

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and	)	Case No. 20-1611-INV
209 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)	)	

**OPPOSITION OF PLH VINEYARD SKY LLC, APPLE HILL SOLAR LLC AND
CHELSEA SOLAR LLC**

On June 24, 2020, the Vermont Public Utility Commission (the “Commission”) initiated an investigation in a complaint filed by Annette Smith, who is affiliated with an organization that calls itself Vermonters for a Clean Environment (“Smith”).

On March 23, 2020, Apple Hill Solar LLC, which is the petitioner in docket 8454 (“AHS”), filed an Amendment to its petition for a certificate of public (“CPG”). The Amendment fully disclosed and described the plans of the landowner, PLH Vineyard Sky LLC f/k/a PLH LLC (the “Landowner”), for the site and how those changes would impact the AHS CPG petition. The actions complained of by Smith were fully disclosed as imminent almost three months ago. No emergency exists justifying an emergency hearing or a temporary restraining order (“TRO”).

The criteria for TRO are not met, and the Commission has no jurisdiction to order the cessation of activities undertaken for agricultural purposes. The Landowner, AHS and Chelsea Solar LLC vigorously oppose the issuance of any injunctive relief, and vigorously oppose the basis for, and the opening of, the investigation.

I. ANR HAS NOT MET THE REQUIREMENTS FOR A TRO.

30 V.S.A. §10(b) provides: “Except as provided in subsections (c), (d), and (e) of this section, the Commission shall give 12 days' notice of all hearings.” 30 V.S.A. § 10 then provides three exceptions: “(c) A scheduling or procedural conference may be held upon any reasonable notice. ... (d) An evidentiary hearing, once commenced upon proper notice, may be continued to a subsequent date upon any reasonable notice ... (e) Notwithstanding any other provision in this section, the Commission or a single member may grant temporary restraining orders in the manner provided by and subject to limitations prescribed by the Vermont Rules of Civil Procedure.”

Under V.R.C.P. 65 a party, *not the tribunal*, needs to have applied for a TRO supported by affidavits that clearly show that a TRO is appropriate. None of that occurred here prior to scheduling the emergency hearing. The belated request for a TRO filed by the Agency of Natural Resources (“ANR”) today does not meet the required standard for issuance of a TRO. Tellingly, the ANR request does not even address the requirements of V.R.C.P. 65. Rather the basis of its motion is its conclusory allegation that “[t]he 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.” ANR Memo at 5.

The Vermont Supreme Court

has advised trial court judges that injunctive relief is an extraordinary remedy not routinely granted unless the right to relief is clear. *Committee to Save the Bishop's House v. Medical Hospital of Vermont*, 136 Vt. 213, 218, 388 A.2d 827 (1978). A temporary restraining order will only be granted ‘if it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition.’ V.R.C. P. 65. The phrase ‘immediate and irreparable injury’ is not explicitly defined by the rule, but our Court and most federal courts have agreed that standard includes at least four factors:

- The significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
- The state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
- The probability that plaintiff will succeed on the merits; and
- The public interest.

See, Vt. Democratic Party v. Republican Governors Ass'n, No. S1285-04 CnC, 2004 Vt. Super. LEXIS 93 (Sup. Ct. Chittenden County 2004).

None of the four factors have been even argued by anyone, much less supported by affidavits as required by V.R.C.P. 65. As a result, ANR's request for a TRO must be denied.

II. The Commission Lacks Jurisdiction Over Lawful Activities Undertaken By The Landowner For Agricultural Purposes.

The Commission has no jurisdiction to order the cessation of activities undertaken for agricultural purposes, which as stated in the Amendment, and restated herein, are the activities currently being undertaken by the Landowner. The Landowner did not purchase the land in question to let it sit idle and accumulate property tax liabilities while not generating any income. It could be years before a solar generating facility is approved or, alternatively, it may never be approved. In any case, the petition for a CPG is unrelated to the agricultural activities of the Landowner. AHS timely amended its petition for a CPG to reflect the changes brought on by the unrelated agricultural activities of the Landowner.

ANR's claim that "[t]he Commission has jurisdiction over the Willow Road Parcel and the clearing activity which is taking place on the Parcel," *see* ANR Memo at 5, is simply a

misstatement of the law. The Commission still retains full authority to approve or not approve the CPG petition, but it has no jurisdiction over the Landowner's independent agricultural activities.¹

III. Clearing Land for Agricultural Use is Not “Site Preparation” for an Electric Generation Facility.

Section 248(b)(A) provides that “no person, as defined in 10 V.S.A. §6001(14), may begin site preparation for ... an electric generation facility.” That language “highlights the Legislature's intent to bring within the statute's purview proposed construction” of an electric generation facility. *In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 175 Vt. 368, 373 (2003).

In *Beaver Wood I* *Petition of Beaver Wood Energy Pownal, LLC*, Dockets 7678 and 7679, 2010 Vt. PUC LEXIS 565 (December 9, 2010) (“*Beaver Wood I*”), the Commission affirmed its *Monument Farms* approach to the site preparation issue as one where the appropriate question is whether the proposed activity “could be used for purposes other than generation.” *Id.* at *9. Here the answer is unquestionably yes.

In *Beaver Wood I* the movant conceded that its activities were *solely* for the purpose of construction of the electric generation facility and had no other use. *Id.* at 13. (“In contrast to the petitioner's assertion in *Monument Farms*, *BWE* has specifically stated that the proposed construction is associated with the proposed biomass generation plants.”) (emphasis added.) Indeed, in *Beaver Wood I* the activities had to be for the construction of an electric generating facility in order to qualify for grandfathering treatment for the United States section 1603 grant in

¹ ANR's statements that: “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,” is irrelevant to the issue presented here. The Landowner does not dispute that the Commission (as opposed to the Vermont Supreme Court) has jurisdiction over the section 248 CPG petition. But the activities of the Landowner do not constitute site preparation for an electric generating facility and there is no evidence to the contrary.

lieu of the Internal Revenue Code section 48 investment tax credit. Here that is not the case from the tax, accounting or purpose standpoint.

From a tax and accounting standpoint, the costs of preparing the land for growing hemp and housing sheep would be attributed to the farming operation, not an electric generating facility of a separate and *independent* federal income taxpayer.² From a purpose standpoint, the purpose is for the Landowner to exercise its legal rights to make productive use of the land by engaging in an agricultural use on the Site, and protecting its investment expectations.

There is no question that the Landowner has the right to engage in such agricultural uses without the need for governmental permits. The mere fact that the Landowner's activities related to agricultural use might coincidentally reduce a tiny fraction (around 1%-1.5%) of the work needed for the construction of the solar facility subject to the section 248 application would not transform those activities into site preparation for an electric generating facility, as the ANR implies.

*Monument Farms*³ and *Beaver Wood I* confirm that activities that support another purpose (even though there may be some overlap) do not fall within site preparation for an electric generation facility. If the ANR's position here were correct, *Monument Farms* would be an egregious case because something—a biodigester—was actually constructed, and crucially, it was constructed *specifically as "begun construction"* work to qualify for the United States Treasury 1603 grant in lieu of investment tax credit. Thus from a tax and accounting standpoint the

² While under common control and related for purposes of 30 VSA §6011(14), AHS is part of a separate corporate taxpayer for federal and state income tax purposes, whose tax return is independent from, and does not include, the Landowner.

³ *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010).

biodigester was treated as part of construction of an electric generating facility. That point needs to be re-emphasized. Even though the costs of the biodigester in *Monument Farms* would be treated for federal and state tax purposes as expressly part of the construction of the electric generating facility, the Commission nevertheless (apparently with concurrence of or without objection from ANR) concluded that the activities and construction would not be considered site preparation for an electric generating facility under section 248 because the biodigester could be used for other purposes, and thus was not solely related to the electric generating facility. *Monument Farms* at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”)

So too here. The Landowner’s activities would serve the purpose of, and are done for the purpose of, using the land for productive use unrelated to the purpose of constructing an electric generation facility. And PLH’s costs would be treated for federal and Vermont state tax and accounting purposes as part of farming, not related to site preparation for an electric facility.

ANR’s implicit proposition—that 248 petitioners and their landowners cannot engage in any activities that could be deemed beneficial for a project, even when such activities are related to a different activity, is flawed and contradicted by the Commission’s rulings in *Monument Farms* and *Beaver Wood I*. ANR’s position is also contradicted by the Commission’s ruling in *In re Georgia Mountain Community Wind*, Docket No 7508, Order of 1/5/2012 (“*Georgia Mountain*”), where the Commission held that “a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land,” provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.”

(Emphasis added.) Tellingly, the ANR simply fails to address these Commission precedents, which undercuts their position.

The Landowner's activities do not constitute site preparation for an electric generating facility, and ANR has conceded that fact. ANR states: "[t]he March 23, 2020 amendment filed in the Apple Hill matter made it obvious that [] the Developer intended to pursue sheep farming in the short term." That as a legal matter is sufficient and concedes that none of the Landowner's activities constitute site preparation for an electric generating facility. They are lawful activities on the Landowner's land. *See, Georgia Mountain*, ("a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.")

And contrary to the facts in *Beaver Wood I* and *Monument Farms* where the activities were needed to be treated as related to the electric generating facility, none of the Landowner's costs would be properly attributed to site preparation for an electric generating facility under federal income tax law or generally accepted accounting standards. Here the costs of the Landowner's activities will be accounted for as costs related to farming and in no way related to the potential solar facility. The Landowner's activities also share no temporal connection with site preparation of an electric generating facility if a CPG is eventually issued. The Landowner is conducting its activities this year, whereas it is plausible that one or more years would intervene between now and when a final non-appealable CPG might be in place.

An analogy can be made to mineral extraction laws that prohibit activities for the removal of minerals, regardless of quantity, without a specific permit authorizing such activity. Courts

have held that those laws do not apply when the purpose of the activity is for a separate authorized activity even though there is overlap. Any removal is merely incidental and exempt from permitting requirements. *See, e.g., Pipkin v. Cnty. of Douglas*, 158 Wash. App. 1056 (2010) (exempting “[t]he leveling, grading, filling, or removal of materials during the course of normal site preparation for an approved use.”); *Athens Metro. Hous. Auth. v. Pierson*, 2002 WL 851767 *6 (Ohio App. Ct. 2002) (exempting removal of materials incidental to construction work from excavation permit requirement); *Linde Enterprises, Inc. v. Pennsylvania Dep’t of Env’tl. Prot.*, 692 A.2d 645, 650 (Pa. Commw. Ct. 1997) (minerals removed incidental if excavator shows the work was concurrent with construction, limited to the construction area, and construction reasonably related to the use); *L. P. Marron & Co. v. Mahwah Twp.*, 39 N.J. 74, 82, 187 A.2d 593, 597 (1963) (excavation and grading incidental to construction and exempt from soil removal permit).

The Commission has recognized that Section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011) (“*Beaver Wood II*”). The Commission has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not solely related to the electric generating facility, even when those were expressly incurred for federal and state tax purposes as part of construction of the electric generating facility. *Monument Farms* at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”) *See also, Georgia Mountain*, (“a petition filed under 30 V.S.A. § 248 does not

terminate the ability of the Petitioner to conduct otherwise lawful activities on its land.”) It is also indisputable that site preparation related to agricultural use “constitute[s] ‘farming’.” *Re: Scott Farm, Inc.* 2003 VT ENV LEXIS 6 (2003).

ANR’s argument simply fails to engage the facts—because the activities are for an agricultural use or an otherwise lawful purpose they are not site preparation for an electric generating facility. The Commission’s *Monument Farms* and *Georgia Mountain Wind* approach is the well-settled approach and firmly supported by cases such as *Mollica v. Div. of Prop. Valuation & Review*, 2008 VT 60 (2008). In *Mollica*, a mobile home was used for only six weeks each year as part of a short season for Christmas tree sales. During the off-season, which was roughly 88% of the time, the mobile home was used for non-farm purposes such as occupancy rentals. Thus even though the predominant use of the mobile home, referred to as a “cottage”, was non-farm, the Supreme Court held that the use was for farm purposes. *Id.* at P17 (“The cottage is not a ‘development,’ ... because it is used exclusively for farming uses during the entire, albeit short, selling season. Nor can the occasional off-season use of the cottage as a rental property be considered the ‘subsequent commencement’ of a nonfarming use so as to bring the property within the definition of ‘development.’”)

The Supreme Court’s decision in *Mollica* firmly supports the Commission’s consistent approach to the issue taken in *Monument Farms* and *Georgia Mountain*—a use that has a separate function apart from the electric facility is not site preparation for an electric generation facility. ANR’s attempt to broadly attack any activity that might provide some net benefit in the future to a possible solar facility ignores the plain language of the statute, the Commission’s decisions in

Beaver Wood, Monument Farms and *Georgia Mountain* (supported by *Mollica*) and would unlawfully infringe on the Landowner's constitutional and statutory rights as a landowner.

IV. ANR's Claims Are Both Irrelevant And Erroneous.

As explained in the attached affidavit of Robert Kobelia, the RTE conservation area on the Site is untouched, and will be untouched during this phase of clearing. Thus, there is no imminent removal of the plants in the RTE conservation area.

Moreover, there are no legal protections of the "rare" plants on the Site. Title 10, Ch. 123, 10 V.S.A. § 5401 et seq. (the "Vermont Endangered Species Law") establishes statutory criteria for the protection of threatened and endangered species by the Secretary of ANR. Under the Vermont Endangered Species Law, the Secretary of ANR is granted the authority to develop a State endangered species list and a State threatened species list. 10 V.S.A. § 5402(a). The statute prescribes the characteristics of endangered species to be a plant or animal species that "*normally occurs in the State* and its continued existence as a sustainable component of the State's wildlife or wild plants is in jeopardy." 10 V.S.A. § 5402(b) (emphasis added).

A species may be listed as threatened only if the following are present: "(1) it is a sustainable component of the State's wildlife or wild plants; (2) it is reasonable to conclude based on available information that its numbers are declining; and (3) unless protected, it will become an endangered species." 10 V.S.A. § 5402(c) (emphasis added). Endangered and threatened species lists may be adopted only by administrative rulemaking. 10 V.S.A. § 5402(a).

In determining whether a species is threatened or endangered, the ANR Secretary must "use the best scientific, commercial, and other data available," and "at least 30 days prior to commencement of rulemaking, notify and consult with appropriate officials in Canada, appropriate

State and federal agencies, other states having a common interest in the species, affected landowners, and any interested persons”. 10 V.S.A. § 5402(e).

The Vermont Endangered Species Law directs the Secretary of ANR to issue general permits to utilities to conduct vegetation management in utility rights-of-way that permit the taking of threatened or endangered species if such takings would not affect the continued survival of the species. 10 V.S.A. § 5402(l)(1), (5). As used in the statute, the term “utility” “means an electric company, telecommunication company, pipeline operator, or railroad company. 10 V.S.A. § 5402(l)(5).

The Vermont Endangered Species Law does not mention nor authorize the Secretary of ANR to list and protect rare species, by rule, guidance, or otherwise.

Furthermore, the “rare” arrow white-leaved aster (*Symphyotrichum urophyllum*), is a plant that is abundant in the United States. Its range extends from the Midwest: Ontario to Arkansas and east to the Carolinas, Pennsylvania, and New York, but does not normally occur across Vermont. ANR’s basis for its “listing” of the arrow white-leaved aster is that it is, like palm trees and likely thousands of other species, purportedly “rare” in Vermont—a term undefined by either ANR or statute. The arrow white-leaved aster, however, is now abundant along the State of Vermont’s rail corridor in Bennington, Vermont, where the railway simply brush-hogs the plants, and neither ANR nor the State of Vermont are doing anything about it.

V. Conclusion.

For the reasons set forth above, ANR’s request for a TRO should be denied and the investigation terminated.

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Respectfully submitted,

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