STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont	Hearings at Montpelier, Vermont September 20 and 21, 2018

Order entered:

PROPOSAL FOR DECISION

PRESENT: Michael E. Tousley, Esq., Hearing Officer

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for the Apple Hill Homeowners Association and Mt. Anthony Country Club at the September 20-21, 2018, hearing

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I. INTRODUCTION

This case involves a petition filed by Chelsea Solar LLC ("Chelsea" or "Petitioner") with the Vermont Public Utility Commission ("Commission")[1] requesting a certificate of public good ("CPG") under 30 V.S.A. § 248 for the proposed construction and operation of a 2.0 MW solar electric generation facility on Willow Road, in Bennington, Vermont (the proposed "Willow Road Project").

In this proposal for decision, I recommend that the Commission approve the Willow Road Project and issue a CPG, subject to conditions.

II. PROCEDURAL HISTORY

On June 20, 2013, Chelsea executed a standard-offer contract for a 2.0 MW solar facility to be located in Bennington, Vermont.

The Willow Road Project petition is a significantly amended version of a petition previously filed by Chelsea in Docket 8302 (the "Chelsea Solar project"). The Chelsea Solar project was filed on June 19, 2014, and was sited in approximately the same location as the Willow Road Project but was accessed from nearby Apple Hill Road. A neighboring project, filed on March 15, 2015, by Apple Hill Solar LLC was approved by the Commission on September 26, 2018 (the "Apple Hill Solar Project").[2] An approval of that decision is pending at

[1] Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

[2] *Petition of Apple Hill Solar LLC*, Docket 8454, Order of 9/26/18.

the Vermont Supreme Court. The Chelsea Solar project was denied by the Commission on February 16, 2016.[3]

On September 8, 2017, Chelsea appealed the Commission's denial of the Chelsea Solar project to the Vermont Supreme Court. While the appeal was pending, Chelsea asked the Commission to reconsider its denial and allow Chelsea to amend the petition to reduce the project's size by using more efficient solar panels.[4] At the same time, Chelsea requested that the Vermont Supreme Court remand its appeal of the Chelsea Solar project to the Commission.[5] The Vermont Supreme Court denied Chelsea's remand request.[6]

On October 12, 2017, the Commission denied Chelsea's request for reconsideration because it lacked jurisdiction as a result of Chelsea's appeal. However, the Commission offered Chelsea the opportunity to file a new amended petition instead of pursuing its appeal.[7]

On October 20, 2017, Chelsea voluntarily dismissed its appeal of the Commission's February 16, 2016, denial decision.[8]

On November 9, 2017, the Vermont Supreme Court dismissed Chelsea's appeal.[9]

On November 28, 2017, Chelsea filed a new petition for the Willow Road Project.[10]

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[3] *Petition of Chelsea Solar LLC,* Docket 8302, Order of 2/16/16; *see also* Docket 8302, orders of 4/14/17 and 4/17/17 (denying reconsideration). The Commission's denial was based on its reading of the 2010 Bennington Town Plan, which was in effect at the time the Chelsea Solar petition was filed. Specifically, the Commission determined the Chelsea Solar project would violate three clear, written community standards in the 2010 Town Plan that sought to conserve the Rural Conservation district where the Chelsea Solar project was sited. The Commission determined that the 2010 Town Plan proscribed the following activities in the Rural Conservation district: (1) non-residential development; (2) development sited prominently on a hillside; and (3) development that did not minimize clearing of natural vegetation. The Chelsea Solar project was not residential, was visible on a hillside above the Vermont Welcome Center, and required clear-cutting 15 acres of trees.

[4] Docket 8302, Chelsea Motion for Reconsideration, dated 9/8/17.

[5] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Appellant's Motion for Remand of 9/9/17.

[6] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Entry Order of 9/11/17.

[7] Docket 8302, Order of 10/12/17; *see also* Case No. 17-5024-PET, Order of 5/17/18 (hearing officer order granting Chelsea vested rights in the 2010 Bennington Town Plan), and Order of 8/30/18 (affirming hearing officer's vested rights order).

[8] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Appellant's Assented To Motion for Voluntary Dismissal of 10/20/17.

[9] Vermont Supreme Court Docket 2017-195, *In re Petition of Chelsea Solar LLC,* Dismissal Order of 11/8/17.

[10] For clarity in this proposal for decision, the denied Docket 8302 petition is referred to as the Chelsea Solar project, the approved Docket 8454 petition is referred to as the Apple Hill Project, and the Case No. 17-5024-PET petition, which is recommended for approval, is referred to as the Willow Road Project.

On December 4, 2017, the Commission provided notice to Chelsea that the Willow Road Project petition was deemed administratively complete and initiated Case No. 17-5024-PET.

On February 12, 2018, the Vermont Division for Historic Preservation filed a letter with the Commission stating that it had reviewed the Project and concluded that the Project will have no adverse effect on any historic sites listed in or eligible for inclusion in the State Register of Historic Places (the "DHP Letter").[11]

On March 2, 2018, I conducted a prehearing conference with respect to the Project.

On March 21, 2018, I issued a prehearing conference order that set deadlines for the proceeding.

On April 17, 2018, I conducted a site visit and public hearing.

On May 17, 2018, I issued an Order granting Chelsea's request that the 2010 Bennington Town Plan (the "Town Plan") apply in this case under the vested rights doctrine.

On June 22, 2018, Chelsea filed a memorandum of understanding ("MOU") between Chelsea and the Vermont Agency of Natural Resources ("ANR") (the "ANR MOU").

On August 20, 2018, Commissioners Roisman and Hofmann visited the Project site.[12]

On August 30, 2018, the Commission issued an order affirming my May 17, 2018, vested rights order.

On September 19, 2018, Chelsea filed a settlement agreement that had been entered into by Chelsea and the Town of Bennington ("Bennington" or the "Town") in which the Town "having had an opportunity to fully review and assess" the Willow Road Project agrees "not to oppose" the Project (the "Bennington Agreement").[13]

On September 20 and 21, 2018, I conducted an evidentiary hearing in Montpelier, Vermont.

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[11] The DHP Letter is admitted into evidence in this proceeding subject to party objections made with their comments on this proposal for decision.

[12] This site visit was conducted as part of a post-hearing site visit of the neighboring Apple Hill Solar Project in Docket 8454. Commissioner Cheney had visited the site on November 13, 2015, as part of the Commission's review of the Chelsea Solar project in Docket 8302.

[13] Bennington Agreement at ¶ 1. The Bennington Agreement was admitted into evidence. Tr. 9/20/18 at 318 (Tousley).

On October 19, 2018, Chelsea filed a post-hearing brief in support of the Project (the "Chelsea Brief") and separate proposed findings of fact. Also on October 19, 2018, the Apple Hill Homeowners Association ("AHHA") and Mt. Anthony Country Club (together, the "Intervenors") jointly filed a brief in opposition to the Project with proposed findings of fact (the "Intervenors' Brief"), and the Vermont Department of Public Service (the "Department") filed a post-hearing brief and proposed findings of fact in opposition to the Petition (the "Department Brief").

On November 2, 2018, the Intervenors, the Department, and ANR each filed reply briefs. Also on November 2, 2018, Chelsea filed a reply brief in response to the Intervenors' Brief and the Department's Brief.

The Department's Reply Brief responds to arguments made in the Chelsea Brief asserting that the Department's position in this case violates Chelsea's constitutional rights to due process and equal protection. I do not address these constitutional arguments in this proposal for decision. Resolution of these arguments was not necessary to my proposed findings of fact. The findings derive from the evidentiary record. These arguments were also irrelevant to my conclusions or recommendation that the Commission find that the Project is in the public good.

No other comments on the Project were filed by the parties.

III. PUBLIC HEARINGS AND COMMENTS

On January 26, 2018, Vermonters for a Clean Environment submitted a copy of a complaint for declaratory and injunctive relief that Chelsea had filed against the Town and others in Bennington in the civil division of the Vermont Superior Court. I do not recommend that the Commission take any action in response to this filing by Vermonters for a Clean Environment because it was meant to inform the Commission of these civil court actions that have since been dismissed.

At the April 17, 2018, public hearing, the Commission received comments from ten members of the public. They commented on:

(1) The nature of the Commission review process and the role of intervenors.

(2) The potential impact of construction traffic on Willow Road and its residents.

(3) The potential impact of the Project on the views from the Monument Drive area and the neighboring Mt. Anthony Country Club that had not been assessed by Chelsea.
(4) The landscaping maintenance plan for the Project site after construction.
(5) The Willow Road Project not being located on a preferred solar site under the most recent Town Plan and adversely affecting aesthetics because it would be visible from a gateway into the Town.
(6) The impact that clear-cutting acres of trees would have on the forest, watershed, air quality, sound, and aesthetics of the area.
(7) The impact of the Project on wildlife.
(8) The greenhouse gas impact of cutting down the trees.
(9) The appropriateness of allowing a commercial developer to profit from a solar project that would clear-cut acres of trees when there are non-profit renewable energy developers available to meet Bennington's energy needs using rooftop solar projects.

The issues addressed in the public comments have been mostly addressed in this proceeding and are reflected in the record. The one exception is the existence of non-profit alternative development that was not addressed by the parties and is not in evidence. Chelsea has a standard-offer contract for the Project approved by the Commission and there is no requirement for the Commission to assess alternatives to that contract as part of its review in this proceeding. I recommend that the Commission therefore take no further action in response to these public comments.

On June 28, 2018, the Commission received two public comments from former intervening parties stating that they were each withdrawing as parties because I had not acted in a timely way to protect them from being deposed by Chelsea. On June 29, 2018, I issued an order quashing their depositions because they were to have taken place more than 50 miles from their residences in violation of Vermont Rule of Civil Procedure 45(c)(3)(A). I recommend that the Commission note their comments but take no further action in response to them.

On October 15, 2018, Senator Brian Campion and Senator Richard Sears jointly filed comments with the Commission reminding the Commission that in 2016 the Town of Bennington was the first community to put forward a renewable energy siting plan. The

Commission has determined that Chelsea has a vested right to the 2010 Bennington Town Plan and the 2016 energy siting plan is inapplicable to the Willow Road Project.[14] The commenters also requested that the Commission review a constituent's disconcerting experience at the September 20, 2018, evidentiary hearing. Specifically, the Intervenors' were concerned about an inappropriate interaction between myself and the Intervenors' counsel. My attempt to control the proceeding was overly aggressive and I have apologized to the Intervenors' counsel. I regret my overly aggressive action and recommend that the Commission take no further action in response to these comments.

IV. FINDINGS

Based upon the petition and the accompanying record in this proceeding, I have determined that this matter is ready for decision. Based on the evidence of record, I report the following findings to the Commission in accordance with 30 V.S.A. § 8(c).

Description of the Project

1. Chelsea Solar LLC is a Vermont limited liability company with offices located at care of Allco Renewable Energy Limited, 1740 Broadway, 15th Floor, New York, New York 10019. Petition at 1.

2. Chelsea proposes to construct and operate a 2.0 MW AC solar electric generation facility on 9.64 acres of cleared area of an approximately 27.3-acre parcel of land located in the northern area of the Town of Bennington, Vermont. Brad Wilson, Chelsea ("Wilson") pf. at 6 and 7.

3. The Project parcel is situated just north of the Vermont Welcome Center and the interchange at the junction of U.S. Route 7 and VT Route 279, is accessed via Willow Road and is located at GPS coordinates 42.9083-73.2059. The Project site is currently vacant and has had no recent residential, commercial, or agricultural use. The Project site is bounded on the north by residential properties, on the south and west by state-owned property adjacent to the interchange at the junction of U.S. Route 7 and VT Route 279, and on the east by an old apple

[14] Case No. 17-5024-PET, Order of 8/30/18 at 6.

orchard no longer in commercial production. The southern boundary of the Project array is approximately 760 feet northwest of Willow Road. Wilson pf. at 6 and 7; Mark Kane, Chelsea ("Kane") pf. at 3-4; Ian Jewkes, Chelsea ("Jewkes") pf. at 3; exhs. CS-BW-2 and CS-MK-3.

4. The solar array would be set back approximately 250 feet from the northeastern edge of the interchange at the junction of US Route 7 and VT Route 279. Exhs. CS-MK-3 and CS-MK-28.

5. The Project will use passivated emitter and rear cell ("mono-PERC") crystalline silicon photovoltaic solar modules to convert solar radiation to electricity. The mono-PERC solar cells are placed in modules with a fixed tilt angle of 15 degrees. The design for the previously proposed Chelsea Solar project called for the use of less efficient solar cells fixed at a 30-degree angle. The use of mono-PERC technology will result in fewer solar cells, less area between the module rows, and a smaller Project footprint. Wilson pf. at 4-5, exh. CS-BW-3.

6. Through a grid interconnection, the electricity generated by the Project will be placed onto the distribution circuit of the local electric utility, Green Mountain Power Corporation ("GMP"). Exh. CS-BW-9.

7. The primary component of the Project is an array of mono-PERC solar modules. These modules convert solar radiation into direct-current ("DC") electricity. The mono-PERC solar cells in the modules have a dark black color, as opposed to the blue color seen in the more common polysilicon variety of solar cells. The solar modules are positioned above the ground and are held in place by a steel and aluminum racking system. Wilson pf. at 4.

8. The racking system groups the modules into multiple rows that will run west to east. The racking system orients the modules facing directly south at a tilt angle of 15 degrees. The racking system is "fixed-tilt," meaning that the modules are held in a fixed position and do not move during the course of a day. The racking system is supported above the ground by galvanized steel H-beams that are driven directly into the soil. The H-beams are designed to allow for 36 inches of clearance between the ground surface at the lowest edge of the solar modules. In this arrangement, the solar modules will reach a maximum height of approximately 6 to 7 feet above the ground surface at their highest edge. The majority of the Project footprint is comprised of the rows of racking and modules. Wilson pf. at 4.

9. The solar modules will be connected to a number of string inverters, located beneath the modules throughout the array. The inverters convert the DC power generated by the modules into the alternating current ("AC") power used in GMP's distribution circuit. Wilson pf. at 5.

10. Underground collection wiring connects the inverters to an equipment skid located near the southern boundary of the solar module array. The equipment skid will house the switchboard, transformer, and communications/monitoring equipment for the Project. The skid supports the equipment atop a pre-fabricated steel floor that includes a secondary transformer oil containment system built into the base. The major equipment cabinets on the skid, as well as the skid frame and floor, will be painted ANSI 61 dark gray. Wilson pf. at 5; exh. CS-IJ-2.

11. Underground cabling will connect the equipment skid to a set of pole-mounted utility equipment at the southeastern corner of the Project footprint where the interconnection equipment will redirect the cable above-ground. The above-ground cabling will connect with the GMP electric circuit that runs overhead along Willow Road.[15] That interconnection will occur within the Project boundaries. Wilson pf. at 5; Wilson pf. reb. at 2.

12. The Project includes a 14-foot-wide gravel private access drive that extends north approximately 850 feet from Willow Road to the Project equipment skid location. Wilson pf. at 5.

13. A 10-foot-high, chain-link security fence will surround the perimeter of the Project, covered in some locations with a partially-opaque black or dark-green mesh screening material for aesthetics purposes. Wilson pf. at 5; Wilson pf. reb at 42; exh. PSD-DR at 2.

14. A 6-inch gap will be left between the bottom of the fence and the ground surface to allow small wildlife to traverse the site. Exh. Joint-ANR-CS-1 at ¶ 21.

15. Within the Project footprint, groundcover will consist of mulch, periodically mown native grass mix, and existing brush vegetation. Wilson pf. at 5.

16. The Project site is currently wooded and will be cleared of approximately 9.64 acres of existing vegetation before Project construction. Wilson pf. at 7.

[15] The aesthetic and natural resource impacts of the GMP line extension that allows for interconnection of this Project were previously reviewed in Docket 8454 for the neighboring Apple Hill Solar Project. Therefore, this review does not address the GMP line extension.

17. Vehicles and equipment associated with the site clearing work will access the site via the vehicle access driveway off Willow Road. This traffic could reach a maximum of six heavy trucks and 30 passenger vehicles to and from the site per day. Average traffic per day over the course of the clearing phase will likely be substantially less than this. The clearing work will take one to two months to complete, depending on site and weather conditions. Construction of the vehicle access driveway will occur in tandem with site clearing activities because the driveway is required to access the site. Clearing activities will be limited to Monday through Friday between 8:00 AM and 5:00 PM, with no work on Saturdays, Sundays, or state or federal holidays. Wilson pf. at 7-8.

18. Once the site clearing work is complete, the Project site will be ready for construction of the solar facility. Project construction will take an estimated two to four months, depending on site and weather conditions. Construction activities for the Project that will use motorized machinery will be limited to between the hours of 8:00 AM and 5:00 PM Monday through Friday. Non-machinery construction activities will be limited to between the hours of 7:00 AM and 6:00 PM Monday through Friday and 8:00 AM to 5:00 PM on Saturday (although generally work on Saturdays is not anticipated). No construction activities will occur on state or federal holidays. There will also be no construction work done on Sundays with the possible exception of quiet, non-machinery work if such work is necessary for timely completion of the Project. Wilson pf. at 8.

19. Vehicles and equipment associated with the construction work will access the site via the vehicle access driveway off Willow Road. Vehicle traffic could reach a maximum of four heavy trucks and 40 passenger vehicles to and from the site per day. Average traffic per day over the course of the construction phase will be less than this. Most days will see no heavy truck traffic because it will be associated only with equipment deliveries to the site. Project construction will begin with the site grading activities to complete the gravel access driveway and to perform contour smoothing in the southeastern portion of the Project footprint. Once grading is complete, Project equipment will be physically installed, including pier supports, racking, modules, equipment skids, wiring, security fence, and interconnection equipment. After the Project equipment is installed, the Project site will be cleaned up and landscaping work

performed, which includes re-seeding disturbed areas with a native grass mix. Once all Project components are in place, the Project will be connected to the utility distribution grid and commissioned to begin full operation. Wilson pf. at 8-9.

20. Once Project construction and commissioning are complete, the Project will begin operation. The Project will operate 24 hours a day, 7 days a week, although it will only generate electricity during daylight hours. The Project is an unmanned facility and is designed to operate without personnel onsite. Maintenance personnel may visit the site approximately twice a month on average to perform equipment testing or repairs. Grounds-keeping personnel may visit the site approximately once every five weeks on average during the non-winter months to mow the ground cover. Vehicle traffic due to these visits would be limited to passenger vehicles with trailers, unless there is an unforeseen major equipment malfunction. Wilson pf. at 9.

21. Washing of the solar modules is not anticipated in the Vermont environment, but if module washing is needed, it would be performed with water that is trucked in from offsite. No solvents would be used. Other than some cooling fans within the equipment skids, there are no moving parts during Project operation. Project operation generates no waste of any kind. Wilson pf. at 9.

22. The Project includes monitoring, metering, and communications equipment. All aspects of Project equipment operation will be monitored via an internet connection from a remote location, and any equipment problems will result in immediate alarms being sent to maintenance personnel. The Project site will be monitored by a set of infra-red, motion-sensitive video security cameras that will alert maintenance personnel to any unauthorized persons trespassing within the Project site area. Wilson pf. at 9-10.

Discussion

1. Working on Sundays

The Petitioner requests the option of doing quiet, non-machinery work on Sunday, if necessary, to meet the Project's contracted operational deadline. I recommend that the CPG issued in this proceeding allow this option after only Chelsea provides notice to the parties and neighbors and no complaints are filed by anyone.

2. Conditional Waivers

As required by 30 V.S.A. § 8007(b), the Commission has implemented procedures governing the application and review of renewable energy projects with a plant capacity that is greater than 150 kW and is 2.2 MW or less by adopting standards and procedures for such projects that include the conditional waiver of several Section 248 criteria.[16] Because the Project is a renewable energy project with a plant capacity not to exceed 2.2 MW, the Project meets the requirements for conditional waivers of certain Section 248 criteria pursuant to 30 V.S.A. § 8007(b) and the Commission's Section 8007(b) Order. These criteria are identified in the findings below.

3. Shared Infrastructure

The Intervenors assert that because the Willow Road Project and the neighboring Apple Hill Solar Project are both accessed from Willow Road and are both connected to the electric distribution grid via the same GMP line extension, the two contiguous projects share infrastructure and therefore are functionally a single 4 MW solar array. The Intervenors further assert that the projects do not qualify as separate plants under "30 V.S.A. § 8002(14)."[17] The Intervenors therefore argue that the Willow Road Project "does not meet the requirements to find the Project is in the public good."[18]

Chelsea responds that "the Intervenors' arguments are irrelevant to this case."[19] Chelsea contends that this is both because the criteria for a standard-offer contract do not apply in a Section 248 permitting case and because the Willow Road Project and the Apple Hill Solar Project factually meet the requirements set 30 V.S.A. § 8002 as interpreted by the Vermont Supreme Court.

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[16] *In Re: Simplified Procedures for Renewable Energy Plants with a Capacity Between 150 kW and 2.2 MW*, Order of 8/31/10 ("Section 8007(b) Order").

[17] The statutory definition for a "plant" in 30 V.S.A. § 8002 is now located at Section 8002(18). The definition applicable here in Section 8002(14) of the previous version of Section 8002 reads:

> "Plant" means an independent technical facility that generates electricity from renewable energy. A group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid.

[18] Intervenors' Brief at 18.

[19] Chelsea Reply Brief at 10-11, citing *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 28.

I am not persuaded by the Intervenors' argument. The fact that both projects are accessed by way of Willow Road and interconnect via the GMP line extension does not make them a single plant under Section 8002. The Willow Road Project, like the Apple Hill Solar Project, will be an independent technical facility with a separate access road from Willow Road and a separate point of interconnection with the new GMP line.

I recommend that the Commission conclude that the Willow Road Project is in the public good having been reviewed under the Section 248 criteria and that it remains in factual conformity with the Supreme Court's guidance regarding the criteria for a standard-offer contract.

Review of Project Under the Section 248 Criteria

Orderly Development of the Region

[30 V.S.A. § 248(b)(1)]

23. The 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 the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. This finding is supported by findings 24 through 37, below.

24. There are extensive public and conservation land holdings in the Town of Bennington, including portions of the Green Mountain National Forest, as well as significant areas of private conservation easements and recreation parks. Exhs. CS-BW-49 at 4 and CS-BW-81 at 28-31.

25. The Project site is identified in the Town Plan as part of a Rural Conservation District. Rural Conservation Districts are located in valley areas outside the urban growth area and have retained their rural and open space character. Exhs. CS-BW-81 at 26 and CS-MB-2 at 32.

26. The purpose of the Rural Conservation Districts is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development. Exhs. CS-BW-81 at 25-26, 29 and PSD-DR-2 at 32.

27. The interchange at the junction of U.S. Route 7 and VT Route 279 serves as the southwestern corner of the Rural Conservation District. The area immediately to the west of Route 7 is in an Industrial Use District. The area immediately to the south of the interchange is a Mixed Residential District. The areas east of the Project site are in Rural Residential, Rural Conservation, and Agricultural Districts, as identified by the Town Plan. The interchange highway complex thus serves as a boundary in the Town Plan between minimally developed rural and agricultural areas in northeastern Bennington and developed urban and industrial areas in western, central, and southern Bennington. Exh. CS-BW-81 at 31.

28. The Town Plan cautions that renewable energy development requires a balance and "[d]evelopment of renewable energy resources should consider both the need for locally produced energy and the need to protect natural and scenic resources." CS-BW-81 at 45.

29. The Town Plan also articulates energy policies and recommendations including: (1) supporting development of renewable energy resources; (2) supporting facilities that provide stable, affordable, and clean renewable sources of energy including solar; and (3) pursuing renewable energy projects. Exh. CS-BW-81 at 92.

30. The Town Plan includes a Parks and Open Space Plan (2007) that articulates Bennington's policy for its use of its undeveloped open spaces – forests, fields, and parkland – now in use for recreational activity. The property on which the Project site is proposed is not a candidate for open space protection. Exh. CS-BW-81 at 91.

31. The Town Plan designates two scenic gateways in the vicinity of the Project. The first is the view of the Bennington Battle Monument and Mt. Anthony directly visible while traveling south on Route 7 near the Project site. This long-range gateway view will not include the Project, which is located above and to the left of Route 7 while traveling south. The second scenic gateway is located 0.75 mile from the Project site along VT Route 279 west of its interchange with Route 67. This scenic gateway includes long-range views of the Green Mountains to the east and will not include the Project site. Exhs. CS-MB-2 at 9, PSD-DR-2 at 7-8, and CS-MK-2 at 9.

32. The Town of Bennington has determined "not to oppose" the Willow Road Project. Bennington Agreement at ¶ 1.

33. Other commercial-scale solar projects have been approved and are operating in the Rural Conservation District. Wilson pf. reb. at 7-12; exhs. CS-BS-BW-20, CS-BW-21, and CS-BW-82.

34. The Bennington Regional Plan (2007) considers the future land use of the region and advances regional goals. It states that "rural development must not be widely scattered throughout the countryside but should occur as relatively compact and cohesive units that serve to reinforce, rather than replace the region's rural character." Exh. CS-BW-79 at 56.

35. The Regional Plan also has an energy policy with ten goals. Among others, these goals include: (1) assuring a safe and reliable supply of energy to meet reasonable consumer demands; (2) decreasing reliance on non-local energy sources; (3) making energy choices that maintain or improve environmental quality; (4) encouraging the development of renewable energy resources; and (5) assuring diversity in energy sources. Exh. CS-BW-79 at 65.

36. The Bennington Regional Energy Plan (2009) encourages both residential and commercial renewable energy using photovoltaic arrays to convert solar energy to electricity. Exh. CS-BW-80 at 34, 36, 51, and 52.

37. The Bennington County Regional Commission Regional Energy Committee commented that the Willow Road Project "was in an area of good solar resource potential, with no statewide environmental constraints." Exh. CS-BW-13 at 2.

Discussion

Section 248(b)(1) provides that, before the Commission may issue a CPG for an in-state facility, the Commission shall find that the facility:

> 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 the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

The Department, through its aesthetics consultant, Mr. Raphael, argues that the Project would unduly interfere with orderly development. In his assessment, Mr. Raphael argues that "orderly development is not just about whether or not the land can be conserved or has impacts

to already conserved space."[20] Instead he asserts that a review of the Project's impact on orderly development of the region must assess what the community and the neighbors envision for the Project site as reflected in the Town and Regional plans. And, in this case Mr. Raphael concludes that the Project site was envisioned by the Town and Regional plans as protected from developments like the Project:

> It is clear from the language of the older town plan that this project footprint and the intensely developed clustering of the arrays over that acreage was not what was envisioned in this district. The basic language set forth in the plan, which hasn't changed since 2010, makes it clear that "distinctive rural character" and "very low density residential" comprise the key qualities of the district. The maintenance of large blocks of productive forest lands – also a town, and indeed state goal, is another principle which this project does not support.[21]

Therefore, from the Department's perspective, the Project would unduly interfere with orderly development.

I am not persuaded by Mr. Raphael's conclusion regarding orderly development for two reasons.

First, Mr. Raphael goes beyond the "due consideration" standard in Section 248(b)(1). Instead, he treats the language describing the Rural Conservation District of the Town Plan as embodying rigid standards that give the Town Plan a veto power over the Project. This overriding treatment is inconsistent with the latest Vermont Supreme Court guidance regarding the Commission's review under Section 248(b)(1),[22] which Mr. Raphael acknowledged he was not familiar with.[23] Section 248(b)(1) requires that the Commission give due consideration to the Town Plan as well as to the statements of municipal officials, but the Commission is not restricted by the language of the Town Plan as Mr. Raphael asserts.[24]

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[20] Exh. PSD-DR-2 at 34.

[21] *Id*. at 35.

[22] *See In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 12 (requiring that the Commission find an undue regional rather than localized impact to disapprove a project under Section 248(b)(1)); *see also* (Robinson, J. concurring) (concluding that Section 248(b)(1) does not require that the Commission give deference to town plans).

[23] Tr. 9/21/18 at 19 (Raphael).

[24] Mr. Raphael appears to be inappropriately giving the Town Plan "substantial deference." Section 248 (b)(1)(C) requires that the Commission give "substantial deference to the land conservation measures and specific policies contained in a duly adopted regional and municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352." The "older" Town Plan used for the review in this case is the 2010 Town Plan. The 2010 Town Plan did not receive an affirmative determination of energy compliance under 24

Second, both the Department in its brief and Mr. Raphael in his testimony do not consider the lack of Town opposition to this Project or the Town's own more expansive interpretation of its Town Plan's restrictions in the Rural Conservation District. Specifically, Mr. Raphael stated only that the fact that the Town does not oppose this Project did not alter his orderly development conclusion.[25] Further, Mr. Raphael stated that in developing his opinion he did not consider the fact that the Town had approved several other commercial solar development projects in the Rural Conservation District.[26]

The Intervenors also argue that the Project would interfere with orderly development of the region because it violates the Town Plan. Specifically, the Intervenors assert that the Project violates a clear, written community standard limiting development in the Rural Conservation District and Town Plan language stating that the Project is in a scenic gateway. I am not persuaded by these arguments for two reasons. First, the Intervenors have not shown that the Project is located in a gateway area as defined by the Town Plan.[27] Second, I gave due consideration to the Town's conclusion that the Project did not violate the Town Plan and thus did not violate a clear, written community standard.

The Intervenors further assert that the Commission is bound by its decision in the Final Order in Docket 8302 that denied the Chelsea Solar project on the grounds that the project would unduly interfere with orderly development.[28] The Intervenors acknowledge that the Town changed its position in this case but do not address the Commission's decision in the neighboring Apple Hill Solar case that gave due consideration to the Town's revised position in that case regarding the Town Plan and its non-opposition to the Apple Hill Solar Project. In Apple Hill, new facts led the Commission to reject its conclusion in Chelsea Solar that that project unduly interfered with orderly development, and the Commission reversed its position regarding the impact of the Town Plan language on orderly development:

V.S.A. § 4352. Therefore, Section 248(b)(1) requires only that the Commission give "due consideration" to the Town Plan rather than the "substantial deference" required by Section 248(b)(1)(C).

[25] Tr. 9/21/18 at 43 (Raphael).

[26] Tr. 9/21/18 at 41 (Raphael).

[27] Finding 31.

[28] Intervenors' Brief at 12-13, Intervenors' Reply Brief at 2.

> The Town's position regarding the applicability of restrictive language in the Town Plan has changed as a result of the Town's engagement as a party in these proceedings over the last three years, its more in-depth understanding of the Project, and its participation in the amendment of the Project to overcome earlier perceived deficiencies in the Project plan.
>
> . . .
>
> We are not bound by our denial decision in Docket 8302, which by its own terms was limited to the facts of that case. In this case, there is evidence that the Town has selectively applied the Town Plan's design standards for the Rural Conservation District by approving other large-scale commercial solar projects in the District.[29]

Both the Intervenors and the Department also argue that the Commission must consider the cumulative impact of the Project with the neighboring Apple Hill Solar Project.[30] I have considered the cumulative impact of the two sites and am not persuaded that the Willow Road Project would unduly interfere with orderly development. The location of this Project next to the Apple Hill Solar Project does cumulatively increase the presence of solar development in this part of Bennington. However, the Town determined that the Apple Hill Solar Project would not unduly interfere with orderly development despite the potential cumulative impact of its location and the Town did not oppose this Project despite that cumulative impact.[31] I agree with the Town's position.

Based on the foregoing and having given due consideration to the Town's non-opposition to both this Project and the neighboring Apple Hill Solar Project, I recommend that the Commission conclude that the Willow Road Project will not unduly interfere with orderly development.

Municipal Screening Requirements

[30 V.S.A. § 248(b)(1)(B)]

38. The 2010 Bennington Town Plan, which is applicable in this proceeding, does not include municipal screening requirements. Exh. CS-BW-81.

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[29] Docket 8454, Order of 9/26/18 at 19 and 62.
[30] Intervenors' Brief at 14 and 43 and exhibit DPS-DR-2 at 25, 30, and 36.
[31] *See* Docket 8454, Order of 9/26/18 at 6, 20, and 62.

Need for Present and Future Demand for Service
[30 V.S.A. § 248(b)(2)]

39. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Impact on System Stability and Reliability
[30 V.S.A. § 248(b)(3)]

40. The Project will not have an adverse impact on system stability and reliability. GMP has completed a system impact study that investigated the impacts of the Project's interconnection to the GMP distribution system and identified the system upgrades necessary to maintain stability and reliability. The completion of the upgrades identified in GMP's system impact study (at the Petitioner's expense) is a requirement of the interconnection agreement with GMP. Wilson pf. at 12; exhs. CS-BW-9 and CS-BW-10.

Economic Benefit to the State
[30 V.S.A. § 248(b)(4)]

41. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Discussion

The Intervenors propose findings of fact based on their testimony that the views in and around the Town of Bennington are a significant economic asset that will be diminished by the Project. The Intervenors argue, therefore, that testimony has been presented that warrants rescinding the conditional waiver of this criterion. I am not persuaded. While there has been testimony from the Intervenors making the argument that the Project will have a negative economic impact in the area, that testimony can readily be characterized as the speculative conclusions of lay witnesses opposed to the Project.

I recommend that the Commission not rescind the conditional waiver because testimony has not been presented to warrant the rescission.

Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment, the Use of Natural Resources, and Public Health and Safety
[30 V.S.A. § 248(b)(5)]

42. Subject to the conditions described below, the Project will not have an undue adverse effect on aesthetics, historic sites, air (including sound and wind) and water purity, the natural environment, the use of natural resources, or public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), and greenhouse gas impacts. This finding is supported by findings 43 through 128, below, which give due consideration to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K).

Discussion

In the ANR MOU, the stipulating parties agree to a proposed condition in the CPG for the Project requiring a 6-inch gap to be left between the bottom of the fence and the ground surface to allow for small wildlife to traverse the site. The stipulating parties agree that the condition is necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the condition in the CPG.

Outstanding Resource Waters
[10 V.S.A. § 1424a; 30 V.S.A. § 248(b)(8)]

43. The Project will not cause an undue adverse impact on outstanding resources waters because there are no designated outstanding resource waters on or near the Project site. Dori Barton, Chelsea ("Barton") pf. at 3, 5; exhs. CS-BW-36 at 4-5, CS-BW-50 at 3, CS-BW-73 at 4, and CS-BW-59 at 3.

Air Pollution, Sound, Wind, and Greenhouse Gas Impacts
[30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)]

44. The Project will not result in undue air pollution, sound, wind, or greenhouse gas emissions. This finding is supported by findings 45 through 56, below.

Air Pollution

45. The proposed secondary transformer oil containment system will protect the groundwater and air from potential contamination. The Project has no other components that have potential for releasing harmful water or air pollutants. Jewkes, pf. at 7.

46. Any air emissions from the Project will be related to limited vehicle and equipment emissions and dust and will be present mostly during construction of the Project. The Project will not produce air pollutants during operation. Exhs. CS-BW-36 at 6 and CS-BW-59 at 3.

Discussion

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not result in undue adverse impacts to air pollution."[32] They argue that Chelsea had a duty to consider and present evidence about the air pollution mitigation value of the forest that will be cleared at the Project site. I am not persuaded by their argument.

Chelsea presented evidence by a qualified witness that potential dust is the only pollutant anticipated and the Project will not result in undue air pollution.

The Intervenors argue that the clear-cutting of trees at the Project site will serve to increase the existing ambient air pollution because the trees will no longer absorb air pollutants. The Intervenors filed opinion testimony by non-expert lay witnesses to support this argument. I was not persuaded that this evidence substantiated their argument that clearing the existing trees creates an undue adverse impact on air pollution. The Intervenors also argue that Chelsea should have done more studies of the passive value of trees on pollution but similarly did not provide a sufficient evidentiary basis for the conclusion that Chelsea needed to do more.

The prefiled testimony of Chelsea's expert that the only air pollutant that might be created by the Project would be dust was admitted without objection, and the Intervenors did not seek to cross examine the witness to challenge that opinion. Given the unchallenged testimony of Chelsea's witness, I am not persuaded by the Intervenors' argument, which is based on speculative lay opinion.

[32] Intervenors' Brief at 39.

I therefore recommend that the Commission conclude that the Project will not result in undue air pollution.

Sound

47. Sound generated by Project construction will be of limited duration and will be similar to the noise generated by typical light construction equipment. The construction activities for this Project using motorized construction machinery will be limited to the hours between 8:00 AM and 5:00 PM Monday through Friday. Non-machinery construction activities will be limited to the hours between 7:00 AM and 6:00 PM Monday through Friday and 8:00 AM to 5:00 PM on Saturdays. Generally, any work on Sundays is not anticipated and will only occur after notice and no complaints from the neighbors. No construction activities will occur on state or federal holidays. Jewkes pf. at 6; Wilson pf. at 8; *see* Discussion at 12.

48. Once operational, the Project will be capable of generating a maximum sound level of 79 dBa from the string inverters and transformer on the equipment skid, which is located near the southern boundary of the Project. The highest estimated sound level generated by the Project at the nearest residence, located approximately 865 feet north of the edge of the array, is 28 dBa. The highest estimated sound level generated by the Project at a property line is at the northern property line, where the Project is estimated to generate a maximum of 32 dBa. These projections do not account for any ambient background sound, including traffic sound, or the attenuating effect of any vegetation located between the sound source and the study points. Also, these projections assume that all pieces of Project equipment are operating simultaneously at their maximum sound level, which will be an infrequent, rather than regular, occurrence. Ryan Haac, Chelsea ("Haac") pf. at 2-3; exh. CS-RH-2 at 6.

49. The Town of Bennington has a noise ordinance that sets forth property line decibel level standards. The Project complies with the applicable local noise standards. Exh. CS-RH-2 at 4.

50. At the request of the Project's neighbors, Chelsea assessed the potential effect on highway sound at their residences that might result from the removal of trees at the Project site. This assessment concluded that removing trees could cause an increased highway sound level of

less than 3 dBA at all residences in the area. A 3 dBA change in broadband sound levels is just perceptible by most people and is not considered a substantial increase by the Vermont Agency of Transportation ("VTrans") Noise Analysis and Abatement Policy. Haac pf. at 4-5; exh. CS-RH-3 at 14.

51. Based on results from background sound monitoring and sound propagation modeling, post-construction background sound levels in the residential neighborhood, which are principally from the nearby highway complex, will not experience a substantial increase due to the Project and will remain well below the level at which VTrans would consider providing noise abatement measures if this were a highway project. Exh. CS-RH-2 at 1.

52. The conclusion that the Project will not create an undue adverse impact on aesthetics with regard to noise also applies to the cumulative impact of the Willow Road Project and the neighboring Apple Hill Solar Project. Tr. 9/20/18 at 65 (Haac).

Discussion

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not create an undue adverse aesthetic impact regarding noise."[33] Their argument is based on their conclusion that the sound assessments conducted by Chelsea were insufficient.

Chelsea presented evidence indicating that the highest potential operational sound generated by the Project will be 32 dBa at the northern property line of the Project and 28 dBA at the nearest residence. Chelsea's expert witness also assessed the potential highway sound at the neighbors' residences that might result from the removal of trees at the Project site and found that the removal of trees would have a negligible impact on the existing highway sound levels at the neighbors' residences. Chelsea also presented evidence concerning construction noise that was unrebutted.

Chelsea has presented evidence by a qualified witness that the Project will not result in undue sound. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

[33] Intervenors' Brief at 29.

I recommend that the Commission conclude Chelsea that the Project will not result in undue sound impacts.

Wind

53. At the request of the Project's neighbors, Chelsea assessed the potential effects on wind levels that could result from the removal of trees at the Project site. Chelsea used historical wind data, wind behavior formulas, and computational fluid dynamics models to evaluate possible wind speed conditions at the site, with and without the planned tree clearing. Scott Reynolds, Chelsea ("Reynolds") pf. at 2-3.

54. Chelsea's wind assessment concluded that only the residence of Ms. Harris, the Project's closest residential neighbor, may experience a measurable difference in wind speeds because of the Project. However, that difference would be both minor and infrequent, and likely imperceptible to a person, and therefore an insignificant change. Reynolds pf. at 3.

Discussion

The Intervenors argue that the Project "will create an undue adverse impact regarding wind."[34] Their argument is based on the conclusion that the wind assessment conducted by Chelsea indicated that the Project will increase the wind at Ms. Harris's home in the Apple Hill neighborhood.

Chelsea presented evidence by a qualified witness that any increase in the wind will be so minimal as to be insignificant and likely imperceptible, and therefore the Project will not result in undue wind. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

I recommend that the Commission conclude that the minor potential increases to the wind speed created by the Project cutting down trees will not result in undue wind.

[34] Intervenors' Brief at 30.

Greenhouse Gases

55. Chelsea performed a greenhouse gas ("GHG") life cycle analysis by determining the potential change in GHG emissions to the atmosphere in metric tons of carbon dioxide. The Project will result in a substantial net benefit regarding greenhouse gases when compared to the current baseload scenario. Harnoor Dhaliwal, Chelsea ("Dhaliwal") pf. at 3; exh. CS-HD-2 at 9.

56. Chelsea has agreed to provide ANR with the Project's "as-built" annual electric generation design estimate within 60 days of the commissioning date of the Project to assist the Agency with compiling and analyzing greenhouse gas impacts. Exh. Joint-ANR-CS-1 at ¶ 6.

Discussion

In the ANR MOU, the stipulating parties identify conditions to be included in the CPG for the Project that require Chelsea to provide ANR with post-construction and annual information to assist ANR with compiling and analyzing greenhouse gas impacts. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on air purity. I agree and recommend that the Commission include the conditions in the CPG.

The Intervenors argue that Chelsea has failed to "meet its burden of proof to show that the Project will not result in an undue adverse aesthetic impact due to" GHG emissions.[35] Their argument is based on their conclusion that the GHG life cycle study conducted by Chelsea "did not consider the [GHG] mitigation values of the forest on Apple Hill or the carbon sequestration of the forest proposed to be cut."[36]

Chelsea has presented evidence by a qualified witness that the Project will not result in undue GHG emissions, including a GHG life-cycle analysis, contrary to the Intervenors' assertions. The GHG life-cycle analysis compared the negative impact of the lost-trees carbon sequestration with the positive impact of non-carbon-sourced electricity for the lifetime of the Project and determined that there would be a net GHG-reduction benefit created by the Project.

The Intervenors did not take the opportunity to cross-examine Chelsea's GHG expert about his testimony or otherwise present evidence in support of their argument. The Intervenors presented non-expert, lay opinion testimony that I find unpersuasive.

[35] Intervenors' Brief at 39.
[36] *Id.*

I recommend that the Commission conclude that the Project will not result in undue GHG emissions.

Water Pollution
[10 V.S.A. § 6086(a)(1)]

57. The Project will not result in undue water pollution. This finding is supported by findings 58 through 81, below.

Headwaters
[10 V.S.A. § 6086(a)(1)(A)]

58. The Project will not result in an undue adverse impact on any of Vermont's headwaters. This finding is based on findings 59 through 61, below.

59. The Project is located within a headwater as defined by 10 V.S.A. § 6086(a)(1)(A) because the Project site is in a drainage area of less than 20 square miles. However, the Project is not characterized by other features that define headwaters. It is not characterized by steep slopes or shallow soils, is not above 1,500 feet in elevation, is not in a watershed of a public water supply as designated by ANR, and is not in an area supplying significant amounts of recharge water to aquifers. Barton pf. at 5-6.

60. ANR Geographic Information System databases and site observations show that runoff from the site drains to a VTrans storm system network at the interchange at the junction of U.S. Route 7 and VT Route 279. This water eventually discharges to an unnamed tributary of Furnace Brook, which eventually flows into Furnace Brook roughly a quarter mile from the Project. Furnace Brook then flows into the Walloomsac River. This headwater sub-watershed is less than one square mile at the point where the Project runoff would discharge to the VTrans storm system network. Barton pf. at 6.

61. Despite the size of the sub-watershed, the Project will meet any health and Vermont Department of Environmental Conservation ("DEC") regulations regarding the reduction of the quality of ground or surface waters flowing through lands defined as a headwater. The conditions contained in DEC's Stormwater Construction General Permit 3-9020, under which the

Project will be covered, would ensure that ground- and surface-water quality are not affected by the Project's construction activities. Exh. CS-BW-36 at 7.

Waste Disposal
[10 V.S.A. § 6086(a)(1)(B)]

62. The Project will meet all applicable health and DEC regulations regarding the disposal of any generated waste. This finding is supported by findings 63 through 66, below.

63. Some solid waste will be generated during construction. All waste will be recycled or disposed of in accordance with all applicable health and environmental conservation regulations regarding the disposal of waste. Also, there will be no injection of waste materials or any harmful or toxic substances into the groundwater. Jewkes pf. at 11; exh. CS-BW-36 at 8.

64. Materials accumulated from clearing will be ground on site and used for erosion prevention and sediment control or removed from the site to an appropriate local disposal/recycling facility. Grubbing of the site is not planned; all stumps will be cut flush with existing grade and left in place. If stumps interfere with Project installation or site grading in a specific location, they will be ground in place or removed and disposed of in an approved stump dump off-site. No on-site stump dump is proposed. Jewkes pf. at 4.

65. The Project will have one pre-fabricated equipment skid. The equipment skid will house a 2,000-kVA medium voltage transformer. The transformer will use Envirotemp FR3, a bio-based coolant, as the cooling oil. This fluid would biodegrade in the environment if accidentally spilled. Further protection against spill is provided by including secondary transformer oil containment in the design of the equipment skid. The base floor of the equipment skid will contain a hollow chamber with open grates surrounding the transformer and leading into the chamber. Spilled transformer oil would be captured and held by this chamber. Jewkes pf. at 6-7.

66. The spill containment basin will be sized to hold 110% of the transformer oil volume plus five inches of freeboard for rain. Jewkes pf. at 7; exh. Joint ANR-CS-1 at ¶ 22.

Discussion

In the ANR MOU, the stipulating parties agree to a proposed condition in the CPG for the Project requiring Chelsea's operations and maintenance contractor to perform periodic inspections of the secondary oil containment system and maintain the system in good working order for the life of the Project. The stipulating parties agree that the condition is necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the condition in the CPG.

Water Conservation
[10 V.S.A. §§ 6086(a)(1)(C)]

67. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Floodways
[10 V.S.A. § 6086(a)(1)(D)]

68. The Project will not result in an undue adverse impact on floodways. The Project site is not located in a floodway or a floodway fringe. Barton pf. at 4 and 6; exhs. CS-DB-2 at 4 and CS-BW-36 at 10.

Streams
[10 V.S.A. § 6086(a)(1)(E)]

69. The Project will not result in an undue adverse impact on streams. There are no streams on the Project site. The closest stream is approximately 230 feet to the south of the Project area; no impacts are expected to occur to this watercourse as a result of the Project. Barton pf. at 6; exhs. CS-DB-2 at 4 and CS-BW-36 at 11.

Shorelines
[10 V.S.A. § 6086(a)(1)(F)]

70. The Project will not result in an undue adverse impact on shorelines. The Project is not located on or adjacent to a shoreline. Barton pf. at 7; exhs. CS-BW-36 at 11 and CS-BW-74 at 4.

Wetlands
[10 V.S.A. § 6086(a)(1)(G)]

71. The Project will not have an undue adverse effect on wetlands. This finding is supported by findings 72 and 73, below.

72. There are no Class II wetlands on the Project site. Barton pf. at 7; exh. CS-DB-2 at 5.

73. Chelsea has agreed to demarcate all wetlands, and their buffers with visible flagging before site preparation or construction and instruct all work crews to avoid those areas. Exh. Joint-ANR-CS-1 at ¶ 8.

Discussion

In the ANR MOU, the stipulating parties agree to proposed conditions in the CPG for the Project to avoid disturbance to wetlands and wetland buffer zones during construction, including GMP's construction of the line extension, operation, and decommissioning. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on wetlands. I agree and recommend that the Commission include them as conditions in the CPG.

Sufficiency of Water and Burden on Existing Water Supply
[10 V.S.A. §§ 6086(a)(2) and (3)]

74. Pursuant to the Commission's Section 8007(b) Order, these criteria are conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

75. In response to concerns from the neighbors, Chelsea conducted an investigation to determine whether the Project would exacerbate the presence of perfluorooctanoic acid ("PFOA") contamination of the drinking water wells uphill from the Project in the Apple Hill neighborhood. The PFOA investigation concluded that the Project would not exacerbate the Apple Hill drinking water well PFOA contamination. Miles Waite, Chelsea ("Waite") pf. at 2-3; exh. CS-MW-2 at 6.

Discussion

The Intervenors argue that "the PUC cannot make a finding the Project will not result in unduly adverse water pollution."[37] The drinking water wells serving the AHHA residences have been found to be contaminated by PFOA. The Intervenors contend that Chelsea has a duty to conduct groundwater testing and analysis because the "limited review of [Chelsea]'s expert reveals numerous uncertainties and variables that may influence migration of contaminants into the air or groundwater or result in changes to groundwater as a result of clear-cutting nearly 10 acres of forest."[38]

Chelsea has presented evidence by a qualified witness that the Project would not exacerbate the Apple Hill drinking water well PFOA contamination. The soil at the Project site does not contain PFOA at levels that could cause an impact to human health through exposure to the soil or dust during construction or operation of the Project.[39]

The Intervenors made no evidentiary showing that the asserted "many unknowns"[40] might enhance the impact of PFOA on the AHHA wells.

I recommend that the Commission conclude that no evidence was presented that would warrant rescinding the waiver of this criterion in this proceeding. There is no evidence that the Project will cause an increase in PFOA-tainted groundwater flowing to the AHHA wells located uphill from the Project.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

76. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result. This finding is supported by findings 77 through 81 below.

77. The implementation of erosion prevention and sediment control measures consistent with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control

[37] Intervenors' Brief at 39.
[38] *Id*. at 38.
[39] Waite pf. reb. at 3.
[40] *Id*.

during construction and the establishment of vigorous permanent vegetative ground cover will ensure that the Project's lands will retain the ability to hold water. Jewkes pf. at 7-8.

78. By clearing existing vegetation at ground level but leaving stumps in place, ground disturbing activities will be avoided during site clearing and the resulting site will be better equipped to manage soil erosion and stormwater runoff. Materials accumulated from clearing will be ground on site and used for erosion prevention and sediment control on site or removed from the site to an appropriate local disposal/recycling facility. Jewkes pf at 4.

79. Approximately 9.64 acres of existing vegetation will be cleared before Project construction. All of the areas that will be cleared are outside of any Class II wetlands or associated wetland buffers. Jewkes pf at 4; exh. CS-IJ-2.

80. Chelsea will apply for a 3-9020 State of Vermont General Permit for Stormwater Runoff from Construction Sites before beginning site clearing work. The 3-9020 permit will include a site-specific Erosion Prevention and Sediment Control Plan that conforms to the Vermont Standards & Specifications for Erosion Prevention and Sediment Control. Jewkes pf. at 8-9.

81. Chelsea has agreed that for any tree clearing activities associated with the Project's site preparation or construction that are not covered by the Construction General Permit 3-9020 or other applicable construction stormwater permit, Chelsea will perform tree clearing in accordance with the acceptable management practices for maintaining water quality on logging jobs in Vermont. Exh. Joint-ANR-CS-1 at ¶ 7.

Discussion

In the ANR MOU, the stipulating parties agree to conditions in the CPG for the Project requiring Chelsea to prevent undue soil erosion impacts, including stormwater discharge impacts during both construction and operation of the Project. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include the conditions in the CPG.

Transportation
[10 V.S.A. § 6086(a)(5)]

82. The Project will not cause unreasonable congestion or unsafe conditions with respect to transportation systems. The Project will be accessed via a private access driveway connecting to Willow Road. The proposed private access driveway will be constructed in accordance with state and local standards and will not interfere with the regular operation of Willow Road. Additional traffic generated by the Project during construction and operation periods will be of a low volume and will not cause congestion or otherwise adversely affect existing traffic patterns. Wilson pf. at 28.

Educational Services
[10 V.S.A. § 6086(a)(6)]

83. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Municipal Services
[10 V.S.A. § 6086(a)(7)]

84. The Project will not cause an unreasonable burden on the ability of the Town of Bennington to provide municipal or governmental services. The Project will not require any municipal sewer or water services. The Project will not require above-average use of municipal police, fire, rescue, or maintenance services. The Project will be designed and installed in accordance with all applicable safety codes and will not be a risk to public health and safety. Wilson pf. at 28.

Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas
[10 V.S.A. § 6086(a)(8)]

85. The Project will not have an undue adverse impact on aesthetics or on the scenic or natural beauty of the area, nor will the Project have an undue adverse effect on historic sites or rare and irreplaceable natural areas. This finding is supported by findings 86 through 114, below.

Aesthetics

86. The Project site is almost entirely wooded with northern hardwood species and slopes down at an 8% grade from the northeast corner to the southwest corner, falling approximately 80 feet over this distance. The topography also exhibits some slight undulations along the slope. Wilson pf. at 6; Jewkes pf. at 3; exhs. CS-IJ-2 and CS-MK-2 at 4, 6 and 44.

87. The area to the south and west of the site is dominated by extensive highway infrastructure, including the Vermont Welcome Center, as well as nearby industrial and commercial development, which defines the western edge of the Project. The area to the north and east of the site is wooded. It includes well-spaced residential properties and agricultural and undeveloped areas. The site sits within a broader valley terminated to the west by the foothills of the Green Mountains and to the east by rolling hillsides. Exhs. CS-MK-2 at 6 and 12 and CS-MB-2 at Figure 2.

88. The roadways associated with the interchange at the junction of U.S. Route 7 and VT Route 279 are heavily traveled. The VTrans route logs indicate that approximately 10,000 vehicles pass through the interchange each day. Exhs. CS-BW-45 at 4 and CS-MB-2 at 9.

89. The Bennington Battle Monument is approximately 1.1 miles south of the Project site. The Monument's observation level is 200 feet above the ground and has four long, narrow openings oriented north, south, east, and west. The Project site will be minimally visible from the northern window. Visibility of the Project site from the Monument grounds is also highly limited due to the presence of structures and trees in the foreground. Exhs. CS-BW-45 at 12, MACC-ML-1 at 6, CS-MB-2 at 12, and CS-MB-4b at B-45; tr. 9/20/18 at 163-166 (Buscher).

90. The Project will be visible approximately one mile away from the Mt. Anthony Country Club. Leon pf. at 4; Kane pf. reb. at 15-17; exh. MACC-ML-1 at 1, 5, 12, and 13.

91. The Project will be visible from Southern Vermont College and its public trails approximately two to three miles away. Leon pf. reb. at 4; Kane pf. reb. at 17-18; exhs. CS-MB-2 at 13 and MACC-ML-3 at 6-10; tr. 9/20/18 at 215 (Kane).

92. The Project site is identified in the 2010 Bennington Town Plan as part of a Rural Conservation District. Kane pf. at 3; exhs. PSD-DR-2 at 5 and CS-BW-81 at 31.

93. The existing visual character of the site is dominated by the extensive highway infrastructure and nearby commercial and industrial development. The Project would expand the extent of development across Route 7 into the Rural Conservation District. Kane pf. at 4-5; exhs. PSD-DR-2 at 8-9, CS-BW-45 at 4, CS-MK-2 at 10-11, and CS-MB-2 at 14-15 and Figure 2.

94. The Project site would require clearing 9.64 acres of trees, will convert existing woodlands to a different land use, and will alter the open-space "character" of Apple Hill. The Project site is not identified as open space in either the Town Plan or the Town's Open Space Plan, which states that Bennington has a wealth of conserved open space. Wilson pf. reb. at 3; exhs. PSD-DR-2 at 11, CS-MB-2 at 14, and CS-BW-49 at 8.

95. The Project will not contribute to a long-term loss of open space. The components of the Project (panels, inverter structures, and transformers) will, following the useful life of the Project, be removed and the land restored to an undeveloped condition. Exhs. PSD-DR-2 at 11, CS-MB-2 at 14, CS-BW-45 at 14, CS-MK-2 at 26-27, and CS-BW-8 at ¶ 2.

96. The Project will be minimally visible to the public on nearby heavily traveled highways and will be shielded by the forest buffer and the topography. Wilson pf. at 36-37; Kane pf. at 4; exhs. CS-MK-2 at 19-20, PSD-DR-2 at 8, and CS-MB-2 at 9.

97. The low height of the Project (7-8 feet), its ability to follow the natural grade, and the retention of significant existing vegetation on the periphery of the site reduce the adverse visual impacts from the Project. Wilson pf. at 4; Kane pf. at 4; exhs. CS-MK-2 at 24, PSD-DR-2 at 9, and CS-MB-2 at 2 and 9.

98. The nearest neighbor is approximately 300 feet north of the Project fence. Exhs. CS-IJ-2 and CS-RH-2 at 3.

99. The Project will be adjacent to the Apple Hill Solar Project, which will also clear-cut 9.67 acres of trees in order to construct a similar 2.0 MW solar project. Exhs. CS-MB-2 at Figure 2, PSD-DR-2 at 12, CS-IJ-2, CS-MK-2 at 35.

100. While the Project requires clearing of the land and further extends a newer land use in the area, this type of land use has been contemplated and permitted elsewhere within the Rural

Conservation District. Wilson pf. at 33-34; exhs. CS-MB-2 at 22, CS-BW-20, CS-BW-21, and CS-BW-22.

101. The materials and forms used for the Project aid in helping the Project to blend into the landscape. The black color of the solar panels is less visible given this dark color. The surfaces of the solar panels are nonreflective. The use of a 10-foot tall fence with affixed earth-tone mesh fabric, which is 85% opaque, helps to further shield the Project from view through existing vegetation or new landscaping. The Project does not require any exterior lighting. Wilson pf. at 3 and 5; Wilson pf. reb. at 31-32; exhs. CS-MK-2 at 5, 16, 25, and 43, CS-MB-2 at 2, 13, and 24, and PSD-DR-2 at 2 and 10, CS-BW-94, and CS-BW-95; tr. 9/20/18 at 97-111 (Buscher); tr. 9/20/18 at 282 (Wilson).

102. The visibility of the Project site would be limited by the nature of the terrain, the preservation and addition of landscaping on the periphery of the site, and by the fact that the surrounding land area is used primarily by people in vehicles. Along with the Vermont Welcome Center, other areas within the viewshed are accessible only by vehicle. In fact, the nature of the roadways – on/off ramps, merge lanes – makes it a highly fluid, mobile visual environment. The view duration would be low; nonetheless the number of potential observers would likely be high, given the location. The extent of visibility would not be large, but the clearing associated with the Project would be noticeable. Exhs. CS-MK-2 at 8-10, CS-MB-2 at 9-11, and PSD-DR-2 at 11.

103. The Project, and the neighboring Apple Hill Solar Project, introduce a new element into the landscape that is not commonly seen, but will be minimally visible in the viewshed panorama from various locations, thus creating an adverse aesthetic impact. Exh. PSD-DR-2 at 9.

104. The Project will not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. The Regional Plan and the Town Plan and their various sub-plans provide strong encouragement to protect scenic resources, but none of these plans specifically address the Project site or provide mandatory requirements to preserve the scenic quality of the site. Exhs. CS-MK-2 at 28, CS-MB-2 at 22, PSD-DR-2 at 20, CS-BW-79, CS-BW-80, CS-BW-81, CS-BW-49, CS-BW-24, CD-BW-88, and CS-BW-27.

105. The Town of Bennington has determined "not to oppose" the Willow Road Project. Bennington Agreement at ¶ 1.

106. Other commercial-scale solar projects have been approved and are operating in the Rural Conservation District. Wilson pf. reb. at 7-12; exhs. CS-BS-BW-20, CS-BW-21, and CS-BW-82.

107. The Project is designed with mitigating elements including:

a. A 10-foot perimeter fence, covered with an 85%-opaque earth-tone mesh screening fabric to be installed as agreed upon by the parties after a post-construction aesthetic review;
b. Burial of the electrical lines within the Project boundaries;
c. Location of the inverter skid in an area screened by existing vegetation;
d. Retention of existing vegetative screening around the Project that has been expanded by the reduction in the Project's footprint;
e. Additional landscape plantings at strategic locations to fill in the gaps in the screening. These plantings occur in three landscape mitigation zones. The first zone is along the western edge of the array between the Project and the Route 7 corridor. This zone would consist of 223 individual trees and shrubs (including cedars). The second area is along the northern edge of the Project, approximately in the center of the array. In this zone, about 10-12 large (20-24 feet) conifers will bolster natural vegetation in screening the Project from the most proximate residential neighbor to the north. The last area is along Apple Hill Road, separating that parcel from the intervening remnant apple orchard. In this location, 142 mixed deciduous shrubs and trees are planned to strengthen the screening provided by the remnant orchard.

Bennington Agreement ¶ 9 and exh. B; exhs. PSD-DR-2 at 2, 26, CS-MK-3 at CS-3, CS-BW-28, and CS-BW-3; tr. 9/20/18 at 97-98 (Buscher).

108. The Petitioner has agreed to:

a. Maintain the landscape mitigation plan described in exhibit B of the Bennington Agreement and to conduct post-construction review with all parties of all proposed mitigation plantings and to add additional plantings if necessary;

b. Fully comply with Commission Rule 5.800 that establishes the requirements related to the installation and maintenance of aesthetic mitigation measures.

Bennington Agreement ¶ 9 and exh. B; tr. 9/21/18 at 282 (Wilson).

109. The Town Plan designates two scenic gateways in the vicinity of the Project. The first is the view of the Bennington Battle Monument and Mt. Anthony directly visible while traveling south on Route 7 near the Project site. This long-range gateway view will not include the Project, which is located above and to the left of Route 7 while traveling south. The second scenic gateway is located 0.75 mile from the Project site along VT Route 279 west of its interchange with Route 67. This scenic gateway includes long-range views of the Green Mountains to the east and will not include the Project site. Exhs. CS-MB-2 at 9, PSD-DR-2 at 7-8, and CS-MK-2 at 9.

110. The Project is set on a site which retains natural vegetated areas on its periphery and has a relatively gentle slope with slight undulations that tend to break-up the mass of the array. The Project will not permanently degrade or diminish areas of noted or high scenic qualities and will allow continued visibility of regional landscape forms from residential properties higher in elevation, while still maintaining adequate and effective screening. Exh. CS-MK-2 at 44.

111. The Project will not be shocking or offensive to the sensibilities of the average person but will appear to be an extension of the nearby highway complex and the commercial and industrial development beyond the highway buffered by existing and enhanced vegetation. Exhs. PSD-DR-2 at 24, CS-MK-2 at 43-44, and CS-MB-2 at 24.

112. While the Project will be adverse, it will not have an undue adverse impact on aesthetics as mitigated in accordance with Commission Rule 5.800. Exhs. PSD-DR-2 at 29, CS-MK-2 at 45, and CS-MB-2 at 24; tr. 9/21/18 at 139 (Raphael).

Discussion

Chelsea, through its first aesthetics consultant, Mr. Kane, asserts that "[t]he design has taken considerable steps to effectively limit its visibility to the public nearby."[41] Mr. Kane concludes that the Project will not create an adverse aesthetic impact on the scenic resources.[42] Through its second aesthetics consultant, Mr. Buscher, Chelsea further contends that:

> Although the Project will have some limited visibility from nearby private properties, the site is not located in a prominent location and the retained vegetation around the Project would prevent visibility from public areas. For these reasons, the Project would not result in an adverse impact to the aesthetics and scenic and natural beauty of the area.[43]

The Intervenors disagree with Chelsea and argue that the Project will have an adverse impact on aesthetics and scenic and natural beauty "because the industrial siting of the array threatens the high scenic qualities and bucolic nature of this highly prominent hillside landscape which serves as an important gateway to the community, region, and state."[44]

Similarly, the Department and its aesthetics consultant disagree with Chelsea. The Department asserts that:

> [T]he Project will have an adverse effect on the scenic and natural beauty of the area in which it is located for two reasons. First, the Project is located in a Rural Conservation District, the purpose of which is to preserve the distinctive rural character of the area. It can be surmised that development of a solar array in a Rural Conservation District does not preserve the rural character of the area. Second, clear cutting 9.64 acres of vegetation and forest will have a significant impact on open space values, including visual and aesthetic buffering, that the forest currently provides from the north and east portions of the Project site.[45]

And, as Mr. Raphael states:

> While the Project has limited to no visibility from most public vantage points, it will have an adverse impact on neighboring properties, particularly with respect to impact on open space and its lack of fit with the surrounding context. Therefore,

[41] Kane pf. at 3.
[42] *Id.* at 4.
[43] Exh. CS-MB-2 at 15.
[44] Intervenors' Brief at 31.
[45] Department's Brief at 12.

> the second prong of the Quechee Test is conducted to determine if the adverse impacts are undue.[46]

Like the Intervenors and the Department, I also disagree with Chelsea. While I recognize that the Project as amended includes significant mitigating measures that reduce its visual impact, I do not agree with Chelsea's assessment that the Project will not be adverse to aesthetics and natural beauty. Chelsea's conclusion has relied on mitigating strategies that are more appropriately addressed in determining whether the Project has an *undue* adverse impact, rather than in making the threshold determination that the Project has an adverse impact. I also disagree with Chelsea's assertion that the Project will be "virtually invisible to all except those hunting for it."[47]

I recommend that the Commission conclude that, while Chelsea has engaged in several mitigating steps to limit the Project's visibility, the Project will have an adverse impact because the Project will be visible from various public and private views. Further, the 9.64-acre clear-cut of the forest required for the Project will be out of context with the currently wooded view of Apple Hill and the less developed Rural Conservation District beyond it.

Having concluded that the Project will have an adverse impact, I nonetheless recommend that the Commission conclude that the Project will not have an *undue* adverse impact on aesthetics or on the scenic or natural beauty of the area.

In determining whether a proposed project would have an undue adverse impact on aesthetics, the Commission is guided by the Quechee test,[48] which provides in relevant part:

> . . . [the next step] is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:
>
> 1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

[46] Exh. PSD-DR-2 at 18.
[47] Chelsea's Brief at 58.
[48] *See In re Rutland Renewable Energy, LLC*, 2016 VT 50 (observing that the Commission uses a modified Quechee test in exercising its regulatory power over project siting).

> 2. Have the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?
>
> 3. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?[49]

In addition to this guidance from the Quechee test, the Commission's consideration of aesthetics under Section 248 is "significantly informed by overall societal benefits of the project."[50]

My analysis below answers these three Quechee test questions and leads me to conclude that the Project will not have an undue adverse impact.

Does the Project Violate a Clear, Written Community Standard Intended to Preserve the Aesthetics or Scenic Beauty of the Area?

Chelsea contends that the standards for the Rural Conservation District ("RCON") in the Bennington Town Plan applicable in this case are "not a clear community standard"[51] and argues that "[t]he insistence of Mr. Raphael and the Intervenors that the Town RCON standards proscribe development is entirely unpersuasive and incorrect as a matter of law."[52] Chelsea asserts that this is because "solar facilities are contemplated and allowed uses within the RCON."[53]

The Intervenors assert that "the Project as proposed, fails to conform with the Town Plan; thus, is violative of the clear, written community standard articulated therein."[54] The Intervenors argue that "the law of the case settles the issue of whether there is a clear, written community standard contained in the Town Plan; thus, [Chelsea] is precluded from arguing that the Town Plan does not contain a clear, written community standard."[55]

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[49] *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 8/8/07, at 64–65.
[50] *In Re: Northern Loop Project, Docket 6792*, Order of 5/16/03 at 28.
[51] Chelsea's Brief at 3 and 19.
[52] *Id*. at 5.
[53] Chelsea's Reply Brief at 13.
[54] Intervenors' Brief at 34.
[55] Intervenors' Reply Brief at 1.

The Department argues that while "the various regional and municipal plans indicate an intent to preserve rural character, scenic views, and important landscapes in the region through broad goals and policies, . . . the proposed Project does not per se violate a clear, written community standard."[56]

Unlike zoning ordinances that are subject to variances depending on the individual circumstances of a permit application, municipal and regional plans have been found to be sources of clear and consistent statements of a community's policies or standards. Unlike Act 250 cases that require compliance with zoning limitations, the Commission has found that it is more appropriate to rely on town plans as the primary source of clear, written community standards.[57] The Commission has also determined that the version of the Bennington Town Plan that applies in this case has been used like a zoning ordinance, has been subject to varied application by the Town, and therefore cannot serve as the source of a clear, written community standard as contemplated by the Commission's application of the Quechee test.[58]

The Intervenors' position is not supported by the limited Commission precedent regarding the law of the case doctrine.[59] The doctrine "posits that when a court decides upon a rule of law, the decision should continue to govern the same issues in subsequent stages in the same case."[60] The doctrine is a "rule of practice" from which a court may depart "in a proper case."[61] The Commission, after becoming more fully aware of the Town's inconsistent application of the Town Plan standards, has departed from its determination in Chelsea Solar in the Apple Hill case. I recommend that the Commission do so here as well.

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[56] Department's Brief at 13 n.13.

[57] Docket 8454, Order of 9/26/18 at 42 (citing *Petition of New Cingular Wireless PCS, LLC*, Docket 8160, order of 12/5/13 at 8).

[58] Docket 8454, Order of 9/26/18 at 62 (holding that the Town Plan language does not serve as a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area).

[59] *See, e.g., In re Vermont Elec. Power Co., Inc.*, Docket 7121, Order of 12/5/06 at 46 (law of the case doctrine did not apply to prior hearing officer ruling in the case and did not limit Commission's reassessment of property rights).

[60] *Morrisseau v. Fayette*, 164 Vt. 358, 364 (1995) (citing *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988)).

[61] *Id*. (citing *State v. Cain*, 126 Vt. 463, 469-70 (1967)).

There can be no "law of the case" in the absence of a final determination establishing that law.[62] The Intervenors argue that the Commission is bound by its determination in Chelsea Solar because the Willow Road Project is simply an amended version of the ongoing Chelsea Solar project and therefore part of the same case. But, the law of the case doctrine cannot apply under the Intervenors' argument because under that argument there has not been a final determination in a final order that the Town Plan contains a clear, written standard. That final determination would still pend the review being conducted here.

Further, even if the Chelsea Solar determination were the "law of the case," it would be proper for the Commission to depart from it in this case. The Commission's decision was based on an incomplete knowledge of the facts. The Town of Bennington has similarly gained a more complete knowledge of the facts and does not oppose this Project.

I am not persuaded by the Intervenors' argument and recommend that the Commission conclude that the law of the case doctrine does not require applying the Commission's determination in the Chelsea Solar case that the 2010 Town Plan includes clear, written community standards.

After taking into account: (1) the Town's revised application of the Town Plan to the Project as currently proposed; (2) the Town's resulting lack of opposition to the Project; (3) the Town's previous selective application of the Town Plan such that the Town approved other commercial solar developments in the Rural Conservation District; (4) the Commission's precedent rejecting zoning bylaws as sources of clear, written community standards due to their varying application; and (5) the Commission's decision in Apple Hill to similarly reject the Town Plan as the source of a clear, written community standard, it is my recommendation that the Commission conclude that that there is no clear, written community standard in the Town Plan intended to preserve the aesthetics or scenic, natural beauty of the area that would prohibit development of the Project at the proposed site.

[62] *In re Chittenden Solid Waste Dist.*, 2007 VT 28, ¶ 29 (citing *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 148 (2d Cir.1999)) (law of the case, like res judicata, "limits relitigation of an issue once it has been decided").

Has the Applicant Failed to Take Generally Available Mitigating Steps that a Reasonable Person Would Take to Improve the Harmony of the Proposed Project with Its Surroundings?

The Intervenors argue that Chelsea has not met its burden to take generally available mitigating steps because it: (1) did not provide simulations of the site from Mt. Anthony Country Club and Southern Vermont College; (2) did not provide simulations showing the impact of the dark mesh on the fence in snow conditions; (3) has not established a budget for the vegetative screening; and (4) cannot guarantee the integrity of the remaining forest once the Project site is clear cut.[63]

The Department asserts that Chelsea must observe the mitigation measures described in Finding 107 above and ensure the implementation of those measures in accordance with Commission Rule 5.800 in order to meet the requirements of this element of the Quechee test.

I am not persuaded by the Intervenors' various arguments. The Intervenors refer to the hearing officer's finding that the project in CPG No. NM-6691[64] had an adverse impact because of its visibility eight-tenths of a mile away at Mt. Philo and infer from this that Chelsea should have done more mitigation simulations from the distant Mt. Anthony Country Club and Southern Vermont College. I disagree. The hearing officer's recommendation of adverse aesthetic impact in the Mt. Philo case was not adopted by the Commission, which denied that petition on other grounds. The Intervenors' other assertions of mitigation shortfalls are similarly unsupported by any evidence or precedent. Further, these arguments do not address both Chelsea's agreement to install the opaque mesh with the parties' input after a post-construction aesthetics review and its agreement to comply with the mitigation maintenance requirements of Commission Rule 5.800.

There is sufficient evidence to conclude that Chelsea has taken generally available mitigating steps in proposing to site the Project at this location. The Project reflects Chelsea's reasonable efforts to mitigate the impacts of the Project and to reduce its visibility within the viewshed. Findings 97, 101, 102, and 107, above, summarize many of the available mitigating steps taken by Apple Hill to improve the harmony of the proposed Project with its surroundings.

Finding 108 also observes that Chelsea has agreed to:

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[63] Intervenors' Brief at 27.

[64] *Application of Peck Electric, Inc. for a certificate of public good for a 144.90 kW interconnected group net-metered photovoltaic electric power system in Charlotte, Vermont;* CPG No. NM-6691, Order of 7/21/17 at 19.

a. Maintain the landscape mitigation plan described in exhibit B of the Bennington Agreement and to conduct post-construction review with all parties of all proposed mitigation plantings and to add additional plantings if necessary;
b. Fully comply with Commission Rule 5.800 that establishes the requirements related to the installation and maintenance of aesthetic mitigation measures.

Further, the Willow Road Project mitigates the aesthetic impact of the previously proposed Chelsea Solar project by using different solar panel technology that will result in fewer solar cells, less area between the module rows, and a smaller Project footprint.

I recommend that the Commission approve these findings and accept my recommendation that Chelsea has taken generally available mitigating steps that a reasonable person would take.

Does the Project Offend the Sensibilities of the Average Person? Is it Offensive or Shocking Because It Is out of Character with Its Surroundings or Significantly Diminishes the Scenic Qualities of the Area?

The Intervenors argue that the Project "would offend the sensibilities of the average person because it would be offensive or shocking and because it would significantly diminish the scenic qualities of the area."[65]

The Department asserts that Chelsea must comply with the mitigation measures addressed above in order to avoid offending the sensibilities of the average person.

When determining whether a project would be considered shocking or offensive, the Commission has concluded that the scenic qualities of an area are "important to its residents and that there would always be some resistance to any change in the landscape . . . however . . . the Quechee test [does] not guarantee that the aesthetic qualities of an area would not change."[66] The Commission has concluded that the greater the distance a viewer is from a project the less overwhelming the project. Consequently it is less likely "an average viewer would find its observation shocking or offensive" even if the distant project "may be seen as 'out of character'

[65] Intervenors' Brief at 32.
[66] *In re UPC Vermont Wind*, 185 Vt. 296, 309 (2009).

with the surrounding area."[67] After reviewing the findings of fact, considering the opinions of the expert and lay witnesses, and reflecting on the relevant precedent, my conclusion and recommendation are that the Commission find that the Project would not shock or offend the sensibilities of the average person.

The Project will clear nearly ten acres of trees out of the long-range views of this area of Bennington. The Project site is also at the edge of the Rural Conservation District and is bordered by extensive highway infrastructure, beyond which lies commercial and residential developments that are part of Bennington's urban core.

While the Project site is located on a hillside above the Vermont Welcome Center, it will be generally screened from nearby views from the Welcome Center, the highways, and the dispersed residences above the Project on the hillside. Chelsea is enhancing that screening by adding mitigation planting and conducting a post-construction aesthetics review to allow for additional screening from nearby views if necessary.

The Project will be visible from more than a mile away across the valley at the Mt. Anthony Country Club and residences along Monument Drive. But that view will not shock or offend the average person. From these locations the Project will appear as an opaque rectangle of several acres cut into the hillside above the highway that will be part of the broader vista of highway and developed urban landscape otherwise visible from these distant viewpoints.

The Project is not a new type of development in Bennington, and the Town has not challenged other commercial solar projects in the Rural Conservation District. This includes the neighboring Apple Hill Solar Project. The Quechee test does not guarantee that the aesthetic qualities of an area will not change. While visible, especially in conjunction with the neighboring Apple Hill Solar Project, the Willow Road Project will not be a dominant element in the landscape. Chelsea has considerably mitigated the adverse impact of the Project on scenic views by reducing its size and visibility through new technology and enhanced landscaping buffers.

It is my conclusion that an average person observing the Project from the nearby residences and longer-range views will not be shocked or offended. Based on the foregoing, I

[67] *Id.* at 311.

recommend that the Commission conclude that the Project will not be shocking or offensive to the sensibilities of the average person.

Having answered all three questions in the second prong of the Quechee test, my recommendation is that the Commission find that while the impact of the Project on aesthetics is adverse, it is not unduly adverse.

I recommend that the Commission include conditions in the CPG agreed to by Chelsea to ensure that the Project does not have an undue adverse impact on aesthetics.

Historic Sites

113. The Project will not have an undue adverse effect on historic sites. DHP has reviewed the Project's potential effects on above-ground historic structures and has identified any potential precontact and historic archaeological resource areas and concluded that the Project will not have an undue adverse effect on historic sites. DHP Letter.

Rare and Irreplaceable Natural Areas

114. The Project will not have an undue adverse impact on rare and irreplaceable natural areas ("RINA"). The Project will not destroy or significantly imperil rare and irreplaceable natural areas because none of these resources are located at the Project site or near the proposed construction. Barton. pf. at 3; exh. CS-DB-2 at 6.

Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)(A)]

115. The Project will not have an undue adverse impact on rare, threatened, and endangered species or necessary wildlife habitat. This finding is supported by findings 112 through 117, below.

116. Arrowwood Environmental conducted a rare, threatened, and endangered plant survey of the Project area on August 14, 2014, and a follow-up survey on October 12, 2017. The arrow-leaved American aster *(Symphyotrichum urophyllum*), a rare species, was found during the inventory. Barton at 8; exhs. CS-DB-2 at 7-9 and CS-DB-3 at 2-3.

117. Arrowwood Environmental worked with ANR and Chelsea to develop a mitigation strategy that would minimize impacts from the Project on the arrow-leaved American aster on the site. This strategy involved the establishment of two conservation areas centered around the largest concentrations of rare plants found on the site. Permission from ANR was obtained to transplant the arrow-leaved American aster plants in the fall of 2014 into the conservation areas. On October 15, 2014, two Arrowwood Environmental personnel conducted the transplanting. The 2017 plant species inventory documented an additional 11 locations of this species. These plants were transplanted to the conservation areas in the fall of 2017. Exh. CS-DB-3 at 2-3.

118. In response to the presence of these rare, threatened, and endangered plants, Chelsea established two plant conservation area and has agreed to follow a detailed protocol in the ANR MOU to mitigate Project impacts so that these impacts are not unduly adverse. Exh. Joint-ANR-CS-1 at ¶ 14.

119. The Project site contains no rare, threatened, and endangered wildlife species. Barton pf. reb. at 4.

120. At the request of ANR, Arrowwood Environmental conducted an acoustic bat survey of the combined area of both the Project site and the Apple Hill Solar Project site in August 2018. The Project area is not a habitat of the Northern Long Eared Bat (a federally listed endangered species). Barton pf. at 4; exh. CS-DB-6.

121. The Project site contains neither necessary wildlife habitat nor any corridors between wildlife habitats. Barton pf. reb. at 2-3.

Discussion

The Intervenors argue that because wildlife is present at the Project site the Project will have an undue adverse impact on necessary wildlife habitat.

Chelsea admitted evidence from a qualified expert that the Project site did not contain necessary wildlife habitat or endangered species. "Necessary wildlife habitat," as defined by 10 V.S.A. § 6001(12), means concentrated habitat which is identifiable and is demonstrated as being decisive to the survival of a species of wildlife at any period in its life, including breeding and migratory periods.

The Intervenors presented no evidence to show that the Project site is in fact necessary wildlife habitat as contemplated by 10 V.S.A. § 6086(a)(8)(A). I am not persuaded that the presence of some wildlife demonstrates the existence of a necessary wildlife habitat. Therefore, I recommend that the Commission conclude that the Project will not have an undue adverse impact on necessary wildlife habitat or endangered species.

In the ANR MOU, the stipulating parties agreed to proposed conditions in the CPG for the Project related to the rare, threatened, or endangered plant conservation areas. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on the natural environment, and I agree and recommend that the Commission include them as conditions in the CPG.

Development Affecting Public Investments
[10 V.S.A. § 6086(a)(9)(K)]

122. The Project would not unnecessarily or unreasonably endanger any public or quasi-public investment in any facility, service, or lands, and it would not materially jeopardize the function, efficiency, or safety of, or the public's use or enjoyment of, or access to any facility, service, or lands. This finding is supported by the findings under 10 V.S.A. § 6086(a)(5), above, and finding 123, below.

123. Existing adjacent public investments are limited to the interchange at the junction of U.S. Route 7 and VT Route 279, including the Vermont Welcome Center, Willow Road, and GMP's nearby overhead distribution circuit.[68] There are no Project impacts that would endanger or interfere with the highway complex and the Vermont Welcome Center. Vehicles and equipment associated with the site clearing work will access the site via the vehicle access driveway off Willow Road. This traffic could reach a maximum of six heavy trucks and 30 passenger vehicles to and from the site per day. Per the system impact study performed by GMP, there would be no adverse effects on GMP's distribution system as a result of the Project's

[68] I observe that none of the parties address the Bennington Battle Monument as a public investment affected by the Project under this criterion. I conclude that this is appropriate, because, as addressed in finding 89 above, the visibility of the Project site from the Monument grounds is highly limited.

interconnection, provided certain system upgrades are implemented. Wilson pf. at 8 and 29; exh. CS-BW-9.

Public Health and Safety
[30 V.S.A. § 248(b)(5)]

124. The Project will not result in an undue adverse effect on the health, safety, or welfare of the public and will not unnecessarily or unreasonably endanger the public or adjoining landowners. The Project does not create any waste or other emissions that would be harmful to public health and safety. The Project will be designed to follow all applicable safety codes and will include safety and security measures designed to discourage access to the site by unauthorized or untrained members of the public. Wilson pf. at 22.

Primary Agricultural Soils
[30 V.S.A. § 248(b)(5)]

125. The Project will not have an undue adverse impact on primary agricultural soils. This finding is supported by findings 126 through 128, below.

126. There is approximately one-fifth of an acre of Stockbridge loam soils, rated as prime farmland, in the Project area. This mapped soil is located on the northeast edge of the Project footprint. Alex DePillis, AAFM ("DePillis") pf. at 5; exh. CS-IJ-2.

127. No solar array construction will occur within the area where primary agricultural soils are located. Activities will be limited to the installation of fence posts and to removal of the existing vegetation. DePillis pf. at 5; exh. CS-IJ-2.

128. The soils at the Project site will be preserved so that upon decommissioning the site will be returned to the pre-Project soil condition as required by 10 V.S.A. § 6001. DePillis pf. at 5; exh. CS-BW-8.

Consistency With Company's Least Cost Integrated Plan
[30 V.S.A. § 248(b)(6)]

129. The Commission has not required non-utilities to have a least-cost integrated resource plan. Therefore, this criterion is inapplicable.

Compliance with Twenty-Year Electric Plan
[30 V.S.A. § 248(b)(7)]

130. Pursuant to the Commission's Section 8007(b) Order, this criterion is conditionally waived for the Project, and no party presented any testimony that would warrant rescinding that waiver in this proceeding.

Waste-to-Energy Facility
[30 V.S.A. §248(b)(9)]

131. The Project does not involve a waste-to-energy facility; therefore, this criterion is not applicable.

Existing or Planned Transmission Facilities
[30 V.S.A. § 248(b)(10)]

132. The Project can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers. Any required system upgrade costs will be paid by the Petitioner rather than the utility or utility customers pursuant to the interconnection agreement. Wilson pf. at 25; exhs. CS-BW-9 and CS-BW-10.

Woody Biomass Facilities
[30 V.S.A. § 248(b)(11)]

133. The Project will not produce electric energy using woody biomass; therefore, this criterion is not applicable.

Minimum Setback Requirements
[30 V.S.A. § 248(s)]

134. The Project is set back 195 feet from the nearest public highway and at least 50 feet from the nearest property line. Wilson pf. at 30; and exh. CS-IJ-2.

V. DECOMMISSIONING PLAN AND FUND

135. At the end of the Project's useful life, the Project shall be decommissioned. Decommissioning involves the removal of Project equipment from the site, revegetation, and restoration of the Project site to a natural state. During decommissioning, all above-ground

electrical equipment shall be removed from the site and taken to the appropriate nearby materials recycling facility. This includes solar modules, racking, foundation posts, combiner boxes, and equipment skids. The access road, fence, and all underground infrastructure will be removed as part of the decommissioning process. Wilson pf. at 10-11; exh. CS-BW-8.

136. The decommissioning plan for the Project provides details and a cost estimate for removal of the solar facility and rehabilitation of the Project property back to its pre-project condition. The power purchase agreement ("PPA") for the Project has a term of twenty-five years. At the end of the PPA term, the Petitioner would determine whether: (1) it is financially viable to continue to operate the Project as is; or (2) a Section 248 amendment should be filed to repower the Project with new solar modules and equipment at that time; or (3) the Project should be decommissioned. Wilson pf. at 10-11; exh. CS-BW-8.

137. The decommissioning fund would initially be funded either by an irrevocable standby letter of credit that includes an auto-extension provision (an "evergreen clause"), and would be issued by an A-rated financial institution solely for the benefit of the Commission, or by a security deposit to be held in a federally insured bank in the United States. No other entity, including Chelsea, shall have the ability to demand payment under the letter of credit or withdraw funds from the deposit without the consent of the Commission. Documentation that demonstrates the establishment of the fund would be filed with the Commission before commencement of construction. Exh. CS-BW-8.

138. Chelsea proposes to establish the fund in the amount of $126,000 based on a cost estimate that it prepared. The amount represents the full estimated cost of decommissioning in 2017 dollars and does not net out salvage value. Exh. CS-BW-8.

139. Upon completion of decommissioning, Chelsea would seek a certification of completion from the Commission. The certification would be provided to the entity issuing the letter of credit or holding the security deposit with instructions to release and terminate the letter of credit or security deposit account. Thereafter, Chelsea or its successor or assignee would be entitled to the remainder of the decommissioning fund. Exh. CS-BW-8.

140. The Commission would have the right to draw on the letter of credit or the security deposit to pay the costs of decommissioning in the event that Chelsea is unable or unwilling to

commence decommissioning within a reasonable period of time, not to exceed ninety days, following issuance of a Commission order requiring decommissioning of the Project. Exh. CS-BW-8.

Discussion

Commission Rule 5.900 establishes standard requirements for the decommissioning of electric generation, electric transmission, and natural gas facilities. Rule 5.904(B) requires that non-utility-owned generation facilities greater than 500 kW in capacity be removed once they are no longer in service and that the site be restored, to the greatest extent practicable, to the condition it was in before installation of the facility. Commission Rule 5.904(B)(2) also requires that requests to construct these facilities include a draft irrevocable standby letter of credit in an amount sufficient to fund the estimated decommissioning and site restoration costs.

Chelsea has submitted a plan for decommissioning the Project and estimates that it will cost $126,000 to decommission the Project. Chelsea has also submitted a draft irrevocable standby letter of credit from an A-rated financial institution that names the Commission as the sole beneficiary, includes an auto-extension provision or "evergreen clause," and is bankruptcy remote.

Chelsea's plan for decommissioning and the draft letter of credit and drawing certificate submitted with the plan are consistent with the requirements of Commission Rule 5.904(B). Therefore, I recommend that the Commission include in the CPG for the Project conditions requiring compliance with the terms and conditions of the proposed decommissioning plan and relevant provisions of Commission Rule 5.904(B).

VI. MEMORANDUM OF UNDERSTANDING

141. ANR and Chelsea executed and filed a memorandum of understanding ("MOU"). Exh. ANR-CS-1.

142. The MOU provides that if the Commission does not approve the MOU in its entirety, then the agreements contained in the MOU may terminate. Exh. Joint-ANR-CS-1 at ¶ 28.

Discussion

The ANR MOU includes conditions related to the GMP line extension that is attached to the Project's interconnection point. The Section 248 impacts of the GMP line extension were reviewed by the Commission as part of its approval of the petition in Docket 8454 for the neighboring Apple Hill Project, which also interconnects with the GMP line extension. The CPG for the Apple Hill Project[69] includes conditions related to the GMP line extension that are repeated in the ANR MOU in this case. Because the GMP line extension was reviewed as part of the petition in Docket 8454 and its CPG included ANR's recommended conditions for Apple Hill Solar LLC related to the GMP line extension, I recommend that the Commission approve these conditions a second time in this case to the extent they similarly apply here.

I recommend that the Commission accept the ANR MOU with all of its provisions, updates, and conditions and require Chelsea to comply with the terms and conditions of the MOU, as a condition of the Commission's approval of this Project.

VII. CONCLUSION

Based upon the evidence in the record, I recommend that the Commission conclude that the Project, subject to conditions:

(a) 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, and the recommendations of the municipal legislative bodies;

(b) is a non-utility renewable energy project with a plant capacity greater than 150 kW and no more than 2.2 MW and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(2) is conditionally waived;

(c) will not adversely affect system stability and reliability;

(d) is a standard-offer project and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(4) is conditionally waived;

[69] *Petition of Apple Hill Solar LLC*, Docket 8454, CPG dated 9/26/18.

(e) will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), and greenhouse gas impacts;

(f) is a non-utility project and criterion 30 V.S.A. § 248(b)(6) is therefore not applicable;

(g) is a renewable energy project with a plant capacity greater than 150 kW and no more than 2.2 MW and thus, pursuant to the Commission's Section 8007(b) Order, review of this Project under 30 V.S.A. § 248(b)(7) is conditionally waived;

(h) does not involve a facility affecting or located on any segment of the waters of the State that has been designated as outstanding resource waters by the Secretary of Natural Resources;

(i) does not involve a waste-to-energy facility;

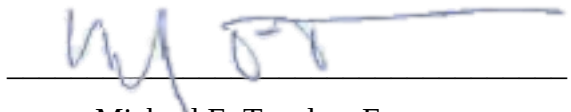
(j) can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers; and

(k) does not involve an in-state generation facility that produces electric energy using woody biomass.

To the extent the findings of fact and conclusions of law in this proposal for decision are inconsistent with any proposed findings of fact or conclusions of law submitted by any party, such proposed findings or conclusions of law, having been considered, are rejected.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 2nd day of January, 2019.



Michael E. Tousley, Esq.
Hearing Officer

VIII. ORDER

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

1. In accordance with the evidence and plans submitted in this proceeding, the 2.0 MW AC solar electric generation facility proposed for construction and operation by Chelsea Solar LLC (the "Petitioner") at Willow Road in Bennington, Vermont, will promote the general good of the State of Vermont pursuant to 30 V.S.A. § 248, and a certificate of public good to that effect shall be issued in this matter.

2. As a condition of this Order, the Petitioner shall comply with all terms and conditions set out in the certificate of public good issued in conjunction with this Order.

Dated at Montpelier, Vermont, this _____.

_____	
Anthony Z. Roisman	PUBLIC UTILITY
_____	COMMISSION
Margaret Cheney	
	OF VERMONT
_____	
Sarah Hofmann	

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 17-5024-PET

Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont	

Entered:

CERTIFICATE OF PUBLIC GOOD ("CPG") ISSUED PURSUANT TO 30 V.S.A. SECTION 248

IT IS HEREBY CERTIFIED that the Vermont Public Utility Commission ("Commission") this day found and adjudged that the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont (the "Project") by Chelsea Solar LLC ("CPG Holder"), in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State, subject to the following conditions:

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

2. Before commencing site preparation or construction of the Project, the CPG Holder shall obtain all other necessary permits and approvals. Construction, operation, and maintenance of the Project shall be in accordance with these permits and approvals, and with all other applicable regulations, including those of the Vermont Agency of Natural Resources ("ANR").

3. The CPG Holder shall restrict clearing activities at the Project site to Monday through Friday between 8:00 AM and 5:00 PM. No clearing work will occur on Saturdays, Sundays, or state or federal holidays.

4. The CPG Holder shall restrict construction activities for the Project that will use motorized machinery to between the hours of 8:00 AM and 5:00 PM Monday through Friday.

Non-machinery construction activities will be limited to between the hours of 7:00 AM and 6:00 PM Monday through Friday and 8:00 AM to 5:00 PM on Saturday. No construction activities will occur on Sundays or state or federal holidays except that the CPG Holder may do quiet, non-machinery work on Sundays to meet Project deadlines, but only if the CPG Holder has contacted all the parties and obtained the Commission's approval after notice to and comment from the parties.

5. The CPG Holder shall be responsible for all costs of distribution and transmission system upgrades that are necessary to address adverse impacts on system stability and reliability due to the Project, as determined by the system impact study.

6. As required by 30 V.S.A. § 248(a)(7), within 45 days of the date of this Order, the CPG Holder shall record a notice of the CPG on the form available at http://puc.vermont.gov/document/cpg-municipal-notice-form in the land records of each municipality in which a facility subject to the CPG is located. The CPG Holder shall file proof of this recording with the Commission.

7. As provided in 30 V.S.A. § 248(t), despite any contrary provision of the law, primary agricultural soils as defined in 10 V.S.A. § 6001 located on the site of a solar electric generation facility approved under Section 248 shall remain classified as such soils, and the review of any change in the use of the site after construction of the facility shall treat the soils as if the facility had never been constructed.

8. The CPG Holder shall remove the facilities authorized by this CPG once they are no longer in service and restore the site to its condition before installation of the facility to the greatest extent practicable, consistent with the terms and conditions of its proposed decommissioning plan, identified in the evidentiary record as exhibit CS-BW-8, which is approved except as modified below.

9. Before beginning site preparation or construction, the CPG Holder shall file with the Commission and obtain Commission approval of a final executed letter of credit from an A-rated financial institution or other financial institution approved by the Commission or shall file and obtain Commission approval of documentation demonstrating that a security deposit account has been established at a federally insured bank located in the United States. If the CPG Holder elects to establish the fund using a letter of credit, the letter of credit shall be an irrevocable

standby letter of credit that: (i) is bankruptcy-remote; (ii) includes an auto-extension provision (an "evergreen clause"); and (iii) is issued solely for the benefit of the Commission. If the CPG Holder elects to establish the fund using a security deposit account, that account shall be established solely for the benefit of the Commission. No other entity, including the CPG Holder, shall have the ability to demand payment under the letter of credit or withdraw from the security deposit without the consent of the Commission. The amount of the letter of credit or security deposit shall represent the full estimated costs of decommissioning without netting out any estimated salvage value for Project infrastructure.

10. The estimated cost of decommissioning shall be adjusted for inflation every three years based upon the net positive change in the annual average of the U.S. Bureau of Labor Statistics' Northeast Urban Consumer Price Index for the preceding three-year period. Every three years, the CPG Holder shall file a report with the Commission and the Vermont Department of Public Service ("Department") on the status of the decommissioning fund after each adjustment. The report shall include the inflation adjustment to determine a revised estimated cost of decommissioning. If the revised estimated cost of decommissioning exceeds the then-value of the letter of credit or deposit account, the CPG Holder shall adjust the letter of credit or deposit such funds as are necessary to ensure that the value of the letter of credit or deposit account equals or exceeds the revised estimated cost of decommissioning. In the event the Consumer Price Index has a negative value at the time the triennial adjustment is calculated, the value of the deposit account shall not be reduced.

11. Before commencing construction, the CPG Holder shall file with the Commission and the parties a letter confirming that it has fulfilled all requisite pre-construction CPG conditions and that it intends to commence construction of the Project.

12. The CPG Holder shall comply with the proposed aesthetic mitigation plan as depicted in exhibit B of the Bennington Agreement.

13. The CPG Holder shall comply with the requirements of Commission Rule 5.800, except to the extent a more stringent requirement for the installation and maintenance of aesthetic mitigation measures is required.

14. The aesthetic mitigation plantings proposed for the Project shall be installed as soon as reasonably possible, and in no case more than 90 days following the completion of

construction, unless this timing would require implementation between October 15 and April 15, in which case the plan shall be fully implemented within 30 days of the following April 15.

15. Within 30 days following the full implementation of the final aesthetic mitigation plan, the CPG Holder shall submit to the Commission and all parties a certification that all work has been fully implemented in a manner consistent with the approved plan. The certification shall include the completion of construction date as well as the date of interconnection and shall be supported by an affidavit and dated photographs of the installed mitigation measures. The CPG Holder shall also conduct an on-site post construction review with all the parties of all project mitigation plantings, propose whether the Project fencing should include opaque mesh screening in any areas of the Project fence, and add additional plantings if necessary.

16. If construction of the facility components or aesthetic mitigation has deviated from the design of the facility as approved, including the addition of any opaque mesh fence screening, the CPG Holder shall also file for Commission review and approval a revised final mitigation plan. Submission of a revised final mitigation plan shall not relieve the CPG Holder from its obligation to request an amendment to the CPG for a substantial change.

17. For a period of three years, the CPG Holder shall conduct an annual inspection of the Project to determine the health, vigor, and continued effectiveness of the aesthetic mitigation. The CPG Holder shall file with the Commission and parties an annual certification documenting the results of the inspection and any corrective actions taken. Certifications required under this paragraph shall be submitted by the dates one, two, and three years following the submission of the certification of completion required by paragraph 16, above.

18. The CPG Holder shall maintain the mitigation measures contained in the final aesthetics mitigation plan or revised final aesthetics mitigation plan for the life of the facility as those measures are depicted on the plan.

19. Before commencing operation, the CPG Holder shall file with the Commission and the parties a letter confirming that it has fulfilled all requisite CPG conditions and that it intends to commence operation of the Project.

20. The CPG Holder shall comply with the MOU between the CPG Holder and the Vermont Agency of Natural Resources ("ANR") agreed to on February 26, 2018, including those

elements of the MOU that relate to Green Mountain Power Corporation's line extension that were also addressed in the CPG in Docket 8454.

21. The CPG Holder shall not commence site preparation or construction, including tree clearing, at the Project site without first obtaining an authorization to discharge under Construction General Permit 3-9020 from ANR's Department of Environmental Conservation ("DEC") Stormwater Program. All Project site preparation and construction activities shall be performed in accordance with this permit.

22. If any authorization to discharge under Construction General Permit 3-9020 or other applicable construction stormwater permit is required by DEC to authorize the discharge of stormwater runoff from construction activities in connection with the Green Mountain Power Corporation ("GMP") Line Extension, then neither GMP nor the Petitioner shall commence site preparation or construction on the Line Extension portion of the Project prior to obtaining any such authorization. All Line Extension site preparation and construction activities shall be performed in accordance with such permit.

23. To the extent any tree-clearing activities associated with the Project's site preparation or construction are not covered by the DEC's Construction General Permit, the CPG Holder shall perform such tree clearing in accordance with the *Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont*.

24. Within 60 days of commencement of operations, the CPG Holder shall provide ANR's DEC Stormwater Program with as-built calculations of all impervious surfaces associated with the Project and the GMP Line Extension and report the total impervious surface area to the DEC's Stormwater Management Program. If it is determined by the Stormwater Management Program that the total impervious area associated with the Project, in combination with the total impervious surface area of any other project deemed by the Stormwater Program to be part of a common plan of development (as defined by DEC's rules) results in a total amount of impervious surfaces that exceeds the 1-acre threshold, the CPG Holder shall obtain an operational stormwater discharge permit and the Project shall be retrofitted with stormwater treatment requirements pursuant to the *Vermont Stormwater Management Manual, Volume I.*

25. The CPG Holder shall avoid disturbing all wetlands and their associated 50-foot buffers during site preparation and construction at the Project site. In order to ensure that

wetlands and buffers are not disturbed, the CPG Holder shall demarcate all wetlands and their 50-foot buffers at the Project site with visible flagging before site preparation or construction and shall instruct all work crews to avoid those areas.

26. Within 60 days of the commencement of Project operation, the CPG Holder shall provide the DEC Wetlands Program with a written certification that the Project site has been built outside the Class II wetlands and their associated 50-foot buffer zones.

27. No later than six months in advance of the Project's decommissioning, the CPG Holder shall complete, and shall provide to the DEC Wetlands Program, an updated wetlands assessment to determine if any of the Project infrastructure is located within any Class II wetlands or 50-foot wetland buffer zones.

28. If, at the time of decommissioning, any Project infrastructure is determined to be located within a Class II wetland or its 50-foot buffer zone, then the CPG Holder shall obtain from the DEC Wetlands Program a jurisdictional determination as to whether the decommissioning activities require a Vermont Wetland Permit, in which case the CPG Holder shall obtain such permit before performing any decommissioning activities and shall comply with its terms and conditions. If, at the time of decommissioning, any Project infrastructure is determined to be located within a Class II wetland or its 50-foot buffer zone and a Vermont Wetland Permit is not required, the CPG Holder shall, sufficiently in advance of decommissioning, submit a wetlands restoration plan to the DEC Wetlands Program for review and approval as an allowed use under the Vermont Wetland Rules (see Section 6.23 of the Vermont Wetland Rules). The restoration plan shall address the removal of the solar array and other Project infrastructure located in any wetland and shall, at a minimum, contain the following elements:

a. Identification of phasing and staging areas;
b. Utilization of methods that prevent rutting in the wetland, including removal of structures during frozen or dry conditions, or use of construction mats or similar techniques to minimize soil disturbance;
c. Revegetation of all disturbed areas within the wetland and buffer zone with appropriate conservation seed mix(es); and
d. Provisions for inspection by ANR before and following site restoration.

29. If any Project infrastructure is located within a Class II wetland or its 50-foot buffer zone at the time of decommissioning, then decommissioning of the Project shall not take place until ANR has issued a Vermont Wetland Permit or has approved the wetlands restoration plan as an allowed use under the Vermont Wetland Rules, whichever is applicable.

30. If any wetland permit is required by DEC's Wetlands Program, the CPG Holder shall ensure that neither the CPG Holder nor GMP will commence site preparation or construction before obtaining the required wetland permit. All site preparation and construction activities shall be performed in accordance with any such permit.

31. All electric distribution line upgrades associated with the GMP Line Extension shall be performed in accordance with Section 6.22 of the Vermont Wetlands Rules. If utility poles are to be located within a Class II wetland or its 50-foot buffer in excess of what is permitted under Section 6.22 of the Vermont Wetlands Rules, the CPG Holder shall ensure that GMP obtains the necessary Vermont Wetland Permit prior to construction of such work. This distribution upgrade condition shall only apply to the specific site preparation and construction activities that are necessary for purposes of interconnecting the Project, and shall terminate upon completion of construction of such Project-specific upgrades in accordance with their terms. It is expressly understood that this condition shall not apply in any way to any independent GMP construction activities which are not associated with the Project and over which the CPG Holder has no direct or indirect control, or to any of GMP's current operations and maintenance activities along the existing distribution route, or to any future operations, maintenance, or construction activities associated with GMP's distribution facilities.

32. The CPG Holder shall comply with the following conditions in order to mitigate impacts on the arrow-leaved American aster (*Symphyotrichum urophyllum*), an S1-ranked very rare species, so that any impacts are not unduly adverse:

a. Before site preparation or construction of the Project:

i. The CPG Holder shall establish and designate two Conservation Areas shown on the site plan included as attachment C to the Rare, Threatened, and Endangered Plant Mitigation Report dated November 11, 2014 (the "Plant Report") and admitted into evidence in this proceeding as exhibit CS-BW-64. The Conservation Areas shall encompass the entire polygons of the areas

shown to the southwest ("Conservation Area 1") and southeast ("Conservation Area 2") corners of the property on the site plan. In other words, the Conservation Area polygons shall include the totality of the contiguous diagonal line markings shown on the site plan and illustrated in various colors designating the rare, threatened, or endangered plant survey information for "S3 – Uncommon", "S1 – Very Rare" and "Proposed Mitigation area" in the southwest and southeast corners of the property.

ii. The Conservation Areas shall be identified with GPS coordinates, as shall the three two-foot-by-two-foot transplant plots identified in the Plant Report. The GPS coordinates shall be provided to the ANR National Heritage Inventory program, and the locations of the transplant plots shall be added to, and clearly shown on, a larger-scale version of the site plan (or a current aerial photo), which shall also be provided to ANR.

iii. The arrow-leaved American aster plants located in the area of the proposed solar array shall be transplanted to the transplant plots in a manner, under conditions, and within a date range approved in advance by ANR.

iv. The CPG Holder shall carry out tree and shrub removal as described in the Plant Report for establishment of the Conservation Areas, taking care not to damage or disturb the arrow-leaved American aster plants existing in, or transported to, those areas. All equipment shall be cleaned of soil and plant material before entry into the Conservation Areas to minimize the spread of invasive species by reducing the transportation and introduction of seeds and plant material.

v. Before site clearing and construction, the CPG Holder shall place a temporary perimeter fence, consisting of an orange snow fence, or similar fencing, to ensure that construction workers and machinery avoid the Conservation Areas. The CPG Holder shall have a representative of Arrowwood Environmental inspect the fencing before construction to confirm it is appropriately located, secured, and clearly visible. The Arrowwood Environmental representative shall also brief the construction crew on the

locations of, and need for avoidance of, the Conservation Areas before commencement of construction and site preparation activities.

vi. The CPG Holder shall remove the temporary perimeter fencing upon completion of all construction activities.

b. Post-Construction Monitoring of the Conservation Areas:

i. The Conservation Areas shall be monitored by Arrowwood Environmental for a period of three years from completion of construction to document survivorship of the transplanted plants further described in the Plant Report.

ii. The Conservation Areas, and a surrounding 50-foot zone, shall be inspected by Arrowwood Environmental at least one time per year for a period of three years from completion of construction to monitor and control any invasive plants within the Conservation Areas and the surrounding 50-foot zone. All invasive plants shall be removed from these areas. The use of herbicides is not permitted without the express written permission of ANR. Mechanical removal is allowed.

iii. An annual report detailing the activities identified in subparts b.i and b.ii, above, shall be submitted to the ANR National Heritage Inventory program by December 31 of each year during the three-year monitoring period.

iv. Representatives of the ANR National Heritage Inventory program shall be permitted to access the Conservation Areas, at reasonable hours, in order to independently inspect the conditions of those areas and the plants growing therein during the life of the Project.

c. Project Operations and Maintenance:

i. The CPG Holder shall make its operations and maintenance contractors aware of the Conservation Areas. All operations and maintenance activities shall be conducted in a manner that avoids damage or harm to the arrow-leaved American aster plants, and other plants noted in the Plant Report. The Conservation Areas shall be mowed at least once every three years. All mowing in these areas shall take place after October 15.

ii. All equipment shall be cleaned of soil and plant material before entry into the Conservation Areas in order to minimize the spread of invasive species by reducing the transportation and introduction of seeds and plant material.

d. Project Decommissioning:

i. Before decommissioning activities, the CPG Holder shall place a perimeter fence, consisting of an orange snow fence, or similar fencing, to ensure that construction workers and machinery avoid the Conservation Areas. The CPG Holder shall have a qualified botanist inspect the fencing before decommissioning to confirm that it is appropriately located, secured, and clearly visible. The qualified botanist shall also brief the decommissioning crew on the locations of, and need for avoidance of, the Conservation Areas before the commencement of decommissioning activities. All decommissioning activities shall avoid the Conservation Areas.

ii. The temporary perimeter fencing shall be removed upon completion of all decommissioning activities.

e. GMP Line Extension

i. Prior to any vegetation disturbance and tree clearing taking place, the populations of arrow-leaved American-aster shall be flagged by Arrowwood Environmental. In addition, a qualified botanist shall be present to supervise tree clearing work along Willow Road between poles 14 and 16 to ensure that there is no earth disturbance and no placement of wood chips or fill within the boundaries of the identified arrow-leaved American-aster plant population.

ii. All tree clearing along Willow Road between poles 14 and 16 shall be conducted during the dormant season for the arrow-leaved American-aster or be performed entirely from the road. Trees shall be cut at the ground surface without earth disturbance and stumps shall remain in place.

33. The CPG Holder shall perform an updated rare, threatened, or endangered plant survey if Project site preparation or construction does not commence by April 30, 2019. In that case, site preparation or construction shall not take place until the Vermont Fish and Wildlife Department has reviewed the updated rare, threatened, or endangered plant survey and

determined that there are no undue adverse impacts to rare, threatened, or endangered plants or has approved appropriate avoidance or mitigation measures.

34. The CPG Holder shall provide ANR with the Project's "as-built" annual electric design estimate within 60 days of the commissioning date of the Project to assist ANR with compiling and analyzing greenhouse gas impacts.

35. The CPG Holder shall provide ANR with the following Project "as-built" information within 60 days of the commissioning date of the Project to assist ANR with compiling and analyzing greenhouse gas impacts:

a. Solar panel manufacturer and model;
b. Solar panel country of origin (manufacture);
c. Solar panel cell technology (e.g., mono-Si, multi-Si, CdTe, etc.);
d. Rated solar panel output (in watts DC);
e. Total number of solar panels installed;
f. Total number of spare panels required (if any);
g. Array mounting type (fixed, 1-axis tracking, 2-axis tracking, ground, roof, other);
h. For fixed or 1-axis tracking, panel orientation and mounting angle;
i. Design system capacity (DC and AC);
j. Rack system manufacturer and model;
k. Rack system components, including the number of each type of major component (e.g. rails, mounting posts, ballasts) and material (e.g. aluminum, steel, concrete);
l. Manufacturer, model, and number of inverters;
m. Manufacturer, model, and number of transformers;
n. Mass of concrete used (for ballasts, foundations, mounting pads, etc.);
o. Percent of Portland cement composition of concrete;
p. Description, quantity, and source of any recycled materials used (e.g., recycled content concrete, recycled aluminum racking, etc.);
q. Amount (length) and gauge of wiring used for Project;
r. Components for connection to grid (circuit boxes, circuit breaker panels, metering equipment, etc.);

s. Distance (e.g., truck miles traveled) for transport of system components to site; and

t. Distance to grid connection.

36. By January 30 of each year, ANR may request that the CPG Holder provide an annual report for the previous calendar year of operations to ANR that shall contain the information set out below and will be used to assist ANR with compiling and analyzing greenhouse gas impacts. The CPG Holder shall have 60 days from the date of ANR's request to supply the information. Should ANR not request the information set out below by January 30, the CPG Holder will not have any obligation to provide an annual report from the previous year of operations. The information to be provided includes the following:

a. Electric generation in kWh for the previous year, broken down by month; and

b. Any information about the replacement of solar panels, inverters, transformers, or a complete racking system. In instances of failure and replacement of equipment (e.g., solar panels, inverters, etc.,), the CPG Holder shall provide descriptions of both the failed and replacement components at the same level of detail as required by the "as-built" reporting requirements of Condition 33, above. This provision does not require the CPG Holder to provide information about *de minimis* replacement of system components (e.g., replacement of racking system hardware), or information regarding regular maintenance activities.

37. Should ANR not request the information in Condition 36, above, in any two consecutive years after Project commissioning, the CPG Holder's reporting obligations will automatically cease.

38. ANR and the CPG Holder, by mutual agreement, may cancel the CPG Holder's reporting obligations related to greenhouse gas impacts at any time.

39. The CPG Holder shall install and maintain fencing with a ground-level opening of six inches above the ground's surface.

40. The CPG Holder shall use a non-toxic, bio-based coolant (FR3 or equivalent) for the Project transformer and shall install a secondary containment system sufficient to accommodate 110% of the transformer coolant volume, plus 5 inches of freeboard for rain. The secondary containment system's final design plans shall be submitted to the DEC Waste Management and

Prevention Division for review and approval before any site preparation or construction. The CPG Holder's operations and maintenance contractor shall perform periodic inspections of the secondary oil containment system and shall maintain the system in good working order for the life of the Project.

41. The CPG Holder shall obtain ANR's approval of the species composition for any vegetative screening to be planted in connection with the Project.

42. The CPG Holder shall comply with all of ANR's requirements for avoiding impacts to Northern Long-Eared Bats in connection with the Project's site preparation and construction activities if ANR determines that the 2018 Northern Long-Eared Bat acoustic survey indicates the probable presence of Northern Long-Eared Bats at the Project site. The CPG Holder shall perform an updated Northern Long-Eared Bat acoustic survey if Project site preparation or construction does not commence by June of 2023. In that case, site preparation or construction shall not take place until ANR has reviewed the updated Northern Long-Eared Bat acoustic survey and determined that there are no undue adverse impacts to Northern Long-Eared Bats or approved appropriate avoidance or mitigation measures.

43. This CPG shall not be transferred without prior approval of the Commission.

Dated at Montpelier, Vermont, this _____.

_____	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
_____	)	COMMISSION
Margaret Cheney	)	
	)	
	)	OF VERMONT
_____	)	
Sarah Hofmann	)	

OFFICE OF THE CLERK

Filed:

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

PUC Case No. 17-5024-PET - SERVICE LIST

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