

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7867

Application of Seneca Mountain Wind, LLC, for)
authority, pursuant to 30 V.S.A. §§ 246 and 248, to)
install four temporary meteorological stations, two)
in the Town of Brighton, Vermont and one each in)
the Towns of Ferdinand and Newark, Vermont)

Hearing at
Montpelier, Vermont
January 23, 2013

Order entered: 8/9/2013

HEARING OFFICER: Bridgette L. Remington, Esq.

APPEARANCES: Karen Tyler, Esq.
Geoffrey H. Hand, Esq.
Andrew N. Raubvogel, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
for Seneca Mountain Wind, LLC

Aaron Kisicki, Esq.
for Vermont Department of Public Service

Donald J. Einhorn, Esq.
for Vermont Agency of Natural Resources

L. Brooke Dingledine, Esq.
Valsangiacomo, Detora & McQuesten
for the Town of Newark

Deborah T. Bucknam, Esq.
The Law Office of Bucknam Black Brazil
for Newark Neighbors United

Jeanne Gervais, Brighton Planning Commission Chair
for the Town of Brighton

James Fay, Chair
for the Essex County Natural Resources Conservation District

Robert & Shirley Elder, *pro se*

William Heath, *pro se*

Noreen Hession, *pro se*

Lydia McMillian, *pro se*

Mark Whitworth, *pro se*

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I. INTRODUCTION

In this Proposal for Decision ("PFD"), I recommend that the Vermont Public Service Board ("Board") approve the application filed by Seneca Mountain Wind, LLC ("Seneca" or the "Petitioner"), pursuant to 30 V.S.A. §§ 246 and 248, and the Board's Order implementing standards and procedures under Section 246 ("Procedures Order"),¹ and grant the Petitioner a certificate of public good ("CPG") authorizing the installation of four temporary meteorological stations, two in the Town of Brighton, Vermont, and one each in the Towns of Ferdinand and Newark, Vermont (the "Project"). I further recommend that the Board approve a Memorandum of Understanding ("MOU") between Seneca and the Vermont Agency of Natural Resources ("ANR") entered into the evidentiary record as Exhibit ANR-JMA-2.

II. PROCEDURAL HISTORY

On April 12, 2012, Seneca filed an Application with the Board, pursuant to 30 V.S.A. §§ 246 and 248, to install four temporary meteorological stations ("MET towers"), two in the Town of Brighton, Vermont, and one each in the Towns of Ferdinand and Newark, Vermont.

On April 18, 2012, after Seneca corrected an error with providing adjoining landowners adequate notice, the Application was considered complete.² Pursuant to Section 246 and the Board's *Section 246 Standards Order*, comments and requests for hearings on the Application were accepted for 30 days from the date Seneca's Application was considered complete.³

1. Order implementing standards and procedures for issuance of a certificate of public good for a temporary meteorological station pursuant to 30 V.S.A. §§ 246 and 248, Order issued March 9, 2010 ("*Section 246 Standards Order*").

2. See *Memorandum Re: Updated Adjoining Landowners List*, issued by the Clerk of the Board on 5/7/12 (finding Seneca's Application complete as of April 18, 2012); letter of April 30, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board (confirming that Ken and Joan Gammell received notice of Seneca's Application as of April 18, 2012); *Memorandum Re: Notice to Updated Adjoining Landowners List*, issued by the Deputy Clerk of the Board on 4/25/12 (requesting comments regarding notice); letter of April 19, 2012, from Andrew N. Raubvogel, Esq., on behalf of Seneca, to Susan Hudson, Clerk of the Board (updating the adjoining landowners map).

3. *Section 246 Standards Order* at 4; see also *Memorandum Re: Updated Adjoining Landowners List*, issued by the Clerk of the Board on May 7, 2012 (stating that comments regarding Seneca's completed Application were due 30 days from April 18, 2012, the date the Application was considered complete).

During the formal public comment period, which ended on May 18, 2012, the Board received numerous comments expressing concerns regarding the Application and requesting that the Board conduct a site visit, hold hearings, deny the Application, and add several environmental-related conditions to any CPG issued for the MET tower installations. Following the public comment period, Seneca filed responses to the public comments, and those members of the public who filed comments with the Board were given an opportunity to respond to Seneca's answers.

On June 29, 2012, I issued an Order adopting a schedule in this Docket, granting the Town of Newark and Newark Neighbors United ("NNU") permissive intervention, and initiating a limited evidentiary proceeding on the following discrete issues:

[T]he possibly adverse effect of: the Hawk Rock MET tower installation on black bear food sources and peregrine falcon habitat; the Hawk Rock MET tower installation on rare, threatened, or endangered species or natural communities; the Bull Mountain MET tower installation on black bear food sources; and the Brighton MET tower installation on black bear food sources; and adopted a schedule for the remainder of this docket.⁴

On July 17, 2012, I conducted a site visit at the proposed Hawk Rock MET tower site in Newark. More than a dozen members of the public attended the site visit. On July 17, 2012, the Chairman of the Board, James Volz, conducted a public hearing in Newark. More than 100 members of the public attended the public hearing and more than fifty members of the public spoke at the hearing.

On July 30, 2012, I issued an Order granting the Town of Brighton permissive intervention, denying Newark's request to expand the scope of the evidentiary proceedings, and establishing procedures for the remainder of the Docket.⁵

On August 15, 2012, I issued an Order determining that Seneca's Application was incomplete because it had not properly notified all landowners of record whose property adjoined

4. *Procedural Order re: Motions for Intervention and Schedule ("First Procedural Order")*, Docket 7867, Order of 6/29/12 at 11–12.

5. *Second Procedural Order Re: Motions for Intervention and Procedures for the Remainder of the Docket ("Second Procedural Order")*, Docket 7867, Order of 7/30/12.

the parcel on which its proposed Project would be located.⁶ Consequently, I vacated the existing procedural schedule and stayed proceedings in this Docket so that this notice defect could be corrected.⁷

On August 23, 2012, as directed by the *Third Procedural Order*, Seneca corrected the notice defect.

On September 14, 2012, I issued an Order allowing any adjoining landowners, who received notice pursuant to the *Third Procedural Order*, to file comments, requests for hearings, and motions to intervene without the restriction imposed in the *Third Procedural Order*.

On September 20, 2012, I issued a *Scheduling Order*, lifting the stay of this proceeding effective September 24, 2012, the date of the deadline for comments and motions to intervene from any landowners first receiving notice as a result of the *Third Procedural Order*.

On October 5, 2012, the Board issued an Order denying a motion for interlocutory review of nine individuals seeking intervention in this proceeding and affirming the *Second Procedural Order*.

On October 10, 2012, I issued an Order denying NNU's motion to compel Seneca to immediately respond to a number of requests to admit promulgated on Seneca by NNU or, in the alternative, deem them admitted in the absence of an immediate response by Seneca. In that Order, I also denied both Seneca's request for attorney's fees and motion for sanctions.

On October 12, 2012, I issued an Order granting William Heath, Essex County Natural Resources Conservation District ("ECNRCD"), Robert and Shirley Elder (the "Elders"), Mark Whitworth, Noreen Hession, and Lydia McMillian permissive intervention, "limited to the issues defined in the *First Procedural Order* and restated in the *Second Procedural Order*."⁸

On October 18, 2012, I held a status conference in this Docket to discuss the schedule for the remainder of the Docket.

6. *Third Procedural Order Re: Notice Requirements, Stay of Docket, and Motion for Intervention ("Third Procedural Order")*, Docket 7867, Order of 8/15/12 at 6.

7. Docket 7867, Order of 8/15/12 at 6.

8. Docket 7867, Order of 10/12/12 at 8–9.

On October 19, 2012, I issued a Scheduling Order, adopting a revised schedule in this proceeding.

On November 8, 2012, the Board issued an Order declining to grant NNU's request for the interlocutory review of the *First Procedural Order*.

On November 14, 2012, prefiled direct testimony and exhibits were filed by Seneca.

On November 15, 2012, I issued an Order reiterating that Seneca's Application was complete as of August 23 and concluding that, as such, the amendments to Newark's existing Town plan, enacted on September 17, 2012, are inapplicable in this proceeding.

On November 15, 2012, I also issued an Order concluding that Seneca substantially complied with the application requirements set forth in the *Section 246 Standards Order* and denying Newark's Motion to Dismiss or, in the alternative, Motion to Deem the Application Incomplete and Stay the Proceedings Due to Seneca's Third Failure to Notify All Abutters.⁹ In the Order, I also denied requests to expand the scope of the limited evidentiary proceeding, directed Seneca to provide copies of the Application and the Order to the owners of two adjoining parcels of land, and provided the owners of those parcels a 30-day period to file both comments on the Application and motions to intervene.

On November 21, 2012, prefiled testimony and exhibits were filed by ANR, Newark, NNU, and the Elders.

On January 16, 2013, I issued an Order ruling on objections made by Seneca to the prefiled testimony and exhibits of Newark, NNU, and the Elders.¹⁰ In the *Objections Order*, I also denied both Newark's and NNU's requests for attorney's fees.

All parties were permitted to prefile rebuttal testimony and exhibits on or before January 10, 2013. Seneca was the only party that elected to prefile rebuttal testimony.

On January 23, 2013, a technical hearing was held in the Board's hearing room in Montpelier, Vermont.

9. *Order re: Newark's Motion to Dismiss* ("*Order re: Newark's Motion to Dismiss*"), Docket 7867, Order of 11/15/12.

10. *Order re Objections to Testimony & Request for Attorney's Fees* ("*Objections Order*"), Docket 7867, 1/16/13.

On February 5, 2013, Seneca, Newark, and NNU filed post-hearing briefs and ANR filed proposed findings and conclusions.

On February 5, 2013, the Department filed a letter stating that it would not submit a brief addressing the remaining environment-related issues in the Docket. The Department's letter also stated that it supported ANR's conclusion that the MET tower installations will not have an undue adverse effect on the environment, subject to the mitigation measures and terms and conditions outlined in the MOU.

On February 12, 2013, Seneca, Newark, and NNU filed reply briefs.

No other comments were filed by the parties.

III. THE APPLICABLE LEGAL FRAMEWORK

Pursuant to 30 V.S.A. § 246(a), the Board is required to "establish by rule or order standards and procedures governing application for, issuance or revocation of, a certificate of public good for the temporary installation of one or more meteorological stations under the provisions of section 248 of this title." Further, pursuant to § 246(c), in developing the standards and procedures, the Legislature has directed that the Board "shall develop a simple application form" and "seek to simplify the application and review process, as appropriate, in conformance with this section."

To facilitate the simplified application and review process contemplated by the Legislature, the Board is authorized pursuant to 30 V.S.A. § 246(c)(3) to "waive the requirements of section 248 of this title that are not applicable to meteorological stations . . ." As is reflected in Section 3 of the Board's *Application for a CPG for Temporary Meteorological Stations, Pursuant to 30 V.S.A. §§ 246 and 248* ("MET Tower Application"), the Board requires applicants to provide a description of a project's impact with regard to the following criteria: aesthetics; historic sites; air and water purity; the natural environment; public health and safety; public investments; and orderly development of the region.¹¹

11. The Board's MET Tower Application was developed in conjunction with the *Section 246 Standards Order*. The *Section 246 Standards Order* conditionally waived review of all remaining criteria under 30 V.S.A. § 248(b) with respect to the installation of temporary meteorological towers. See *Section 246 Standards Order* at 7. However, applicants are also required to state whether a proposed project will be situated on, near or within any

After a MET Tower Application is filed with the Board, the Board may determine to hear evidence on an issue if it concludes that the proposed project raises a significant issue with respect to one or more of the substantive criteria of Section 248 listed in Section 3.3, based upon its own review or upon comments filed with the Board. To raise a significant issue, a showing must provide specific information regarding potential impacts under the criteria. In turn, this information must go beyond describing general or speculative claims.¹²

In the *First Procedural Order*, I determined that evidentiary proceedings were necessary to resolve a limited number of specific issues raised by parties and interested persons in their comments filed in response to Seneca's Application. Specifically, I identified the following potentially significant issues for hearing, namely, the possibly adverse effect of: (1) the Hawk Rock MET tower installation on black bear food sources and peregrine falcon habitat; (2) the Hawk Rock MET tower installation on rare, threatened, or endangered species or natural communities; (3) the Bull Mountain MET tower installation on black bear food sources; and (4) the Brighton MET tower installation on black bear food sources.¹³ I further clarified that my use of the term "natural communities" with respect to the Hawk Rock site was limited to "the type of, and impact to, the natural community present on the Hawk Rock cliff, and the possibility that the deer wintering yard near the proposed Hawk Rock MET tower extended into the area of clearing associated with that tower's installation."¹⁴

Accordingly, the findings and discussions that follow address all of the criteria identified in Section 3 of the Board's MET Tower Application, including those discrete issues which arise under the 30 V.S.A. § 248(b)(5) criteria and were the subject of the evidentiary proceedings undertaken in this Docket.

floodways, shorelines, streams, wetlands, outstanding resource waters, rare and irreplaceable natural areas, or necessary wildlife habitat, and if so, to demonstrate why the proposed project will not have an undue adverse impact on any such resource, explaining any measures proposed to avoid or minimize any such impact.

12. Board's MET Tower Application.

13. Docket 7867, Order of 6/29/12 at 11-12; *see also* Docket 7687, Order of 10/19/12 at 2, n.1 and 2; Docket 7867, Order of 7/30/12 at 7-8.

14. Docket 7867, Order of 1/16/13 at 6.

IV. FINDINGS

Based upon the Application, the prefiled testimony and exhibits, the MOU, and the evidence presented at the technical hearing, I have determined that this matter is ready for decision. Based on the evidence of record, I hereby report the following findings to the Board in accordance with 30 V.S.A. § 8(c).

A. Background and Project Description

1. Seneca is a Delaware limited liability company, registered to do business in Vermont, with its principal address at 155 Fleet Street, Portsmouth, NH 03801. Soininen pf. at 3; exh. Seneca-JS-2 at Section 1.

2. Seneca proposes to install four temporary MET towers, two in the Town of Brighton, and one each in the Towns of Ferdinand and Newark, Vermont. Soininen pf. at 4; exh. Seneca-JS-2 at Section 3:1-3.

3. Seneca has secured leases from the Daniel R. Ouimette Trust and Hawk Rock Holdings, LLC, totaling more than 10,500 acres of land, each lease consisting of numerous legally distinct parcels, along the borders of the Towns of Brighton, Ferdinand, and Newark for the installation of the four MET towers. The MET towers are proposed to be located on some but not all of the legally distinct parcels that are covered by the two leases. Exh. Seneca-JS-2 at Attachment A; Soininen pf. at 4.

4. In Docket No. 7037, the Board granted a CPG to EMDC, LLC, for the installation of MET towers at two of the four sites proposed in this Docket.¹⁵ MET towers have previously been operated at those locations for approximately three years but have since been taken down. Seneca has no affiliation with EMDC, LLC, and had no involvement with the previous installation or operation of those MET towers. Soininen pf. at 4.

5. The two towers Seneca proposed to site in the Town of Brighton are described in the Application as the Brighton Tower and the Bull Mountain Tower. The tower proposed for siting in the Town of Ferdinand is described in the Application as the Seneca Mountain Tower. The

15. *Petition of EMDC*, Docket 7037, Order of 9/30/05.

tower proposed for siting in the Town of Newark is described in the Application as the Hawk Rock Tower. Exh. Seneca-JS-2 at Section 3:1-3.

6. Maintenance activities at all of the proposed MET towers may include monthly battery checks and data card switch outs. Every second or third month this would also include an overall visual inspection of the towers. These activities require one person, and take thirty to sixty minutes per site. Every six months, to coincide with the monthly visits noted above, cable tension adjustments will be made as needed. These activities require four people, and take two to three hours per site. The first such adjustment must occur two to three months after the towers are installed. Lastly, every two years, sensors will be replaced. This requires three to four people and takes one day for all four sites. Soininen pf. at 6; exh. Seneca-JS-3 at 6.

7. The proposed MET towers are temporary structures and will be dismantled no later than five years from the issuance of a CPG authorizing their installation. Seneca-JS-2 at Section 3:4.

8. The proposed MET towers will not exceed 200 feet in height and will not require any FAA or other type of lighting. Seneca-JS-2 at Section 3:7.

9. The towers will range in width from approximately eight to ten inches for the Hawk Rock tubular tower and up to twenty-four inches for the Bull Mountain tower, and the towers would only be visible above the tree canopy. Seneca-JS-2 at Section 3:7.

10. The weathered galvanized or aluminum tubing and gray guy wires of the towers will tend to blend into the background under cloudy sky conditions. Seneca-JS-2 at Section 3:7.

11. When viewed from off-site public locations, the towers' narrow profiles will reduce their visual impacts, in particular from locations more than one or two miles away. The closest public road to the MET tower sites is Route 114, over one mile away. Seneca-JS-2 at Section 3:7.

12. Two of the four proposed sites have already hosted MET towers in the past, so the proposed towers will not constitute an entirely new visual element within the landscape. Seneca-JS-2 at Section 3:8.

Brighton MET tower

13. The proposed Brighton MET tower will be located in the southern part of the Town of Brighton. Exh. Seneca-JS-2 at Attachment B.

14. The Brighton MET tower site is one of the two sites at which a MET tower was previously installed, and Seneca plans to reinstall the previously-used tower. *See* finding 4; exh. Seneca-JS-2 at Section 3:1.

15. Access to the Brighton MET tower site is by an existing logging road that transitions to an all-terrain vehicle trail for the final approach. No new clearing, grading or other type of disturbance will be required to reinstall the tower previously utilized at this location. Exh. Seneca-JS-2 at Section 3:1.

16. The same tower previously used at the site, a Radian 45GSR, will be reinstalled, including foundation and anchors. The tower is owned by the landowner and will be purchased by Seneca prior to installation. It is a lattice-type tower constructed with solid steel sections and has an erected height of 190 feet above ground level. Exh. Seneca-JS-2 at Section 3:1.

17. The tower will be anchored in three directions and from four different tower levels to a single anchor point in each direction. The tower foundation consists of a tapered triangular steel base embedded within approximately four cubic yards of partially sunken concrete block. The anchors are constructed of a steel rod that is embedded within approximately one cubic yard of fully sunken concrete block. The foundation and anchors are in place and no new disturbance is required for the installation of the tower. Exh. Seneca-JS-2 at Section 3:1.

18. Installation of the tower involves adding ten-foot lattice sections in vertical sequence. Additional installation activities include mounting booms to support meteorological sensors at various heights, installing a lightning rod atop the lattice sections, and grounding the entire system, including anchors. Wind speed anemometry sensors and wind direction vanes will be installed at several heights with redundant sensors at each height, and temperature, vertical wind speed, and barometric pressure sensors will be installed at intervals along the length of the tower. The data collected by the sensors is stored in a data logger¹⁶ at the tower base, which is powered by a small solar panel mounted on or adjacent to the tower, below the height of the surrounding tree canopy. Exh. Seneca-JS-2 at Section 3:1-2.

19. Operation of the meteorological station is designed to be autonomous. Communications devices installed with the logger will transmit the collected data by cellular signal for ongoing

16. Data loggers electronically record and store information such as averages of wind speeds and directions.

remote monitoring. All maintenance visits at this site will be done by all-terrain vehicle. Exh. Seneca-JS-2 at Section 3:2.

Bull Mountain MET tower

20. The proposed Bull Mountain MET tower will be located north of Bull Mountain, near the southwest corner of the Town of Brighton. Exh. Seneca-JS-2 at Section 3:2 and Attachment B.

21. The MET tower site area has previously been logged. Only minimal new clearing of approximately 0.1 acres is required to permit access to the tower anchor locations. Exh. Seneca-JS-2 at Section 3:2.

22. Access to the site is by an existing logging road that permits pickup truck access to an existing clearing. No new clearing for access will be required. Exh. Seneca-JS-2 at Section 3:2.

23. The tower would be a lattice-type structure, 197 feet in height, manufactured by Double K Consulting (or the equivalent, depending on market availability). Exh. Seneca-JS-2 at Section 3:2.

24. The tower is supported by a baseplate and guy wires that connect nine levels of the tower to anchors in three directions. The guy wire anchors will be attached to bedrock with rock anchoring systems. Installation of the anchors may require some limited excavation to expose rock ledge. In the event that adequate rock ledge cannot be found, alternative anchors such as soil auger anchors, spade anchors, or concrete deadman anchors may be used. All anchor types can be accommodated within the area of disturbance indicated in the site plans accompanying the Application, and the final anchor type will be determined in the field. Exh. Seneca-JS-2 at Section 3:2.

25. The Double K will be assembled, and sensors and a lightning protection system installed, with the tower on the ground. The tower will then be lifted into an upright position using a gin pole and winch. Exh. Seneca-JS-2 at Section 3:2.

26. Placement of sensor equipment on the MET tower, data collection, operation and the nature of maintenance activities will be the same as for the Brighton tower. Exh. Seneca-JS-2 at Section 3:2.

27. Seneca has entered into a stipulation with ANR regarding seasonal restrictions on the timing of installation and maintenance of the Bull Mountain MET Tower. Specifically, Seneca has agreed not to install the proposed Bull Mountain MET tower or engage in planned maintenance activities, including, but not limited to, cable tension adjustment and sensor replacements, from September 1 through November 30 each year. The seasonal restrictions do not apply to: (1) monthly battery checks and data card switch outs; (2) visual inspections of towers and equipment every second or third month; and (3) unplanned (non-routine) repairs of the MET tower and equipment as necessary to prevent interruption of MET data collection. Additionally, Seneca will provide a report to ANR and the Board, by December 2nd of each year after installation of the MET towers, documenting the number of unplanned repair events by Seneca that occurred during the seasonally restricted period for the Bull Mountain MET site, and explaining the basis for each event. Exh. ANR-JMA-2 at 2.

Seneca Mountain MET tower

28. The proposed Seneca Mountain MET Tower will be located in the Town of Ferdinand. Exh. Seneca-JS-2 at Section 3:2 and Attachment B.

29. The proposed Seneca Mountain MET tower is the second of two proposed MET tower sites at which a MET tower was previously installed. Seneca-JS-2 at Section 3:2 and Attachment B.

30. Access to the site is by an existing logging road that transitions to an all-terrain vehicle trail for the final approach. Exh. Seneca-JS-2 at Section 3:2.

31. No new clearing, grading or other type of disturbance will be required to reinstall the tower that was previously utilized in this location. Exh. Seneca-JS-2 at Section 3:2.

32. The same tower previously used at the site, a Radian 45GSR, would be reinstalled, including foundation and anchors. The tower is owned by the landowner and will be purchased by Seneca prior to installation. Exh. Seneca-JS-2 at Section 3:2-3.

33. The tower to be reinstalled is a lattice-type tower constructed with solid steel sections and has an erected height of 190 feet above ground level. Exh. Seneca-JS-2 at Section 3:3.

34. The tower will be anchored in three directions and from four different tower levels to a single anchor point in each direction. The tower foundation consists of a tapered triangular steel

base embedded within approximately four cubic yards of partially sunken concrete block. The anchors are constructed of a steel rod that is embedded within approximately one cubic yard of fully sunken concrete block. The foundation and anchors are in place and no new disturbance is required for the installation of the tower. Exh. Seneca-JS-2 at Section 3:3.

35. The reinstallation, equipment to be used, data collection, and operation and maintenance will be the same as described above for the Brighton tower. Exh. Seneca-JS-2 at Section 3:3; *see also* findings 16 through 19.

Hawk Rock MET tower

36. The proposed Hawk Rock MET tower will be located in the Town of Newark. Exh. Seneca-JS-2 at Section 3:3 and Attachment B.

37. The tower will be an XHD model, constructed of tubular steel, and will be 197 feet in height. Exh. Seneca-JS-2 at Section 3:3; exh. ANR-JMA-2 at 2.

38. Access to the MET tower site is by an existing logging road that provides pickup truck access almost all the way to the site. The final 550 (+/-) feet of access will require clearing to a width of approximately eight feet. Total anticipated tree clearing for this access is approximately 0.1 acres. The MET tower site itself is currently forested, and 1.1 acres of clearing will be necessary to install the MET tower, guys and anchors. No stumping or grubbing of the trail or the MET tower site will be needed. Exh. Seneca-JS-2 at Section 3:3 and Attachments C1 and C2.

39. The XHD tubular steel tower is manufactured by NRG Systems. It is supported by a baseplate and guy wires that connect six levels of the tower to twelve anchors – three anchors in each of four directions. The guy wire anchors will be attached to bedrock with rock anchoring systems. Installation of the rock anchors may require some limited excavation to expose bedrock ledge. The rock anchor installation process requires removing approximately one square foot of topsoil per anchor to expose the rock surface. In the event that adequate rock ledge cannot be found, alternative anchors such as soil auger anchors, spade anchors, or deadman anchors may be used. Exh. Seneca-JS-2 at Section 3:3; Lew-Smith pf. reb. at 6.

40. The XHD is a tilt-up tower, which will be installed in the same manner as the Bull Mountain tower described above. Installation of the tower can be completed in two to five days. Exh. Seneca-JS-2 at Section 3:3; Parsons pf. reb. at 3.

41. Seneca has entered into a stipulation with ANR regarding seasonal restrictions on the timing of installation and maintenance of the Hawk Rock MET Tower. Specifically, Seneca has agreed not to install the proposed Hawk Rock MET tower or to engage in planned maintenance activities, including but not limited to, cable tension adjustment and sensor replacements from September 1 through November 30, and from February 15 through July 31 of each year. Exh. ANR-JMA-2 at 2.

42. Regarding the February 15 through July 31 seasonal restriction, if it is confirmed that peregrine falcons have not utilized the cliffs near the proposed Hawk Rock Met tower for nesting by May 1st of any given year, the seasonal restriction shall be waived for the balance of that year.

43. If it has been confirmed by ANR that the falcon chicks have fledged earlier than July 31 in any given year, the end date shall be adjusted accordingly for that year. Exh. ANR-JMA-2 at 2.

44. The seasonal restrictions do not apply to: (1) monthly battery checks and data card switch outs; (2) visual inspections of towers and equipment every second or third month; and (3) unplanned (non-routine) repairs of MET towers and their equipment when necessary to prevent interruption of MET data collection. Exh. ANR-JMA-2 at 2.

45. Seneca will provide a report to ANR and the Board, by December 2nd of each year after installation of the MET tower, documenting the number of unplanned repair events by Seneca that occurred during the seasonally restricted period for the Hawk Rock MET site, and explaining the reasons for each event. Exh. ANR-JMA-2 at 2.

46. In addition to the seasonal restrictions, Seneca will install bird diverters on the guy wires of the Hawk Rock MET tower. The bird diverters will be Firefly Met Tower Bird Diverters from P&R Technologies, Inc., or a functionally similar device. The diverters will be installed in accordance with the manufacturer's spacing recommendations. Soininen pf. at 7-8; exhs. ANR-JMA-2 at 2 and Seneca-JS-4.

B. Substantive Criteria of Section 248 Considered in Section 246 Proceedings**Orderly Development of the Region**

[30 V.S.A. § 248(b)(1)]

Findings

47. The proposed Project will not unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of municipal legislative bodies, and the land conservation measures contained in the plan of the affected municipality. This finding is supported by findings 48 and 53, below.

48. The proposed Project will be temporary and installed entirely on private land leased by Seneca. Exh. Seneca-JS-2 at Section 3:4, 8, and 10 and Attachments A and B.

49. The proposed Project sites are not identified in the Brighton Town Plan, the Ferdinand Town Plan (via the Unified Towns and Gores' Local Development Plan ("UTG Plan")) or the Newark Town Plan¹⁷ (collectively "Town Plans") as areas subject to any specific land conservation measures. Brighton Town Plan; UTG Plan; Newark Town Plan.

50. The proposed Project is consistent with the principles and goals of the Plan for the Northeast Region ("Northeast Regional Plan") and the Town Plans, which are all generally supportive of small-scale renewable energy development and require the minimization of aesthetic, environmental, and wildlife impacts. In addition, the Town Plans recommend looking at commercial-scale renewable energy developments on a case-by-case basis. None of the Plans specifically address MET towers. Northeast Regional Plan at Sections 3, 4, 6, and 7; Brighton Town Plan at 25-29; UTG Plan at Sections 3 and 9; Newark Town Plan at 17-24; *see also* findings 55 through 143.

51. The Brighton Town Plan does not specifically address MET tower installations, but is generally supportive of the development of renewable energy resources within the Town while

17. In an earlier Order, I concluded that the Newark Town Plan, in place at the time Seneca filed its Application in April 2012, was applicable in this proceeding and that the amended Newark Town Plan, dated September 17, 2012, was inapplicable in this Docket given that Seneca's rights vested in the existing Newark Town Plan when Seneca's Application became complete as of August 23. *Order re: Applicability of Newark's Town Plan*, Docket 7867, Order of 11/15/12. Thus, all references herein citing the Newark Town Plan or applicable Newark Town Plan refer to the Newark Town Plan in place at the time Seneca filed its Application in April 2012.

indicating that large-scale energy projects have the potential to negatively impact the area. Brighton states that it would like the opportunity to review large-scale projects on an individual basis and to be able to negotiate for mitigation or compensation payments with energy developers should negative impacts be likely. Brighton Town Plan at 25-26.

52. The Ferdinand Town Plan clearly does not specifically address MET tower installations, but is generally supportive of local, small-scale renewable energy within the Town while indicating that commercial-scale renewable energy projects will be reviewed on a case-by-case basis. In addition, the Ferdinand Town Plan states that the Regional Commission should consider supporting commercial-scale renewable energy generation projects when the benefits outweigh any negative impacts. UTG at Section 9.

53. The Newark Town Plan does not specifically address MET tower installations, but is generally supportive of small-scale renewable energy development while expressing that plans to locate industrial-scale generation and transmission facilities in Newark need to be evaluated with "extreme caution." In addition, the Newark Town Plan highlights the need to encourage growth while preserving the peaceful, rural, scenic, and quiet nature of the area. Newark Town Plan at 21-22 and 29.

Discussion

Although Newark and Brighton oppose the proposed Project,¹⁸ the Regional and Town Plans do not address MET towers specifically and the proposed Project sites are not identified in any of the Town Plans as areas subject to any specific land conservation measures. In addition, while the Regional and Town Plans express concerns regarding commercial-scale generation projects within the area, it is important to note that Seneca's petition in this Docket does not propose a commercial-scale energy generation project. Instead, Seneca is proposing the installation of four temporary MET towers, entirely on privately-owned lands, that: (1) require a combined 1.3 acres of clearing, at two sites; (2) do not include lighting or any moving parts or lights; (3) have a narrow profile; and (4) are less than 200 feet in height. Further, as discussed in detail below, the MET tower installations will not cause undue adverse impacts to the aesthetics

18. I note here that no comments were received from the Town of Ferdinand or the United Towns and Gores concerning the Project's potential to interfere with the orderly development of the region.

of the area, necessary wildlife habitat, or the environment and, in fact, two of the four MET tower installation sites have previously hosted MET towers.¹⁹ Therefore, I conclude that the proposed Project's installation will comply with the Regional and Town Plans and, given the minimal impacts of the proposed Project, I find no basis to conclude that the Project will interfere with the orderly development of the host towns or the region.

Aesthetics, Historic Sites, Air and Water Purity,
The Natural Environment and Public Health and Safety

[30 V.S.A. § 248(b)(5)]

54. The Project as proposed will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, public health and safety, and public investments. This finding is supported by findings 55 through 143, below.

Air and Water Purity

[10 V.S.A. § 6086(a)(1)]

Findings

55. The proposed Project will not have an undue adverse impact on air and water purity. Exh. Seneca-JS-2 at Section 3:9. This finding is also supported by findings 56 through 63, below.

56. The operation of the proposed Project will not produce air emissions. Exh. Seneca-JS-2 at Section 3:9.

57. The proposed Project involves clearing approximately 1.3 acres total. The clearing associated with the installation of the towers will not involve stumping or grubbing. Marketable trees will be felled and removed, while brush and un-marketable trees will be left in place. Exh. Seneca-JS-2 at Section 3:5 and Attachment E:4.

58. Soil disturbances associated with the installation of the guy wire anchors at each location will be stabilized after construction is completed by grading, seeding with a native

19. See Findings 55 through 143.

conservation seed mix, and mulching with weed-free straw. Exh. Seneca-JS-2 at Section 3:5 and Attachment E:4.

59. The proposed Project will not have an undue adverse impact on headwaters. Although the footprints of the MET towers installations are all located within headwaters areas, the proposed Project will involve minimal clearing and earth disturbances and will not create any new impervious surfaces. Exh. Seneca-JS-2 at Attachment E:5, 7, 11, 16, and 19. *See also* Findings 57 and 61.

60. The proposed Project is not located within a floodway or on or adjacent to a shoreline. Exh. Seneca-JS-2 at Attachment E:8, 12, 16-17, and 20.

61. The proposed Project will not have an adverse impact on streams. There are no streams located within each of the footprints of the four MET tower installation locations. One stream is located approximately 140 feet southwest from the existing clearing limits for the Brighton MET tower site and the tower's installation will not involve any new clearing. One intermittent stream is located approximately fifty feet east of the Bull Mountain MET tower base; however, the stream flows north to a drainage ditch on the eastern side of the existing access road and no clearing will occur along the banks of the drainage. No streams are located within 300 feet of the Seneca Mountain or Hawk Rock MET tower sites. Exh. Seneca-JS-2 at Attachment E:7-8, 12, 16 and 20.

62. The proposed Project will not have an undue adverse impact on wetlands. One wetland is located within the existing cleared areas of both the Brighton and Bull Mountain MET tower sites; however, both wetlands will be flagged prior to installation activities and no Project-related activities will occur within the wetlands. No wetlands are located within or directly adjacent to the clearing limits of the Seneca Mountain and Hawk Rock MET tower sites. Exh. Seneca-JS-2 at Attachment E:7-8, 13, 17, and 20.

63. There are no outstanding resource waters in the proposed Project area. Exh. Seneca-JS-2 at Attachment E:9, 17, and 20.

Aesthetics

[10 V.S.A. § 6086(a)(8)]

Findings

64. The proposed Project will not have an undue adverse impact on the scenic and natural beauty of the area or aesthetics. This finding is supported by findings 65 through 72, below.

65. The Brighton and the Seneca Mountain sites previously hosted MET tower installations and Seneca will reinstall the same towers previously installed at the sites. Exh. Seneca-JS-2 at Section 3:1-2.

66. The Bull Mountain site area has previously been logged and will involve minimal new clearing of approximately 0.1 acres. Exh. Seneca-JS-2 at Section 3:2.

67. The Hawk Rock site will involve clearing approximately 1.2 acres. Exh. Seneca-JS-2 at Section 3:3.

68. The towers will be less than 200 feet in height and twenty-four inches or less wide. Exh. Seneca-JS-2 at Section 3:7 and Attachments D1-D3.

69. The narrow profile of the MET towers and the guy wires will only be visible where they extend above the tree canopy. In addition, the color of the weathered galvanized or aluminum MET towers and grey guy wires will help them blend into the background. Exh. Seneca-JS-2 at Section 3:7 and Attachments D1-D3.

70. The MET towers will not have any lighting or moving parts. Exh. Seneca-JS-2 at Section 3:7 and Attachments D1-D3.

71. The MET towers will be visible at a distance of more than one mile from the closest off-site public location (roads, buildings, etc.), Route 114, diminishing their visual impacts. Exh. Seneca-JS-2 at Section 3:8.

72. The MET towers will be temporary and must be removed within five years of the date of issuance of a CPG authorizing the project to move forward. Exh. Seneca-JS-2 at Section 3:4 and 3:8.

Discussion

Newark and NNU contend that Seneca has failed to meet its burden to demonstrate that the proposed Hawk Rock MET tower will not have an undue adverse impact on aesthetics. Both

Newark and NNU argue that impacts from the proposed tower will be unduly adverse because its installation would violate clear, written community standards, offend the sensibilities of the average person, and Seneca has failed to take steps to mitigate the aesthetic impacts of the proposed tower.²⁰

Newark and NNU's arguments are to no avail. First, there is no clear, written community standard that would be violated by the installation of the proposed Hawk Rock MET tower. The relevant applicable document is the December 2011 Newark Town Plan. While that Plan contains a number of vision statements regarding preservation of scenic resources in the Town, it does not specifically identify Hawk Rock or any other particular resource as a target for scenic preservation. Additionally, the Plan actually contemplates the possibility that new generation or transmission facilities will be developed within the Town, stating that "the town should exercise caution in considering power generation facilities and major transmission lines in the town" and that such proposals should be reviewed with "extreme caution."²¹ While this language is certainly not an endorsement of new generation or transmission projects within the Town, it also does not expressly bar all such projects. Most importantly, this language does not constitute a prohibition of MET tower construction within the Town that would be violated by installation of the Hawk Rock MET tower.

The revisions enacted by Newark in its amended Town Plan, dated September 17, 2012, further undermine Newark's arguments regarding the existence of a clear standard in the applicable Newark Town Plan.²² The applicable Newark Town Plan did not endorse, but plainly contemplated, the possibility of generation and transmission projects in Newark, while the amended Newark Town Plan expressly prohibits the type of structures contemplated in this Docket as well as their placement at the Hawk Rock site. On their face, the September 2012 revisions to the applicable Newark Town Plan were intended to create a clear, written standard in

20. Newark Brief at 16-20; NNU Brief at 2-7.

21. Newark Brief at 17.

22. See footnote 17 (discussing Newark's and NNU's argument that the amended Newark Town Plan, dated September 17, 2012, should apply to this proceeding); see also Docket 7867, Order of 11/15/12 at 6-7 (finding that the amended Newark Town Plan does not apply to this proceeding).

order to halt the proposed Hawk Rock MET tower. I see this as demonstrative of the absence of a clear, written standard in the applicable Newark Town Plan that would prohibit placement of the Hawk Rock MET tower.

Both Newark and NNU²³ contend that the proposed Hawk Rock MET tower would offend the sensibilities of the average person based on the level of public opposition to the proposed Project.²⁴ However, while there has been unmistakable opposition to the proposed Project from some quarters, it is not clear whether this opposition represents a majority or minority view from a regional perspective. Additionally, the evidence presented demonstrates that the average viewer will see the MET tower from a distance, which diminishes its visual impacts. The tower will also have a narrow profile and its color will cause it to blend into the background when viewed from a distance. The tower will not have any lighting or moving parts, and only the portion of the tower that extends above the tree canopy will be visible. Lastly, the structure would be temporary and would be required to be removed within five years of the date of issuance of a CPG authorizing the proposed Project to move forward. Given these facts, I conclude that the Hawk Rock MET tower will not shock or offend the average person, notwithstanding the expressed opposition.

With respect to mitigating measures that Seneca proposes to undertake, I conclude that the characteristics of the Hawk Rock MET Tower, in particular its color, distance from public viewing spots and lack of any lighting, are reasonable steps to address the aesthetic impacts of the proposed Project. Seneca has met its *prima facie* burden in this regard and neither Newark or NNU has provided any persuasive evidence in rebuttal to demonstrate that additional reasonable mitigation are needed or otherwise warranted.

With regard to the proposed Brighton, Seneca Mountain, and Bull Mountain MET towers, the average viewer will see these structures from a distance, which diminishes their visual impacts. The towers will also have a narrow profile and their color will help them blend into the background when viewed from a distance. The towers will not have any lighting or

23. NNU is also critical of Board precedent examining this issue. See NNU Brief at 4-7. However, that precedent is controlling for purposes of my analysis.

24. Newark Brief at 18-19; NNU Brief at 4.

moving parts and only the portion of the tower that extends above the tree canopy will be visible. Further, the Brighton and Seneca Mountain sites involve the reinstallation of previously installed towers at the same locations. Lastly, the structures would be temporary and would be required to be removed within five years of the date of issuance of a CPG authorizing the project to move forward.

Therefore, based on the record evidence and the foregoing analysis, I conclude that the installation of the proposed Hawk Rock, Brighton, Seneca Mountain, and Bull Mountain MET towers will not result in undue adverse aesthetic impacts.

Historic Sites

[10 V.S.A. § 6086(a)(8)]

Findings

73. The proposed Project will not have an undue adverse impact on historic or archaeological resources. This finding is supported by finding 74, below.

74. There are no known historic sites or archeological sites within the vicinity of the proposed MET tower installation sites. Exh. Seneca-JS-2 at Section 3:8-9.

Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

Findings

75. The proposed Project will not have an undue adverse impact on rare and irreplaceable natural areas ("RINAs"). This finding is supported by findings 76 through 79, below.

76. The proposed Brighton MET tower site is surrounded by Red Spruce-Northern Hardwood Forest, an S4 community, considered widespread in the state. In addition, no clearing is proposed at this site and therefore the Brighton MET tower installation will not impact the natural community surrounding the site. Exh. Seneca-JS-2 at Attachment E:9.

77. The proposed Bull Mountain MET tower site is surrounded by Northern Hardwood Forest, a B-ranked S5 community that is considered common and widespread in the state. Given the small amount of clearing associated with the proposed Bull Mountain MET tower installation

(0.1 acres), it will not result in an undue, adverse impact to the natural community at the site. Exh. Seneca-JS-2 at Section 3:2 and Attachment E:9; *see also* Lew-Smith pf. at 8.

78. The proposed Seneca Mountain MET tower site is surrounded by Montane Yellow Birch-Red Spruce Forest, an S3 community, considered uncommon but not rare in the state. In addition, no clearing is proposed at this site and therefore the Seneca Mountain MET tower installation will not impact the natural community surrounding the site. Exh. Seneca-JS-2 at Attachment E:17.

79. The proposed Hawk Rock MET tower site consists of Northern Hardwood Forest, a B-ranked S5 community that is considered common and widespread and is not considered State significant. The limited disturbance caused by the installation of the tower will not extend to natural communities outside of the Northern Hardwood Forest that encompasses the project site and will therefore not result in an undue, adverse impact to the natural community at the site. Lew-Smith pf. at 8-9; exh. Seneca-JS-2 at Attachment E:21; *see also* Findings 127 through 130, below, and following discussion.

Discussion

Newark's witness, Dr. Gerhardt, asserts that the Hawk Rock MET tower site and its surrounding area, when taken together, constitute a RINA that will be unduly adversely impacted by the proposed Project.²⁵

I do not find Dr. Gerhardt's analysis and conclusions to be persuasive. The proposed Project site, as well as its immediate surroundings, consists of Northern Hardwood Forest, a common and widespread community type that is not considered State significant. The first step in determining the presence of a RINA is determining whether a community type is state significant,²⁶ and such is not the case with respect to the proposed Project site and its environs. Dr. Gerhardt's position seems to be based on an amalgamation of numerous community types and

25. Gerhardt pf. at 58-61; *see also* Newark Brief at 12.

26. Tr. 1/23/13 at 237 (Lew-Smith).

habitats from the area surrounding the proposed Project site, and eventually encompassing a much larger region within which the project site is situated.²⁷

Dr. Gerhardt's analysis does not compel the conclusion that there will be undue adverse impacts to any RINA. As noted above, the proposed Hawk Rock project site itself is not considered State significant and therefore would not constitute a RINA. Additionally, as discussed later in this PFD, other potentially significant natural communities lying outside the project footprint will not be unduly adversely impacted by the proposed Project. Thus, even if Dr. Gerhardt is correct that nearby natural communities, taken together constitute a RINA, there is still no basis to conclude there would be undue adverse impacts on this area.

Therefore, based on the evidence of record and above analysis, I conclude that the proposed Hawk Rock MET tower will not result in any undue adverse impacts on any RINAs.

Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)(A)]

80. The proposed Project will not destroy or significantly imperil necessary wildlife habitat or any endangered species. This finding is supported by findings 75 through 79, above, and findings 81 through 143, below.

A. Hawk Rock MET Tower Site - Black Bear Food Sources

Findings

81. "Necessary wildlife habitat" for black bears, as that term is used in Act 250 and incorporated into Section 248, includes: (1) fall mast tree crops such as beechnuts from American beech trees and acorns from oak trees, which bears utilize primarily during the fall months; and (2) wetlands with specific species compositions, which bears utilize during the spring and sometimes the summer months. Parsons pf. at 6.

82. Stands of beech trees utilized by bears ("bear-scarred beech trees") that include fifteen or more scarred beech trees are sufficiently large to constitute necessary wildlife habitat. Parsons pf. reb. at 11.

27. Gerhardt pf. at 59-61.

83. No bear-scarred beech trees are present within the MET tower footprint, meaning the 1.2 acre area to be cleared of trees. However, a stand of fifty-seven bear-scarred beech trees was identified in an area to the east and northeast of the proposed MET tower footprint. Parsons pf. at 7; exh. Seneca-JS-2, Attachment C1.

84. No additional food sources that constitute necessary wildlife habitat for black bears were identified at or in the vicinity of the Hawk Rock MET tower site. Exh. Seneca-JS-2, Attachment E at 21-23.

85. The stand of bear-scarred beech adjacent to the Hawk Rock site has been and continues to be used by black bear. Parsons pf. at 8; exh. Seneca-JS-2 at Attachment E at 21-22.

86. The proposed Hawk Rock MET tower will not directly impact black bear food sources that constitute necessary wildlife habitat, because no bear-scarred beech will be removed for the tower's installation and there are no bear food sources within the area to be cleared for the tower's installation. Parsons pf. at 8; exh. Seneca-JS-2 at Attachment E at 21-22.

87. Seneca will install the tower outside the critical feeding period of September 1 through November 30. Exh. ANR-JMA-2.

88. Seneca will perform all planned maintenance activities during the times outside of the critical feeding period, with the exception of: (I) monthly battery checks and datacard switch-outs; (ii) visual inspections of towers and equipment every second or third month; and (iii) unplanned (non-routine) repairs of MET towers and their equipment, if feasible, i.e., without materially impacting the ongoing collection of MET data. Exh. ANR-JMA-2.

89. Seneca will provide a report to ANR and the Board by December 2 of each year after the installation of the MET tower, documenting the number of unplanned repair events by Seneca that occurred during the critical feeding period. Exh. ANR-JMA-2.

90. The restrictions agreed to between Seneca and ANR in their MOU provide adequate assurances that the indirect impacts to use of the bear-scarred beech stand will be minimized or avoided. Austin pf. at 9; *see also* exh. ANR-JMA-2.

Discussion

The evidence of record indicates that there will be no direct impacts to the bear-scarred beech stand adjacent to the proposed Hawk Rock site; that is, no bear-scarred beech trees in this

stand will be removed due to the installation of the tower. Mr. Austin, a witness for ANR, testified that the MET tower proposed for this site would create an undue adverse impact to this habitat unless the timing of installation were to occur outside the critical fall feeding period for black bear, typically September 1 through November 30, because the presence of humans during this critical time period could deter black bears from accessing food sources.²⁸ To minimize the impact of such human presence, Mr. Austin stated that maintenance activities should be minimized or restricted to times outside this feeding period, except for emergency purposes.²⁹ Mr. Austin ultimately testified, with the mitigation measures agreed to in the MOU, that the proposed MET tower will not result in an undue adverse impact to this habitat.³⁰

I conclude that the restrictions on the installation and maintenance of the Hawk Rock tower imposed in the MOU between Seneca and ANR are sufficient to mitigate the concerns expressed by the Parties regarding bear food sources at the proposed Hawk Rock site. Accordingly, provided the terms and conditions of the MOU are followed with respect to the proposed Hawk Rock site, I find that there will be no undue adverse impacts to black bear food sources at this site.

B. Hawk Rock Met Tower Site - Peregrine Falcon Habitat

Findings

91. The cliff face adjacent to the Hawk Rock MET tower site is a known historic peregrine falcon nesting site. Peregrine falcons have occupied Hawk Rock in four of twenty-six years between 1984 and 2010. Watrous pf. at 3.

92. Peregrine falcon nesting activity for 2012 was confirmed at the Hawk Rock Cliffs on May 11, 2012. Watrous pf. at 3.

93. The Hawk Rock Cliffs, and particularly the location where peregrine falcons have historically nested, are approximately 700 feet away from the proposed Hawk Rock MET tower and 500 feet away from the proposed clearing limits at the ends of the guy wires. The top edge

28. Austin pf. at 7.

29. Austin pf. at 7.

30. Austin pf. at 9; *see also* exh. ANR-JMA-2.

of the cliffs is located uphill from the base of the proposed MET tower and its footprint.

Watrous pf. at 6; Watrous pf. reb. at 5; Lew-Smith pf. reb. at 7.

94. Installation of the proposed Hawk Rock tower will not directly impact peregrine falcon habitat. The installation will not remove or render the nesting site unavailable to the falcons because the nesting site is 700 feet away from the proposed tower, 500 feet away from the clearing boundary, and half-way down the cliff face. Watrous pf. at 6.

95. Installation of the proposed Hawk Rock tower may result in a direct impact by creating the possibility of peregrine falcon collisions with the MET tower or guy wires. Watrous pf. at 6-7.

96. The presence of guy wires at the site is a greater risk than the presence of the monopole tower itself. The risk presented by the monopole tower itself is minor. Tr. 1/23/13 at 207 (Buck).

97. Falcons defending their territory or chasing prey are often too engrossed in their pursuit to see guy wires in time to avoid a collision, which usually will result in irreparable injury or death. The proximity of the MET tower to the nesting site makes this possibility a concern. Buck pf. at 4; Gerhardt pf. at 27.

98. Peregrine falcons prefer to nest on high ledges near the open areas where they like to hunt, such as rivers, lakes and fields. At the Hawk Rock site, these types of preferred open hunting areas are in the adjacent valley and away from the proposed MET tower site. The ridgeline along the Hawk Rock Cliffs between the nesting site and proposed MET tower is forested. Additionally, the proposed tower would be located behind the nesting site rather than between the nesting site and the adjacent valley, which also reduces the risk of collisions. Gerhardt pf. at 26; Watrous pf. at 10; Watrous pf. reb. at 7; tr. 1/23/13 at 23-24 (Buck).

99. Peregrine falcon activity is concentrated over valleys rather than mountain ridgelines. Watrous pf. reb. at 8.

100. In fourteen published post-construction mortality monitoring studies at thirty installed MET tower locations, very limited bird mortality was found, none of which involved peregrine falcons. No bird mortality at all has been documented at MET tower sites in the northeast during standardized surveys. Watrous pf. at 11-12; Watrous pf. reb. at 8.

101. Seneca will use a monopole tower, rather than a lattice tower, at the Hawk Rock site. Use of a monopole tower will significantly decrease the likelihood of collision with or perching on the tower. Exh. ANR-JMA-2 at 2; Buck pf. at 6.

102. Seneca will install bird diverters on the guy wires to make them more visible to the falcons and thereby reduce the risk of collision mortality based on the presence of the guy wires. Exh. ANR-JMA-2 at 2; Watrous pf. reb. at 8; *see also* Buck pf. at 6 (expressing his opinion that use of the diverters would sufficiently reduce the risk of collision with the guy wires to render any potential impacts not undue).

103. Use of a monopole tower coupled with the installation of the bird diverters on the guy wires will reduce the direct impacts to peregrine falcons at the Hawk Rock site so that they are not unduly adverse. Buck pf. at 5.

104. Indirect impacts from human presence attributable to construction and certain maintenance activities along the access road and at the Hawk Rock site itself during the peregrine falcon nesting and courtship season would create a level of disturbance likely to negatively impact nest fidelity and nesting success. Buck pf. at 4.

105. Vermont's peregrine falcon population, though no longer a federal or state endangered species, remains vulnerable due to its limited and specialized habitat requirements, and its innate sensitivity to nest disturbance. Ongoing success at maintaining the population's status is due largely to efforts by the State of Vermont and Audubon Vermont aimed at reducing or eliminating human disturbances at or near nest sites during critical periods, without which the peregrine population would be unlikely to sustain itself. Buck pf. at 4.

106. Subject to certain modifications regarding yearly use of the site by peregrine falcons, the MOU between Seneca and ANR prohibits construction and certain maintenance activities during the critical courtship and nesting seasons. These restrictions, coupled with the use of a monopole tower and bird diverters, reduce the impacts from the proposed Hawk Rock tower so that they will not be undue. Exh. ANR-JMA-2; Buck pf. at 5-6.

Discussion

Provided that the terms of the MOU as they relate to the installation of the proposed Hawk Rock MET tower are complied with, I conclude that there will be no undue adverse impacts to the peregrine falcon habitat, or the peregrine falcons utilizing the habitat, at the Hawk Rock site.

Mr. Buck from ANR testified that significant risks were presented by the presence of the tower and its supporting guy wires, as well as by disturbances from human activities during the critical courtship and nesting period. However, he also testified that those risks are reduced to an acceptable level by use of a monopole tower, which will temper the tendency for birds to perch on the tower as compared to a lattice tower, by use of bird diverters to reduce collision risk with the guy wires, and by limiting or prohibiting human activities at the site during critical periods.

Newark and NNU both rely heavily on a letter dated July 31, 2012, from Margaret Fowle,³¹ a conservation biologist who is affiliated with Audubon Vermont, in support of their position that the proposed MET tower would cause undue adverse impacts to peregrine falcons at the Hawk Rock site.³² However, Newark's and NNU's reliance on Ms. Fowle's letter is misplaced as they primarily rely on non-site-specific concerns expressed by Ms. Fowle. When she specifically addresses the project at Hawk Rock, Ms. Fowle states that she is not opposed to the proposed location provided certain protections are instituted. Ms. Fowle also notes that it is still possible, even with protective measures, that there will be some level of negative impact to peregrine falcons at this site.³³

The protective measures recommended by Ms. Fowle include covering guy wires in some material that increases their visibility to peregrines and other raptors, limiting maintenance work on the tower above the tree canopy to avoid breeding season, and conducting regular post-construction site monitoring to assess any impacts to falcons from the existence of the tower.³⁴

31. Admitted into evidence as Exhibit N-KW-3.

32. See Newark Brief at 2-5; NNU Brief at 7-10.

33. Exh. N-KW-3 at 2.

34. Exh. N-KW-3 at 2.

Each of Ms. Fowle's concerns are addressed in the MOU between Seneca and ANR. The guy wires will be equipped with bird diverters installed per the manufacturer's instructions. Construction and maintenance activities—and not just those taking place above the tree canopy—are restricted to coincide with the courtship and nesting season, and the site will need to be monitored each year to determine if peregrines are utilizing the site and to document when any chicks fledge.³⁵

With respect to the potential for some negative impacts mentioned in Ms. Fowle's letter, the relevant standard in this proceeding is not simply whether there will be any impact from the MET Tower, but rather whether any such impacts will be unduly adverse. I find that ANR's expert witness credibly and persuasively testified that the conditions imposed by the MOU will be sufficient to reduce impacts to the point where they would not be considered undue.

While the installation and presence of the tower at the proposed Hawk Rock site, without mitigation, potentially could result in undue adverse impacts to peregrines falcons at the Hawk Rock nesting site, if the terms and conditions of the MOU are followed with respect to the proposed Hawk Rock site, I find the impacts will not be unduly adverse.

C. Hawk Rock Met Tower Site - Rare, Threatened, or Endangered Non-Avian Species Findings

107. There is no habitat that exhibits any sign of use by any non-avian rare, threatened or endangered ("RTE") animal species, nor were there any specialized habitats present or habitats that are indicative of those preferred or generally occupied by any non-avian RTE animal species within the footprint of the Hawk Rock MET tower site. Parsons pf. at 5-6.

108. There is no habitat in the near vicinity of the proposed MET tower that showed either any sign of use by a non-avian RTE species, or would be considered optimum or preferred for habitation by any Vermont- or federally-listed RTE animals. Parsons pf. reb. 2-3; Parsons pf. at 5-6.

109. It is possible that there is suitable habitat for the yellow-nosed vole or long-tailed shrew at the base of the eastern ledges of the Hawk Rock Cliffs. Such habitat and the species that

35. Exh. ANR-JMA-2.

occupy it could be negatively impacted by large quantities of stormwater drainage. Tr. 1/23/13 at 128-31 (Parsons).

110. It is highly unlikely that there would be any significant increase in surface water runoff from the clearing required for the proposed MET tower given the small area of clearing and the fact that surface vegetation, shrubs and surface moss will not be removed. In addition, given the minimal runoff, the nearest wetland—a small seepage wetland—would experience little or no impact and there are no wetlands that would be considered high-elevation wetlands in the immediate vicinity of the proposed project because high-elevation wetlands are generally considered to be located at elevations above 2,500 feet, higher than the project site elevation of approximately 1,800. Tr. 1/23/13 at 131-32 and 150 (Parsons); Parsons pf. reb. at 8.

111. The top of the Hawk Rock ledges lies uphill from the proposed MET tower site so increased surface water runoff resulting from the project, if any, would not flow in the direction of the potential habitat at the base of the eastern ledges of the cliffs. Tr. 1/23/13 at 149-51 (Parsons).

112. The proposed MET tower's potential indirect impacts outside its immediate footprint are limited because the proposed clearing is small (1.2 acres); minimal soil disturbance will occur because the cleared area will not be grubbed, stumped, or graded, and no excavation is planned other than the removal of one square foot of topsoil per guy wire anchor; the MET tower will not generate any significant noise; and the human presence on the site, as limited by the seasonal restrictions in the MOU between Seneca and ANR, will be small both during construction and afterwards. Parsons pf. reb. at 3; exh. ANR-JMA-2.

113. The work performed on behalf of Seneca regarding RTEs at the proposed Hawk Rock Met Tower site is consistent with the complexity of the task at hand, and the area involved, both in terms of direct and indirect impacts, is relatively small and is not a complex environment. Parsons pf. reb. at 2-4.

Discussion

The evidence of record demonstrates that there will be no undue adverse impacts on non-avian RTE species as a result of the installation and operation of the Hawk Rock MET tower. Seneca's expert witness, Mr. Parsons, surveyed the footprint and immediate surrounding area to

assess both the presence of RTE species and the presence of suitable habitat for such species. Based on his survey, he concluded that the proposed tower would not result in undue adverse impacts because he saw no signs of RTE use or suitable habitat in the area he surveyed. Under cross-examination, Mr. Parsons conceded that the habitat at the base of the eastern ledges of the Hawk Rock Cliffs—an area he did not consider to be within the area of potential impact—was potentially suitable habitat for yellow-nosed vole and long-tailed shrew. However, the proposed Project is not located in this area and will therefore have no direct impacts. Additionally, while Mr. Parsons also conceded that large amounts of water runoff could negatively impact this habitat, he testified that any increase in runoff from the Project would be minimal due to the small amount of clearing and lack of soil disturbance involved. Additionally, the edge of the cliffs is uphill from the area to be cleared for the tower so any increase in runoff, regardless of how small, would not flow in the direction of this habitat.

Both Newark and NNU criticize Mr. Parsons' conclusions as lacking sufficient survey work and scientific data.³⁶ I disagree. Mr. Parsons credibly and persuasively testified that the amount of work he performed was consistent with the complexity of the task at hand, and that the area involved, both in terms of direct and indirect impacts, is relatively small and is not a complex environment.³⁷

In response to Mr. Parson's testimony, Newark submitted the testimony of its own expert, Dr. Kilpatrick. However, Dr. Kilpatrick admitted that he spent no time at the Hawk Rock site and performed no analysis of drainage patterns from the site.³⁸ Dr. Kilpatrick only speculates that the potential yellow-nosed vole and long-tailed shrew might be impacted by water runoff from the proposed Hawk Rock MET Tower site.³⁹ Dr. Kilpatrick further suggests, without any underlying support, that runoff from the project site might impact high-elevation wetlands that

36. Newark Brief at 14-15; NNU Brief at 10-11.

37. Parsons pf. reb. at 2-4.

38. Tr. 1/23/13 at 167 (Kilpatrick).

39. "It is not clear that runoff from the proposed Met tower site would not impact this talus habitat and potentially effect populations of these two species of rare mammals." Kilpatrick pf. at 7.

are potential habitat for other rare species.⁴⁰ However, in addition to establishing that there are no high-elevation wetlands in the immediate vicinity of the proposed project,⁴¹ the evidentiary record notwithstanding demonstrates that the nearest wetland—a small seepage wetland—would experience little or no impact because any increase in runoff would be minimal due to limited soil disturbance, and, in any event, runoff would not likely be sufficient to flow overland through forest from the project site to the wetland.⁴²

Newark has raised concerns regarding potential impacts to American marten and Canada lynx, two state-listed endangered mammals.⁴³ However, I find Newark's position to be untenable based on the record. Installation of the Project will require approximately 1.2 acres of tree clearing. The habitat area for these species described by Newark's witness, Dr. Gerhardt, includes a large and forested region in the northeast part of Vermont. To conclude that clearing a little over one acre of this vast area would cause undue adverse impacts to the habitat and the species that use it makes little sense, particularly in an area where these two species are experiencing a resurgence in spite of extensive clear cuts occurring in this region on a regular basis.⁴⁴

Based on the evidence presented and the foregoing analysis, I conclude that Seneca has met its *prima facie* burden of demonstrating that the proposed Hawk Rock tower will not have any undue adverse impacts to non-avian RTE species, notwithstanding the arguments of Newark and NNU to the contrary.

40. Kilpatrick pf. at 7.

41. Tr. 1/23/13 at 131-32 (Parsons); Parsons pf. reb. at 8.

42. Parsons pf. reb. at 8; tr. 1/23/13 at 156 (Parsons).

43. Newark Brief at 10-11; Gerhardt pf. at 42-45.

44. Parsons pf. reb. at 9.

D. Hawk Rock MET Tower Site - Rare, Threatened, or Endangered Avian and Bat Species

Findings

114. RTE birds and bats are unlikely to be present at the proposed site. The forest stand at the site is composed of early successional northern hardwood forest, which is common throughout the state, characterized by small-diameter trees and cluttered understory. This forest type generally supports common avian species, and is unlikely to provide roosting habitat for any RTE bat. All RTE bat species in Vermont roost in large diameter trees. Watrous pf. at 13-14.

115. Construction of the proposed MET tower will not directly impact any RTE birds or bats, even if they did use the site, because all tree clearing will take place outside the breeding and roosting season for birds and bats, due to the seasonal restrictions on construction to which Seneca has agreed to protect the peregrine falcons at the site. Watrous pf. at 14.

116. Construction of the Hawk Rock MET tower will not indirectly impact any RTE bird or bat species that use the proposed site because the abundance of forest cover surrounding the proposed site will provide nearby habitat for any displaced individuals. Watrous pf. at 14.

117. The shaded talus slopes at the Hawk Rock Cliffs are unlikely habitat for the eastern small-footed bat, which prefers habitat that receives more direct sunlight and has smaller crevices. Watrous pf. at 12; Watrous pf. reb. at 3.

118. Even if there were RTE bat species in the talus slopes below the Hawk Rock Cliffs, the proposed Project will not unduly impact that habitat or those species. Because the proposed MET tower site is located downhill from the edge of the Hawk Rock Cliffs, any potential additional runoff generated by the proposed Project would not impact the talus or cliff face. Moreover, it is unlikely that additional runoff would be generated as a result of the proposed project, given that shrubs, ground vegetation, and moss will not be removed. Watrous pf. reb. at 5; tr. 1/23/13 at 150 (Parsons).

119. The risk of bird mortality due to collision with the proposed MET tower or its guy wires, is low. Federal and state agencies rarely require mortality searches at MET towers due to the low instance of mortality. In fourteen publicly available mortality monitoring studies at MET towers, few bird carcasses were found. There has been no documented bird mortality at MET towers in the Northeast in standardized surveys. Watrous pf. at 11-12.

120. The risk of bat mortality due to collision with the proposed MET tower or its guy wires is low. Studies indicate that bats readily fly around MET towers and are at a low risk of collision with the towers or their guy lines. Numerous studies have documented bat activity using acoustic detectors mounted on MET towers without any documented bat fatalities at these towers.

Watrous pf. reb. at 4.

Discussion

Based on the foregoing findings, I conclude that there will be no undue adverse impacts on avian or bat RTE species as a result of the proposed Hawk Rock MET tower. The evidence demonstrates that the habitat at and immediately around the site is not conducive for use by RTE bird and bat species. However, even assuming the possibility that some RTE species may utilize the site and surrounding environs as suggested by Newark's witness, Dr. Kilpatrick,⁴⁵ the evidence does not support the conclusion that these species would be unduly impacted by the presence of the project. Studies on bird and bat mortality at MET tower sites demonstrate that mortality is low for birds and non-existent for bats. The evidence also demonstrates that there will be no undue impacts to potential bat habitat on the Hawk Rock Cliffs because surface water runoff from the project site will be minimal and will not be in the direction of the potential habitat.

Newark also raised concerns regarding potential impacts to Bicknell's Thrush habitat.⁴⁶ However, the evidence demonstrates that the Hawk Rock site does not consist of habitat that is favored by this species.⁴⁷ While it is possible that Bicknell's Thrush might utilize the type of habitat present at the Hawk Rock site for brief stopover periods during migration, the clearing of 1.2 acres of a common habitat type in the State of Vermont simply would not rise to the level of

45. Kilpatrick pf. at 7-8.

46. Gerhardt pf. at 33-35.

47. Watrous pf. reb. at 5.

an undue impact.⁴⁸ Even Newark's witness, Dr. Gerhardt, acknowledges that there is no evidence that the Bicknell Thrush use the Hawk Rock area for migration.⁴⁹

Based on the evidence of record and the foregoing analysis, I conclude that the MET tower proposed for the Hawk Rock site will not result in undue adverse impacts to avian or bat RTE species.

E. Hawk Rock MET Tower Site - Rare, Threatened or Endangered Plant Species
Findings

121. No RTE plant species are present within the footprint of the Hawk Rock tower site. Lew-Smith pf. at 5; exh. Seneca-MLS-2.

122. It is possible that RTE plants exist on the face of the Hawk Rock Cliffs. However, because the footprint of the tower is located downslope from the top of the cliffs, there will be no increase in surface water runoff over the edge of the cliffs. Tr. 1/23/13 at 139 and 149-51 (Parsons); exh. Seneca-LS-3.

123. Because there are no RTE plant species within the proposed tower site, and because the face of the Hawk Rock Cliffs will not experience any increase in surface water runoff from the proposed project, there will be no undue adverse impacts to RTE plant species. Findings 78 and 79.

F. Hawk Rock MET Tower Site - Deer Wintering Yard
Findings

124. There is a potential deer wintering yard approximately 300 feet to the south of the proposed tower site. Exh. Seneca-JS-2 at Attachment C1 and Attachment E:22.

125. No clearing will occur within the boundaries of the potential deer wintering yard, though the edge of the cleared area will be within approximately 130 feet of the potential deer wintering area. Exh. Seneca-JS-2 at Attachment C1 and Attachment E:22.

48. Watrous pf. reb. at 6.

49. Tr. 1/23/13 at 314 (Gerhardt).

126. Installation of the MET tower at this site will likely occur at a time when the deer wintering yard is not in use. After installation, human presence at the tower site will be very limited. Parsons conditional pf. reb. at 2.

Discussion

Because installation of the proposed tower will not involve clearing within the boundaries of the potential deer wintering yard, there will be no direct impacts to this necessary wildlife habitat as a result of the proposed Project. However, Mr. Parsons stated that installation of the Hawk Rock Met Tower "*will likely* occur at a time when the deer wintering yard is not in use"⁵⁰ and Seneca does not propose to install the proposed Hawk Rock MET Tower during winter conditions. Therefore, to ensure that the installation of the Hawk Rock MET Tower does not impact use of the deer wintering ward, I recommend that the Board prohibit Seneca from commencing construction activities at the Hawk Rock site when winter conditions are present at the site.

Post-construction indirect impacts will be limited because human presence and activity at the site will be quite limited pursuant to the autonomous nature of the tower's operations and the terms of the MOU between Seneca and ANR.

Newark's witness, Dr. Gerhardt, cites to a statement from the Vermont Department of Fish and Wildlife that residential, commercial and industrial development within or adjacent to a deer wintering area will decrease the amount of winter deer habitat and thus have an impact on the area's deer population. According to Dr. Gerhardt, this statement demonstrates that placement of the MET tower near the potential deer wintering yard will cause undue impacts to this necessary habitat.⁵¹

I do not find Dr. Gerhardt's conclusion to be persuasive. The MET tower is not a commercial or industrial development that involves the type of regular human presence, activities or noise levels often associated with commercial or industrial development. Assuming the MET

50. Parsons conditional pf. reb. at 2 (emphasis added).

51. Gerhardt pf. at 47.

Tower is constructed, it will involve very limited human activities and will not produce any other impacts that would interfere with deer use of this habitat.

Thus, with the inclusion of the proposed restriction of construction during winter conditions and based on the evidence of record and the foregoing analysis, I conclude that the installation of the MET tower proposed for the Hawk Rock site will not result in any undue adverse impacts to the potential deer wintering yard.

G. Hawk Rock Met Tower Site - Nearby Hawk Rock Cliff Community

Findings

127. There is a natural community associated with the Hawk Rock Cliffs located approximately 700 feet southeast of the proposed Hawk Rock tower site. Lew-Smith pf. at 8.

128. The cliff is a Boreal Acidic Cliff community which is an S4 community and is therefore considered a State significant natural community. However, it is not deemed to be a rare and irreplaceable natural area as it is considered to be widespread in the state. Lew-Smith pf. at 8.

129. The Hawk Rock Cliff community is located outside the footprint of the proposed MET tower site and, therefore, there will not be any direct impacts to this natural community. Lew-Smith pf. at 9.

130. Drainage patterns from the proposed MET tower site are not in the direction of the cliff community. Therefore, there will be no indirect impacts to the community from any surface water runoff resulting from the area cleared for the project. Lew-Smith pf. at 9; exh. Seneca-MLS-3.

Discussion

Because the proposed Project activities will not occur within the Hawk Rock Cliff natural community, and because the face of the Hawk Rock Cliffs will not experience any increase in surface water runoff from the proposed Project, the Project will not result in undue adverse impacts to the natural community.

H. Bull Mountain MET Tower Site - Black Bear Food Sources

Findings

131. An extensive area of concentrated bear-scarred beech is in close proximity to the Bull Mountain MET tower site. There are likely over 1,000 beech trees within the area and the

westernmost edge of the beech stand is located approximately 190 feet from the area to be cleared for the tower installation. Exh. Seneca-JS-2 at Attachment E at 14; Austin pf. at 8.

132. The concentrated area of bear-scarred beech is highly significant as a necessary wildlife habitat for black bear. Austin pf. at 8-9.

133. The tower will be solar-powered and produce virtually no noise. Exh. Seneca-JS-2 at Attachment E at 15.

134. Seneca will install the tower outside the critical feeding period of September 1 through November 30. Exh. ANR-JMA-2.

135. Seneca will perform all planned maintenance activities during the times outside of the critical feeding period, with the exception of: (I) monthly battery checks and datacard switch-outs; (ii) visual inspections of towers and equipment every second or third month; and (iii) unplanned (non-routine) repairs of MET towers and their equipment, if feasible, i.e., without materially impacting the ongoing collection of MET data. Exh. ANR-JMA-2.

136. Seneca will provide a report to ANR and the Board by December 2 of each year after the installation of the MET tower, documenting the number of unplanned repair events by Seneca that occurred during the critical feeding period. Exh. ANR-JMA-2.

Discussion

Mr. Austin testified that without the mitigation measures included in the MOU, the Bull Mountain MET tower installation would pose an undue adverse impact on the black bear habitat at the site. I find the relevant terms of the MOU to be reasonable mitigation and monitoring measures.⁵² Therefore, provided that the terms of the MOU as they relate to the installation of the Bull Mountain MET tower are complied with, I conclude that there will be no undue adverse impacts to the black bear food sources at the proposed Bull Mountain MET Tower site.

I. Brighton MET Tower Site - Black Bear Food Sources

Findings

137. No bear-scarred beech stands are located near the site. Exh. Seneca-JS-2 at Attachment E at 10.

52. See Findings 134-36, above.

138. One wetland is located within the existing cleared area at the site. Although the wetland may provide some feeding habitat for bear, it is not considered significant enough to warrant imposing restrictions at the site and Seneca will flag and avoid the wetland during installation. Exh. Seneca-JS-2 at Attachment E at 8-9; Austin pf. at 7.

139. Bear may feed on berry resources within the existing cleared area at the site and the surrounding area supports important bear food sources, including dense areas of raspberries, black berries, cherries, sedges, and other wetland plants. Exh. Seneca-JS-2 at Attachment E at 10; Austin pf. at 8.

Discussion

Although black bear food resources are located within the Brighton MET tower site and the larger area includes important black bear food sources, the installation will not create an undue adverse impact on black bear food sources or black bear habitat because it will have a relatively small footprint, is largely within an existing cleared area, will avoid the existing wetland, and will only require limited, infrequent maintenance.⁵³

J. Additional Wildlife Habitat and Endangered Species - Not Subject to the Technical Hearing

Findings

140. The proposed Brighton, Bull Mountain, and Seneca MET tower sites do not include any known RTE species mapped by the Vermont Nongame and Natural Heritage Project and it is not likely that any rare plants exist on the sites. Exh. Seneca-JS-2 at Attachment E:10, 15, and 18.

141. There is no evidence of any over-wintering moose or deer in the vicinity of the proposed Brighton MET tower site. Exh. Seneca-JS-2 at Attachment E:10.

142. There is no necessary wildlife habitat within the previously cleared or planned clearing areas at the proposed Bull Mountain MET tower site. Exh. Seneca-JS-2 at Attachment E:15.

143. There is no necessary wildlife habitat in the vicinity of the proposed Seneca Mountain MET tower site. Exh. Seneca-JS-2 at Attachment E:18.

53. See Findings 15-16, 19, and 136.

Discussion

The environmental assessment submitted by Seneca at the time of its Application stated that it was not likely that any rare plants existed at the proposed Brighton, Bull Mountain, and Seneca MET tower sites. However, Seneca never submitted the results of an RTE plant inventory at those proposed sites, such as it did for the Hawk Rock MET tower site (exhibit Seneca-MLS-2). Therefore, I recommend that prior to the commencement of construction activities for the Brighton, Bull Mountain, and Seneca Mountain MET towers, Seneca should be required to submit to the Board and ANR the results of an RTE plant inventory for those sites.⁵⁴ If any RTE plant species are identified during the plant inventory, I recommend that Seneca be required, prior to the commencement of construction at those sites where RTE plant species are identified, to submit a mitigation plan regarding such species and sites to the Board and ANR for review and to the Board for approval.

Development Affecting Public Investments

[10 V.S.A. § 6086(a)(9)(K)]

Findings

144. The proposed Project will not unnecessarily or unreasonably endanger the public or quasi-public investments in any governmental public utility facilities, services, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of the public's use or enjoyment of, or access to, such facilities, services, or lands. Exh. Seneca-JS-2 at Section 3:9-10. This finding is also supported by findings 145 through 147, below.

145. The proposed Brighton, Bull Mountain, and Seneca Mountain site properties will share a boundary with private land subject to a public access easement held by the Vermont Land Trust ("Plum Creek Property") and private land subject to a limited public access easement held by the Vermont Department of Forests, Parks and Recreation ("Heartwood Property"). The Seneca Mountain site is located more than 2,000 feet away from the Plum Creek Property line and approximately 900 feet away from the Heartwood property line, and the Bull Mountain and

54. See tr. 1/23/13 at 239 (Lew-Smith) (discussing the need to conduct an RTE plant inventory at the Hawk Rock MET tower site after the Application was submitted).

Brighton sites are several miles away from either property line. Exh. Seneca-JS-2 at Section 3:10 and Attachments A1-A2 and B.

146. The larger leased Hawk Rock site property is more than 2,600 acres and a portion of those leased lands includes a conservation easement held by the Vermont Land Trust. The proposed Hawk Rock site is located approximately 485 feet from the conserved land. Exh. Seneca-JS-2 at Section 3:10 and Attachments A3 and B.

147. The proposed Project will not materially impact the public access easements in place on the Plum Creek or Heartwood properties or the conservation easement on the leased Hawk Rock land. Exh. Seneca-JS-2 at Section 3:10. *See also* Findings 56-63 and 67-72.

Public Health and Safety

[30 V.S.A. § 248(b)(5)]

148. The proposed Project will not have any undue adverse impacts on public health or safety. The proposed tower locations are on private property with gate-controlled access. The proposed tower locations are set back more than 485 feet from any adjoining property line, removing any risk related to tower blowdowns. At heights of less than 200 feet, the towers do not trigger Federal Aviation Administration notice requirements and do not require lighting. Exh. Seneca-JS-2 at Section 3:9 and Attachments F and G.

V. CONCLUSION

Based upon the evidence in the record, I recommend that the Board approve the proposed project and issue a CPG for construction of the proposed project with the conditions set forth in the proposed Order and CPG, below. I am circulating the Proposal for Decision to the parties for their review and comment pursuant to 3 V.S.A. § 811.

Dated at Montpelier, Vermont this 30th day of July, 2013.

s/Bridgette L. Remington
Bridgette L. Remington, Esq.
Hearing Officer

VI. BOARD DISCUSSION

On May 2 and May 13, 2013, Brighton filed substantive comments on the PFD.⁵⁵ On May 9, 2013, Seneca, Newark, and NNU filed substantive comments on the PFD.⁵⁶ In addition, ANR filed a letter with the Board on May 7, 2013, requesting that a typographical error be corrected in the PFD; the Department filed a letter with the Board on May 9, 2013, stating that it had no comments regarding the PFD; and Noreen Hession filed a letter with the Board on May 9, 2013, requesting oral argument on the PFD.⁵⁷ On May 29, 2013, at the request of Newark and Noreen Hession, the Board convened an oral argument regarding the scope of the proceedings, the Orders issued by the Hearing Officer regarding notice and the applicability of Newark's amended Town Plan, and issues regarding the substantive criteria of Section 248(b) considered in Section 246 proceedings.⁵⁸

Having considered all of the comments on the PFD as well as the positions presented during the oral arguments, we adopt the Hearing Officer's PFD, as modified by the discussion below.⁵⁹

55. Letter of May 13, 2013, from Brighton, to Bridgette Remington, Esq., Hearing Officer ("Brighton Comments of May 13"); letter of May 2, 2013, from Brighton, to Bridgette Remington, Esq., Hearing Officer ("Brighton Comments of May 2").

56. Letter of May 9, 2013, from Andrew Raubvogel, Esq., et al., on behalf of Seneca, to Susan M. Hudson, Clerk of the Board ("Seneca Comments"); letter of May 9, 2013, from L. Brooke Dingledine, Esq., on behalf of Newark, to Susan M. Hudson, Clerk of the Board ("Newark Comments"); letter of May 9, 2013, from Deborah R. Bucknam, Esq., on behalf of NNU, to Susan M. Hudson, Clerk of the Board ("NNU Comments").

57. Letter of May 9, 2013, from Aaron Kisicki, Esq., on behalf of the Department, to Susan M. Hudson, Clerk of the Board; letter of May 9, 2013, from Noreen Hession, to All Parties in PSB Docket No. 7867; letter of May 7, 2013, from Donald J. Einhorn, Esq., on behalf of ANR, to Susan M. Hudson, Clerk of the Board.

58. Seneca, Newark, NNU, Noreen Hession, and Mark Whitworth offered oral arguments. We note here that Ms. Hession did not file substantive written comments with the Board regarding the PFD and that Mr. Whitworth did not file a request for oral argument or any written comments with the Board regarding the PFD. Therefore, where our discussion references either Ms. Hession's or Mr. Whitworth's comments, our discussion solely references statements made by those parties at the May 29 oral argument.

59. Non-substantive errors, including those noted by ANR, Seneca, Newark, and NNU, have also been corrected in the PFD.

A. ISSUES RAISED BY MULTIPLE PARTIES

We note as an initial matter that many of the public and party comments filed with the Board and made at the public hearing addressed a future large-scale wind project. However, this proceeding is limited to the review of Seneca's petition for the installation of four temporary MET towers under Section 246. If a filing for a large-scale wind project is made in the future, many of the concerns expressed by the public and the parties regarding large-scale wind projects may be relevant and would likely be considered in any such future proceeding. Our decision today to issue a CPG for Seneca's MET Tower project in no way signifies a decision one way or the other with regard to the merits of any wind project that Seneca or others may propose for construction in the future.

Scope of the Proceedings and Review of the Criteria Considered in Section 246 Proceedings

Newark asserts that the Hearing Officer erred by waiving consideration of the criteria for aesthetics and orderly development of the region ("orderly development"), and therefore foreclosing Newark and other parties from providing evidence regarding those criteria.⁶⁰ NNU requests that the evidentiary record be re-opened to allow the parties to present evidence on the issues of aesthetics, public investments, the natural environment, and public health and safety. NNU further contends that the Hearing Officer has proposed findings unsupported by evidence in violation of the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence.⁶¹

First, we address Newark's and NNU's contentions that the Hearing Officer improperly restricted the scope of the evidentiary proceedings. While the Board may determine to hear evidence when it concludes an application raises a significant issue with regard to one or more of the substantive criteria of Section 248 listed in Section 3.3 of the Board's MET Tower

60. Newark Comments at 1.

61. NNU Comments at 1-2. NNU also states that the Hearing Officer's refusal to hear evidence on these issues is of particular concern because NNU attempted, by filing a complaint in Caledonia Superior Court, to compel the Hearing Officer to hear evidence on these issues. NNU Comments at 1. However, we note that the Caledonia Superior Court dismissed NNU's complaint and denied Newark's motion for a preliminary injunction as well as all other subsequent motions filed by NNU and Newark in that proceeding. *NNU v. Board*, Docket No. 196-8-12, Order of 10/10/12.

Application, Section 246 by its terms does not require the Board to hear evidence on all of those criteria. Rather, the Board determines whether there is a need to hear evidence based on whether public comments or information submitted by the parties specifically demonstrate the potential for impacts under the criteria that amount to more than general or speculative claims.⁶² If the Board finds that a project does not raise a significant issue with respect to the requisite statutory criteria, an order may be issued without holding a public hearing or evidentiary proceedings.⁶³ Having examined the record on this point, we concur with the Hearing Officer's decision to limit the scope of the evidentiary proceedings in this Docket to certain wildlife habitat and natural communities issues. We do not find that either the public or the party comments submitted to the Board raised a significant issue necessitating further evidentiary proceedings and hearings in this case regarding aesthetics, orderly development, or the other relevant criteria considered in Section 246 proceedings. Accordingly, we find that the Hearing Officer properly limited evidentiary proceedings to those discrete topics that in her judgment raised significant issues.

Next, we address the contentions by Newark and NNU that the Hearing Officer "waived" the other relevant substantive criteria and issued findings unsupported by evidence. We find these arguments to be misplaced given that the PFD clearly contains numerous findings and, where necessary, includes extensive discussion, pursuant to Section 246, the *Section 246 Standards Order*, and the Board's MET Tower Application, regarding: aesthetics; historic sites; air and water purity; the natural environment; public health and safety; public investments; and orderly development.⁶⁴ Thus, in limiting the scope of this proceeding and thereby restricting the extent of the evidence that the parties were allowed to present, the Hearing Officer clearly followed the legal framework established by the Legislature and the Board⁶⁵ for reviewing Seneca's petition as filed under Section 246. In addition, Newark's and NNU's contention that

62. Board's MET Tower Application.

63. See 30 V.S.A. § 246(c)(2). See also PFD at pages 5-6, above (explaining the applicable legal framework for Board review of petitions filed under Section 246).

64. PFD at pages 14-44 and Findings 47-148, above.

65. See PFD at pages 5-6, above (explaining the applicable legal framework for Board review of petitions filed under Section 246).

the Hearing Officer has recommended findings that were unsupported by evidence overlooks that every proposed finding in the PFD was supported by citations to the evidentiary record. Thus, we find no merit to Newark's and NNU's objections that the Hearing Officer improperly limited the scope of this proceeding and failed to base her findings and conclusions on the evidentiary record in this proceeding.

Notice to Adjoining Landowners and Completeness of Application

In this proceeding, Seneca's Application was first deemed complete on April 18, 2012, but later found to be incomplete following a ruling on a matter of first impression which ultimately required that notice be given to a significant number of newly-identified adjoining landowners.⁶⁶ Once notice was provided to the newly-identified adjoining landowners on August 23, 2012, the Hearing Officer deemed the Application complete as of that date.⁶⁷

Newark contends that Seneca's Application should not have been considered complete until at least September 23, 2012, because a number of adjoining landowners were first provided notice on August 23, 2012, as a result of the *Third Procedural Order*. Newark reasons that the Application actually was not complete until the 30-day pre-application notice period had run.⁶⁸ And, while Newark believes that September 23 was the earliest the Application could have been deemed complete, Newark contends that the Application actually wasn't complete until December 16, 2012, because the owners of two adjoining parcels of land first received notice on November 16, 2012. According to Newark, the Hearing Officer's use of the substantial compliance standard to determine when the Application was complete has no basis in rule or statute, that it was "created" by the Hearing Officer, and that the 30-day pre-application notice is

66. See Docket 7867, Order of 8/15/12 at 6.

67. See *Order re: Newark's Motion to Dismiss* ("*Order re: Newark's Motion to Dismiss*"), Docket 7867, Order of 11/15/12 at 4-6.

68. Newark Comments at 29-30. The MET Tower Application requires that:
[t]he applicant must provide written notice, at least 30 days in advance of filing the application form pursuant to 30 V.S.A. § 246, to the [Department], [ANR], the municipal and regional planning commissions and legislative bodies of the towns where the project will be located, the landowners of record of property adjoining the project site, and the Board.
MET Tower Application at 1, General Instructions.

mandated by statute.⁶⁹ Newark is also critical of an August 15, 2012, Order issued by the Hearing Officer because it limited the scope of comments that could be filed by newly-identified adjoining landowners. Even though the limitations on the scope of comments for these individuals were dispensed with by an Order issued on September 14, 2012, Newark believes that a new 30-day notice period should have been granted at that time, and that individuals may have refrained from filing comments due to the initial scoping limitations.⁷⁰ Lastly, during the oral argument, Newark represented that there are additional adjoining landowners along the access roads to the MET tower sites that still have not been provided the required advance notice of the Application, and that the Application therefore remains incomplete.⁷¹

As with Newark, Mr. Whitworth asserted during the oral argument that the Application should not have been considered complete until December 16, 2012, because there were adjoining landowners that did not receive notice of the Application until November 16, 2012.⁷²

During the oral argument, Ms. Hession also raised concerns over the 30-day pre-application notice requirement and the determination that the Application was complete as of August 23, 2012.⁷³

Seneca takes the position that its Application was actually complete on April 18, 2012, for two reasons. First, Seneca contends that it is the substantive content of an application that governs the completeness determination, and that notice failures, if there were any at all, do not render an otherwise complete application incomplete. Seneca therefore asserts that its Application was complete as of April 18, 2012, because at that time it had addressed all the substantive requirements for a MET Tower application.⁷⁴ Second, Seneca believes the Hearing Officer's ruling regarding the required scope of notice to adjoining landowners established by the

69. Newark Comments at 29-30.

70. Newark Comments at 30.

71. Tr. 5/29/13 at 48-50 (Dingledine).

72. Tr. 5/29/13 at 8-9 (Whitworth).

73. Tr. 5/29/13 at 30 (Hession).

74. Tr. 5/29/13 at 43-47 (Tyler).

Third Procedural Order was incorrect because it could result in notice requirements for "far-flung" landowners, and not just those most likely to be impacted as a result of being immediately adjacent to a proposed project. Therefore, according to Seneca, it actually completed the required notice no later than April 18, 2012.

We first address Seneca's argument that notice requirements are not relevant to a determination of an application's completeness. We reject Seneca's position for two reasons. First, the application form itself requires an applicant to submit to the Board "a list of the names and addresses of the parties notified of this application" as part of the application process.⁷⁵ We conclude that an application is incomplete when the attendant landowner list improperly omits as many landowners as were omitted in Seneca's initial Application. Second, Seneca's interpretation of the completeness standard would frustrate the purpose behind the pre-filing notice requirement in our application process. The pre-filing notice requirement serves the legislative goal of processing MET Tower applications expeditiously by affording adjoining landowners and applicants an opportunity to work out any potential differences prior to the filing of an application. Adopting Seneca's position would mean that an application would be deemed complete as long as it addresses the applicable criteria. The clock would start running on the proceeding even if no adjoining landowners have received notice, thus eliminating any opportunity to resolve any issues with the adjoining landowners through negotiation as opposed to litigation. This lost opportunity for settlement, combined with the inevitable delays that would result from having to correct deficient notice after the review process has begun, would be counter to the legislative intent of expediting the Section 246 process.

Second, we address Seneca's assertion that the Hearing Officer's interpretation of the scope of the notice required to be given to adjoining landowners was overly broad. We concur with the Hearing Officer's interpretation of the term "adjoining landowner" for determining the scope of notice required in a Section 246 proceeding. Our *Procedures Order* requires that the pre-filing notice and a copy of the application as filed be provided to the landowners of record of

75. MET Tower Application at 2, Section 1.

property adjoining the property on which the project will be located.⁷⁶ In turn, for purposes of a Section 246 application, the term "adjoining landowner" is defined as an individual who owns land in fee simple that "shares a property boundary with the tract of land on which that facility or substation is located or is adjacent to that tract of land and the two properties are separated only by a river, stream, railroad line or public highway."⁷⁷ In this case, the Hearing Officer correctly found that Seneca signed leases with Daniel Ouimette and Hawk Rock Holdings, LLC, and thereby created a single, large parcel of land (the "project parcel") within which the MET towers are proposed for siting. Thus, under our rule, the fee simple owners of lands that are adjacent to the project parcel were entitled to notice. We acknowledge that this interpretation of our rule required Seneca to provide notice to many more landowners than would have been necessary had the Hearing Officer ruled in Seneca's favor.⁷⁸ However, Seneca's proposed interpretation creates the opportunity for project developers to subvert the pre-filing notice process by leasing small tracts of land around the perimeter of a project site, thereby artificially limiting the number of landowners entitled to notice. This is not an appropriate outcome.⁷⁹

With respect to the concerns raised by Newark, Mr. Whitworth, and Ms. Hession, while they do raise legitimate issues, we ultimately are not persuaded by their arguments. First, all adjoining landowners were, in fact, provided with a 30-day period from the time they received notice to file comments and seek to intervene as parties.⁸⁰

Second, as noted above, the pre-filing notice requirement is intended to provide parties an opportunity to work through potential areas of disagreement on an anticipated application before it is filed. Seneca notified those adjoining landowners that it believed were entitled to the pre-

76. *Procedures Order* at 6-7.

77. PSB Rule 5.402(B)(2)(b).

78. *See* Docket 7867, Order of 8/15/12. We note that in situations where the notice requirement would result in undue hardship without any corresponding benefit, an applicant may seek a waiver of the Rule's requirements. *See* PSB Rule 1.200.

79. Our review of the record leads us to conclude that this was not Seneca's intent in structuring the leases in the manner it did.

80. Docket 7867, Order of 8/15/12 at 6-7; *Order re: Newark's Motion to Dismiss* at 10.

application notice pursuant to its understanding of the definition of adjoining landowner in PSB Rule 5.402(B)(2)(b). While the Hearing Officer eventually ruled that Seneca's interpretation of the rule was incorrect, we note that the ruling on that issue was a matter of first impression, and while we agree with the Hearing Officer's determination, we find Seneca's initial interpretation was offered in good faith. Further, as a practical matter, Seneca's Application had already been filed as of the date of the Hearing Officer's ruling on notice requirements. So, because there was no way at that point to provide the newly-identified adjoining landowners with notice in advance of the filing, the *Third Procedural Order* stayed the schedule in the proceeding pending the running of a 30-day, post-filing period to afford these individuals a reasonable opportunity to comment on the Application.⁸¹ Staying the proceeding until the 30-day, post-filing period had run for the newly-identified adjoining landowners was an effective and reasonable solution in the face of a situation created, not by any bad faith on Seneca's part, but rather by a sequence of events that gave rise to the need to deal with a procedural matter of first impression.

Additionally, we note that a determination had already been made that our review of the proposed project would be conducted as a contested-case proceeding, so the intent behind having a pre-filing notice period to foster dialogue and settlement would not have been served in any event. Lastly, Newark is incorrect in asserting that the pre-filing notice requirement is a statutory requirement. The only 30-day period referenced in Section 246 is a thirty-day window in which objections may be raised *after* an application has been filed, and as noted above, all adjoining landowners were provided with that opportunity.⁸²

Third, we also agree with the Hearing Officer's determination that the Application was complete as of August 23, 2012, because as of that date, Seneca had substantially complied with the application requirements. Newark's claim that the Hearing Officer "created" the substantial compliance standard without any support is unfounded. Our *Procedures Order* specifically states that, "Upon receiving an application under Section 246, Board staff will review the application for completeness. If the application does not *substantially comply* with the

81. Docket 7867, Order of 8/15/12 at 6-7.

82. See 30 V.S.A. § 246(c)(2).

application requirements set forth herein, the Clerk of the Board will inform the applicant of the deficiencies."⁸³ Thus, the substantial compliance requirement for completeness is expressly stated in our *Procedures Order* and the Hearing Officer correctly looked to it in making her determination.

With respect to adjoining landowners that should have received notice on August 23, 2012, but did not; our review of the record indicates that the owners of two parcels potentially fall into this category.⁸⁴ As of August 23, 2012, Seneca had provided copies of its Application to seventy different entities or persons, each of whom was provided an opportunity to submit comments, request a hearing, and seek to intervene. Given these facts, it was appropriate for the Hearing Officer to find that Seneca had substantially complied with the application requirements under our *Procedures Order* upon notice to the landowners identified as a result of the *Third Procedural Order*.

Fourth, we are not persuaded by Newark's criticism of the limitation on the scope of comments from newly-identified adjoining landowners in the *Third Procedural Order*, issued on August 15, 2012, because those limitations were subsequently lifted in the *Order re: Clarification of Third Procedural Order*, issued on September 14, 2012. In any event, Newark's concerns about potentially discouraged commenters are speculative and find no support in the record of the case, a review of which confirms that several of the newly-identified adjoining landowners filed comments and sought intervention on numerous issues.⁸⁵

Lastly, Newark states that it believes numerous additional adjoining landowners have yet to be provided notice, including landowners whose property abuts land over which the access road travels. Newark appears to suggest that the Hearing Officer excluded these individuals from

83. *Procedures Order* at 7 (emphasis added).

84. The Leuiken and Gowdy Parcels. *See Order re: Newark's Motion to Dismiss* at 9-10.

85. *See e.g.*, Mathieu intervention request, dated 9/19/12, addressing aesthetics; Hession supplemental request for intervention, dated 9/27/12, addressing significant issues related to the public good; Whitworth supplemental request for intervention, dated 9/27/12, addressing orderly development, economic benefits, and aesthetics.

receiving notice.⁸⁶ Newark's comments on this final issue simply are not specific enough for us to take them into detailed consideration. We have reviewed the Hearing Officer's rulings on notice and find no action that effectively foreclosed any adjoining landowners to the project parcel from receiving due notice. To the extent that Newark is referring to lands that abut the so-called Williams parcel, the Hearing Officer correctly determined that the Williams parcel was not part of the project parcel. Seneca leased the Williams parcel after it filed the Application, and no changes were ever made to the Application that resulted in any project-related infrastructure being located on that parcel.⁸⁷

In summary, we agree with the Hearing Officer that Seneca was in substantial compliance with the notice requirements of the *Procedures Order* as of August 23, 2012, and conclude that the Application was properly deemed complete as of that date.

Applicability of the Newark Town Plan

During a September 17, 2012, public hearing, Newark adopted revisions to its Town Plan (the "September 17 Plan"). The newly-adopted revisions contain explicit language that would regard the erection of the Hawk Rock MET tower as "inappropriate and inconsistent with the town's vision and goals."⁸⁸ The issue that we address today is whether the September 17 Plan or the version of the Town Plan that was in existence at the time Seneca filed its Application in April of 2102 (the "Existing Plan"), applies in this proceeding. For the reasons discussed below, we conclude that it is the Existing Plan that is applicable to this proceeding.

86. Tr. 5/29/13 at 49-50 (Dingledine). In the event Newark meant to argue that the intervention request of the Mathieus was denied, we note that it was not denied based on the location of their property. The Mathieus' property does abut the project parcel and they received notice as a result of the *Third Procedural Order*. The Mathieus' intervention request was denied, in part, because it was not timely filed with the Board, but primarily because of the Mathieus' failure to properly serve other parties with their request until almost two weeks after it was filed, even after being notified by the Clerk of the Board that service on other parties was a requirement in order for the Mathieus' request to be considered. Docket 7867, Order of 10/16/12 at 2-3.

87. *Order re: Newark's Motion to Dismiss* at 7-9.

88. September 17 Plan at 27 ("The Town of Newark regards large-scale industrial development as inappropriate within the town. . . . Newark regards commercial or industrial structures that exceed 125 feet in height as inappropriate and inconsistent with the town's vision and goals.")

Mr. Whitworth contends that the September 17 Plan is controlling in this proceeding. According to Mr. Whitworth, under the "pending ordinance doctrine," the effective date of the September 17 Plan was actually July 2, 2012, the date on which the September 17, 2012, public hearing was warned, and a date which predates the Hearing Officer's determination that the Application was complete on August 23, 2012. Mr. Whitworth contends that the "pending ordinance doctrine" has been adopted by the Vermont Supreme Court.⁸⁹

Similarly, Newark contends that the September 17 Plan went into effect on August 9, 2012, the date of the first public hearing on the revised plan. Newark also cites to the Vermont Natural Resources Board's *District Commission Training Manual* ("*Act 250 Training Manual*") for the proposition that a plan which is in the process of being adopted at the time an application is filed will apply to that application provided the town has noticed a hearing on the new plan prior to the date of application, and provided the new plan is adopted within a reasonable time thereafter.⁹⁰

NNU refers back to its previous filings on the applicability of Newark's Existing Plan in support of its contention that the September 17 Plan applies.⁹¹

By contrast, Seneca asserts that the Existing Plan applies in this proceeding because its rights vested in the law that was in effect at the time a complete application was filed. According to Seneca, the "pending ordinance doctrine" is a common law doctrine that, in Vermont, has been codified with respect to zoning ordinances but has never been codified with respect to town plans. Seneca further asserts that the case, cited in the *Act 250 Training Manual* and relied on by Newark, was actually decided on a statutory basis under a specific section in Title 24 regarding the expiration of town plans, and that the "pending ordinance doctrine" was discussed in dicta

89. Tr. 5/29/13 at 7-8 (Whitworth).

90. Newark Comments at 29 (citing *Act 250 Training Manual* at § 32 (Criterion 10 (Local and Regional Plan)), available at <http://www.nrb.state.vt.us/lup/manual.htm>). Newark also states that it is "curious" that the PFD does not mention the Department's position that the September 17 Plan should be controlling in this Docket. *Id.* at 31 (citing to PFD at 19). We note here that at the time the PFD was issued, an order specifically addressing the parties' arguments regarding the applicability of the September 17 Plan had been issued, which detailed and rejected the Department's position. *Order re: Applicability of Newark's Town Plan*, Docket 7867, Order of 11/15/12 at 2-6.

91. NNU Comments at 2.

only. Seneca also points to the different roles that town plans have in Act 250 proceedings, where compliance with such plans must be demonstrated, and Section 248 proceedings, where the Board must give plans due consideration, but where compliance is not mandated. Seneca also notes that the policy considerations that underlie the "pending ordinance doctrine" are not present here. According to Seneca, the doctrine serves to prevent applicants for zoning permits from rushing the filing of their applications to secure coverage under existing ordinances when a pending ordinance change has been drafted and noticed that may prove less favorable to the applicants. Seneca asserts that the opposite is true in this case because Newark revised its Existing Plan after the Application was filed and the permitting process was underway in an attempt to stop the proposed project.⁹²

Having considered the foregoing arguments, we conclude that the weight of the Vermont Supreme Court's precedent compels the conclusion that the Existing Plan, which was in effect at the time the Application was deemed complete, applies to this proceeding.⁹³

Newark's reliance on the *Act 250 Training Manual* is misplaced for two reasons. First, the contents of the manual do not constitute legal authority. Second, the *Act 250 Training Manual*, which Newark seeks to invoke in support of its position is not fully supported by the case cited in the manual, *In re John A. Russell Corp.* In the *Russell* case, the Court determined that where a prior town plan had expired and a new town plan was in the process of being adopted, the new town plan would apply provided the town had noticed a hearing on the new plan prior to the date of application, and the new plan was adopted within a reasonable time thereafter.⁹⁴ The Court specifically explained:

There is nothing in the chapter on municipal planning and zoning that specifically provides for the effect of an unapproved plan in an Act 250 proceeding. Although the wording is somewhat confusing, we take this statutory section as an

92. Tr. 5/29/13 at 40-44 (Tyler).

93. See e.g., *Smith v. Winhall Planning Commission*, 140 Vt. 178, 181-83, 436 A.2d 760, 761-63 (1981) (holding that zoning regulations in effect when application was filed govern an application, not subsequently enacted amendments). See also *In re Ross*, 151 Vt. 54, 58, 557 A.2d 490, 493 (1989) (finding that applicants have a vested right in a town plan after submitting a "complete" application).

94. *In re John A. Russell Corp.*, 2003 VT 93, 176 Vt. 520, 838 A.2d 906.

expression of the Legislature that a pending plan must be given effect even if it is not yet finally approved. *In essence, the plan is retroactive to cover any gap period between the expiration of the old plan and the adoption of the new one.*⁹⁵

In addition to the fact that the prior town plan had expired, the Court discussed two other facts in rendering its decision. First, the applicant sought a remand during an earlier appeal. The remand occurred after the prior plan had expired, and the town's planning commission had approved the new plan and submitted it to the town selectboard, which had in turn noticed a public hearing on the new plan. Second, the two plans in question were substantively identical.⁹⁶

Here, in our proceeding, none of the factors that drove the Court's decision in *Russell* are present. Seneca's Application was filed at a time when the Existing Plan was still in effect. There was no gap between the expiration of one plan and the adoption of another that necessitated the retroactive application of the September 17 Plan. The two plans at issue are not substantively identical. To the contrary, the September 17 Plan revisions specifically added language to the Existing Plan that would require the Newark Planning Commission to find that the proposed Hawk Rock MET Tower installation is inappropriate based on its purpose and height,⁹⁷ while the Existing Plan does not address the heights of commercial and industrial structures or expressly prohibit installations such as the proposed Hawk Rock MET tower.

Mr. Whitworth's position that the "pending ordinance doctrine" has been adopted by the Vermont Supreme Court is mistaken. In *Russell*, the Court discussed this doctrine because the Environmental Board had relied on it below, treating the remand of the earlier appeal as a new date of application to apply the duly noticed but not yet adopted plan to the application. The Court specifically stated that it agreed with the outcome of the Environmental Board's decision (i.e. that the new plan would apply), but "based on a variation of the Board's rationale."⁹⁸ The Court goes on to explain that its decision is based on the statutory scheme found in Chapter 117

95. *Russell*, 2003 VT 93, ¶ 15 (citations omitted) (emphasis added).

96. *Id.* at ¶ 14.

97. "Newark regards commercial or industrial structures that exceed 125 feet in height as inappropriate and inconsistent with the town's vision and goals." September 17 Plan at 27.

98. *Id.*

of Title 24 of the Vermont Statutes Annotated, stating, "[a]lthough we discussed the pending ordinance doctrine with respect to a zoning case in *Handy*, 171 Vt. at 350, 764 A.2d at 1238, we did not clearly adopt it in that case. We need not create a general rule here."⁹⁹ Thus, the Court in fact did not adopt the "pending ordinance doctrine," at least not with respect to the applicability of town plans in either Act 250 or Section 248 proceedings. Therefore, this doctrine is not binding upon us in this Docket and we see no basis to use our discretion to apply it, particularly in light of the great weight of the Court's precedent in other administrative proceedings that an applicant's rights vest at the time a proper application is filed, which in this case occurred on August 23, 2012, when the Existing Plan was still in effect.

NNU's comments rely on a filing it made on October 2012, for the proposition that the September 17 Plan applies to Seneca's Application.¹⁰⁰ We have reviewed NNU's earlier filing as well as the Hearing Officer's November 15, 2012, Order addressing the applicability of Newark's September 17 Plan.¹⁰¹ We agree with the Hearing Officer's analysis and her application of the relevant legal precedent to the question of which version of the Newark town plan applies in this proceeding. We are therefore unpersuaded by NNU's position on this question as expressed in its October 18, 2012, filing.

In conclusion, having reviewed the *Order re: Applicability of Newark's Town Plan*, issued on November 15, 2012, and the parties' comments on the PFD, filed with the Board and expressed at the oral argument, we find that the Hearing Officer correctly concluded that the September 17 Plan is inapplicable to this proceeding and that the Hearing Officer properly reviewed Seneca's Application under the Existing Plan.

99. *Id.* at ¶ 15.

100. On October 2, 2012, the parties were asked to file legal memoranda on whether the Existing Plan or the September 17 Plan should apply to Seneca's Application. On October 17, 2012, SMW, Newark, and the Department each filed a brief on the applicability of the September 17 Plan. *Order re: Applicability of Newark's Town Plan*, Docket 7867, Order of 11/15/12 at 2. NNU did not file a memorandum in response to the October 2 request. However, on October 15, 2012, NNU filed a Motion for Relief from Judgement Pursuant to V.R.C.P. 60(b), which included arguments as to why the September 17 Plan, rather than the Existing Plan, should apply in this proceeding. *See Order re: NNU Rule 60(b) Motion* (Board Order declining to grant NNU interlocutory review of the scoping orders).

101. *Order re: Applicability of Newark's Town Plan*, Docket 7867, Order of 11/15/12.

Orderly Development and Aesthetics

Newark asserts that Seneca failed to meet its burden of proof to show that the proposed Hawk Rock MET tower installation and the proposed Project will not have an undue adverse impact on aesthetics and orderly development.¹⁰² Brighton also asserts that the proposed MET towers will negatively impact aesthetics and orderly development.¹⁰³ It appears from both Newark's and Brighton's comments that the towns primarily base their assertions regarding Seneca's failure to satisfy the orderly development criterion on the proposed Project's aesthetic impacts.¹⁰⁴ Therefore, within this section, we will discuss the towns' orderly development assertions based on the proposed Project's potential aesthetic impacts.

We turn first to Newark's contention that Seneca is not entitled to a rebuttable presumption of no undue adverse impact on the issue of aesthetics in this proceeding because Seneca proposes to operate the MET towers for a period of five years.¹⁰⁵ This argument is irrelevant. As stated by the Hearing Officer in the Second Procedural Order:

In Section 246 cases, the rebuttable presumption is an evidentiary burden-shifting device that does not apply to the Board's initial determination whether a significant issue with regard to aesthetics has been raised in an application or by the comments filed in response to an application.¹⁰⁶

Thus, because the rebuttable presumption is a burden-shifting device and the evidentiary proceedings in this Docket did not include aesthetics, Newark's assertion regarding the rebuttable presumption provides no basis for reconsidering the Hearing Officer's ruling on this point.

We turn next to Newark's assertion that the Hearing Officer's findings on aesthetics are without adequate evidentiary support because the information provided by Seneca in its Application does not satisfy the aesthetics criterion for a MET Tower project. Newark contends

102. Newark Comments at 2-13 and 31.

103. Brighton Comments of May 2 at 1-3.

104. Any contentions related to orderly development not concerning aesthetics will be addressed within the specific comment sections for each party below.

105. Newark Comments at 2 and 10-11.

106. Docket 7867, Order of 07/30/12 at 6-7.

that notwithstanding Seneca's representations in its Application regarding aesthetics, the proposed Project will have an undue adverse aesthetic impact because it violates a clear, written community standard and offends the sensibilities of the average person and because Seneca failed to mitigate the aesthetic impacts.¹⁰⁷ We disagree.

With regard to whether a clear, written community standard exists within Newark or Brighton, Newark contends that the Existing Plan includes goals to protect and preserve the natural beauty and scenic vistas of the town to preserve the aesthetics of the area, which establish a clear, written community standard; and Brighton contends that the Brighton Town Plan includes language regarding the importance of tourism and the scenic beauty of the area to its economic well-being, which establishes a clear, written community standard.¹⁰⁸ However, these arguments overlook that "to be considered a clear, written community standard, there must be language 'intended to preserve the aesthetics or scenic beauty of the area where the proposed project is located and [it] must apply to specific resources in the proposed project area.'"¹⁰⁹ The Hearing Officer concluded that the applicable Existing Plan did not "specifically identify Hawk Rock or any other particular resource as a target for scenic preservation" and that none of the host towns' town plans included specific land conservation measures or language specifically

107. Newark Comments 6-13 (citations omitted) (referencing the so-called Quechee analysis). The Board has adopted the Quechee test in determining whether a proposed project would have an undue adverse impact on aesthetics, summarized by the Vermont Supreme Court in *In re Amended Petition of UPC Vermont Wind, LLC* as follows:

In determining whether the project would have an undue adverse aesthetic impact under § 248(b)(5), the Board employ[s] the so-called Quechee test. Under this test, developed in connection with Act 250 proceedings, a factfinder first examines whether a project will have an adverse impact on scenic and natural beauty, and if so, whether the impact will be 'undue.' An adverse impact is considered undue if: (1) it violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; or (2) it offends the sensibilities of the average person; or (3) the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.

In re Amended Petition of UPC Vermont Wind, LLC, 2009 VT 19, ¶ 24, 185. Vt. 296, 969 A.2d 144.

108. Newark Comments at 6-8; Brighton Comments of May 2 at 2.

109. *UPC Vermont Wind*, 2009 VT 19, ¶ 26. *See also*, footnote 147.

addressing MET tower installations.¹¹⁰ Newark's comments do not provide any evidence to support the fact that such specific language exists. As for Brighton's comments, which are discussed in more detail below, Brighton admits that the Brighton Town Plan does not include language specifically identifying scenic areas for preservation.¹¹¹

Newark also contends that the town-wide vote to amend its Existing Plan embodies a clear, written community standard and provides a basis for the position that the proposed Hawk Rock MET tower would shock and offend the average person.¹¹² We disagree on both accounts. As discussed above, the September 17 Plan is not applicable in this proceeding and, therefore, cannot provide a basis for finding that an applicable clear, written community standard exists in this proceeding. To the contrary, the September 17 Plan's revisions appear to have been directed at creating a clear, written standard after the fact with which to prompt the Board to deny Seneca's Application for the proposed Hawk Rock MET tower; as such, these actions undermine Newark's argument that a clear, written community standard exists in the applicable town plan.¹¹³ Thus, after reviewing the applicable town plans and the Hearing Officer's proposed findings and discussions under the aesthetics and orderly development criteria, we agree with the Hearing Officer's conclusion that no clear, written community standards would be violated by the installation of the proposed MET towers.

With regard to whether the proposed Project offends the sensibilities of the average person, Newark contends that the proposed Project will shock and offend the average person given the local opposition expressed at the public hearing and the town-wide vote to amend its Existing Plan.¹¹⁴ In addition, at the oral argument Newark and Ms. Hession took issue with the Hearing Officer's observation that: "while there has been unmistakable opposition to the proposed Project from some quarters, it is not clear whether this opposition represents a majority

110. PFD at 15-16, 19-20, and Findings 49-53, above.

111. Brighton Comments of May 2 at 2. *See* discussion ante, 68-70.

112. Newark Comments at 8.

113. September 17 Plan.

114. Newark Comments at 8.

or minority view from a regional perspective."¹¹⁵ Significantly, all of Newark's assertions and one of Ms. Hession's assertions specifically reference wind turbine projects rather than Seneca's current petition for the installation of four temporary MET towers.¹¹⁶ However, these arguments overlook that the standard for the purposes of the Board's aesthetic analysis is whether the proposed Project offends the sensibilities of the *average* person.¹¹⁷ Therefore, while the local and, potentially, regional majority may find the proposed Project offensive based on their proximity and personal and emotional connection to the current landscape, the evidentiary record shows that the average person would only view the narrow profile of the portion of the MET towers above the tree canopy from a distance of more than one mile and would not see any lighting or moving parts affixed to the towers. Based on the limited and distant public views of the proposed Project, we agree with the Hearing Officer's conclusion that the proposed Project will not shock or offend the average person.

With regard to whether Seneca took generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings, Newark asserts that Seneca did not take any discernible measures to mitigate the aesthetic impacts of the proposed Project and did not present information addressing alternative site locations to the Hawk Rock MET tower.¹¹⁸ While Seneca did not provide information regarding site

115. PFD at 21. Specifically, Newark asserts that the Hearing Officer's statement is "completely erroneous" because: (a) Newark voted three to one against turbines; (b) Brighton voted two to one against turbines; and (c) the NVDA Board voted thirty-nine to three to suspend development of wind projects. Newark Comments at 31. Ms. Hession asserts that the proposed Project is in fact opposed region-wide because: (a) more than half of the registered voters in Newark signed a petition opposing Seneca's proposal; (b) fifty-three out of the fifty-four people that spoke at the July 17 public hearing, spoke against the Project; (c) the NVDA Board approved a moratorium on large-scale wind development projects; (d) Newark voted overwhelmingly to amend its Existing Plan to disallow industrial wind project developments, which include structures more than 125 feet tall, such as the Project; (e) responses to a survey conducted in Brighton indicating that sixty-three percent opposed ridgeline development for wind projects; (f) all the elected legislators in the region ran on a platform opposing the Project; and (g) Newark voted to pay for attorney's fees to defend its September 17 Plan. Tr. 5/29/13 at 22-29 (Hession).

116. See Newark Comments at 31 (all three assertions refer specifically to wind turbines rather than MET towers); tr. 5/29/13 at 22-29 (Hession) (reference to the NVDA moratorium refers specifically to large-scale wind development projects rather than MET towers).

117. *In re UPC Vermont Wind*, 2009 VT 19, ¶ 24.

118. Newark Comments at 10.

alternatives for the proposed MET tower installations, Seneca is employing several measures that mitigate the impacts of the proposed Project. Seneca's site selections require very little clearing because Seneca is utilizing two previous MET tower sites and, with the exception of a brief extension at the Hawk Rock MET tower site, will utilize existing access roads.¹¹⁹ Seneca is also installing towers with heights that do not trigger the need for lighting.¹²⁰ In addition, that the towers will be located more than one mile from public vantage points and that the color of the towers will tend to blend the towers into the background also mitigate the aesthetic impacts of the proposed Project.¹²¹ Thus, we find the Hearing Officer correctly concluded that Seneca has taken reasonable measures to mitigate the aesthetic impacts of the proposed Project.

Newark asserts that the Hearing Officer should have allowed for a balloon test to obtain a more accurate idea regarding the proposed Project's visual impacts and that Seneca should have provided additional evidence regarding the aesthetic impacts of the proposed Project.¹²² We disagree. Such a balloon test demonstration and additional evidence were not necessary in this proceeding because Seneca provided the specifications of the proposed MET towers, the locations of the proposed MET towers, and indicated that the closest off-site public view of the proposed Project will be from at least one mile away.¹²³ Given the minimal visual impact of the proposed Project based on the tower specifications and locations as well as the temporary nature of the towers, Seneca's application information was sufficient to establish that the proposed Project's aesthetic impacts would not be unduly adverse. In addition, Newark's comments include a statement that no consideration was given to the visual impacts of bird diverters within the aesthetics analysis.¹²⁴ As discussed below, Seneca will install brightly colored tabs approximately 3.5" x 7" in size at recommended intervals on the guy wires of the Hawk Rock

119. PFD at Project Background and Description; exh. Seneca-JS-2.

120. PFD at Findings 8 and 148, above.

121. PFD at Finding 68 and 71, above.

122. Newark Comments at 3-4 and 8-11.

123. Exh. Seneca-JS-2; PFD at Finding 71, above.

124. Newark Comments at 31.

MET tower.¹²⁵ Newark correctly points out that the Hearing Officer makes no mention of the bird diverters in the aesthetic criterion findings or discussion. The presence of such diverters should be considered under the aesthetics criterion given that they will impact the color and profile of the tower, which serve to mitigate its visual impact. However, given the small size of the diverters and the other mitigating factors of the tower, such as the limited and distant public views, the lack of lighting, and the impermanence of the tower, the presence of the diverters does not provided a sufficient basis for us to reject the Hearing Officer's conclusion that the proposed Hawk Rock MET tower will not have an undue adverse impact on aesthetics.

In conclusion, we find that Seneca met its *prima facie* burden with regard to the aesthetics criterion when it filed its initial Application with the Board, and that neither the parties opposed to the proposed Project nor the public presented sufficient information during the Application comment periods to raise a significant issue with regard to aesthetics in this case. Accordingly, the Hearing Officer did not err in concluding that the proposed Project will not have an undue adverse impact on the aesthetics of the surrounding area.

Given our conclusion that the proposed Project will not have an undue adverse impact on aesthetics, we further reject the parties' contentions that Seneca did not satisfy its burden under the orderly development criterion based on the aesthetic impact of the proposed Project. Other arguments regarding whether Seneca satisfied its burden under the orderly development criterion will be addressed separately below.

Peregrine Falcons at Hawk Rock

Newark has proposed a number of findings that are critical of the qualifications of Kristen Watrous, Seneca's witness on peregrine falcons and rely heavily on a letter from Margaret Fowle,¹²⁶ a conservation biologist and ornithology expert with Audubon Vermont, for the

125. Newark Comments; exh. Seneca-JS-4; PFD at Finding 46, above.

126. Letter of July 31, 2012, from Margaret Fowle (the "Fowle Letter"). The Fowle letter was admitted into evidence as Exhibit N-KW-3.

proposition that the Hawk Rock MET tower will have an undue adverse impact on peregrine falcons nesting at the Hawk Rock cliffs.¹²⁷

According to Newark, Seneca has failed to demonstrate that there will be no undue adverse impacts to the peregrine falcon habitat. Newark contends that Ms. Watrous was not qualified to testify on bird impacts because she is not an ornithologist. Newark states that the Fowle Letter demonstrates that there will be an undue, adverse impact unless the guy wires supporting the tower are wrapped in a highly visible material. According to Newark, the use of "bird diverters"—brightly colored tabs approximately 3.5" x 7" in size placed at recommended intervals on the guy wires—is insufficient to protect against collisions with the wires. Newark states that Seneca provided "no evidence at all" of the efficacy of bird diverters, and that the opinions of the ANR and Seneca witnesses are unsupported and fail to quantify the reduction in the risk of collisions that would be realized as a result of diverter use.¹²⁸ Newark further asserts that Ms. Watrous' testimony was not based on "sufficient facts or data," was not the "product of reliable principles and methods," and the principles and methods were not applied "reliably to the facts of the case."¹²⁹ Newark contends that Ms. Watrous selectively presented portions of the Fowle Letter and ignored the "most basic and essential statements" made in the letter regarding the project, in particular the risks associated with guy wires and the fast flight of peregrine falcons.¹³⁰ Newark characterizes Ms. Watrous' testimony that bird diverters can reduce avian collision mortality by 50% to 90% as a "bald faced assertion" that has no relevance to the proposed project given its proximity to the habitat, and is "completely unsupported by any sufficient facts or data and is not the product of reliable principles and methods."¹³¹

NNU contends that there is no provision in the PFD or the MOU between Seneca and ANR for the monitoring of impacts to peregrine falcons nesting at the site, or to ensure

127. Newark Comments at 14-16.

128. Newark Comments at 17-18.

129. Newark Comments at 18-19, 20-21 (quoting V.R.E. 702).

130. Newark Comments at 19-20.

131. Newark Comments at 20-21.

compliance with the terms of the MOU. NNU requests that such provision be ordered to ensure proper oversight and monitoring, and suggests that NNU members are appropriate to perform the task.¹³² NNU also believes there was insufficient evidence presented to support a finding that the proposed bird diverters would sufficiently reduce the risk of peregrine falcon collisions with the tower guy wires.¹³³

As to Ms. Watrous' qualifications to testify regarding peregrine falcon impacts, Newark failed to object to the admissibility of Ms. Watrous' prefiled testimony based on her alleged lack of qualifications as an expert.¹³⁴ Furthermore, even if Newark's objection to Ms. Watrous' prefiled testimony had not been waived we do not find Newark's objection to be persuasive. We note that while Ms. Watrous does not have a degree in ornithology, she does have a Bachelor's degree in biology and a Master's of Science degree in Wildlife Biology. Her professional experience includes work for the University of Vermont as a research assistant on bobcats, and for the Vermont Department of Fish and Wildlife as research assistant on bat mist netting surveys. In 2007, she was hired by her current employer, Stantec Consulting, as a wildlife biologist and is serving as Stantec's project manager on the Seneca project.¹³⁵ As project manager, Ms. Watrous directed a team of individuals who were involved in the project, including two ornithologists. These two ornithologists conducted field work at the project site and consulted with Ms. Watrous on their findings. Ms. Watrous also consulted other scientific literature and studies related to potential impacts to the peregrine falcons.¹³⁶ Given this background and the fact that Ms. Watrous holds a Master's of Science degree and has worked in the field for ten years, we find the evidentiary record amply supports the Hearing Officer's determination that Ms. Watrous possesses the education, training and experience necessary to

132. NNU Comments at 2; tr. 5/29/13 at 19-20 (Bucknam).

133. Tr. 5/29/13 at 10 (Bucknam).

134. Tr. 1/23/13 at 338 (Remington). Newark questioned Ms. Watrous regarding her qualifications at the technical hearing after Ms. Watrous' prefiled testimony was admitted into the evidentiary record without objection.

135. Tr. 1/23/13 at 345, 433-34 (Watrous).

136. Tr. 1/23/13 at 345 (Watrous).

interpret scientific literature, as well as the statistics or the conclusions that scientific literature presents. In turn, it is reasonable to conclude that this background enables Ms. Watrous to understand and interpret the findings of the two ornithologists on the project team.¹³⁷

Accordingly, while Ms. Watrous does not have a degree in ornithology, the Hearing Officer did not err in affording her testimony regarding peregrine falcons and potential impacts at the Hawk Rock site some measure of weight, in particular where the Hearing Officer found support elsewhere in the record.

Newark's proposed findings are largely based on portions of the Fowle Letter that speak to concerns regarding impacts to peregrine falcons from towers generally, and which are not specific to the Hawk Rock tower. Later in her letter, Ms. Fowle states that she does not object to the proposed Hawk Rock tower provided certain protections are instituted, noting that it is still possible, even with protective measures, that there will be some level of negative impact to peregrine falcons at the site. Ms. Fowle's recommended mitigation measures consist of covering guy wires in a highly visible material to increase their visibility to peregrines and other raptors, limiting maintenance work on the tower above the tree canopy to avoid breeding season, and conducting regular post-construction site monitoring to assess any impacts to falcons from the existence of the tower.¹³⁸

Newark and NNU both contend that the use of the proposed bird diverters is not sufficient to meet Ms. Fowle's recommendation that the wires be wrapped with a highly visible material and assert that Seneca has failed to demonstrate otherwise.

We disagree. The proposed bird diverters are to be installed consistent with the manufacturer's recommendations. Additionally, Ms. Watrous testified that bird diverters have been shown to achieve significant reductions in bird collision mortality when diverters are used on guy wires. Furthermore, there is additional evidence supporting Ms. Watrous' opinion regarding the effectiveness of the bird diverters from ANR's bird expert, John Buck. Mr. Buck testified that significant risks were posed by the presence of the tower and its supporting guy

137. Tr. 1/23/13 at 436 (Watrous).

138. Exh. N-KW-3 at 2.

wires. However, he also testified that those risks would be reduced to an acceptable level, in part, by use of bird diverters to reduce collision risk with the guy wires.¹³⁹ And, while there is a basis in the evidentiary record for crediting Ms. Watrous' opinion on the effectiveness of the bird diverters, the Hearing Officer made clear that she primarily relied on the testimony of ANR witness Mr. Buck—whose expertise was not challenged—in reaching her determination that the MOU between Seneca and ANR would be sufficient to protect against undue impacts to the peregrine falcons.¹⁴⁰

We have also considered NNU's requests for monitoring compliance with the MOU and regular site monitoring for impacts to peregrine falcons.

With respect to the MOU, in the event any party has reasonable grounds to believe that Seneca is not complying with the MOU, they should notify the Board and provide the information that they believe shows non-compliance.

With respect to NNU's request that Seneca be required to monitor impacts on peregrine falcons, we conclude that this is reasonable and direct Seneca to file, prior to commencing construction or site preparation, a proposal to monitor the impacts of the Hawk Rock tower installation on peregrine falcons for review and approval by the Board. Parties will have fourteen calendar days to submit comments with the Board on the proposed monitoring plan. However, in developing and commenting on the plan, Seneca and the other parties should keep in mind that one of the significant concerns related to the tower installation was the presence of human activity at the tower site during the critical breeding and nesting season. Accordingly, care must be taken to conduct monitoring in a manner that does not in turn give rise to the kinds of human activity impacts that the MOU seeks to avoid in the first instance.

139. The complete list of mitigating steps includes use of a monopole tower, which will temper the tendency for birds to perch on the tower as compared to a lattice tower, use of bird diverters to reduce collision risk with the guy wires, and limiting or prohibiting human activities at the site during critical periods. Buck pf. at 4-6.

140. PFD at 29, above.

Public Good

With regard to whether the proposed Project promotes the general good of the state and whether the proposed Project's benefits outweigh its potential impacts, Brighton asserts that the Board has accepted, as a matter of course, that the potential benefits of wind generation justify such projects.¹⁴¹ Brighton's comments appear to reflect Newark's assertion that Seneca has failed to meet its burden of proof to show that the proposed Project will promote the general good of the State of Vermont in accordance with Sections 246 and 248. Newark states that Seneca failed to present any evidence regarding this "burden" and implies that the Hearing Officer assumed that the future benefits of a large wind project would justify the proposed Project's public good.

Newark is mistaken regarding the burden of proof in Section 246 proceedings. Pursuant to Section 246(b) a MET tower project "*shall* be deemed to promote the public good of the state if it is in compliance with the criteria of this section and the board rules or orders."¹⁴² If, as in this case, a MET tower project is determined to be consistent with all applicable criteria, the plain language of the statute requires that the Board approve the project and issue a CPG. As such, Section 246 leaves no discretion to deny approval of a MET tower that meets the applicable criteria. Therefore, the Hearing Officer was required to conclude that the proposed Project promotes the public good of the state because the evidentiary record reflects that it complies with the substantive criteria of Section 248 that are considered in Section 246 proceedings.

141. Brighton's comments including the following:

You state that the project will not have an 'undue' adverse impact. What makes the placement of four 200 foot tall towers in the midst of an otherwise unspoiled region of the state 'due'? . . . What apparently makes it 'due' is that the [Board] has taken to heart the idea expressed in previous decisions—that recognition of the potential benefits of wind generation is proper and supported by Vermont state energy policy. . . [and] rather than let the 248 process determine if the potential benefits are real, the [Board] has accepted that contention *a priori*, so it becomes a bias that a quasi-judicial board should not have. That bias is what supports the 'due' adverse impact.

Brighton Comments at 3 (emphasis in original). Section 248(b)(1) requires that the Board find that the proposed Project "will not *unduly* interfere with the orderly development of the region." 30 V.S.A. § 248(b)(1) (emphasis added). Section 248(b)(1) does not require that the Board find a proposed project is "due," only that it is not undue. Therefore, we are addressing Brighton's question regarding whether the proposed Project is "due" in our discussion regarding public good rather than under our discussions regarding orderly development.

142. 30 V.S.A. § 246(b) (emphasis added).

Accordingly, we find no error in the Hearing Officer's recommendation that we approve the Project and issue a CPG to that effect.

B. INDIVIDUAL PARTY COMMENTS AND REQUESTS TO ALTER THE PFD

Brighton's Requests to Alter

Brighton requests that we make several alterations to the PFD, which we address in turn as follows.

Brighton requests that any references to the previous MET Tower installations be removed from the PFD.¹⁴³ Specifically, Brighton requests that we not adopt Finding 4, which reads:

In Docket No. 7037, the Board granted a CPG to EMDC, LLC, for the installation of MET towers at two of the four sites proposed in this Docket. MET towers have previously been operated at those locations for approximately three years but have since been taken down. Seneca has no affiliation with EMDC, LLC, and had no involvement with the previous installation or operation of those MET towers.¹⁴⁴

Brighton asserts that referencing the previous temporary structures in support of future installations effectively facilitates acceptance of permanent undue impacts. We acknowledge that Brighton has expressed a valid concern. However, it is relevant to our analysis that impacts from new MET tower installations will be minimized given the presence of a previous project (e.g., either no, or minimal, clearing is necessary for access to tower sites). We also note here that, with respect to references in the PFD to the previous tower installations within the aesthetics analysis at Finding 65 and the related discussion at page 21, we only adopt the findings and related discussion in so far as the references to the previous towers are for the purpose of reinforcing that new aesthetic impacts will be minimized based on the previous clearing at the sites and conveying that the average person would have previously viewed the structures to be

143. Brighton Comments of May 2 at 1.

144. Brighton indicates that the towers and associated equipment from the previous installations, approved in Docket 7037, have been taken down but are still on site. Brighton Comments of May 2 at 1. However, we note here that whether the towers and associated equipment from the previous installations are still on site is beyond the scope of this proceeding.

installed as part of the proposed Project at the Brighton and Seneca Mountain sites.¹⁴⁵ We do not adopt Finding 65 and the related discussion at page 21 to the extent that they imply that the presence of previous towers somehow mitigates the visual impact of the currently proposed MET Towers. Therefore, having offered this clarification, we decline to strike the previous MET Tower references in the PFD as requested by Brighton.

Brighton further requests that the Board deny the Application because Seneca has publicly stated that the MET Towers are not needed for Seneca's future wind turbine project proposal.¹⁴⁶ However, Brighton filed a letter on May 13 clarifying that Seneca stated that it had enough data from previous tower installations, and other resources to propose a turbine concept to the United Towns and Gores, but that they needed the proposed Project's data because it would reduce uncertainty and lower financing costs. Pursuant to Section 246 and the Board's *Section 246 Standards Order*, the need criterion of Section 248 is conditionally waived, and we decline to override the conditional waiver of the need criterion based on Brighton's above filings.

Brighton also makes several arguments regarding the Hearing Officer's analysis under the orderly development of the region criterion. First, Brighton states that requiring towns to specify all areas that should be protected, as land conservation measures, would be unreasonable.¹⁴⁷ However, Section 248(b)(1) requires that the Board find a proposed electric generation facility "will not unduly interfere with the orderly development of the region with due consideration having been given to . . . the land conservation measures contained in the plan of any affected municipality."¹⁴⁸ Given this statutory mandate, the Hearing Officer reviewed the relevant Town

145. See PFD at Finding 65 and Aesthetics Discussion at 21, above.

146. Brighton Comments of May 2 at 3; Brighton Comments of May 13 at 1.

147. Brighton Comments of May 2 at 2. Ms. Hession also raised a concern regarding the need for small towns to provide specificity in their town plans regarding areas of importance in towns. Tr. 5/29/13 at 30-31 (Hession). Our discussion here also applies to Ms. Hession's stated concern and, therefore, we will not discuss Ms. Hession's general concern separately.

148. Land conservation measures must evince a specific policy directed towards land conservation; general policy statements in plans that apply indiscriminately throughout the municipality do not rise to the level of a land conservation measure. See Docket 6860, Order of 1/25/05 at 201-202 (citations omitted), which includes the following discussion:

Applying the plain language of [Section 248(b)(1)], such [land conservation] measures are those

Plans and found that the proposed Project sites were not identified in any of the relevant Town Plans, as areas subject to any specific land conservation measures.¹⁴⁹ Brighton's comments do not assert that the Hearing Officer was incorrect in finding that the Brighton Town Plan did not identify the proposed sites as areas subject to specific land conservation measures, but rather comment on the unreasonableness of the statutory requirement. Given that the Board must apply the statute as written, we decline to alter the Hearing Officer's finding that the proposed Project sites were not identified in any of the relevant Town Plans as areas subject to any specific land conservation measures.

Next, Brighton asserts that "Town [P]lans should be considered in a broader context when this kind of development is proposed" and that the proposed Project is "the complete opposite of the intent of" the Brighton Town Plan, which "clearly indicates the importance of tourism and the scenic beauty of the area to [its] economic well-being."¹⁵⁰ Brighton's statements regarding the intent of its town plan are not accompanied by any citations to its town plan that would call into question the findings and conclusion made by the Hearing Officer. Brighton's Town Plan, while highlighting the importance of tourism and the scenic beauty of the area, does not address MET Tower installations directly and, in fact, leaves open the opportunity for Brighton to review large-scale renewable projects on an individual basis and to negotiate for mitigation or compensation payments with developers that wish to site such large-scale projects

that are specifically directed toward land conservation, and not general policy statements that apply indiscriminately throughout the municipality. . . . Consistent with the Vermont Supreme Court's precedent in applying the Act 250 requirement of conformance with local plans, we further conclude that for a provision in a municipal plan to constitute a 'measure' that is cognizable under Section 248(b)(1), that provision must 'evince a sufficiently specific policy' promoting land conservation. The Court concluded that without that specificity, it would be 'thus left with precisely the sort of broad goals lacking in specific policies or standards that we have consistently disallowed as the basis for the denial of a permit under Criterion 10.' Non-specific provisions of municipal plans should not carry more weight in applying Section 248(b)(1) than in applying Criterion 10 of Act 250 (10 V.S.A. § 6086(a)(10), given that Section 248(b)(1) requires 'due consideration' of the land conservation measures of the municipal plans, rather than a finding of conformance as required by Criterion 10.

149. PFD at Finding 49, above.

150. Brighton Comments of May 2 at 2-3.

in the town.¹⁵¹ After reviewing Finding 51, the Brighton Town Plan, and Brighton's comments, we are unpersuaded that the town plan intended to prohibit MET Tower installations within Brighton and, alternately, it appears that the town plan contemplates that much larger projects may be acceptable within the town.

Lastly, Brighton requests that its town plan's "support for small-scale renewable energy development not be misinterpreted to support a large industrial wind project."¹⁵² This argument is not germane to our decision in this Docket given that the proposed Project does not involve a proposal for a large industrial wind project, but rather the installation of four temporary MET Towers.

Based on our review of the Hearing Officer's findings and conclusions regarding Brighton's Town Plan under the orderly development criterion, we find no reason to alter the PFD.

Seneca's Requests to Alter the PFD

The Petitioner requests that we make several alterations to the PFD, which we address in turn as follows.

The Petitioner requests that we modify Finding 71, which reads "[t]he MET towers will be visible at a distance of more than one mile from the closest off-site public location (roads, buildings, etc.), Route 114, diminishing their visual impacts." The Petitioner suggests that the finding should be modified "for clarity" to read that the "nearest public location from which any of the MET towers will be visible is more than one mile away from all of the proposed tower sites, diminishing the visual impact of the towers." We find that Finding 71 accurately reflects the record and are not persuaded that modifying the finding based on the Petitioner's request will provide additional clarity. Therefore, we decline to make the requested modification.

The Petitioner requests that we modify Finding 95, which reads "[i]nstallation of the proposed Hawk Rock tower may result in a direct impact by creating the possibility of peregrine

151. PFD at Finding 51, above.

152. *Id.* at 3.

falcon collisions with the MET tower or guy wires." The Petitioner, while acknowledging that the PFD addresses mitigating factors, proposes that the finding be modified to add a "clarifying statement" that "[s]uch a direct impact, however, is unlikely given the presence of many mitigating factors." We find that Finding 95 accurately reflects the record. Therefore, we decline to make the modification requested by Seneca.

The Petitioner also requests that we modify the proposed CPG Condition 7, which reads "Seneca shall not commence construction activities at the Hawk Rock site when winter conditions are present at the site." The Petitioner asks that the condition be modified to reflect that the area referenced in the Hearing Officer's discussion on page 36 of the PFD is only a potential deer wintering area. The Petitioner instead proposes the following condition: "Seneca shall not commence construction activities at the Hawk Rock site until it is verified that deer are not at the time utilizing the potential deer wintering yard located approximately 280' south of the base of the Hawk Rock MET tower." Alternatively, Seneca proposes that the condition be modified to read "Seneca shall not commence construction activities at the Hawk Rock site when winter conditions are present at the site that would support the use of the area for deer wintering; winter conditions are present when there are twelve inches or more of snow on the ground." We find that the CPG Condition 7 as proposed by the Hearing Officer will ensure that the potential deer wintering yard will be protected. We decline to adopt either of Seneca's requested revisions because neither proposal explains how deer usage would be verified or provides support for its definition of winter conditions. Therefore, we decline to make the modification as requested by Seneca.

Newark's Comments and Requests to Alter the PFD

MET Tower Heights

Newark also makes two statements regarding the height of the proposed Brighton and Seneca Mountain MET towers without requesting that the Board alter the PFD. Newark points out that in this proceeding Seneca proposes to re-install towers at the Brighton and Seneca Mountain sites with heights of 190 feet while the previous developer represented that the towers

at those locations would be 197 feet in height.¹⁵³ Although we acknowledge the apparent discrepancy between the proposed heights for towers in this proceeding and in Docket 7037, in this Order, we are approving Seneca's proposed installation of Brighton and Seneca Mountain towers, with heights of 190. Condition 2 of the CPG to be issued in this Docket specifically states that:

Construction, operation and maintenance of the Project shall be in accordance with the plans and evidence submitted in this proceeding. Any substantial change or material deviation from these plans must be approved by the Board. Failure to obtain advance approval from the Board for a substantial change or a material deviation from the approved plans may result in the assessment of a penalty pursuant to 30 V.S.A. Sections 30 and 247.

Therefore, if Seneca installs towers at the Brighton or Seneca Mountain sites that are more than 190 feet in height, Seneca must seek approval from the Board for such a change or be subject to penalty pursuant to Sections 30 and 247.

Newark also states that at least two of the proposed MET towers, with associated equipment, are 200 feet in height¹⁵⁴ and that, therefore, Finding 68 is incorrect¹⁵⁵ because it states that the towers are less than 200 feet. Seneca's application materials indicate that two of the proposed towers do reach 200 feet in height with the tower's associated lightning rods included.¹⁵⁶ However, that the towers, with the lightning rods, reach 200 feet in height does not negate the fact that the towers themselves are less than 200 feet. Therefore, we find no reason to alter the PFD based on Newark's comments regarding the tower heights and we reiterate that Seneca is required to install the proposed Project according to the plans and evidence submitted in this Docket in accordance with Condition 2 of the CPG to be issued in this Docket.

153. PFD at Findings 16 and 33, above; Docket 7037, Order of 9/30/05.

154. Newark Comments at 31 (citing page 15 of the PFD).

155. We note that Finding 8 states that the towers will not exceed 200 feet and Finding 148, like Finding 68, states that the towers are less than 200 feet.

156. Exh. Seneca-JS-2 at Attachment D1.

Orderly Development

Newark contends that Seneca failed to show that the proposed Hawk Rock MET tower will not have an undue adverse impact on the orderly development of the region based on the tower's aesthetic impacts on tourism, recreation, and the property values of Newark's residences.¹⁵⁷ In addition, Newark specifically asserts that its general support of small-scale renewable energy development is not relevant to this proceeding and that the town has reviewed the potential for a large-scale wind project and determined that it does not want such a project, as evidenced by "a petition and a special town meeting."¹⁵⁸ Newark also states that the only reason to erect a MET tower is to support wind turbines and that its Existing Plan calls for extreme caution when evaluating the larger-scale development projects.¹⁵⁹

We disagree with Newark's contentions and agree with the Hearing Officer's conclusion that Seneca satisfied its burden under the orderly development criterion. As discussed in detail above, we find that: (a) the proposed Project will not have an undue adverse aesthetic impact and reiterate here that, in any event, any aesthetic impacts will be temporary; (b) the September 17 Plan is inapplicable in this proceeding; (c) despite Newark's opposition to the proposed Project, it does not run afoul of the language of the applicable Existing Plan, which does not specifically address or prohibit MET tower installations and, in fact, contemplates larger-scale transmission and renewable energy developments being located in Newark; and (d) the impacts on peregrine falcons nesting at Hawk Rock are not unduly adverse given the mitigation measures agreed to by Seneca and the additional monitoring required by this decision.¹⁶⁰ In addition, while Newark's Existing Plan's support of small-scale renewable energy projects may not be directly relevant to whether the proposed Project complies with the plan, Finding 53, which references that support, also directly contrasts that support with the plan's admonition to treat

157. Newark Comments at 11-13. In addition, Newark argues that the September 17 Plan is applicable in this proceeding and clearly states that MET tower installations in Newark are inappropriate. *Id*; see also, discussion, *supra*, at 51-55.

158. Newark Comments at 30-31 (citing "a petition and a special town meeting vote").

159. Newark Comments at 31.

160. See discussion, *supra*, at 77-78.

larger developments with extreme caution.¹⁶¹ Newark does not assert that Finding 53 is incorrect, and we find that the contrast between Newark's support for small-scale development and its expressed need for caution when considering large-scale development is relevant to the Board's review under the orderly development criterion. Further, Newark's assertion that the only reason to install a MET tower is to support wind turbine development is not germane to our decision in this proceeding given that Section 246 specifically waives the need criterion used to evaluate electric generation facility proposals under Section 248.¹⁶² Finally, we note here that there is no persuasive evidence in the record to support a conclusion that the minimal and temporary aesthetic and wildlife impacts created by the Hawk Rock MET tower installation will impact tourism, recreation, or property values in the area, much less the orderly development of the region.

Peregrine Falcon Nesting

Newark asserts that Finding 91, which states that "Peregrine falcons have occupied Hawk Rock in four of twenty-six years between 1984 and 2010,"¹⁶³ is false. Newark bases this contention on the following statement: "Falcon nesting at Hawk Rock has been observed 4 years between 1984 and 2010. There were years in this interval where no observations were made."¹⁶⁴ Given that there is evidence in this Docket that supports Finding 91 and that Newark's contention is not accompanied by any citation to any evidence in the record, we cannot determine that Finding 91 is false and, thus, decline to alter the finding.

161. PFD at Finding 53, above.

162. 30 V.S.A. §§ 246 and 248.

163. Newark Comments at 32; PFD at Finding 91 (citing Watrous pf. at 3). We note here that Newark's comments actually reference "Item 9 on page 25"; however, based on Newark's substantive argument regarding the years of falcon activity at Hawk Rock, we interpret Newark's cite to Item 9 as referencing Finding 91).

164. Newark Comments at 32.

Rare and Irreplaceable Natural Areas and Wildlife Habitat and Endangered Species

Newark has proposed a number of findings that (1) are critical of the methodology for, and conclusions of, the environmental assessment undertaken by the firm hired by Seneca; and (2) seek to support the proposition that the Hawk Rock MET tower will have an undue adverse impact on RINAs, necessary wildlife habitat, and endangered species.¹⁶⁵

According to Newark, Seneca has failed to demonstrate that there will be no undue adverse impacts to RINAs, necessary wildlife habitat, and endangered species. Newark contends that the Hearing Officer should have placed more credibility on NNU's and Newark's witnesses' testimony and exhibits than on Seneca's witnesses' testimony. Newark asserts that the witnesses for both Seneca and ANR did not make their conclusions based on reliable or sufficient scientific facts or data. Specifically, Newark contends that Seneca's witnesses did not: (a) spend adequate time at the sites to accurately and completely identify or assess the impacts; (b) provide any information about what rare small mammals occur at high elevation sites in Newark, Brighton, and Ferdinand; and (c) show that runoff from the Hawk Rock MET tower installation would not impact wildlife habitat. Newark also asserts that the Hawk Rock MET tower installation would potentially adversely and unduly impact rare species, their habitats, several natural community types and black bear, moose, and deer habitats. Finally, Newark alleges that Hawk Rock and the surrounding area constitute a RINA that would be adversely and unduly impacted by the proposed Project and that no reasonable steps were taken to mitigate the adverse impacts of the proposed Project on the RINA.¹⁶⁶

We disagree. First, while Newark asserts that additional surveys should have been conducted and questions the amount of time that Seneca's witnesses spent at the proposed Project sites, it is clear from the prefiled testimony and exhibits and the live testimony provided at the technical hearing that Seneca's witnesses based their conclusions on a variety of commonly relied upon sources, including maps published by ANR, on-site observations, and review of the topographical maps and other data available regarding the region. Therefore, we find that

¹⁶⁵. Newark Comments at 21-29.

¹⁶⁶. Newark at 21-29.

Seneca's witnesses based their conclusions on scientific data and reasonable methods given the minimal size and impacts of the proposed Project. Second, it is clear from the prefiled and live testimony of ANR's expert witnesses that they based their conclusions on available scientific data and methods. Next, it is clear from the live testimony that Seneca's expert witness regarding non-avian RTEs and necessary wildlife habitat conceded that RTEs, including small mammals, and their habitat may exist within the Hawk Rock talus habitat.¹⁶⁷ However, Mr. Parsons also stated that because: (a) there was no mapped or observed presence of RTEs or necessary wildlife habitat within the footprint of the clearing for the proposed Hawk Rock MET Tower; (b) surface water runoff from clearing in forested areas is extremely rare; and (c) the Hawk Rock cliffs were located uphill from the proposed Hawk Rock MET tower installation and would not be impacted from surface water runoff from the tower installation, the proposed Project would not create an unduly adverse impact on RTEs or necessary wildlife habitat at the Hawk Rock site.¹⁶⁸ Finally, Newark's assertion that the Hawk Rock MET tower site and its surrounding area, when taken together, constitute a RINA¹⁶⁹ is unfounded given that the Hawk Rock site and its immediate surroundings are comprised of Northern Hardwood Forest, which is a common and widespread community type, which is not considered State significant.¹⁷⁰ Whether the larger area constitutes a RINA is not germane to our discussion given the minimal impact of clearing approximately one acre for the proposed Hawk Rock MET tower's installation. In addition, that the installation will only necessitate such minimal clearing and will, for the most part, utilize an existing access road are factors that mitigate the impact of the proposed installation.

Thus, we find that Seneca provided sufficient evidence to support the Hearing Officer's conclusion that the proposed Project, with the proposed conditions regarding necessary wildlife

167. Newark's comments and proposed findings did not provide supporting evidence with regard to the presence of RTE small mammals outside of the Hawk Rock area.

168. Tr. 1/23/13 at 116 -152 (Parsons). *See also*, discussion *supra*, at 77-78.

169. Newark Comments at 26-27.

170. As noted by the Hearing Officer, the first step in determining the presence of a RINA is determining whether a community type is State significant.

habitat and RTEs, will not have an undue adverse impact on RTEs, RINAs, or necessary wildlife habitat.

Surface Water Runoff at the Hawk Rock MET tower site

Newark asserts, referencing the PFD at Findings 111 and 130, that Seneca "has offered no proof that runoff will not flow in the direction of the [Hawk Rock] cliffs."¹⁷¹ Newark also asserts that Dr. Gerhardt's testimony should be taken seriously and is more credible than the flow diagram submitted by Seneca regarding surface runoff, which Newark contends includes "no methodology explanation"¹⁷² First, we will address Newark's contention that Seneca offered no proof that surface water runoff will not flow in the direction of the Hawk Rock cliffs. Upon review, it is clear that Findings 111 and 130 cite directly to live testimony and a prefiled exhibit provided by Seneca in support of the finding that runoff from the proposed Hawk Rock MET tower site will not flow in the direction of the Hawk Rock cliffs.¹⁷³ Therefore, Newark's objection to the adequacy of the evidentiary support for these findings is without merit.

Next, we address Newark's contention that Dr. Gerhardt's testimony was more credible than the exhibit submitted by Seneca (Exhibit Seneca-MLS-3). Newark provided no citations to the relevant portions of Dr. Gerhardt's testimony which would support this contention. However, upon reviewing the live testimony provided by Dr. Gerhardt regarding the potential direction of runoff from the Hawk Rock MET tower site, we find that Dr. Gerhardt's testimony was inconclusive on this issue and note that he specifically stated that he had "not done any kind of

171. Newark Comments at 32.

172. Newark Comments at 32, footnote 5.

173. Newark Comments at 32 (citing PFD at Finding 111, which states that "[t]he top of the Hawk Rock ledges lies uphill from the proposed MET tower site so increased surface water runoff resulting from the project, if any, would not flow in the direction of the potential habitat at the base of the eastern ledges of the cliffs," (citing tr. 1/23/13 at 149-51 (Parsons))); *id.* at 32, footnote 5 (citing PFD at Finding 130, which states that "[d]rainage patterns from the proposed MET tower site are not in the direction of the cliff community. Therefore, there will be no indirect impacts to the community from any surface water runoff resulting from the area cleared for the project." (citing Lew-Smith pf. at 9; exh. Seneca-MLS-3)).

formal engineering analysis of the drainage patterns."¹⁷⁴ Further, Newark's assertion that Seneca's exhibit on this issue was unsupported by a methodological explanation is unfounded given that Mr. Lew-Smith, whose company produced the exhibit, provided a detailed methodological explanation regarding the exhibit's creation at the technical hearing.¹⁷⁵ In conclusion, we find that Seneca produced credible evidence that runoff from the Hawk Rock MET tower site will not reach the Hawk Rock cliffs and find that the Hearing Officer appropriately relied on, and cited, that evidence in the PFD. Therefore, we find no reason to alter the PFD based on Newark's arguments related to the evidence regarding surface water runoff at the Hawk Rock site.

American marten, Canada lynx, and Bicknell's Thrush at the Seneca Mountain site

Newark states that "Seneca Mountain is known to be home to RTE species, including pine marten, Canada lynx, and Bicknell's Thrush."¹⁷⁶ Newark's statement cites to Finding 78, which is under the RINA criterion, and which does not address potential impacts to RTE species.¹⁷⁷ In addition, Newark's statement is not accompanied by a request to alter the PFD or any supporting documentation. Further, Finding 140 specifically states that the Seneca MET tower site does not include any known RTE species mapped by the Vermont Nongame and Natural Heritage Project.¹⁷⁸ Therefore, we find no reason to alter the PFD based on Newark's statement.

174. Tr. 1/23/13 at 304 (Gerhardt). Dr. Gerhardt stated that "[m]y observations of the site, and again I'm not an engineer, I did not have a transit and a level, but my observations at the site suggested to me that approximately the eastern third of the site *might* drain towards the cliffs . . . [a]nd there are areas that in my view, again this is without formal survey, engineering survey data that would drain towards the cliff ." *Id.* at 326-327 (emphasis added).

175. Tr. 1/23/13 at 245-248 (Lew-Smith).

176. Newark Comments at 31.

177. We note that the Hearing Officer acknowledges the potential for habitat impacts on the American marten, Canada lynx, and Bicknell's Thrush under the RTE discussions regarding the Hawk Rock MET tower site on pages 32, 34, and 35 of the PFD, above.

178. PFD at 140 (citation omitted).

Ms. Hession's Comments

Ms. Hession also raised concerns regarding the Board's review of town plans and the need for small towns to identify specific areas of importance in town plans, and highlighted that Newark's town plan includes several vision statements regarding preservation of Newark's scenic resources, as noted by the Hearing Officer in the PFD.¹⁷⁹ However, for the same reasons discussed under the section addressing similar concerns raised by Brighton regarding its town plan we conclude that we must apply Section 248(b)(1) as written and, therefore, we find no reason to alter the Hearing Officer's PFD regarding the orderly development of the region.¹⁸⁰

Ms. Hession's, NNU's, and Mr. Whitworth's Comments and Requests to Alter the PFD

Ms. Hession's, NNU's and Mr. Whitworth's comments and requests to alter have been addressed within our discussions above.

VII. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted.
2. The installation and operation of four temporary meteorological stations by Seneca Mountain Wind, LLC ("Seneca" or the "Petitioner"), at the locations specified in the above findings (the "Project"), and in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. §§ 246 and 248, and a Certificate of Public Good to that effect shall be issued in this matter.
3. The Memorandum of Understanding ("MOU") between Seneca and the Vermont Agency of Natural Resources ("ANR") is adopted and incorporated herein, and Seneca shall comply with the terms of the MOU as adopted.

179. Tr. 5/29/13 at 30-31 (Hession).

180. See discussion ante, 68-70.

4. Construction, operation and maintenance of the Project shall be in accordance with the plans and evidence submitted in this proceeding. Any substantial change or material deviation from these plans must be approved by the Board. Failure to obtain advance approval from the Board for a substantial change or a material deviation from the approved plans may result in the assessment of a penalty pursuant to 30 V.S.A. Sections 30 and 247.

5. Prior to proceeding with construction, Seneca shall obtain all necessary permits and approvals. Construction, operation, and maintenance of the Project shall be in accordance with such permits and approvals, and with all other applicable regulations, including those of ANR.

6. Prior to commencing construction or site preparation, Petitioner shall file with the Board and Parties a letter stating that it has fulfilled all requisite CPG conditions, and that it intends to commence construction of the Project.

7. Seneca shall not install lighting on any of the temporary meteorological stations.

8. Prior to the commencement of construction activities for the Brighton, Bull Mountain, and Seneca Mountain MET towers, Seneca shall submit to the Board and ANR the results of a rare, threatened, or endangered ("RTE") plant inventory for each of those sites. If any RTE plant species are identified during the plant inventory, prior to the commencement of construction at those sites where RTE plant species are identified, Seneca shall submit a mitigation plan regarding such species and sites to the Board and ANR for review and to the Board for approval.

9. Seneca shall not commence construction activities at the Hawk Rock site when winter conditions are present at the site.

10. Seneca shall remove the wind measurement towers and all associated equipment within five years of the date of this Certificate of Public Good and the site shall be restored substantially to its preconstruction condition pursuant to 30 V.S.A. § 246(c)(2).

11. Prior to commencing construction or site preparation, Seneca shall file a proposal to monitor the impacts of the Hawk Rock tower installation on the peregrine falcons for review and approval by the Board. Parties shall have fourteen calendar days to submit comments with the Board on the proposed monitoring plan.

Dated at Montpelier, Vermont, this 9th day August, 2013.

<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: August 9, 2013

ATTEST: s/Judith C. Whitney
Deputy 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.