

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209	)	Case No. 20-1611-INV
into whether the petitioner initiated site	)	
preparation at Apple Hill in Bennington, Vermont,	)	
for electric generation in violation of 30 V.S.A. §	)	
248(a)(2)	)	

**VERMONT AGENCY OF NATURAL RESOURCES MEMORANDUM
CONCERNING SITE CLEARING**

Introduction

On June 19, 2020, Vermonters for a Clean Environment (VCE) filed a comment with the Vermont Public Utility Commission (“Commission”) in Docket 8454 and Case No. 17-5024. VCE’s comment indicated that forest clearing was occurring at the proposed Apple Hill and Willow Road (formerly Chelsea) solar project sites. On that same day, the Clerk of the Commission notified the parties in those (Apple Hill and Willow Road) cases of VCE’s comment and of the Commission’s desire to receive from the parties “any comments in response to VCE’s comment as soon as possible.”¹

The Vermont Agency of Natural Resources (“Agency”), a party in the Apple Hill and Willow Road cases, filed preliminary comments on June 23, 2020 in response to the Commission’s request. On June 24, 2020, the Commission issued an order opening an investigation and noticing a hearing in this Case No. 20-1611 (the “Investigation Order”) and made the parties in Docket 8454 and Case No. 17-5024 parties in the investigation proceeding. In the Investigation Order, the Commission asked the parties to address

¹ Email from Judith C. Whitney, Clerk of the Commission, dated 6/19/2020.

“whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30,” and whether any parties were requesting a temporary restraining order.²

The Agency now files this memorandum, as well as the attached Affidavits from Patrick Lowkes and Robert Popp,³ in response to the Investigation Order.

As previously indicated, the Agency has confirmed that site clearing activity is in fact occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed (“Willow Road Parcel” or simply “Parcel”). The Agency believes that the site clearing being conducted violates Section 248(a)(2) of Title 30. The Agency supports an investigation into the site clearing and requests that the Commission issue a temporary restraining order, which is necessary to avoid irreparable harm to the very rare and rare plants which are documented to occur at the Willow Road Parcel.

Background

On June 16, 2020, Agency Environmental Enforcement Officer Patrick Lowkes visited the Willow Road Parcel and observed that site clearing activity was occurring.⁴ The site clearing activity was consistent with what is performed for a logging job.⁵ According to the person conducting the clearing, Robert Kobelia, the clearing was being performed on behalf of the landowners who were undertaking an agricultural project.⁶ Mr. Kobelia, did not acknowledge the existence of rare plants at the Parcel, after being

² Investigation Order at page 1.

³ The affidavits were prepared and executed prior to issuance of the Commission’s Investigation Order. Because of this, the affidavits are captioned under the prior proceedings (Docket 8454 and Case No. 17-5024-PET).

⁴ Affidavit of Patrick Lowkes, dated 6/24/2020 (Lowkes Aff.) ¶ 5.

⁵ Lowkes Aff. ¶ 5.

⁶ Lowkes Aff. ¶ 3.

informed of their existence by Officer Lowkes, nor did he indicate that he was taking any measures to avoid those plants.⁷ Mr. Kobelia stated that he would be clear cutting the Parcel, doing so in 5-acre sections.⁸

The clearing began near the end of Willow Road where an area was cleared that had the appearance of a log landing.⁹ A 10' to 15' wide swath was also cleared, and silt fence installed, in an area that appeared to run generally along the boundary of the Parcel.¹⁰ Bulldozer tracks are evident and a bulldozer, along with a pick-up truck (with “forester” markings), were present at the parcel.¹¹

The owner of the Willow Road Parcel (PLH LLC), and the petitioners for the proposed Apple Hill Project and Willow Road (formerly “Chelsea”) Project (referred to collectively as the “Developers”), are effectively one and the same.¹²

Very rare and rare plants consisting of Arrow-Leaved American Aster (*Symphyyotrichum urophyllum*), an S1-ranked very rare species, and Nimblewill Muhly (*Muhlenbergia schreberi*), an S2-ranked rare species, are documented to occur at the Willow Road Parcel.¹³ The site clearing activity at the Willow Road Parcel which was observed on June 16, 2020 would result in destruction of the very rare and rare plants if the activity took place in the areas where the plants are located.¹⁴ The portion of the

⁷ Lowkes Aff. ¶ 4.

⁸ Lowkes Aff. ¶ 4.

⁹ Lowkes Aff. ¶ 5; Lowkes Aff. Exhibit B.

¹⁰ Lowkes Aff. ¶5; Lowkes Aff. Exhibits A and C.

¹¹ Lowkes Aff. ¶5; Lowkes Aff. Exhibit D.

¹² PLH LLC, the owner of the Willow Road Parcel, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC are all related entities under common ownership and control. *See*, Case No. 17-5024, Petition of Chelsea Solar, Order dated 6/12/2019, at page 56, fn. 70; *see also*, Case No. 8454, Procedural Order Re: PLH Motion to Intervene, dated 6/15/2017, at page 2. For purposes of this Memorandum, these entities are collectively referred to as the Developer.

¹³*See*, Docket Nos. 8302, 8454 and Case No. 17-5024-PET; *see also*, Affidavit of Robert Popp, dated June 24, 2020 (Popp Aff.) ¶ 6.

¹⁴ Popp Aff. ¶¶ 10, 11.

Willow Road Parcel where the Apple Hill Project is proposed contains both very rare and rare plants in a number of locations, included a rare plant conservation area that was established by the Developer in the southeastern portion of the Parcel.¹⁵

On March 23, 2020, the Developer filed an amendment to the Apple Hill Project which proposed to eliminate certain Project elements (such as tree clearing and fencing) due to the fact that these activities and Project elements were going to be undertaken and installed in connection with a sheep farming operation in advance of the proposed solar electric generation facility.¹⁶ The revised Apple Hill Project site plan filed on March 23, 2020 (the “Sheep Farm Plan”) does not show the southeastern rare plant conservation area which was established by the developer. Nor does it show the locations of the rare plants within or adjacent to the proposed solar array.¹⁷ The Sheep Farm Plan does not indicate that any flagging, fencing, or any other measures would be taken to avoid impacts to the rare plants at the Willow Road Parcel. Neither does the testimony filed the by the Developer on March 23, 2020 in support of the proposed amendment.¹⁸

Worse yet, in addition to failing to indicate the existence of, and protective measures to avoid, the rare plant conservation area, the Sheep Farm Plan depicts buildings to be constructed either within or in close proximity to the rare plant conservation area.¹⁹

¹⁵ Popp Aff. ¶¶ 6, 7, 8; Popp Aff. Exhibits B and C.

¹⁶ See, Docket 8454, Petitioner’s Amendment to Petition for Certificate of Public Good of Apple Hill Solar LLC, dated 3/23/2020, including prefiled direct testimony of Christopher Little and Exhibit AHS-IJ-2 (Rev. 3/22/2020) Sheet C-100; *see also*, Docket 8454, Final Order, dated 5/7/2020, at pages 23-25.

¹⁷ Popp Aff. ¶ 9.

¹⁸ Popp Aff. ¶ 9.

¹⁹ Compare the site plans. Popp Aff. Exhibits A and B.

On June 4, 2020, the Developer filed a motion requesting that the Commission vacate and reconsider the Commission's Final Order of May 7.²⁰ The Developer's June 4 motion also argues that the Commission acted inappropriately in rejecting the March 23, 2020 amendment request.²¹ The Commission has not yet acted on the Developer's June 4 motion.

Discussion

The site clearing activity observed on June 16 constitutes site preparation in violation of the prohibition, contained in 30 V.S.A. § 248(a)(2), on conducting site preparation or construction prior to issuance of a certificate of public good ("CPG"). This activity also presents a threat of irreparable harm to the very rare and rare plants which exist at the Willow Road Parcel.

The Commission has jurisdiction over the Willow Road Parcel and the clearing activity which is taking place on the Parcel. First, as stated in the Department of Public Service Comments filed on June 24, 2020, the Apple Hill solar project remains under the Commission's jurisdiction because of the recently filed motion for reconsideration.

Second, while the Willow Road project proposal was denied by Final Order of the Commission on June 12, 2019, that denial was without prejudice and provided the Developer with an opportunity to amend the Willow Road proposal by "formally merging the Apple Hill Facility and the Willow Road Facility as a single project and seeking authorization for a 4.0 MW plant."²² Such an amendment would, by necessity, involve the entire Willow Road Parcel. While that Developer has not acted on that opportunity,

²⁰ See, Docket 8454, Petitioner's Motion for Hearing and Motion to Alter and Amend and for Reconsideration of Apple Hill Solar, LLC.

²¹ *Id.*

²² Case N. 17-5024, Order dated 6/12/2019 at page 56, n.71.

there was no time limitation imposed and the opportunity to amend remains. In this regard, the Commission's jurisdiction over the Willow Road Parcel remains.

Third, the Developer (who is also the Willow Road Parcel landowner) voluntarily submitted to the Commission's jurisdiction when it filed Section 248 applications for the Chelsea (8302), Apple Hill (8454), and Willow Road (17-5024) solar projects – all on the 27-acre Willow Road Parcel. The Developer has been pursuing these projects, in one iteration or another, for more than five years. Every indication is that the Developer will continue to pursue one or more solar projects at the Willow Road Parcel. For example, denials have been appealed. Motions for reconsideration have been filed. The March 23, 2020 amendment filed in the Apple Hill matter made it obvious that while the Developer intended to pursue sheep farming in the short term, the long term plan was still to construct a solar electric generation facility.

Finally, it is the Agency's understanding the GMP line upgrade and extension necessitated by the solar projects has been installed, undoubtedly at significant cost to the Developer.

Given the circumstances surrounding the Willow Road Parcel, the Developer, and these solar project, it is apparent that activities which are necessary to the construction of a solar facility, such as the recent tree clearing, are in fact activities which are appropriately considered to be site preparation or construction. Because the Commission has not issued a CPG, such activities violate the prohibition contained in Section (a)(2).

Because the clearing activity which has now been documented will destroy very rare and rare plants (which have also been documented). And because there is no indication that there are any measures in place to avoid or protect these plants – in fact,

the Developer's own Sheep Farm Plan fails to even acknowledge existence of the plants.

It is now necessary that the Developer be restrained from continuing these activities in order to avoid irreparable harm to natural resources for which impacts to are subject to the Commission's jurisdiction under Section 248.

Conclusion

For the reasons stated above, the Agency respectfully requests that the Commission issue a temporary restraining order to stop the clearing and proceed with an investigation to determine an appropriate penalty for a violation of the prohibition, contained in Section 248(a)(2) of Title 30, on site preparation or construction without a CPG.

Dated June 25, 2020, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



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