

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 )

Order entered: 1/16/2013

**ORDER RE: OBJECTIONS TO PREFILED TESTIMONY  
AND REQUESTS FOR ATTORNEY'S FEES**

**I. INTRODUCTION**

In this Docket, the Vermont Public Service Board ("Board") is considering 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 ("Project"). Seneca Mountain Wind, LLC ("SMW") has filed objections to the admission into evidence of portions of the prefiled testimony and entire exhibits of the Town of Newark ("Newark"), Newark Neighbors United ("NNU"), and Robert and Shirley Elder (the "Elders"). In this Order, I sustain the majority of SMW's objections. However, I have also decided to overrule some of SMW's objections. In this Order, I also deny both Newark's and NNU's requests for attorney's fees.

**II. PROCEDURAL HISTORY**

On April 12, 2012, SMW 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 June 29, 2012, I issued the *Procedural Order re: Motions for Intervention and Schedule* ("First Procedural Order"), granting Newark and 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.<sup>1</sup>

On July 30, 2012, I issued a *Second Procedural Order Re: Motions for Intervention and Procedures for the Remainder of the Docket* ("*Second Procedural Order*"), reiterating the limited scope of the proceedings and denying Newark's revised motion to intervene and expand the scope of the evidentiary proceedings.<sup>2</sup>

On October 12, 2012, I issued an *Order re: Motions to Intervene*, granting the Elders permissive intervention, "limited to the issues defined in the *First Procedural Order* and restated in the *Second Procedural Order*."<sup>3</sup>

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

On December 21, 2012, SMW made a filing pursuant to Board Rule 2.216(C) objecting to portions of the prefiled testimony and exhibits of Newark, NNU, and the Elders ("SMW Objections").

On January 7, 2013, replies to the SMW Objections were filed by Newark, NNU, the Elders, and the Department of Public Service ("DPS" or "Department"). The Department's reply stated that it was declining to offer a response to the SMW Objections given that the objections focused on issues related to the environmental impacts of the Project.

No other comments regarding the SMW Objections were received.

### **III. POSITIONS OF THE PARTIES**

#### **SMW**

SMW objects to sixteen portions of Fritz Gerhardt's prefiled testimony and to three of Mr. Gerhardt's exhibits, provided on behalf of Newark, as irrelevant and immaterial given the

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1. Docket 7867, Order of 6/29/12 at 11–12.

2. See Docket 7867, Order of 7/30/12 at 5–7 (citing Docket 7867, Order of 6/29/12 at 11–12).

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

limited scope of the evidentiary proceeding and the limited scope of Newark's intervention.<sup>4</sup> SMW also objects to one portion of Mr. Gerhardt's prefiled testimony based on his lack of personal knowledge regarding the amount of time SMW spent reviewing available data.<sup>5</sup> SMW further objects to the majority of the prefiled testimony of Winston Newland and Valerie Desmarais, provided on behalf of NNU, as irrelevant,<sup>6</sup> improper,<sup>7</sup> lacking in personal knowledge,<sup>8</sup> and inadmissible hearsay.<sup>9</sup> SMW further asserts that Mr. Newland and Ms. Desmarais are not qualified experts. In addition, SMW objects to the majority of Robert Elder's substantive testimony, provided on behalf of the Elders, as irrelevant and immaterial given the limited scope of the evidentiary proceeding and the limited scope of the Elders' intervention.<sup>10</sup>

### **Newark Response**

Newark asserts that the testimony provided by its witnesses regarding deer and moose is relevant to the "natural communities" portion of this proceeding.<sup>11</sup> Newark also contends that it should be allowed to present testimony on the proposed MET tower sites located outside of Newark because its request for intervention did not indicate that its interests were limited to the Hawk Rock MET tower site and the Order granting Newark intervention did not state such a limitation.<sup>12</sup>

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4. Citing Vermont Rule of Evidence 402 and 3 V.S.A. § 810(1).

5. Citing V.R.E. 602 (witness must have personal knowledge of facts within testimony).

6. Citing V.R.E. 402 and 3. V.S.A. § 810(1) (evidence which is not relevant is inadmissible).

7. Citing V.R.E. 701 (opinion testimony by lay witness not to be based on scientific, technical or other specialized knowledge).

8. Citing V.R.E. 602 (witness must have personal knowledge of facts within testimony).

9. Citing V.R.E. 802 (hearsay generally not admissible as evidence).

10. Citing V.R.E. 402 and 3. V.S.A. § 810(1) (evidence which is not relevant is inadmissible).

11. *Newark's Opposition to SMW's Objections*, filed on January 7, 2013 ("Newark Response") at 2–6.

12. Newark Response at 6.

**NNU Response**

NNU asserts that NNU's witnesses, Mr. Newland and Ms. Desmarais, are experts pursuant to V.R.E. 702 based on their knowledge, skill, and experience.<sup>13</sup> According to NNU, both Mr. Newland and Ms. Desmarais have extensive experience in the forest surrounding the proposed Hawk Rock Met tower site in the Town of Newark. Specifically, NNU states that Mr. Newland has been traversing the Hawk Rock area for 60 years, and has hunted in the area 5-6 times per season for 58 years. NNU states that Ms. Desmarais has spent decades in the Burke and Newark area, and learned relevant skills from her father, a Certified Vermont Guide.<sup>14</sup> NNU also asserts that the testimony provided by its witnesses regarding deer and moose is relevant to the "natural communities" portion of this proceeding.<sup>15</sup>

**The Elders' Response**

The Elders state that SMW's leasehold interest in land subject to a conservation easement and the construction and use of the existing access road leading to the proposed Hawk Rock MET tower site are material and relevant to this proceeding.<sup>16</sup> The Elders assert that SMW's potential violations of the conservation easement are material and relevant to the scope of this proceeding because SMW leased the conserved lands as part of the Project and because any activities on the leased lands will directly impact bear food sources, peregrine falcon habitat, rare, threatened, and endangered species, and natural communities.<sup>17</sup>

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13. *Memorandum in Opposition to Seneca's Objection to Pre-filed Testimony and Request for Attorneys Fees*, filed on behalf of NNU on January 7, 2013 ("NNU Response") at 2–3.

14. NNU Response at 3.

15. NNU Response at 4-5.

16. *Rebuttal Arguments to SMW's Objections*, filed on behalf of the Elders on January 7, 2013 ("The Elders Response") at 1–6.

17. The Elders Response at 3.

**Newark's and NNU's Requests for Attorney's Fees**

Newark and NNU both request that SMW be ordered to pay attorney's fees for defending their witnesses against SMW's Objections to their prefiled testimony and exhibits, which objections Newark and NNU assert were frivolous and in bad faith.<sup>18</sup>

**IV. DISCUSSION**

The SMW Objections largely focus on the scope of the evidentiary proceedings in this Docket, as established in the *First Procedural Order*. In the *First Procedural Order*, I initiated 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.<sup>19</sup>

The initiation of this limited evidentiary proceeding was precipitated by public comments filed with the Board. In particular, the agreements between SMW and the Vermont Agency of Natural Resources raised concerns regarding the potential impacts of the Hawk Rock, Bull Mountain, and Brighton MET tower installations on black bear food sources and the potential impacts of the Hawk Rock MET tower installation on peregrine falcon habitat. In addition, several comments submitted to the Board raised concerns regarding the potential impacts of the Hawk Rock MET tower installation on rare, threatened, or endangered ("RTE") species and natural communities. I determined that while other concerns raised during the public comment period could be resolved using the evidence provided by SMW with its initial application, resolving the concerns identified in the *First Procedural Order* required the initiation of a limited evidentiary proceeding. Therefore, to the extent that Newark's, NNU's, and the Elders' prefiled testimony and exhibits fall outside the scope of the limited issues detailed above, I sustain the SMW Objections.

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18. Newark Response at 7; NNU Response at 5.

19. Docket 7867, Order of 6/29/12 at 11–12.

As an initial matter, it is necessary to clarify my intentions with respect to the use of the term "natural communities." Based on the prefiled testimony and exhibits submitted to the Board and the responses to the SMW Objections, it is clear that my use of that term in the *First Procedural Order* has led to some confusion. Newark and NNU state that there are no statutory or regulatory definitions of "natural communities" and assert that natural communities include all natural inhabitants of a particular area.<sup>20</sup> However, as used in the *First Procedural Order*, I intended for the term "natural communities" to refer to "an assemblage of plants and animals that are found recurring across a specific landscape under similar environmental conditions where natural processes, rather than human disturbances, prevail."<sup>21</sup> In defining the limited scope of this proceeding, two issues related to natural communities raised concerns: 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. Therefore, the portions of Newark's, NNU's, and the Elders' prefiled testimony and exhibits that address wildlife and natural resources that are not within the natural community present on the Hawk Rock cliff, or do not pertain to black bear food sources, peregrine falcon habitat, RTE species, or the deer wintering yard, as identified in the *First Procedural Order* and as detailed directly above, are outside the scope of these proceedings.

#### **OBJECTIONS TO THE TOWN OF NEWARK'S TESTIMONY AND EXHIBITS - GERHARDT**

##### **1. SMW Objections 1, 2, 14, 15 and 17**

SMW objects to the admission of pages 23:1-3, 23:6-24:9, 63:17-18, 63:19-64:17, and 66:20-67:4 of Mr. Gerhardt's testimony.<sup>22</sup> SMW asserts that, to the extent this testimony discusses impacts from Met towers on the ecology and natural resources of the various tower

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20. See Newark Response at 3; NNU Response at 5.

21. Natural Communities section of the Vermont Wildlife Diversity Program's website, *available at* [http://www.vtfishandwildlife.com/wildlife\\_nongame.cfm](http://www.vtfishandwildlife.com/wildlife_nongame.cfm).

22. The specific portions of prefiled testimony that are subject to the SMW Objections are identified by page and line number. For example, 23:1-3 refers to page 23, lines 1 through 3, and 23:6-24:9 refers to the material starting on page 23, line 6, and continuing on to page 24, line 9. This convention will be used throughout this Order to identify the specific testimony that is subject to the objections being discussed.

sites, other than the tower proposed for the Hawk Rock site located in the Town of Newark, the testimony is irrelevant and immaterial.<sup>23</sup>

Because Newark's permission to intervene was limited to the interests identified in its motion to intervene, which stated that Newark would focus on the impacts of the Project on Newark,<sup>24</sup> and because Mr. Gerhardt never states how the potential impacts of the proposed tower sites outside of Newark would have impacts within the town, his testimony regarding the sites outside of Newark is not within the scope of Newark's intervention and the objection is sustained. The testimony is admissible for the limited purpose of addressing potential impacts of the Project at the Hawk Rock site.

## 2. SMW Objection 3

SMW objects to the admission of pages 30:23-31:3 of Mr. Gerhardt's testimony. According to SMW, this portion of Mr. Gerhardt's testimony addresses aesthetic impacts and is therefore outside the scope of the issues identified in the *First Procedural Order* for consideration in the technical hearing.<sup>25</sup>

Newark contends that the term "natural communities" includes the issue of rare and irreplaceable natural areas, which in turn includes a discussion of aesthetically unique features.<sup>26</sup>

As discussed above, my use of the term "natural communities" in the *First Procedural Order* 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. These issues are related to potential tower impacts to these communities and potential interference with habitat usage by relevant species. This scope does not include aesthetic impacts. Accordingly, SMW Objection 3 is sustained.

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23. SMW Objections at 3.

24. *First Procedural Order* at 7–8.

25. SMW Objections at 3.

26. Newark Responses at 6.

### 3. SMW Objections 4, 5

SMW objects to the admission of pages 33:1-35:12 and 42:1-45:1 of Mr. Gerhardt's testimony to the extent these portions of Mr. Gerhardt's testimony address potential impacts to rare, threatened and endangered species that extend beyond the Hawk Rock MET tower site. SMW contends that such impacts are outside the scope of this proceeding.

As set forth in the *First Procedural Order*, the scope of potential impacts to RTE species was limited to the proposed Hawk Rock Met tower site in Newark. Additionally, Newark's permission to intervene was limited to impacts within the town and Mr. Gerhardt has not explained how potential impacts at tower sites other than the Hawk Rock site would have impacts within the Town of Newark. To the extent the testimony addresses potential impacts to RTE species at sites other than the Hawk Rock site, the objection is sustained. Newark is free to move the admission of the testimony for the limited purpose of addressing potential RTE species impacts at the Hawk Rock site.

### 4. SMW Objections 6, 7, 8, 9, 10, 11, 13, 16, 18, 19 and 20

SMW objects to the admission of pages 45:2-4, 45:5-10, 45:1-12, 45:12-46:9, 46:10-12, 46:13-48:2, 59:7-9, 21-22; 66:6-11, exh. N-FG-4, exh. N-FG-5, and exh. N-FG-14 of Mr. Gerhardt's testimony and exhibits. According to SMW, these portions of Mr. Gerhardt's testimony and the related exhibits discuss matters outside the scope of issues identified for consideration in the technical hearing by the *First Procedural Order*. Specifically, SMW asserts that Mr. Gerhardt's discussion of necessary or critical wildlife habitat other than black bear food sources, peregrine falcon habitat and RTE species is irrelevant and immaterial to the issues being considered in this proceeding. SMW further asserts that Mr. Gerhardt's discussion regarding use of the area by moose and white-tailed deer also falls outside the scope of permissible issues.<sup>27</sup>

Newark contends that these topics are relevant to the issues identified in the *First Procedural Order* because they fall within the meaning of the term "natural communities."<sup>28</sup>

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27. SMW Objections at 4-6.

28. Newark Response at 2-6.

As discussed earlier in this Order, the term "natural communities" as used in the *First Procedural Order* was limited in scope and, with the exceptions noted immediately below, the objections are sustained.

My ruling on these objections, however, does not extend to any testimony discussing the potential deer wintering yard adjacent to the Hawk Rock site as it was my intent to include that resource in the scope of the term "natural communities" as I used it in the *First Procedural Order*. Any such testimony is admissible.

Additionally, Objection 20 is overruled. Exhibit N-FG-14 depicts significant ecological features within the Project area. While the exhibit also depicts an area of "abundant moose browse," the majority of the exhibit includes information within the scope of the proceeding, including natural communities and the falcon nesting site. Newark is free to move the admission of this exhibit for the limited purpose of providing information on those issues.

#### 5. SMW Objection 12

SMW objects to the admission of pages 55:5-58:12 of Mr. Gerhardt's testimony. SMW objects to this portion of Mr. Gerhardt's testimony to the extent it discusses Project impacts, other than those from the proposed Hawk Rock Met tower, on any "enduring feature," asserting that it is irrelevant and immaterial to this proceeding.<sup>29</sup>

Newark contends that these topics are relevant to the issues identified in the *First Procedural Order* because they fall within the meaning of the term "natural communities."<sup>30</sup>

Objection 12 is sustained to the extent Mr. Gerhardt's testimony discusses the Project's potential impacts on any "enduring feature" other than potential impacts from the proposed Hawk Rock Met tower. As discussed earlier, Newark's intervention is limited to impacts within the town, and Mr. Gerhardt has not explained how Met towers proposed to be sited outside the Town of Newark would have impacts within that town.

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29. SMW Objections at 5.

30. Newark Response at 2-6.

#### 6. SMW Objection 21

SMW objects to the admission of page 12:6-9 of Mr. Gerhardt's testimony, asserting that Mr. Gerhardt lacks the requisite personal knowledge to make the claim contained in that portion of his testimony.<sup>31</sup>

Newark did not offer a response to SMW Objection 21.

Vermont Rule of Evidence 602 requires a witness to have personal knowledge of the facts in order to testify about those facts. In this instance, Mr. Gerhardt speculates about the number of hours spent by SMW and its consultants in reviewing certain information. Accordingly, the objection is sustained.

### **OBJECTIONS TO NEWARK NEIGHBORS UNITED TESTIMONY - NEWLAND AND DESMARAIS**

#### 1. SMW Objection re: expert testimony and hearsay

As an initial matter, SMW objects to the majority of the testimony of Mr. Newland and Ms. Desmarais on the grounds that they are not qualified as experts in this proceeding and have, without personal knowledge and lacking proper foundation, provided opinion evidence prohibited by V.R.E. 701.<sup>32</sup>

According to NNU, both Mr. Newland and Ms. Desmarais are experts for the purposes of their testimony pursuant to V.R.E. 702 based on their knowledge, skill, and experience.<sup>33</sup> Mr. Newland's testimony states that he has been traversing the Hawk Rock area for 60 years, and has hunted in the area 5-6 times per season for 58 years.<sup>34</sup> Ms. Desmarais states in her testimony that she developed her knowledge of the natural resources in the area under the tutelage of her father, a Certified Vermont Guide renowned for his knowledge of the woods and wildlife, and who participated in the state's first black bear study intended to determine the biological basis for black bear management. According to Ms. Desmarais, she was able to participate in and learn

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31. SMW Objections at 6.

32. SMW Objections at 7-8. V.R.E. 701 prohibits opinion testimony by lay witnesses where that testimony is based on scientific, technical or other specialized knowledge.

33. *Memorandum in Opposition to Seneca's Objection to Pre-filed Testimony and Request for Attorneys Fees*, filed on behalf of NNU on January 7, 2013 ("NNU Response") at 2-3.

34. Newland pf. at 1.

from this 10-year study, which provided her with a basis for the continuing study of bears, bear habits and habitats, and their distribution and characteristics. Ms. Desmarais also states that she has explored the most remote sections of the Project area on horseback, averaging over 700 miles a summer in the Wildlife Management Areas north of Burke, as well as the West Branch of the Nulhegan, the area around the former radar base, Seneca Mountain, and the Madison Basin out to Paul Stream and Maidstone Lake, and the Victory Bog trails. According to Ms. Desmarais, spending several hundred hours annually outdoors in the woods of the region has led her to a great familiarity with the wildlife species that inhabit the area.<sup>35</sup>

V.R.E. 702 provides that:

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Both Mr. Newland and Ms. Desmarais filed testimony about the wildlife and habitat in the Project vicinity, and the potential for the Project to impact both the habitat and the species that rely on it. I find that Mr. Newland has sufficient knowledge of the wilderness and wildlife in the vicinity based on his 58 years of hunting and hiking in the Hawk Rock area to be considered an expert witness regarding the wildlife and wildlife habitat in the Hawk Rock area. I also find that Ms. Desmarais has sufficient knowledge, experience, and skill based on her extensive time spent in the wilderness of the Northeast Kingdom and the tutelage she received from her father to be considered an expert witness with regard to bear and other wildlife in the Project area.

V.R.E. 703 permits expert witnesses to rely on otherwise inadmissible information as the basis of their testimony, provided that the information relied on is of a type reasonably relied on by experts in their field in forming opinions and conclusions on a particular matter. Accordingly, an expert witness may rely on information as the basis for testimony which itself may otherwise be considered hearsay. In this instance, Mr. Newland relied on discussions he had regarding area habitat with another individual familiar with the area. In forming her opinions, Ms. Desmarais

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35. Desmarais pf. at 1-3.

relied in part on some learned treatises, expert testimony offered in another proceeding, the West Mountain Wildlife Management Area Plan, and an Act 250 Permit newsletter. I conclude that these types of information may reasonably be relied upon by experts in forming the opinions set forth in Mr. Newland and Ms. Desmarais' prefiled testimony. Therefore, I find no basis for excluding any of the prefiled testimony of NNU's witnesses based on objections of lack of expert qualifications or hearsay.

However, while NNU's witnesses are qualified as experts for the purposes of their testimony, their testimony is only relevant and material when discussing the issues related to the limited scope of this proceeding as described above. Accordingly, I rule on the pertinent SMW Objections below.

### **Objections to Newland Testimony**

#### **1. SMW Objections 1, 2, 3, 6, 7, 8, 10, and 11**

SMW objects to the admission of pages 2:18-21, 3:2-5, 3:9-10, 4:4-5:1, 5:3-15, 6:1-8:4, 8:17-10:12, 10:14-18 of Mr. Newland's testimony, as well as Exhibit NNU-WN-1. According to SMW, these portions of Mr. Newland's testimony address issues outside of those identified for consideration in the *First Procedural Order*.<sup>36</sup>

NNU responds that the issues of deer and moose are relevant to this proceeding because they fall within the term "natural communities."<sup>37</sup>

As discussed earlier in addressing the SMW Objections to the prefiled testimony of Newark's witnesses, the term "natural communities" as used in the *First Procedural Order* is more limited than NNU urges. Accordingly, the objections are sustained because the testimony at issue pertains to deer and moose habitat and food sources and bear habitat (rather than bear food sources) and is therefore outside the scope of this proceeding.

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36. As discussed above, many of the individual SMW Objections to Mr. Newland's testimony also include an objection based on lack of qualifications as an expert. Because I addressed those objections on a general level in the preceding section, I will not repeat the analysis again on an objection-by-objection basis. The same holds true for SMW's objections to the testimony of Ms. Desmarais.

37. NNU Responses at 4–5.

## 2. SMW Objection 4

SMW objects to the admission of page 3:14-16 of Mr. Newland's testimony to the extent that it addresses the presence of moose in the Project area.<sup>38</sup>

While some of this testimony discusses moose, the majority of the cited testimony actually relates to bear food sources, a topic within the scope of this proceeding. Accordingly, the objection is overruled with respect to the first three sentences and is sustained with respect to the final two sentences of the cited portion of Mr. Newland's testimony.

## 3. SMW Objections 5 and 9

SMW objects to the admission of pages 3:20-4:2 and 8:8-15 of Mr. Newland's testimony to the extent that it addresses the presence of deer and moose in the Project area.<sup>39</sup>

Objections 5 and 9 to Mr. Newland's testimony are overruled with respect to the portions of the testimony that pertain to bear food sources, which is a topic within the scope of this proceeding. Objections 5 and 9 to Mr. Newland's testimony are sustained with respect to the portions of testimony that address deer food sources and activities, which are outside the scope of this proceeding.

## **Objections to Desmarais Testimony**

### 1. SMW Objections 1, 2, and 7

SMW objects to the admission of pages 3:16-5:3, 5:5-19 and 13:3-14:2 of Ms. Desmarais' testimony to the extent that it addresses the presence of deer and moose and bear habitat in the Project area.<sup>40</sup>

SMW Objections 1, 2 and 7 to Ms. Desmarais' testimony are overruled in regard to the portions of testimony that address bear food sources and the deer wintering yard in the Hawk

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38. NNU's response to each objection regarding the scope of the proceeding is the same as that described and addressed under SMW Objections 1, 2, 3, 6, 7, 8, 10, and 11 to the testimony of Mr. Newland. Accordingly, the response and analysis need not be repeated here. The same is true for objections as to scope with regard to the SMW Objections to the testimony of Ms. Desmarais.

39. SMW Objections at 9–10.

40. SMW Objections at 14, 16.

Rock area. Objections 1, 2 and 7 are sustained in regard to the portions of testimony that generally address bear habitat, general wildlife issues, moose wintering areas, and game trails.

2. SMW Objection 5

SMW objects to the admission of pages 7:7-8:14 of Ms. Desmarais' testimony, asserting that Ms. Desmarais lacks the requisite personal knowledge to render an opinion on the adequacy of a wildlife analysis performed by one of SMW's consultants.<sup>41</sup>

As discussed earlier in this Order, I believe that Ms. Desmarais has sufficiently demonstrated a base of knowledge to qualify as an expert to testify with respect to wildlife and wildlife habitat in this proceeding. Accordingly, I am overruling the objection and allowing Ms. Desmarais' opinion testimony with respect to this issue. However, nothing in this ruling prevents SMW from cross-examining Ms. Desmarais on this issue and arguing how much weight should be given to this testimony when it files its brief.

3. SMW Objections 3, 4 and 8

SMW objects to the admission of pages 6:4-14, 6:19-7:5 and 14:4-15:16 of Ms. Desmarais' testimony because these portions of her testimony contain hearsay, and with respect to Objection 8, address matters outside the area of the proposed Hawk Rock Met tower site.<sup>42</sup>

Objections 3, 4, and 8 to Ms. Desmarais' testimony are overruled based on her status as an expert witness with regard to bear. The portions of the testimony from page 4:14 through page 15:16 will only be considered with regard to the Hawk Rock site given the limited scope of NNU's intervention discussed directly below.

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41. SMW Objections at 13.

42. SMW Objections at 12-14.

#### 4. SMW Objection 6

SMW objects to the admission of pages 8:16-12:17 of Ms. Desmarais' testimony because all of the questions and answers relate to the proposed Bull Mountain and Brighton MET tower sites, and NNU's grant of intervention does not extend to these proposed sites.<sup>43</sup>

Objection 6 is sustained given that NNU's permission to intervene was limited to the interests identified in its motion to intervene, which stated that NNU would focus on the immediate concerns of Newark residents and property owners.<sup>44</sup> NNU's Response to SMW's Objections did not address the scope of its limited intervention nor did NNU explain how impacts on bear food sources at the Bull and Brighton MET tower sites would impact the residents and property owners of Newark.

#### **OBJECTIONS TO TESTIMONY OF THE ELDERS - ROBERT ELDER**

SMW raises four objections to the admissibility of the prefiled testimony of Robert Elder at pages 2:6-24, 3:1-15, 3:16-4:3 and 4:4-5:2 of that testimony. SMW contends that these portions of Mr. Elder's testimony, which address the leasehold interests held by SMW, the terms of a conservation easement that applies to some of the lands leased by SMW, logging activities on the conserved lands, and roads offsite from the proposed Met tower locations, are not relevant to the issues identified in the *First Procedural Order* for consideration in this proceeding.<sup>45</sup>

The Elders respond that the issues discussed in Mr. Elder's testimony are relevant to this proceeding because SMW's lease agreement allows SMW to construct roads that could impact necessary wildlife habitat, that they are seeking to ensure that the terms of the conservation easement are followed, and that the offsite roads are relevant to the extent they were constructed to support wind generation facilities.<sup>46</sup>

Objections 1 through 4 are sustained. The questions and responses included in Mr. Elder's testimony concerning the conserved land near the location of the proposed Hawk Rock MET tower installation and the construction of the existing access road which will be used

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43. SMW Objections at 13.

44. *First Procedural Order* at 7–8.

45. SMW Objections at 14–15.

46. Elders' Response at 2–6.

by the proposed Hawk Rock MET tower are not relevant or material to the limited scope of this proceeding.<sup>47</sup> There has been no information provided to date that any activities related to the installation and maintenance of the proposed Hawk Rock Met tower would occur on any portion of the conserved lands. Accordingly, SMW's interest in the conserved lands, the terms of the conservation easement, and any previous logging or road-building activities on those lands have not been shown to be relevant to the limited issues being considered in this proceeding. Nothing in this ruling would prevent the Elders, or any other party, from raising the issue of any conserved lands under lease by SMW in the event SMW ultimately files a petition seeking approval to construct a wind generation facility, should such a proposal run afoul of the requirements of any applicable conservation easement.

My decision in this Order to overrule several of SMW's objections in no way eliminates or limits SMW's opportunity to use the tools of cross-examination and briefing to challenge the weight to be accorded any of the prefiled testimony and exhibits provided by Newark, NNU, and the Elders to the extent they are admitted into the evidentiary record.

### **Requests for Attorney's Fees**

I find that SMW's Objections were not filed in bad faith and, therefore, deny Newark's and NNU's requests for attorney's fees.

**SO ORDERED.**

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47. I note here that this determination of relevance does not impact the enforceability of the conservation easement in a civil court of law.

Dated at Montpelier, Vermont, this 16th day of January, 2013.

s/ Bridgette Remington  
Bridgette Remington, Esq.  
Hearing Officer

OFFICE OF THE CLERK

FILED: January 16, 2013

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

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