams, wetlands, BSB and a state significant Montane Yellow Birch Red Spruce Forest. Parcel 3a will be permanently conserved and no logging activities or logging road construction will be permitted and landowner usage will be restricted to recreational activities.³³

The second parcel, known as Parcel 3b, consists of approximately 122 acres of forested land ranging in approximate elevation from 1,900 feet to 2,500 feet above mean sea level and occupying an east aspect of the ridgeline. Parcel 3b includes streams, wetlands, BSB and a state significant Montane Yellow Birch Red Spruce Forest and state significant Montane Spruce Fir Forest. Like Parcel 3a, Parcel 3b will be permanently conserved with no logging activities or logging road construction allowed and landowner usage restricted to recreational activities.³⁴

32. VHB Memo dated 8/15/11 at 4.

33. VHB Memo dated 8/15/11 at 7.

34. VHB Memo dated 8/15/11 at 7.

Based on the information submitted by GMP and the comments filed by the parties, we conclude that no party has raised a significant issue that warrants further process with respect to GMP's August 17, 2011, filing as it relates to Parcels 1 and 2. The Towns' arguments relate primarily to the newly created gaps in the forest canopy resulting from Mr. Wileman's logging road building and maintenance. While we agree with the Towns that the impacts of Mr. Wileman's activities on Parcels 1 and 2 will not be fully eliminated until the canopy has regrown over a period time, these impacts are nonetheless temporary and are adequately offset by the permanent conservation of an additional 172 acres on terms more restrictive than those covering Parcels 1 and 2.³⁵ We reach this conclusion based on ANR's supplemental comments which explain that the impacts from the recent clearing, when viewed at the landscape level of the Lowell Mountain Habitat Block, are limited in nature and do not create the need for connectivity easements in the manner that project construction does. Thus, Parcels 3a and 3b are not intended to provide connectivity. Rather, they are intended to place more land under conservation which results in a greater degree of wildlife protection than the Mitigation Parcels by themselves as contemplated in the Natural Resource MOU.

We disagree with the Towns and LMG that Parcels 3a and 3b must provide connectivity to mitigate the fragmentation that occurred on Parcels 1 and 2. As ANR explained in its supplemental comments, it was the landscape level scale of fragmentation that would result from project construction that gave rise to the need for connectivity easements. The limited nature of the impacts to Parcels 1 and 2 does not require the same remedy, and conserving more land in the immediate area, and increasing the restrictions on the previously identified Parcels 1 through 4, will adequately compensate for the temporary impacts to Parcels 1 and 2.

The Towns have also raised the issue of GMP's compliance with the 1272 Order. Compliance with the 1272 Order is a matter currently within ANR's jurisdiction.³⁶ The issue before the Board is whether the remediation actions and proposed supplemental mitigation are

35. The conservation of the newly identified 172 acres results in a mitigation ratio of almost 17:1.

36. ANR indicated in its August 24, 2011, comments that the remediation actions required by the 1272 Order had been satisfactorily performed.

sufficient to offset the impacts from the recent activity on the Mitigation Parcels, not whether GMP is in compliance with the 1272 Order.

Parcel 3

According to VHB, the primary impacts to Parcel 3 were also associated with water quality because the clearing, grading and placement of fill within the Class II wetland and buffer zone resulted in a reduction in the area's ability to provide water quality protection to the wetland itself, with the significant potential for soil erosion and sediment export. VHB also concluded that there was a minor potential for impact to wildlife habitat from Mr. Wileman's activities in Parcel 3 due to the change in condition and functions within the impacted portion of the wetland and buffer zone.³⁷

Remediation actions for impacts to Parcel 3 included removal of fill from the Class II wetland area, regrading of the buffer zone with all areas to be seeded with appropriate seed mixes, planted with plugs and trees and stabilized with straw mix. GMP will monitor revegetation and soil stabilization consistent with the requirements of the project's post-construction revegetation plan. VHB concludes that, as a result, no permanent impacts to the Class II wetland and buffer will remain. Additionally, VHB states that any temporary impacts to the wetland will be offset by the additional conserved wetlands located on Parcels 3a and 3b.³⁸

No party has submitted comments that contest the information submitted by GMP with respect to the remediation actions on Parcel 3. ANR submitted comments stating that GMP has satisfactorily completed the activities required by the 1272 Order and that the proposed supplemental mitigation also adequately offsets any impacts to Parcel 3. Additionally, our review of the information submitted leads us to conclude that no significant issues have been raised that warrant further process with respect to GMP's August 17, 2011, filing as it relates to Parcel 3.

37. VHB Memo dated 8/15/11 at 4-5.

38. VHB Memo dated 8/11/15 at 4, 8.

Parcel 4 and GMP Contractor Tree Cutting

According to VHB, no activities were undertaken by Mr. Wileman on Parcel 4 and all tree cutting performed by GMP's contractor occurred within the corridor for the project's access road. Therefore, VHB concludes that no impacts occurred to any mitigating function of Parcel 4 as the result of Mr. Wileman's actions, or from any tree cutting performed by GMP's contractor.³⁹

No party has submitted comments that contest the information submitted by GMP with respect to Parcel 4. Additionally, our review of the information submitted leads us to conclude that no significant issues have been raised that warrant further process with respect to GMP's August 17, 2011, filing as it relates to Parcel 4.

We also note our disagreement with what appears to be the Towns' and LMG's⁴⁰ objections to the use of a post-certification compliance process to determine whether GMP is meeting its obligations under our Orders issued May 31 and July 12, 2011. The Towns argue that a failure to conduct evidentiary hearings with sworn testimony and cross-examination is a denial of their due process rights. However, the Towns' argument fails to account for the fact that the Vermont Supreme Court has already upheld the use of this type of post-certification process in Section 248 proceedings. In *Petition of Vermont Elec. Power Co., Inc.*,⁴¹ the Supreme Court found that Section 248 approval of a general route for a transmission line, followed by a post-certification review of a specific route, was an accepted and common practice for the Board and administrative tribunals generally. Provided parties have an opportunity for comment and to request additional hearings, the process is acceptable.⁴² In a subsequent case, the Vermont Supreme Court affirmed the Board's use of conditional approvals under Section 248, with the post-certification review process used to determine whether a petitioner has met the obligations imposed by the conditions of approval. The use of this process was again considered acceptable

39. VHB Memo dated 8/15/11 at 5.

40. LMG adopted the Towns' arguments. LMG Response at 1.

41. 131 Vt. 427 (1973).

42. *Petition of Vermont Elec. Power Co., Inc.*, 131 Vt. 427, 435 (1973).

provided parties had an opportunity to submit comments on the post-certification filings and that nothing precluded the Board from holding additional hearings if it found them necessary.⁴³

In this proceeding we approved the project subject to a number of conditions, including compliance with the requirements of the Natural Resource MOU. The process we are engaged in regarding the impacts of Mr. Wileman's activities on the Mitigation Parcels, as well as GMP's contractor's tree cutting activities, is aimed at determining whether GMP is fulfilling a portion of its obligations under the Natural Resource MOU in compliance with Condition 15(a) of the May 31 Order and CPG. For post-certification filings such as these, it is an accepted Board process to afford the parties an opportunity to comment and request a hearing on the filings, with the Board then scheduling a hearing if any party demonstrates that the filings raise a substantial issue that requires a hearing or if the Board in its discretion deems a hearing is merited.⁴⁴ Accordingly, the post-certification process being utilized to address the issues before us is compliant with Vermont Supreme Court precedent upholding its use in prior cases.

Additionally, it is not unusual for the Board to rely on expert reports in assessing compliance with conditions of approval during post-certification reviews as it does today.⁴⁵ Provided the reports contain the analyses and opinions of qualified experts, there is nothing objectionable about the Board relying on them in reaching its conclusions in post-certification proceedings in the absence of an issue warranting additional hearings or other process.

In this case, three parties submitted information with respect to the remediation actions and supplemental mitigation intended to restore the functions and values of the Mitigation Parcels. First, GMP submitted the August 15, 2011, Memorandum from its consultant, VHB, in support of its contention that any impacts to the Mitigation Parcels had been adequately remediated by its actions and by the proposed supplemental mitigation. Second, the Towns submitted the affidavit of Mr. Lindholm in support of their contention that Mr. Wileman's

43. *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 10.

44. Our experience demonstrates that with a major utility construction project such as a utility-scale wind electric generation facility or significant transmission line, it is almost inevitable that minor post-certification changes to the project are required, often as a result of unanticipated field conditions or other unforeseen practical impediments. Thus, to allow needed utility infrastructure projects to move forward, the Board must be able to review such minor changes to determine if the project continues to comply with the CPG requirements.

45. *See, e.g., Amended Petition of Vermont Wind, LLC*, Docket 7156, Order of 3/24/09 at 7-8.

clearing activities on Parcels 1 and 2 resulted in habitat fragmentation, and that those fragmentation impacts are not offset by the proposed supplemental mitigation because Parcels 3a and 3b do not provide any connectivity between unfragmented habitat blocks. Lastly, ANR filed comments that it was satisfied that the proposed supplemental mitigation adequately offset the fragmentation impacts from Mr. Wileman's clearing activities on Parcels 1 and 2, because the fragmentation impacts were limited and did not rise to the level where additional habitat connectivity was needed when viewed within the scale of the entire habitat block. ANR concluded that the addition of Parcels 3a and 3b would actually result in an increase in wildlife protection when compared to the level that would have been achieved through the Natural Resource MOU by itself.

Of these three, we find ANR's comments to be the most reliable and persuasive. ANR is the state agency charged with protecting the state's natural resources, and the supplemental comments it filed on August 25, 2011, were based on an analysis performed by a recognized qualified expert that has testified on the subject of impacts to wildlife in a number of Section 248 proceedings.

The memorandum prepared by VHB addresses both water quality and wildlife habitat issues. The memorandum was authored by Jeffrey A. Nelson, one of GMP's witnesses in the evidentiary phase of this proceeding. Mr. Nelson's resume⁴⁶ indicates that he is qualified as an expert with respect to water quality issues, but does not indicate any specific expertise related to wildlife biology or forest habitat management. A significant portion of the impacts to Parcels 1, 2 and 3 from Mr. Wileman's activities related to water quality, and thus Mr. Nelson is qualified to submit the memorandum with respect to water quality impacts and their remediation. However, given his apparent lack of expert qualifications with respect to habitat fragmentation, we are less inclined to rely on his conclusions in that regard and instead rely on the opinion of ANR's expert.

Lastly, we do not give any significant weight to the Towns' supporting affidavit because Mr. Lindholm shows only limited experience with respect to the issues now before us, especially by comparison to the experience of ANR's expert, Mr. Austin. According to his resume, Mr.

46. Exh. Pet.-JAN-1.

Lindholm was a professional tree feller from 1974-76, working in Vermont forests and observing the effects of clearing on surface waters and natural areas. In March of 2011, Mr. Lindholm was appointed to the Vermont Fish and Wildlife Board. Mr. Lindholm represents that he has read extensively on the impacts of tree clearing and other development on wetlands and other natural resources and that he has been given authority to clear trees in the Bird Mountain Wildlife Management Area.⁴⁷ We do not believe that Mr. Lindholm's representations create a sufficient basis to warrant our reliance on his opinion. He reports only that he worked felling trees for two years and that he has read extensively on the subject of impacts from tree clearing. His affidavit provides no details regarding the types of clearing activities he participated in, his role in those activities nor the types of impacts he observed and whether or how he quantified or qualified them. His affidavit also fails to provide any details about the extensive reading he claims to have undertaken over the years regarding the impacts of tree clearing, such as the number of publications read, their titles or their authors, and there is no indication that Mr. Lindholm has ever published any papers on the issues now before us, or that he has ever been qualified as an expert in any contested case or other regulatory proceeding with respect to these issues. Lastly, the affidavit fails to explain how his appointment to the Fish and Wildlife Board and his receipt of authority to cut trees in a wildlife management area relate to the impacts that Mr. Wileman's activities might have on wildlife and its movement throughout Parcels 1 and 2. In short, the affidavit fails to provide information that would warrant our reliance on Mr. Lindholm's opinion.

Because we give little weight to Mr. Lindholm's opinion, and because his affidavit was submitted in support of the Towns' arguments that GMP's remediation actions and proposed supplemental mitigation are inadequate to restore the Mitigation Parcels to their intended functions and values, we conclude that the Towns have failed to raise a significant issue that warrants additional process or hearings. We also conclude that LMG has not raised a significant issue that warrants additional process as its arguments largely mirror and adopt those of the Towns. Additionally, our review of ANR's comments and GMP's August 17, 2011, submissions, leads us to conclude that GMP's remediation actions and proposed supplemental mitigation have adequately addressed the impacts resulting from recent unauthorized activities undertaken on

47. Lindholm Affidavit at ¶¶ 2-4.

Parcels 1, 2 and 3, subject to ongoing monitoring as required by ANR pursuant to its authority under 10 V.S.A. § 1272. The Town's and LMG's motions for additional hearings are therefore denied.

CONCLUSION

For the reasons described above, we find that GMP's remediation actions in conjunction with the proposed supplemental mitigation, subject to ongoing monitoring as required by ANR pursuant to its authority under 10 V.S.A. § 1272, adequately offset the impacts that resulted from the recent activity on Parcels 1, 2 and 3. Accordingly, the Towns' and LMG's motions for technical hearings are denied and the GMP Motion is moot.

SO ORDERED.

Dated at Montpelier, Vermont, this 31st day of August, 2011.

s/ James Volz	)	
	)	
	)	PUBLIC SERVICE
s/ David C. Coen	)	
	)	BOARD
	)	
	)	OF VERMONT
	)	

OFFICE OF THE CLERK

FILED: August 31, 2011

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.

DISSENTING OPINION OF JOHN D. BURKE

I dissent from the Board's decision not to grant the requests of the Towns and LMG for additional technical hearings prior to deciding on the adequacy of GMP's remediation actions and proposed supplemental mitigation to offset the impacts from the recent unauthorized activity on Parcels 1, 2 and 3.

In this proceeding, we found that impacts to the natural environment from the construction of the project would be adequately offset by a number of actions to be undertaken by GMP. Included in those actions was the conservation of the Mitigation Parcels. However, subsequent to our decision in this matter, Parcels 1, 2 and 3 experienced potentially detrimental impacts as the result of Mr. Wileman's unauthorized earthwork, road construction and maintenance. As a result, it is not clear that, absent appropriate remediation and supplemental mitigation, these parcels still adequately offset project impacts to the point where they can be considered adverse, but not undue.

While I appreciate the efforts of all the parties in addressing this question, I do not believe the Board should decide on the adequacy of GMP's remediation actions and proposed supplemental mitigation without first giving the Towns and LMG an opportunity to cross examine ANR's expert under oath as to that very question. The Town and LMG bear no responsibility for the current situation since it was GMP who chose to deal with Mr. Wileman and I believe that due process concerns require us to hold technical hearings, rather than deny them.

I should stress that my disagreement with my colleagues is over the process being employed to decide this important question. My disagreement does not necessarily extend to their ultimate conclusion that GMP's actions may have adequately addressed the impacts from Mr. Wileman's activities. Indeed, it is only after a technical hearing at which ANR's expert is cross examined that I will be able to render my opinion on that question, one way or the other.

While my colleagues would treat this as a compliance filing, I believe this to push the limits of compliance too far. Here our original decision has to be modified because of the drastic activities which occurred on the parcels to be conserved. My colleagues make this decision without even an affidavit from ANR's expert, but rather on a letter from an ANR employee who

spoke to the expert. I understand that time constraints exist in this matter and the effect delay could have on the economic viability of the project, but that does not legitimize the abrogation of the parties' constitutional rights.

Thus, I dissent.

Dated at Montpelier, Vermont, this 31st day of August, 2011.

s/ John D. Burke

John D. Burke, Board Member

OFFICE OF THE CLERK

FILED: August 31, 2011

ATTEST: s/ Susan M. Hudson

Clerk of the Board