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Agency of Natural Resources

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Judith Whitney, Clerk
Vermont Public Utility Commission
112 State Street – 4th Floor
Montpelier, VT 05620-2701

Re: 19-0855-RULE, Proposed Revisions to Vermont Public Utility Commission Rule 5.100

Dear Ms. Whitney:

On April 16, 2019, the Vermont Public Utility Commission (“Commission”) issued an Order Opening Rulemaking for Commission Rule 5.100, Rule Pertaining to Construction and Operation of Net-Metering Systems. Attached to the Order is a draft of potential changes to Rule 5.100. The Vermont Agency of Natural Resources (“Agency”) reviewed the Order and draft potential changes and offers the following comments in response.

I. Registration Process Changes

The Agency supports the draft potential changes to Section 5.105 because they clarify the Agency may comment on registrations. Currently, Section 5.105 states only a letter raising interconnection issues timely filed by the interconnecting utility would stop the automatic issuance of a certificate of public good (“CPG”).

For hydroelectric facilities, the Agency recommends the net-metering registration form require applicants to list permit numbers and authorization dates for all Federal Energy Regulatory Commission and Agency licenses, exemptions, and permits associated with the facility, which will help expedite the Agency’s review. Currently, the certification section of the registration form only requires applicants of hydroelectric facilities to certify their projects have all necessary federal and state permits. This does not require revisions to Section 5.105, though the Agency believes this rulemaking is an appropriate opportunity to recommend this change.

II. Amendments, Transfers, and Abandonment

Generally, the Agency supports the draft potential changes to Section 5.108 (amendments to pending registrations and applications) as they remove a disincentive for applicants to respond to changes requested by the Agency that would currently be considered a major change and hence require withdrawal and refileing an application (*e.g.*, moving the limits of disturbance more than 50 feet to avoid environmental features).

The draft potential changes to Section 5.108 remove a requirement that comments on or objections to a proposed minor amendment be filed within 10 business days of the date the minor amendment was filed. The draft potential changes also specify that a request to amend a pending application must be filed as a motion in the pending case and that the Commission may, in its discretion, request comments from interested persons or undertake any other process necessary to ensure the adequate review of an application in its response to an amendment request.

The Agency understands the Vermont Rules of Civil Procedure (“VRCP”) provide parties a 14-day window to respond to a motion and a 10-day window to reply to a response to a motion. To provide certainty about process and a minimum reasonable time for parties to file comments on an amendment request, the Agency recommends the Commission specify in Section 5.108 that parties have a 14-day window to respond to a motion to amend.

The Agency observes that if a motion to amend a pending application is filed during the initial 30-day application comment period, and the Commission has not ruled on the motion before the closure of this comment period (likely given the timeframes provided under the VRCP), parties may be uncertain which version of the project (*i.e.*, the original proposed project or the project as proposed in an amendment request) to comment on. This may result in unnecessary or speculative filings. Therefore, to preserve parties’ reasonable time to review and comment on a project during the 30-day application comment period, the Agency recommends the Commission consider specifying in Section 5.108 that any motion to amend a pending application filed during the 30-day application comment period trigger an automatic stay on all parties’ 30-day application comment period until the Commission rules on the motion and establishes a new comment deadline in its ruling.

The draft potential changes to Section 5.109 (amendments to approved net-metering systems) also remove a “10 business days” requirement to file objections, leaving the Commission, in its discretion, to decide whether to request comments, hold hearings, or take other steps to review applications. The Agency recommends a 14-day minimum time period be provided for parties to file comments or objections to amendment requests to approved net-metering systems. Also, the Agency notes that with removal of the distinction for major amendments, there is no guarantee interested persons that were not parties to the original proceeding will receive notice of an amendment request; it would be at the Commission’s discretion whether non-parties to the original proceeding receive notice.

The Agency supports the draft potential changes to Section 5.110 (transfer and abandonment of CPGs) that extend the commissioning deadline for net-metering systems from one to two years. This change may provide more time for CPG holders to satisfy Agency requirements prior to construction (*e.g.*, receipt of Agency permits; completion of amendments to post-closure certifications for landfills, compliance with seasonal restrictions on construction to protect wildlife) without needing to file a written request to extend the commissioning deadline to do so. The Agency recommends the transfer form required under draft subsection (3) of 5.110(B) be revised to require proposed CPG holders certify they have read the application (including supporting materials), CPG, and Commission order issuing the CPG associated with the CPG to be transferred. The Agency is concerned plans and evidence included in applications, which CPG holders must operate and maintain their projects in accordance with, may not be fully understood by proposed CPG holders. Failure to read through the application, CPG, and Commission order issuing the CPG could result in CPG non-compliance.

III. Preferred Site Definitions

The Agency agrees with the draft potential changes to preferred site definitions (2), (4), and (5). The changes to definitions (2) and (5) match those recommended by the Agency in Case No. 17-5202-PET. The changes to definition (4) address concerns raised by the Agency in Case 17-5202-PET by ensuring the Agency will receive sufficient information to determine whether a site meets the statutory definition of a brownfield site and can therefore be certified as such.

The Agency believes the draft potential changes to preferred site definitions (1) and (3) result in definitions that are very similar and, therefore, may merit consolidation into one definition. The principal difference between the two definitions in the draft potential changes appears to be that preferred site (1) requires the entire plant (energy generating and non-energy generating components) to be located on an existing impervious surface or structure, whereas preferred site (3) allows for non-energy generating components to be located off the existing impervious surface or structure provided no part of the plant overlaps with various features defined in 10 V.S.A. chapter 151.¹

For simplicity, the Agency recommends the Commission consider maintaining the current definition of preferred site (1) (*i.e.*, structures only), essentially making it a rooftop category. In recognition of the Agency's permitting authority, ability to comment on and request CPG conditions related to features identified in the second to last sentence of preferred site definition (3), and potential need for some components of net-metering systems to overlap certain environmental features, the Agency would be open to removing all features except rare and irreplaceable natural areas and necessary wildlife habitat from the second to last sentence of preferred site definition (3). Also, where "impervious

¹ 10 V.S.A. chapter 151 references but does not define headwaters, rare and irreplaceable natural areas, or wetlands.

surface” is used in definitions (1) and (3), the Agency recommends inserting “constructed” before the term to ensure naturally impervious surfaces (*e.g.*, rock outcrops) are not considered preferred sites. Depending on how the Commission changes preferred site definition (1), the Commission may need to revise Section 5.111(A) for consistency.

The draft potential changes to preferred site definition (6), combined with changes to Sections 5.106 and 5.107 (discussed below), address observations and recommendations made by the Agency and others in Case No. 17-5202-PET. The changes remove the ambiguity surrounding the components of net-metering systems that must occur on the disturbed or previously disturbed portion of the extraction site and allow for reclamation to occur prior to operation of the plant, which may result in lower cumulative earth disturbance. The Agency agrees that three years is a reasonable minimum time an extraction site must have been used prior to application filing to qualify under definition (6) but notes there may still be ambiguity regarding the meaning of this requirement. This potential ambiguity should be discussed as part of the rulemaking. For simplicity, the Agency recommends deleting “developed and” in subparagraph (a).

The draft potential changes propose to remove the joint letter option from preferred site definition (7). The Agency is open to this change because it would ensure a municipal planning process has been used to identify preferred sites, which may vet environmental issues. The Agency is aware of the position of some municipalities that it is overly burdensome to update municipal plans to identify preferred sites (the other option within preferred site definition (7)). In response to that concern, the Agency would support retention of the joint letter option provided the site identified in the joint letter does not contain “known constraints” or “possible constraints,” as described in the Department of Public Service’s determination standards for certification under 24 V.S.A. §4352,² or is a geographically specific preferred site identified in a regional plan certified as compliant with 24 V.S.A. §4352. This would ensure some level of planning and natural resource screening occurred before identifying the site as preferred. The Agency observes that several net-metering applicants used the joint letter option of definition (7) when definitions (4) or (6) could have been used, suggesting some applicants may be trying to circumvent the requirements of definitions (4) and (6). This may be an unintended consequence that could be corrected during this rulemaking.

In the Order Opening Rulemaking, the Commission requests comments on the relevance, if any, of tree clearing in determining preferred site status. The Agency is keenly interested in this topic, as fragmentation of forest land is a primary threat to Vermont’s biological diversity as well as the social and ecological services forests provide.³ The Agency has

² See Act 174 Recommendations and Determination Standards, available online at: <https://publicservice.vermont.gov/content/act-174-recommendations-and-determination-standards>.

³ Vermont Forests, Parks, and Recreation. 2015 Vermont Forest Fragmentation Report. Vermont Agency of Natural Resources. 54 pp.

observed a recent upward trend in net-metering systems that involve substantial forest clearing, and a few net-metering applications have been filed that propose forest clearing that is far out of scale with the forest clearing associated with projects of similar capacity, often due to the shade management needed at sites with poor solar exposure. The Agency seriously questions whether net-metering systems that require such excessive clearing, resulting in an inefficient use of natural resources, should be given preferred site status, even if they meet one of the preferred site definitions.⁴

The Agency requests this topic be discussed at a workshop and in future comments on this rulemaking. Conceptually, to address concerns about forest loss and fragmentation, the Agency would support a change to the preferred site definition that would prevent a net-metering system that proposes excessive forest clearing from being considered a preferred site; for example, by prohibiting preferred site status from being granted to systems that involve more than “X” acres of forest clearing, an amount of forest clearing equivalent to “Y” times the area to be occupied by the energy generating component of the project, or a simple ratio of acres of forest clearing to plant nameplate capacity. This could be accomplished by inserting a proviso after, “Preferred Site means one of the following:” and before the specific definitions of each preferred site category. Similar changes could be made to the preferred site definition to ensure preferred site status is not given to systems proposed in grid-constrained areas. The Agency defers to the Department of Public Service on whether preferred-site status is appropriate for grid-constrained areas.

IV. Application Requirements Related to Preferred Sites

The draft potential changes to Sections 5.106 and 5.107 include new preferred site documentation requirements for brownfields and extraction sites. Regarding brownfield sites, the Agency agrees with the language proposed; however, the Agency requests this requirement be made applicable to all applications under Sections 5.106 and 5.107, not just applications for projects on brownfield preferred sites. Regardless of whether preferred site status as a brownfield site is sought, the Agency may need a site investigation report to review applications on brownfields for impacts on the natural environment. Several net-metering applications that did not seek brownfield preferred site status have been filed for systems on brownfields, often using the joint letter option of preferred site definition (7). Universalizing this requirement to all applications is analogous to the way wetland delineations are addressed in Sections 5.106(D)(6) and 5.107(C)(9).

The Agency agrees with the draft preferred site documentation requirements for extraction sites but recommends the Commission add a requirement that applicants provide evidence indicating whether the site complies with the temporal aspect of preferred site definition (6) (*i.e.*, that the extraction site has been used at least three years prior to the date on which an application has been filed).

⁴ Applications proposing extensive forest clearing have claimed preferred site status under definitions (7) and (9), which do not restrict net-metering systems to previously developed sites.

In its comments in Case No. 18-0086-INV, the Agency recommended Sections 5.106 and 5.107 be revised to require advance notices identify the preferred site category applicants intend to apply under. The Agency continues to recommend this change, as including this information at the advance notice stage may streamline application review, promote application completeness, and facilitate preferred site certification.

V. CPG Process for Solar Canopies

In the Order Opening Rulemaking, the Commission also requests comments on whether there should be a simplified process for obtaining a CPG for a solar canopy over an existing parking lot. While the construction of canopy systems over existing parking lots will likely have less environmental impacts and risks than other forms of ground-mounted systems, the potential for undue adverse natural resource impacts still exists, especially related to stormwater and hazardous sites.

If the Commission chooses to establish a simplified process for obtaining a CPG for solar canopies over existing parking lots, the Agency recommends that process be more robust than the current registration process. Specifically, the Agency recommends that any registration process for solar canopy systems over existing parking lots require additional information, including a site plan and elevation drawings.

Since parking lots can be used to cap areas of contaminated soil at hazardous sites, and construction of parking lot canopy systems typically requires boring through existing parking areas and excavating soils to install canopy footings, the registration form should include questions related to hazardous sites, such as, “is this an active or known hazardous site and if so, are there land use restrictions at that site?”. Many hazardous sites across the state are mapped on the Agency’s Natural Resources Atlas, so this information should be relatively easy for applicants to obtain and include in their registration forms.

Similarly, establishment of large solar canopies atop existing parking lots has the potential to redirect a significant volume of stormwater away from or towards existing stormwater management features that may not be designed to manage that new volume. Therefore, a parking lot canopy registration form should require a letter from an engineer confirming the project will not affect a permitted stormwater design or create an increase in impervious surfaces.

When considering the necessity of an expedited process for parking lot canopy net-metering systems, it is also important to note that two of the larger parking lot canopy systems currently permitted in Vermont were processed relatively quickly: the CPG for the 110-kW parking lot canopy system at the Alchemist Brewery (Case No. 138-1394-NMP) was issued 48 days after the application was deemed complete; the 150-kW parking lot canopy system at the ECHO Leahy Center was issued 100 days after the application was deemed complete. That said, the Agency is willing to work with the Commission and

stakeholders to refine the process and requirements for obtaining a CPG for a solar canopy over an existing parking lot.

VI. Rate Structure, Incentives for Beneficial Electrification, and Locational Pricing

As renewably generated energy constitutes an increasing percentage of the state's electric portfolio, the Agency supports maximizing the greenhouse gas reduction benefits of new net-metered generators and the other values these systems may offer the state. That said, the Agency has no specific comments on rate structure, incentives for beneficial electrification, or locational pricing at this time and welcomes the opportunity to discuss these topics during the rulemaking.

VII. Biennial Update

In its comments in Case No. 18-0086-INV, the Agency recommended the Commission develop a process to track and disseminate, on an annual basis, data related to: the number of net-metering systems that apply and are permitted in a given year; the number of systems that apply and are permitted at each of the preferred site categories; the plant capacity and category of systems that apply and are permitted; and REC disposition of systems that are permitted. The Agency still believes development of such a process would be helpful—in part, by ensuring interested parties are relying on the same data in policy discussions about net-metering—and encourages the Commission to consider whether and how Section 5.128 could be revised to facilitate this process.

Much of the data recommend for tracking and dissemination above already appears in the Commission's ePUC system and the Agency understands the Commission recently added a staff position to manage the net-metering program, which may include data tracking and dissemination among its responsibilities. Regardless, it may be appropriate to revise 5.128 to ensure sufficient data is gathered; for example, by requiring the information required in Section 5.128(D) be filed annually rather than every two years and include information on the preferred site categories of each net-metering system. The Agency recommends this topic be addressed in a workshop in connection with this rulemaking.

VIII. Other Issues

Limits of Disturbance and Site Plan Requirements

The term "limits of disturbance" is used throughout Rule 5.100 and is defined in Section 5.103 as:

"Limits of Disturbance" means the boundary within which all construction, materials storage, grading, landscaping, and any other activities related to site preparation, construction, operation, maintenance, and decommissioning take place as a result of the net-metering system, including areas disturbed due to the creation or modification of access roads, utility lines, and the clearing or management of vegetation.

“Limits of disturbance” and “limits of earth disturbance” are also terms used by the Agency in construction stormwater permitting, and refer more specifically in that context to “earth disturbance,” which is defined in the Agency’s Stormwater Permitting Rule as:

“Earth disturbance” means construction activities including clearing, grading, and excavating, but does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

The Agency’s Department of Environmental Conservation interprets earth disturbance to include all construction activities, including access by and staging for vehicles, equipment, and work crews, that expose soil to the erosive effects of wind and precipitation.

Section 5.103’s definition of limits of disturbance refers broadly to all activities associated with net-metering system construction, operation, maintenance, and decommissioning, including activities that do not involve earth disturbance, such as vegetation management that does not expose soil. To avoid confusion with the Agency’s use of the term in construction stormwater permitting, the Agency recommends the term “limits of disturbance” be replaced with “project limits” throughout Rule 5.100 and the definition of the term be revised as follows:

~~“Project Limits of Disturbance” means the boundary within which all construction, materials storage, earth disturbance grading, vegetation clearing, planting, and management, landscaping, and any other activities related to site preparation, construction, operation, maintenance, and decommissioning take place as a result of the net-metering system, including areas disturbed due to the creation or modification of access roads, and utility lines, and the clearing or management of vegetation.~~

The Agency also recommends the term “earth disturbance” be added as a definition in Section 5.103 as follows:

“Earth Disturbance” means earth disturbance as defined in the Agency of Natural Resources’ Stormwater Permitting Rule.

To ensure project limits and the total acreage of earth disturbance are included in site plans, the Agency recommends subsections (a) and (d) of 5.106(D)(5) and 5.107(C)(5) be revised as follows:

(a) Proposed facility location, ~~and~~ any project features, and project limits;

(d) Locations, specific A descriptions, and the total acreage of any areas where vegetation is to be cleared or altered, proposed earth disturbance, and a description of any proposed direct or indirect alterations to or impacts on wetlands or other natural resources protected under 30 V.S.A. § 248(b)(5) during any phase of the project, including the limits of disturbance and the total acreage of any disturbed area;

Process for Rulemaking

The Agency recommends at least three workshops be held in connection with this rulemaking to address issues raised in this letter, including the relevance of tree clearing in determining preferred site status, the CPG process for solar canopies, and changes to Section 5.128. Workshops could be clustered into the following topics:

- Preferred sites: definitions, application requirements, and considerations regarding tree clearing and grid constraints
- Rate design: structure, incentives for beneficial electrification, and locational pricing
- Other issues, including registration, amendment, and transfer processes

Following this initial round of commenting, the Agency recommends participants be given the opportunity to comment in advance of each workshop and in response to each draft revised Rule 5.100 prepared by the Commission.

Thank you for the opportunity to comment on potential changes to Rule 5.100 and the associated rulemaking process. Please contact me if you have questions about these comments. The Agency looks forward to participating in the rulemaking.

Respectfully submitted,



Billy Coster
Director of Planning

Cc: Service List