

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Docket No. 8454

Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont

Hearings at
Montpelier, Vermont
August 18, 2015
and
March 22, 2018

Order entered:

9/26/2018

ORDER RE PROPOSAL FOR DECISION AND ORDER ISSUING CERTIFICATE OF PUBLIC GOOD

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

APPEARANCES: Kimberly K. Hayden, Esq.
Paul, Frank & Collins, P.C.
Michael Melone, Esq.
Thomas Melone, Esq.
for Apple Hill Solar LLC

James Porter, Esq.
Geoffrey Commons, Esq.
Traci Leibowitz, Esq.
Jeanne Elias, Esq.
for the Vermont Department of Public Service

Donald Einhorn, Esq.
Vermont Agency of Natural Resources

Libby Harris, *pro se*
Brook Dingleline, Esq,
Valsangiacomo, Detora & McQuesten, P.C.
for Libby Harris at the March 22, 2018, hearing

Lora Block, *pro se*
Dan Malmborg, *pro se*
for the Apple Hill Homeowners Association

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I. INTRODUCTION

This case involves a petition filed by Apple Hill Solar LLC (“Apple Hill” 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 at 1133 Willow Road, Bennington, Vermont (the proposed “Project”).

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

II. PROCEDURAL HISTORY

On March 15, 2015, the Petitioner filed a petition with supporting testimony and exhibits (the “Petition”).

On March 31, 2015, I conducted a prehearing conference with respect to the Project.

On April 9, 2015, I issued a prehearing conference order that established dates for the site visit and public hearing, as well as deadlines for the initial phases of the proceeding.

On May 7, 2015, I conducted a site visit and public hearing. Three individuals commented on the proposed Project during the public hearing at the Bennington Fire House. Concerns raised by the speakers about the Project included potential wind and aesthetic impacts of the Project.

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.

On May 14, 2015, Libby Harris filed a motion to intervene *pro se*. I granted that motion on July 9, 2015.

On May 18, 2015, Ms. Harris filed a motion requesting that the Commission order Apple Hill to pay the costs for her to retain expert witnesses. That motion was denied by the Commission on July 10, 2015.

On June 30, 2015, Apple Hill filed two memoranda of understanding (“MOUs”), the first between Apple Hill and the Vermont Agency of Natural Resources (“ANR”) (the “ANR MOU”) and the second between Apple Hill and the Vermont Department of Public Service (the “Department”) (the “Department MOU”).

On August 13, 2015, the Selectboard of the Town of Bennington (“Bennington” or the “Town”) voted to oppose the Apple Hill Project.²

On August 16, 2015, Apple Hill filed a memorandum in opposition to the anticipated intervention of Bennington (the “Apple Hill Memorandum”).

On August 17, 2015, Bennington filed a motion to intervene as a party in this Docket (the “Bennington Intervention Motion”). That motion was granted for permissive intervention on August 18, 2015.

On August 18, 2015, I conducted an evidentiary hearing in the Commission’s hearing room in Montpelier, Vermont. At the evidentiary hearing, all of the prefiled testimony and exhibits of the parties then filed were admitted into the evidentiary record.

On September 10, 2015, Apple Hill filed a post-hearing brief in support of its Petition (the “Apple Hill 1st Hearing Brief”) and Ms. Harris filed a post-hearing brief and proposed findings of fact in opposition to the Petition (the “Harris 1st Hearing Brief”).

On September 14, 2015, Bennington filed a post-hearing brief and proposed findings of fact in opposition to the Petition (the “Bennington 1st Hearing Brief”). In its brief, Bennington also made a motion requesting that it be permitted to intervene as a matter of right rather than permissively.

On September 17, 2015, Ms. Harris and ANR each filed briefs in reply to the Apple Hill 1st Hearing Brief.

² Bennington Intervention Motion at 2.

On September 18, 2015, Apple Hill filed a brief in reply to the Harris 1st Hearing Brief and the Bennington 1st Hearing Brief (the “Apple Hill 1st Hearing Reply Brief”).

On November 13, 2015, Commissioners Volz and Cheney conducted a site visit.

On March 11, 2016, Apple Hill filed a motion requesting that judicial notice be taken of certain documents (“Motion for Judicial Notice”), as well as a motion to reopen discovery (“Motion to Reopen Discovery”).

On April 4, 2016, Apple Hill filed a request to amend the Petition (“Motion to Amend”).

On May 12, 2016, Apple Hill made a motion to strike comments made by the Department and ANR on April 29, 2016, in their responses opposing Apple Hill’s Motion for Judicial Notice, Motion to Reopen Discovery, and Motion to Amend (“First Motion to Strike”).

On September 19, 2016, PLH LLC (“PLH”) filed a motion in this proceeding requesting “that the [Commission] grant its limited intervention request and rule that PLH’s proposed activities do not constitute site preparation for an electrical generating facility.”³ PLH stated that it planned to prepare the site of the proposed solar electric generation facility for “growing horticultural crops” (the “PLH Motion”).⁴ The PLH Motion was denied on June 15, 2017.

On October 19, 2016, the Department and ANR jointly filed a motion requesting that the Commission order Apple Hill “to show cause why certain proposed activity at the Apple Hill Project site does not constitute CPG site preparation or construction in violation of 30 V.S.A. § 248(a)(2) (the “Show Cause Motion”).⁵

On January 24, 2017, Apple Hill filed a motion requesting that the Commission direct the parties to this Docket to engage in mediation pursuant to Vermont Rule of Civil Procedure 16.3 (“Motion for Mediation”).

On March 30, 2017, Apple Hill filed a motion to strike certain comments made by Ms. Harris in her response opposing Apple Hill’s Motion for Mediation (“Second Motion to Strike”).

³ PLH Motion, Docket 8454, filed 9/19/16, at 3.

⁴ Id. at 1.

⁵ Section 248(a)(2) of Title 30 prohibits “site preparation for or construction of an electric generation facility or electric transmission facility within the State which is designed for immediate or eventual operation at any voltage ... unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.”

On May 24, 2017, I issued an order allowing for further discovery and a second evidentiary hearing to consider whether to permit Apple Hill's proposed amendment and to allow the admission of any additional evidence into the record related to the impact of the language of the Bennington Town Plan ("Town Plan") on the permissibility of the Project.

On August 14, 2017, the Selectboard of the Town of Bennington voted 5-1 that "the Town will not oppose Apple Hill on the grounds that the Project fails to comply with the Town Plan in effect when the application was filed."⁶

On September 18, 2017, Apple Hill filed supplemental prefiled testimony and exhibits in support of the amendment of the Project.

On October 17, 2017, I issued an order in which I determined, pursuant to Commission Rule 2.204(G)(1), that the materials filed by Apple Hill in support of its amendment of the Project were deficient because they did not clearly indicate the changes that the proposed amendment may affect, including the impacts of those changes on certain Section 248 criteria.

On October 30, 2017, Apple Hill filed additional prefiled testimony and exhibits in support of its proposed amendment of the Project.

On November 30, 2017, I issued an order in which I determined, pursuant to Commission Rule 2.208, that the materials filed by Apple Hill in support of its amendment of the Project were administratively complete and deemed the proposed amendments effective as of October 30, 2017.

On December 1, 2017, the Apple Hill Homeowner's Association ("AHHA") filed a motion to intervene in this proceeding. That motion was granted on December 22, 2017.

On December 6, 2017, Ms. Harris made a motion requesting that the Commission retain expert witnesses pursuant to 30 V.S.A. § 20(a)(1). That motion was denied on January 23, 2017.

On January 31, 2018, Bennington, joined by the AHHA and Ms. Harris, filed an emergency motion to stay these proceedings. That motion was denied on February 9, 2018.

On February 16, 2018, the Vermont Division for Historic Preservation ("DHP") filed comments on the amended Petition stating that the Project will have no adverse effect on any historic sites listed or eligible for inclusion in the State Register of Historic places and that no

⁶ Transcript of August 14, 2017, Bennington Selectboard Meeting, exh. AHS-ECOS-111 at 45, lines 14-17.

archeological sites or archeologically sensitive areas were identified at the Project site (exh. AHS-ECOS-28).

On February 22, 2018, the Department filed a memorandum stating its position on the amended Petition that “[t]he proposed changes themselves do not give rise to grounds upon which to change the Department’s position as stated in the [Department] MOU”.

On February 26, 2018, Apple Hill filed an amended MOU with ANR (the “Amended ANR MOU”).

On March 15, 2018, Apple Hill filed an update to the Department MOU reflecting the Department’s February 22, 2018, memorandum.

On March 22, 2018, I held a second evidentiary hearing in this proceeding.

On April 10, 2018, Apple Hill submitted additional testimony from Mark Kane responding to questions asked by Ms. Harris during the second evidentiary hearing (the “Kane Affirmation”). No parties objected to the additional testimony and it is admitted into the evidentiary record of the proceeding as late-filed testimony.

On April 13, 2018, Ms. Harris and the AHHA jointly filed a post-hearing brief on the Petition (“Harris-AHHA Brief”). The Department also filed comments stating that it did not object to Apple Hill’s upcoming second brief on the Petition, draft proposal for decision, and proposed order to be filed by Apple Hill on April 16, 2018.

On April 16, 2018, Apple Hill filed a motion to supplement the record with the post-hearing testimony and affidavit of Thomas R. Haac. Apple Hill also filed a second brief on the Petition, a draft proposal for decision, and a proposed order (the “2nd Apple Hill Brief”).

On April 25 and April 27, 2018, the Commission received additional public comments concerning the Project. These comments: (1) opposed the Project because of its potential visibility from the Mt. Anthony Country Club and other locations near Monument Avenue in Bennington; (2) were concerned about the impact of the Project’s construction on Willow Road; and (3) requested that the Commission deny the Petition because the Project violated the Town Plan.

On April 27, 2018, Bennington filed a response to the 2nd Apple Hill Brief (the “Bennington Response”), and Ms. Harris and the AHHA jointly filed a reply to the 2nd Apple Hill Brief (the “Harris-AHHA Reply Brief”).

On May 15, 2018, I directed Apple Hill to respond to arguments made in the Bennington Response that Apple Hill is bound by the Commission’s February 16, 2016, denial of the Petition of Chelsea Solar LLC in Docket 8302, and “is barred from relitigating the issue in this Docket by the doctrines of *stare decisis* and *res judicata*.”⁷

On May 25, 2018, Apple Hill filed a legal brief in opposition to the Bennington Response (the “Apple Hill Rebuttal”) and Ms. Harris and the AHHA jointly filed comments in support of the Bennington Response.

On September 17, 2018, the Town of Bennington withdrew as a party.

No other comments on the Petition were received by the Commission.

III. RULINGS ON REMAINING MOTIONS

A. Bennington Motion to Intervene as of Right

On August 13, 2015, the Selectboard of the Town of Bennington declared its opposition to the Apple Hill Project.⁸ In response, Apple Hill filed the Apple Hill Memorandum in which it opposed any potential intervention by Bennington as both untimely and based on incomplete and inaccurate information about the Project. Bennington responded on August 17, 2015, a day before the evidentiary hearing, by emailing the Bennington Intervention Motion to the Commission and requesting intervention as a matter of right pursuant to 30 V.S.A. 248(a)(4)(F). In the alternative, Bennington requested permissive intervention under Commission Rule 2.209(B) to address the “visual impacts, aesthetics, safety, and environmental issues associated with the pending project.”⁹

At the first evidentiary hearing, I asked all the parties to respond to the Bennington Intervention Motion.

⁷ See Bennington Response at 2.

⁸ Bennington Intervention Motion at 2.

⁹ Bennington Intervention Motion at 1.

Bennington: (1) reiterated the requests in its motion; (2) stated that it did not wish to alter the schedule for the proceeding but did wish to participate in examination of the witnesses at the evidentiary hearing; (3) submitted a brief stating Bennington's position on the Petition; and (4) requested the opportunity to comment, as appropriate, on my proposal for decision.¹⁰

The Department: (1) indicated that it did not oppose Bennington's intervention; (2) argued that the Commission has the discretion to allow that intervention whether it is granted as of right or permissively; and (3) suggested that granting permissive intervention would obviate the need for addressing whether intervention as of right was appropriate and would not prejudice the parties or create undue delay.¹¹

ANR took no position on the Bennington Intervention Motion.¹²

Ms. Harris supported the Bennington Intervention Motion, recommending that Bennington be heard because its perspective would be broader than her personal perspective.¹³

In the Apple Hill Memorandum, Apple Hill opposed Bennington's intervention because: (1) the Bennington Intervention Motion was untimely and therefore is not permitted under Commission Rule 2.209; (2) Bennington has no right to intervene; (3) allowing Bennington's intervention would negatively affect Apple Hill's procedural rights; and (4) Bennington's intervention was premised on incorrect information about the Project.¹⁴ At the first evidentiary hearing, Apple Hill reiterated its argument that the Bennington Intervention Motion, having been made immediately prior to the evidentiary hearing, was untimely because Bennington had notice of the Project nearly two years prior to the evidentiary hearing. Apple Hill also argued that granting the Bennington Intervention Motion would create a delay in the Project review schedule that would adversely affect Apple Hill's procedural rights.¹⁵

At the first evidentiary hearing, I granted Bennington permissive intervention noting that my determination to grant Bennington intervention permissively reflected my having not had the opportunity to fully review and consider the law related to a municipality's right to intervene

¹⁰ Tr. 8/18/15 at 8-10 (Collier).

¹¹ Tr. 8/18/15 at 7 (Elias).

¹² Tr. 8/18/15 at 7 (Einhorn).

¹³ Tr. 8/18/15 at 8 (Harris).

¹⁴ Apple Hill Memorandum at 2-9; *see also* tr. 8/18/15 at 22 (Carroll) and 47-48 (Kane).

¹⁵ Tr. 8/18/15 at 10-11 (Melone).

under 30 V.S.A. § 248(a)(4)(F). The scope of Bennington's intervention was limited to the aesthetics, environmental, and public health and safety criteria under Section 248(b)(5).¹⁶

After the first evidentiary hearing, Apple Hill filed a motion requesting that I reconsider my decision to permissively grant Bennington intervention pursuant to Rule 2.209.

As part of its post-hearing brief, Bennington reiterated its request that it be granted party status as a matter of right, rather than permissively.¹⁷ The Apple Hill 1st Hearing Reply Brief responded to Bennington's request by restating Apple Hill's position that Bennington is not entitled to party status as of right because of the then new language of 30 V.S.A. § 248(a)(4)(F). The other parties did not comment on Bennington's request that its intervention be as of right rather than permissive.

Bennington cites the *Petition of Next Generation Solar Farm, LLC*, Docket 8523, Order of 6/24/15, to support its intervention as of right despite the fact that the statutory language that created the right became effective after the filing of the petition. The hearing officer in Docket 8523 granted the Town of New Haven intervention in that Docket as of right, even though the effective date of 30 V.S.A. 248(a)(4)(F) came after the date of the filing of the petition, because the new statutory language was a procedural change to the standard for intervention that did not affect the substantive rights of the parties under Section 248.¹⁸

Consistent with the ruling in Docket 8523, I hereby deny Apple Hill's motion for reconsideration and grant Bennington's motion to intervene as of right pursuant to 30 V.S.A. § 248(a)(4)(F) and Commission Rule 2.209(A).

B. Motions Related to Additional Due Process

On May 24, 2017, in response to Apple Hill's Motion for Judicial Notice, Motion to Reopen Discovery, Motion to Amend, and Motion for Mediation, I issued a procedural order that granted the Motion to Reopen Discovery and established a schedule that led to the second evidentiary hearing conducted on March 22, 2018. In the May 24, 2017, Order I deferred ruling on the Motion for Judicial Notice, the Motion to Amend, and the Motion for Mediation, as well

¹⁶ Tr. 8/18/15 at 13-14 (Tousley).

¹⁷ Bennington 1st Hearing Brief at 2.

¹⁸ See also Docket 8523, Order of 8/13/15 at 5-6.

as the First and Second Motions to Strike pending the completion of discovery and the second evidentiary hearing.

In issuing this proposal for decision and having amended the Petition and completed discovery and the second evidentiary hearing, I finally rule on these Apple Hill motions finding them all moot because the intervening proceedings have provided Apple Hill the additional due process sought in the motions.

C. Department and ANR Joint Motion for an Order to Show Cause

On October 19, 2016, the Department and ANR jointly filed the Show Cause Motion requesting that the Commission order Apple Hill “to show cause why certain proposed activity at the Apple Hill Project site does not constitute CPG site preparation or construction in violation of 30 V.S.A. § 248(a)(2).”¹⁹ The Show Cause Motion arose in response to the September 19, 2016, PLH Motion to intervene and for a declaratory ruling in this proceeding regarding site preparation.

The Show Cause Motion was premised on a factual proposal by PLH to develop the Apple Hill Project site for agricultural purposes that has not been undertaken as reflected in the exhibits supporting Apple Hill’s amendment. Given the fact that, since the filing of both the PLH Motion and the Show Cause Motion, PLH has not moved forward with any horticultural site preparation at the Apple Hill Project site, and my recommendation herein that the Commission approve the Petition, which means that future horticultural activities will not take place at the site, I am ruling that the Show Cause Motion is moot.

D. Apple Hill Motion to Reopen the Record and Admit Post-Hearing Testimony

On April 16, 2018, Apple Hill filed a motion to supplement the record with the April 13, 2018, post-hearing affidavit of Thomas R. Haac. No parties have objected. I am therefore granting Apple Hill’s motion to supplement the record and am admitting the post-hearing affidavit of Mr. Haac into the evidentiary record as late-filed testimony along with the Kane Affirmation.

¹⁹ Show Cause Motion at 1.

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 hereby report the following findings to the Commission in accordance with 30 V.S.A. § 8(c).

Description of the Project

1. Apple Hill Solar LLC is a Vermont limited liability company with offices located at c/o Allco Renewable Energy Limited, 1740 Broadway, 15th Floor, New York, New York 10019. Petition at 1.

2. Apple Hill proposes to construct and operate a 2.0 MW AC solar electric generation facility on 9.67 acres of cleared area of an approximately 27.3-acre parcel of land located in the northern area of the Town of Bennington, Vermont. The Project is located adjacent to the proposed Willow Road project,²⁰ which would be located directly to the north and west of the Project.²¹ All visual simulations and analysis of Apple Hill's aesthetic consultant in this proceeding contemplate the Willow Road project having already been constructed. Brad Wilson, Apple Hill ("Wilson") pf. at 2, pf. supp.1 at 1, and pf. reb. at 5; tr. 3/22/18 at 50 (Wilson); Mark Kane, Apple Hill ("Kane") pf. supp.3 at 2; exhs. AHS-MK-7 and 9.

3. The parcel is situated just north of the Vermont Welcome Center and the interchange at the junction of US Route 7 and VT Route 279 at 1133 Willow Road with GPS coordinates 42.908763-73.206395. 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 a shared property line with a residential property and a remnant apple orchard, on the south and southwest by the state-owned property adjacent to the interchange at the junction of US Route 7 and VT Route 279, and on the east and northwest by heavily wooded private lands. Wilson pf. at 2 and pf. supp.1 at 3, 5; Kane pf. at 3-4; exhs. AHS-ECOS-12, AHS-MK-2 and AHS-MK-12.

²⁰ *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 "Chelsea Solar Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont, case no. 17-5024-PET, deemed administrative complete on 12/4/17.*

²¹ All visual simulations and the analysis of Apple Hill's aesthetic consultant in this proceeding contemplate the Willow Road project having already been constructed.

4. The solar array would be set back approximately 300 feet from the northern edge of the interchange at the junction of US Route 7 and VT Route 279. Exh. AHS-ECOS-12.

5. The amended 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 original Project design called for the use of less efficient solar cells fixed at a 30-degree angle. The use of mono-PERC technology in the amended Project will result in fewer solar cells and less area between the module rows. Thus, the Project will have a footprint that, excluding the 2.32-acre Willow Road access drive area, will be reduced from 13.6 acres to 7.35 acres. Wilson pf. supp.1 at 2.

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. AHS-ECOS-22.

7. The grid interconnection will be accomplished over a distribution line extension to be constructed by GMP. The line extension will traverse approximately 4,350 feet beginning at the current distribution line on East Road and extending along Hewitt Road and Willow Road to the Project interconnection point. The GMP line extension has four components: (1) nine new 38-foot-tall poles along Hewitt Road; (2) three 38-foot-tall replacement poles on Willow Road; (3) nine new 38-foot-tall poles along Willow Road; and (4) the three-phase circuit distribution line to make the connection. Kane pf. supp.2 at 2-5; exhs. AHS-SUP2-MK-1 and AHS-SUP2-MK-2; Dori Barton, Apple Hill ("Barton") pf. supp.1 at 1; exh. AHS-DB-3 at 3.

8. 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 held in place by a steel and aluminum racking system. Wilson pf. supp.1 at 2.

9. 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. supp.1 at 2-3.

10. 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. supp.1 at 3.

11. Underground collection wiring connects the inverters to an equipment skid located along 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. supp.1 at 3-4.

12. The utility interconnection equipment will also be installed at the equipment skid, and from there the Project output cabling will run above-ground and connect with a new GMP electric circuit that runs overhead along Willow Road outside the Project fence line near the southern boundary of the Project property. Wilson pf. supp.1 at 4; Wilson pf. at 5.

13. The Project includes a 14-foot-wide gravel private access drive that extends north approximately 500 feet from Willow Road to the Project equipment skid location. Wilson pf. supp.1 at 4.

14. A 10-foot-high, chain-link security fence will surround the perimeter of the Project covered with a partially-opaque earth-tone mesh screening material for aesthetics purposes. Wilson pf. supp.1 at 4; tr. 3/22/18 at 106 (Wilson).

15. 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-AH-1.

16. Within the Project footprint, groundcover will consist of mulch, periodically mown native grass mix, and existing brush vegetation. Wilson pf. supp.1 at 4.

17. The Project site is currently wooded and will be cleared of approximately 9.67 acres of existing vegetation prior to the commencement of Project construction. Wilson pf. supp.1 at 2.

18. Vehicles and equipment associated with the clearing work will access the site via the vehicle access driveway off Willow Road. Vehicle traffic could reach up to 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 two to four 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. supp.1 at 6.

19. 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 four to six 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 Sundays or state or federal holidays. Wilson pf. supp.1 at 7.

20. Vehicles and equipment associated with the construction work will access the site via the vehicle access driveway off Willow Road. Vehicle traffic could reach up to 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 the contour smoothing in the southwestern 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 can be connected to the utility distribution grid and commissioned to begin full operation. Wilson pf. supp.1 at 7.

21. 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. supp.1 at 8.

22. Washing of the solar modules is not anticipated in the Vermont environment, but if module washing is needed, it would be performed with water only 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. supp.1 at 8.

23. 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 up to three sets 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. supp.1 at 8.

Discussion

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.²² 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.

Review of Project Under the Section 248 Criteria

Orderly Development of the Region

[30 V.S.A. § 248(b)(1)]

24. 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 25 through 34, below.

25. 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. Kane pf. at 5; exh. AHS-MK-3.

26. 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. Kane pf. at 5; exh. AHS-MK-3 at 16 and 25-26.

27. The purpose of the Rural Conservation Districts is to preserve traditional low-density rural and agricultural uses while accommodating low-density residential development. Exh. AHS-MK-3 at 25-26, 29.

28. The interchange at the junction of US 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

²² *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").

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 between minimally developed rural and agricultural areas in northeastern Bennington and developed urban and industrial areas in western, central and southern Bennington. Exh. AHS-MK-3 at 31.

29. The Town Plan articulates an energy policy with ten goals. Among others, these goals include: (1) ensuring 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) ensuring diversity in energy sources. AHS-MK-4 at 65.

30. The Bennington Regional Plan and the Bennington Regional Energy Plan articulate a number of goals supporting development of local renewable energy resources. Wilson pf. supp.1 at 16; exh. AHS-ECOS-15 Regional Plan at 6 and 65 and Regional Energy Plan at i, ii, 7, 32, and 36.

31. 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. Kane pf. at 5; exh. AHS-MK-3 at 91.

32. The Town of Bennington Selectboard has determined that that “the Town will not oppose Apple Hill on the grounds that the project fails to comply with the Town Plan in effect when the application was filed.” Exhs. AHS-ECOS-11 at 45 and 47 and AHS-ECOS-32 at 17 and 28.

33. 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.” Kane pf. at 7; exh. AHS-MK-4 at 56.

34. With regard to more extensive commercial development, the Bennington Regional Plan recommends that the towns in the region limit the number and size of commercial

establishments and advises towns to develop local municipal zoning bylaws to specifically coordinate areas of such development. Exh. AHS-MK-4 at 56.

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.

Ms. Harris and the AHHA argue that the Project would unduly interfere with orderly development because it deviates from language in the Town Plan.²³ Ms. Harris and the AHHA also dispute Apple Hill's contention that "the Town has taken the position that the Project satisfies the Town Plan."²⁴ The Town also asserts that it "has taken no position as to the Project's overall compliance with the Town Plan."²⁵

I disagree with Ms. Harris, the AHHA, and the Town's assertions. 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.

On August 13, 2015, the Selectboard of the Town of Bennington was briefed on the Project by Richard Carroll, a witness for Ms. Harris. Prior to Mr. Carroll's briefing, the Town had not taken a position on the Project. Mr. Carroll presented a single simulated view of the Project that did not show the vegetative screening then planned for the Project.²⁶ Apple Hill was not given notice of the Selectboard's consideration of the Project and did not have an opportunity

²³ Harris-AHHA Brief at 12; Harris-AHHA Reply Brief at 1.

²⁴ Harris-AHHA Reply Brief at 4.

²⁵ Bennington Response at 7. I also observe that the Bennington Response, while it questions language in the 2nd Apple Hill Brief, does not state that the Town opposes the Project.

²⁶ Tr. 8/18/15 at 21-22 (Carroll); *see also* exh. AHS-ECOS-11 at 10-11.

to respond to Mr. Carroll's briefing. Mr. Carroll had not reviewed all the filings in the Docket and did not present the Selectboard with any information about the aesthetic mitigation proposed with the original Petition.²⁷ The Selectboard voted 4-0 that the Commission should "halt the [Project] because of [its] inevitable damage to the environmental safety, visual, and aesthetic values of the natural and historical surroundings."²⁸

On August 18, 2015, the Town was granted party status in this proceeding and participated in the first evidentiary hearing.

After the first evidentiary hearing, Apple Hill engaged in discussions with the Town to address its concerns with the Project. These discussions led to amendments to the Project plan "based on input from the Town."²⁹

On August 14, 2017, the Selectboard voted 5-1 that "the Town will not oppose Apple Hill on the grounds that the project fails to comply with the Town Plan in effect when the application was filed."³⁰ This Town position was restated by the Town Planner, Mr. Dan Monks, in a deposition taken on September 29, 2017, in the offices of the Town attorney.³¹

Having reviewed the municipal and regional plans as well as the recommendations of the Selectboard and the Town Planner, I am not persuaded by the arguments of Ms. Harris, the AHHA, and the Town. Rather, I find that the statements of the Town Selectboard and the Town Planner are persuasive in interpreting the Town Plan.

Giving due consideration to these plans and statements, I recommend that the Commission conclude that the Project will not unduly interfere with the orderly development of the region.

²⁷ *Id.* and tr. 8/18/15 at 46-48 (Kane).

²⁸ Bennington Intervention Motion at 2.

²⁹ Wilson pf. supp.1 at 1-2.

³⁰ Exh. AHS-ECOS-11 at 47.

³¹ Exh. AHS-ECOS-32 at 17 and 28.

Need for Present and Future Demand for Service

[30 V.S.A. § 248(b)(2)]

35. 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)]

36. 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, including the line extension (at the Petitioner's expense) is a requirement of the interconnection agreement with GMP. Wilson pf. at 12; exhs. AHS-ECOS-5 and AHS-ECOS-22.

Economic Benefit to the State

[30 V.S.A. § 248(b)(4)]

37. 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.

**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)]

38. Subject to the conditions described below, the Project, including the GMP line extension, 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 39 through 123, 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 Amended 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)]

39. The Project will not cause an undue adverse impact to Outstanding Resources Waters (“ORWs”) because there are no designated ORWs on or near the Project site. Barton pf. at 3; Barton pf. supp.2 at 2-3; Scott Mapes, Apple Hill (“Mapes”) pf. at 4-5.

Air Pollution, Sound, Wind, and Greenhouse Gas Impacts

[30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)]

40. The Project will not result in undue air pollution, sound, wind, or greenhouse gas emissions. This finding is supported by findings 41 through 52, below.

Air Pollution

41. 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. Ian Jewkes, Apple Hill (“Jewkes”) pf. at 9.

42. 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. Mapes pf. at 5-6.

Discussion

Ms. Harris and the AHHA argue that Apple Hill 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 Apple Hill had a duty to consider the air pollution mitigation value of the forest on Apple Hill. I am not persuaded by their argument.

Apple Hill’s burden of proof involves two concepts—the burden of production and the burden of persuasion. Under its burden of production, Apple Hill has a duty here to introduce enough evidence to allow the Commission to find in its favor of the question of whether the Project will result in undue air pollution. Under its burden of persuasion, Apple Hill has a duty to convince the Commission to view the facts in a way that favors Apple Hill.³³ And, while the burden of persuasion remains with Apple Hill, the burden of production can shift. Once Apple Hill has carried its initial burden of production, then the non-petitioner parties must present evidence contrary to Apple Hill’s evidence on the question of whether the Project results in undue air pollution.

Apple Hill presented evidence by a qualified witness that the Project will not result in undue air pollution. The burden of production thus shifted to Ms. Harris and the AHHA to present evidence that calls into question that evidence. Ms. Harris and the AHHA 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. Ms. Harris and the AHHA made no evidentiary showing substantiating their argument that clearing the existing trees creates an undue adverse impact on air pollution nor did they provide an evidentiary basis for the conclusion that Apple Hill needed to do more. Ms. Harris and the AHHA have not met their burden of production to provide evidence that calls into question Apple Hill’s evidence.

I therefore recommend that the Commission conclude Apple Hill has met both its burden of production and its burden of persuasion on the question of whether the Project will result in undue air pollution and conclude that the Project will not result in undue air pollution.

³² Harris-AHHA Brief at 35.

³³ Docket 8454, Order of 1/23/18 at 3; *see generally* *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 9/1/11 at 3 (citing Black’s Law Dictionary (9th ed. 2009)); and *Joint Petition of Green Mountain Power Corporation, Vermont Electric Cooperative, Inc., and Vermont Electric Power Company, Inc. for a certificate of public good*, Docket 7628, Order of 6/28/12 at 18.

Sound

43. 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, work on Saturdays is not anticipated. No construction activities will occur on Sundays or state or federal holidays. Jewkes pf. at 6.

44. Once operational, the Project will be capable of generating a maximum 82 dBa of sound from the string inverters and transformer on the equipment skid, which is located on the southern boundary of the Project approximately equidistant from the eastern and western property boundaries. The highest estimated noise level generated by the Project at the nearest residence, located approximately 895 feet north of the equipment skid, is 33 dBa. The highest estimated noise level generated by the Project at a property line is at the eastern property line, where the Project is estimated to generate 42 dBa. These projections do not account for any ambient background noise, including traffic noise, or the attenuating effect of any vegetation located between the noise source and the study points. Also, these projections assume that all pieces of Project equipment are operating simultaneously at their maximum noise level, which will be an infrequent, rather than regular, occurrence. Mapes pf. at 6; Wilson pf. supp.2. at 2-5.

45. 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. AHS-ECOS-27; Wilson pf. supp.2. at 2-5.

46. At the request of the Project's neighbors, Apple Hill 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 2 dBa at the closest residence, 1 dBa at the next closest residence, and no increase at other more

distant residences. A 2 dBa change in broadband sound levels is not perceptible by most people, and a 1 dBa change is typically imperceptible. Ryan Haac, Apple Hill (“Haac”) pf. reb. at 3.

47. 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 the Vermont Agency of Transportation (“VTrans”) would consider providing noise abatement measures if this were a highway project. Exh. AHS-RH-2 at 1.

48. Existing ambient traffic noise heard at the nearest residences effectively drowns out any potential noise from the Project. Haac post-hearing affidavit at 2.

Discussion

Ms. Harris and the AHHA argue that Apple Hill has failed to “meet its burden of proof to show that the Project will not create an undue adverse aesthetic impact regarding noise.”³⁴ Their argument is based on their conclusion that the sound assessments conducted by Apple Hill were insufficient.

Apple Hill presented evidence indicating that the highest potential operational sound generated by the Project will be 42 dBa at the edge of the Project. Apple Hill 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 at the neighbors’ residences.

Apple Hill has presented evidence by a qualified witness that the Project will not result in undue sound. The burden of production shifted to Ms. Harris and the AHHA to present evidence that calls into question that evidence. Ms. Harris and the AHHA made no evidentiary showing substantiating its undue sound argument or providing a basis for the conclusion that Apple Hill needed to do more.

I recommend that the Commission conclude Apple Hill has met both its burden of production and its burden of persuasion on the question whether the Project will result in undue sound and conclude that the Project will not result in undue sound.

³⁴ Harris-AHHA Brief at 20.

Wind

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

50. Apple Hill'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. reb. at 3.

Discussion

Ms. Harris and the AHHA argue that Apple Hill has failed to "meet its burden of proof to show that the Project will not create an undue adverse aesthetic impact regarding wind."³⁵ Their argument is based on the conclusion that the wind assessment conducted by Apple Hill was flawed and insufficient.

Apple Hill presented evidence by a qualified witness that the Project will not result in undue wind. The burden of production shifted to Ms. Harris and the AHHA to present evidence that calls into question that evidence. Ms. Harris and the AHHA made no evidentiary showing substantiating its undue wind argument or providing a basis for the conclusion that Apple Hill needed to do more.

I recommend that the Commission conclude Apple Hill has met both its burden of production and its burden of persuasion on the question of whether the Project will result in undue wind and conclude that minor potential increases to the wind speed created by the Project cutting down trees will not result in undue wind.

³⁵ Harris-AHHA Brief at 22.

Greenhouse Gases

51. Apple Hill 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. Nathan Ayer, Apple Hill (“Ayer”) pf. at 4.

52. Apple Hill 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-AH-1 at ¶16.

Discussion

In the Amended ANR MOU, the stipulating parties identify conditions to be included in the CPG for the Project that require the Petitioner 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.

Ms. Harris and the AHHA argue that Apple Hill 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.³⁶ Their argument is based on their conclusion that the GHG life-cycle study conducted by Apple Hill “did not consider the [GHG] mitigation values of the forest on Apple Hill or the carbon sequestration of the forest proposed to be cut.”³⁷

Apple Hill has presented evidence by a qualified witness that the Project will not result in undue GHG emissions, including a GHG life-cycle analysis. 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 burden of production then shifted to Ms. Harris and the AHHA to present evidence that calls into question that evidence. Ms. Harris

³⁶ Harris-AHHA Brief at 36.

³⁷ *Id.*

and the AHHA did not take the opportunity to cross-examine Apple Hill's GHG expert about his testimony or otherwise present evidence in support of their argument.

I recommend that the Commission conclude that Apple Hill has met both its burden of production and its burden of persuasion on the question of whether the Project will result in undue GHG emissions and conclude that the Project will not result in undue GHG emissions.

Water Pollution

[10 V.S.A. § 6086(a)(1)]

53. The Project will not result in undue water pollution. This finding is supported by findings 54 through 84, below.

Headwaters

[10 V.S.A. § 6086(a)(1)(A)]

54. The Project will not result in an undue adverse impact on any of Vermont's headwaters. This finding is based on findings 55 through 57, below.

55. 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. Mapes pf. at 7.

56. ANR Geographic Information System ("GIS") databases and site observations show that runoff from the site drains to a VTrans storm system network at the interchange at the junction of US 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. Mapes pf. at 7.

57. 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. Mapes pf. at 7; exh. AHS-SMM-2; exh. AHS-SMM-5.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

58. The Project will meet all applicable health and DEC regulations regarding the disposal of any generated waste. This finding is supported by findings 59 through 63, below.

59. 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. Mapes pf. at 8.

60. Materials accumulated from clearing will be ground on site and used for erosion prevention and sediment control and/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 3-4.

61. 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 Envirotamp FR3 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.

62. 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 6; exh. Joint ANR-AH-1 at ¶ 22.

63. The Project's transformer will use Envirotamp FR3, a bio-based coolant, or an equivalent, and will be constructed with a secondary spill containment system. Jewkes pf. at 6.

Discussion

In the Amended ANR MOU, the stipulating parties agree to a proposed condition in the CPG for the Project requiring Apple Hill'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)]

64. 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)]

65. 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. Mapes pf. at 10.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

66. The Project will not result in an undue adverse impact on streams. This finding is supported by findings 67 through 69, below.

67. There are no perennial streams on the Project site. The closest stream is approximately 100 feet to the south of the Project area; no impacts are expected to occur to this identified watercourse as a result of the Project. Mapes pf. at 11; Barton pf. at 3.

68. The proposed interconnection route for the GMP line extension, along Hewitt and Willow Roads, is located adjacent to or near a stream. Barton pf. supp.1 at 2.

69. There are a series of small tributaries to the Walloomsac River near the GMP line extension. There will be minimal clearing of trees. Poles are to be installed within the existing

road fill slope resulting in no new disturbance to stream riparian zones. The GMP line extension will not adversely impact the two stream resources that were identified. Barton pf. supp.1 at 2-6; exh. AHS-DB-4.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

70. The Project will not result in an undue adverse impact on shorelines. Neither the Project nor the GMP line extension is located on or adjacent to a shoreline. Barton pf. at 3; Barton pf. supp.1 at 3; and Mapes pf. at 11.

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 through 77 below.

72. There are no Class II wetlands on the Project site. There are, however, five Class II wetlands located along the GMP line extension. Barton pf. at 4; Barton pf. supp.1 at 6.

73. These Class II wetlands have been formally delineated along with their associated 50-foot buffer areas. There are no vernal pools along the line extension route. Barton pf. supp.1 at 4.

74. The GMP line extension places three poles within wetland buffer zones of three wetlands. The Vermont Wetland Rules (Section 6.22) allow for the installation of a new overhead utility line that does not involve extensive tree clearing, with three poles or fewer in the wetland or buffer zone. Barton pf. supp.1 at 4.

75. The line extension has been designed to avoid direct wetland impacts. The poles are to be installed within the existing road fill slope resulting in minimal disturbance to wetland buffer areas. The proposed interconnection will not involve extensive tree clearing and GMP has confirmed that no wetlands permit will be required. Barton pf. supp.1 at 6; Barton pf. supp.2 at 4.

76. Apple Hill has agreed to demarcate all wetlands and their buffers with visible flagging prior to site preparation or construction and instruct all work crews to avoid those areas. Exh. Joint-ANR-AH-1 at ¶ 8.

77. Apple Hill has agreed that within 60 days of the commencement of Project operation, it shall provide the DEC's Wetlands Program with a written certification that the Project has been built outside of the Class II wetlands and their associated 50-foot buffers. Exh. Joint-ANR-AII-1 at ¶ 9.

Discussion

In the Amended 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, and 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)]

78. 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.

Discussion

Ms. Harris and the AHHA argue that Apple Hill has failed to "meet its burden of proof to show that the Project will not result in undue adverse impacts to groundwater contamination."³⁸ The drinking water wells serving the AHHA residences, including Ms. Harris's, have been found to be contaminated by perfluorooctanoic acid ("PFOA"). Ms. Harris and the AHHA contend that Apple Hill has a duty to conduct groundwater testing and analysis because "[i]f the source of contamination is uphill from AHHA and if groundwater flows uphill to AHHA wells through the

³⁸ Harris-AHHA Brief at 35.

Project site and if the forest is cut, that could cause more PFOA to flow to AHHA wells.” Apple Hill responded to this concern by stating that “we have seen no evidence that there would be any impact . . . [PFOA] is not caused by the Project.”³⁹

Ms. Harris and the AHHA made no evidentiary showing that there is any relationship between the trees several hundred feet downhill at the Project site and the groundwater flowing from the contamination source uphill and hundreds of yards from the Project such that the Project 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)]

79. 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 80 through 84 below.

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

81. 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 and/or removed from the site to an appropriate local disposal/recycling facility. Jewkes pf at 3-4.

82. Approximately 9.67 acres of existing vegetation will be cleared prior to 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. AHS -ECOS-12.

³⁹ Tr. 3/22/18 at 15 (Wilson).

83. Apple Hill will apply for a 3-9020 State of Vermont General Permit for Stormwater Runoff from Construction Sites prior to 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 4.

84. Apple Hill 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, Apple Hill shall perform such tree clearing in accordance with the acceptable management practices for maintaining water quality on logging jobs in Vermont. Exh. Joint-ANR-AH-1 at ¶ 7.

Discussion

In the Amended ANR MOU, the stipulating parties agree to proposed conditions in the CPG for the Project requiring Apple Hill to prevent undue soil erosion impacts, including stormwater discharge impacts during both construction and operation of the Project and the GMP line extension. 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)]

85. 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 is in accordance with state and local standards and will not interfere with 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 15-16.

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

86. 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)]

87. 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 16.

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

88. 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 89 through 115, below.

Aesthetics

89. The Project site is almost entirely wooded with northern hardwood species. The site on Apple Hill slopes at a 10% grade from the northeast corner to the southwest corner, falling approximately 117 feet over this distance. The topography also exhibits some slight undulations along the slope. Kane pf. at 3-5; exh. AHS-MK-2; Kane Affirmation at 2.

90. 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, and includes well-spaced residential properties, and agricultural

and undeveloped areas. The site is on the side of a hill at the foot of which lie the highway interchange and the Vermont Welcome Center and at its apex the residences in the Apple Hill neighborhood. From the Project's southwestern boundary, the Project site rises at an average 10% slope from an elevation of 661 feet to 778 over a 1266-foot distance. The hillside site sits within a broader valley terminated to the west by the foothills of the Green Mountains and to the east by rolling hillsides. Kane Affirmation at 2; exhs. AHS-MK-2 at 4 and Figure 1, AHS-MK-3, AHS-MK-7 at Welcome Center Site Section, and AHS-ECOS-12 at C-101.

91. The roadways associated with the interchange at the junction of US Route 7 and VT Route 279 are heavily traveled. The VTrans route logs indicate that approximately 9,000 vehicles pass through the interchange each day. Kane pf. at 4-5; exh. AHS-MK-3 at 5.

92. The Bennington Battle Monument is approximately 1.1 miles south of the Project site. The Monument's observation level, 200 feet above the ground, has four narrow viewing windows at compass bearings of 340°, 070°, 160°, and 250°. The Project site would be located between two windows at a bearing of 020° and will be only minimally visible from the Monument. Visibility of the Project site from the Monument grounds is also highly limited due to the presence of structures and trees in the foreground. Kane pf. at 4; exh. AHS-MK-2 at 9.

93. The Project site will also be visible approximately one mile away from the Mt. Anthony Country Club below the Bennington Battle Monument. Exh. Harris/AHHA-JS-2 at 19.

94. The Project site is identified in the 2010 Bennington Town Plan as part of a Rural Conservation District. Kane pf. at 5; exh. AHS-MK-3.

95. 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. AHS-MK-2, AHS-MK-3, and AHS-MK-8.

96. The Project site would require clearing 9.67 acres of trees and would convert existing woodlands to a different land use. This loss of vegetation does not necessarily contribute to a long-term loss of open space. The Project requires minimal alteration of the underlying terrain. The components of the Project (panels, inverter structures, and transformers)

will, following the useful life of the Project, be removed and the land restored swiftly to an undeveloped condition. Kane pf. supp.3 at 19.

97. The low height of the Project (i.e. 6-7 feet), its ability to follow the natural grade, and the retention of significant existing vegetation on the periphery of the site reduce the adverse impacts from the Project. Kane pf. supp.3 at 29; Wilson pf. supp.1 at 2-3.

98. The nearest neighbor is approximately 389 feet north of the Project fence. Kane pf. supp.3 at 4.

99. The property on which the Project is planned is not a visual focal point within the broader landscape. The components of the Project are low in height and follow the natural shape of the landform. The distance between the Project site and offsite viewpoints greatly lessens the perception of scale. The design of the Project has numerous layers of effective visual mitigation that screen off-site views (significant setbacks, retention of natural vegetation, new landscaping, use of earth-tone and taller screening fencing, and the use of darker frames holding the photovoltaic modules). The reduction in the footprint of the amended Project further reduces its scale relative to the immediate surroundings. Kane pf. supp.3 at 18 and 38; exhs. AHS-MK-7 and AHS-MK-12.

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. Kane pf. supp.3 at 20-21; exh. AHS-ECOS-32 at 32-33.

101. The materials and forms used for the Project aid in helping the Project to blend into the landscape. The matte-black color of the frames that support the solar panels is less visible given this dark color. The surfaces of the solar panels are nonreflective and a dull, dark color that has a similar surface reflectivity to natural grasses, meadows, and fields. 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. Kane pf. supp.3 at 18.

102. The visibility of the Project site will 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. Kane pf. at 4; Kane pf. supp.3 at 18-19; exhs. AHS-MK-2, AHS-MK-8 and AHS-MK-9.

103. The power line extension to connect the Project with the GMP grid is longer than often seen in existing solar projects in Vermont; nonetheless the infrastructure proposed by GMP will have little impact on either the general public or the few residential properties the line extension will be visible from. The line extension expands the area within which visual impacts might occur, but its character and location do not create an unduly adverse condition with respect to the scenic beauty of the area. Kane pf. supp.2 at 2-3; exh. AHS-SUP2-MK-1.

104. The Project is designed with mitigating elements including:

- a. A tall perimeter fence (10 feet), combined with an 85%-opaque earth-tone mesh screening fabric;
- b. Retention of existing vegetative screening around the Project that has been expanded by the reduction in the footprint;
- c. 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 the southern property boundary of the Harris residence, 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.

Kane pf. supp.3 at 2, 4; exhs. AHS-MK-7 and AHS-MK-12; tr. 3/22/18 at 106 (Wilson).

105. The Petitioner has agreed to:

- a. Maintain the landscape mitigation plan described in exh. AHS-MK-12 for the life of the Project;
- b. Make good faith efforts to work with the Department and VTrans to investigate and implement visual mitigation in the form of landscape screening of the GMP line extension corridor as visible from Route 7 and the Vermont Welcome Center;
- c. Conduct a post-construction site visit with the parties to determine if additional landscape mitigation is necessary and fund up to \$5,000 for additional landscaping; and
- d. Work with GMP to install dark grey interconnection equipment on the line extension.

Exhs. Joint-DPS-AH-1 and Joint-DPS-AH-2.

106. The Town of Bennington Selectboard has determined that “the Town will not oppose Apple Hill on the grounds that the project fails to comply with the Town Plan in effect when the application was filed.” Exhs. AHS-ECOS-11 at 46-47 and AHS-ECOS-32 at 17, 18, 23-25, 28, 29, and 53.

107. The Town Plan defines the characteristics of the Rural Conservation District, where the Project will be built, as a transitional land use area between more developed urban growth areas and forest lands. The primary purpose of the district is to “preserve the distinctive rural character” of the area. Kane pf. supp.3 at 22-23.

108. Large solar projects have been approved for construction in the Rural Conservation District. Kane pf. supp.3 at 20-21; exh. AHS-ECOS-32 at 32-33.

109. Other non-residential development that does not compromise the distinctive rural character of the Rural Conservation District has also been approved by Bennington. Kane pf. supp.3 at 23.

110. The Project site is located in close proximity to both the highway system and the necessary infrastructure to convey generated power. Kane pf. supp.3 at 23; exhs. AHS-MK-11 and AHS-MK-12.

111. The Project site is not located within public, open space and is not identified in the Town's Park and Open Space Plan for conservation purposes. Kane pf. supp.3 at 22-23; exh. AHS-ECOS-13 at Map 7-3.

112. 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. Kane pf. supp.3 at 28-29.

113. The Bennington County Regional Plan is a guidance document that provides an overarching policy framework for land use and development in the region. The Project is consistent with the Regional Plan's development goals for renewable energy projects. Kane pf. supp.3 at 30-33; exh. AHS-ECOS-4.

Discussion

Apple Hill, through its aesthetics consultant, states that "[t]he design of the Project effectively prevents visibility to the public and neighbors"⁴⁰ and "with respect to the revised plans, the Project is not visible."⁴¹ He concludes that:

Apple Hill has taken significant design modifications to lessen and eliminate its visual impacts on its surroundings. As noted above, this layering of mitigative strategies extends from the property line to the array and, as evidenced in the simulations prepared, promotes visual compatibility in all seasons. Given this, I conclude that the Project would not create an adverse aesthetic impact on the scenic resources.⁴²

Ms. Harris and the AHHA disagree and conclude that the Project will have an adverse impact on aesthetics and scenic and natural beauty "because such an industrial use of the land is

⁴⁰ Kane pf.supp.3 at 20.

⁴¹ *Id.* at 26.

⁴² *Id.* at 20.

in conflict with the natural surroundings of the lush hillside setting in the Rural Conservation District.”⁴³

I also disagree with Apple Hill. While I recognize that the Project as amended includes significant mitigating measures that reduce its visual impact, I do not agree with Apple Hill’s assessment that the Project will be invisible and not adverse to aesthetics and natural beauty. Apple Hill’s aesthetics consultant has relied on mitigating strategies that are more appropriately addressed in determining whether the Project has an *undue* impact, rather than in making the threshold determination that the Project has an adverse impact. I also disagree with Apple Hill’s assertion that the Project will not be visible.

I recommend that the Commission conclude that, while Apple Hill has engaged in several mitigating steps to reduce the Project’s visibility, the Project will have an adverse impact because the Project will be visible from various public and private views, and because the 9.67-acre clear-cut required for the Project will be out of context with the currently wooded views 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,⁴⁴ 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?
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?

⁴³ Harris-AHHA Brief at 24.

⁴⁴ 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).

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?⁴⁵

My analysis below answers these three 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?

Unlike zoning ordinances that are subject to variances depending on the individual circumstances of the permit application, municipal and regional plans have been found to be a source of clear and consistent statements of a community's policies or standards. The Commission has found, therefore, that it is more appropriate to rely on town plans as the primary source of clear, written community standards.⁴⁶ In this case, I find that the Town Plan is being treated like a zoning ordinance and has been subject to varied application by the Town. For that reason, I find the current situation distinguishable from what was before the Commission in the neighboring *Chelsea Solar* case,⁴⁷ and determine that the Town Plan cannot serve as the source of a clear, written community standard as contemplated by the Commission's application of the Quechee test.

In order for a municipal or regional plan provision to be considered a clear, written community standard, it must be "intended to preserve the aesthetics or scenic beauty of the area" where the proposed project would be located and must apply to specific resources in the proposed project area.⁴⁸ "[T]he community standard element is intended to allow the municipality to identify designated areas and resources that need protection."⁴⁹ A clear, written community standard must be more than simply "general in nature" and do more than seek "to promote good stewardship of scenic resources without identifying specific actionable

⁴⁵ *Amended Petition of UPC Vermont Wind*, Docket 7156, Order of 8/8/07, at 64–65.

⁴⁶ *Petition of New Cingular Wireless PCS, LLC*, Docket 8160, order of 12/5/13, at 8.

⁴⁷ *Petition of Chelsea Solar, LLC*, Docket 8302, Order of 2/16/16.

⁴⁸ *In re Halnon*, NM-25, Order of 3/15/01, at 22.

⁴⁹ *In re Rutland Renewable Energy*, 202 Vt. at 69.

standards.”⁵⁰ Here, the Town Plan has set aside the Rural Conservation District for conservation but allows development in the district on a case-by-case basis. Therefore, the Town Plan is akin to a zoning ordinance that is subject to a variance and is not a source for clear, written community standards.

Chelsea Solar

In *Chelsea Solar*, the Commission denied the petition because it found that the 2010 Bennington Town Plan, the same plan that is applicable here, contained clear, written community standards that prohibited a proposed solar installation that would have abutted the Project on Apple Hill.⁵¹ The Town was not a party to the *Chelsea Solar* case prior to the Commission’s denial of the petition. The Town had, however, filed comments opposing the Chelsea project, requesting that the Commission “halt the two solar projects, the Chelsea Solar and the neighboring Apple Hill Solar projects, because of the inevitable damage to the environmental, safety, visual, and aesthetic values of the natural and historical surroundings around the two project sites in northern Bennington.”⁵²

The Commission stated that “[i]t is appropriate for us to rely on the Town Plan as the primary source of clear, written community standards,”⁵³ and the Commission observed that:

The Town filed comments on this Project after the hearing officer issued the PFD. These comments led us to review more closely the language of the Town Plan. . . . Because Bennington did not intervene in this Docket, its comments have not been entered into evidence. Consequently, our determination relies solely upon the specific language of the Town Plan, which was entered into evidence by Chelsea.⁵⁴

In *Chelsea*, the Commission concluded that: “*In this case*, we find that the Town Plan language is specific in nature, is specifically applicable to the Project site, and seeks to conserve scenic resources by identifying specific actionable requirements and thus constitutes a clear, written

⁵⁰ *Joint Petition of Green Mountain Power Corporation, et al*, Docket 7628, Order of 5/31/11, at 83.

⁵¹ Docket 8302, Order of 2/16/16 at 56. The Commission determined that the 2010 Town Plan proscribed the following activity 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 project was not residential, was visible on a hillside above the Vermont Welcome Center, and required clear-cutting 15 acres of trees.

⁵² Bennington Comments (citing the language of a Bennington Selectboard vote on August 13, 2015).

⁵³ Docket 8302, Order of 2/16/16, at 58 n.50.

⁵⁴ Docket 8302, Order of 2/16/16, at 51 n.23.

community standard.”⁵⁵ Notably, the Commission is now reviewing an amended version of the Chelsea project, just as this case is now being reviewed in an amended form.

Amended Project and Revised Town Interpretation

In this case, the Town’s position with regard to the impact of the 2010 Town Plan on the Project has changed as the Project has changed. As a result of the Town’s reconsideration of the Project in light of the Town Plan, I conclude that the Town Plan does not constitute a clear, written community standard as contemplated by the Commission’s application of the Quechee test. The Commission found the Town’s interpretation of the Town Plan persuasive in *Chelsea* where it denied the petition. I also find the Town’s interpretation of the Town Plan persuasive here, but with a different result because the Town does not oppose this Project for violating the 2010 Town Plan.

As noted above in findings 32 and 106, the Town of Bennington has determined not to oppose the Project as a violation of the 2010 Town Plan. The Town reversed its position regarding the Apple Hill Project at a Bennington Selectboard meeting called to examine the amendments to the Project plan. The Town’s counsel recommended to the Selectboard that “the Town not take the position that with regard to the revised [Project] plan that it fails to comply with the Town Plan that was in effect when the original application was filed”⁵⁶ because the Project plan “was revised by the developer, I would say in an attempt to deal with the obvious deficiencies in the real [Project] plan as compared to the requirements of the Town Plan.”⁵⁷

Further, the Town has formally taken a position just the opposite of the Commission’s determination in *Chelsea* that the language of the Town Plan disallowed commercial alternative energy projects, like Chelsea and Apple Hill, in the Rural Conservation District. The Town Selectboard was advised by its counsel that the Commission determination was inconsistent “with the precedence that has been done, and it’s not consistent with the planning process that

⁵⁵ Docket 8302, Order of 2/16/16, at 58 (emphasis added).

⁵⁶ Exh. AHS-ECOS-11 (Transcript of the August 14, 2017, meeting of the Bennington Selectboard) at 5 and 45.

⁵⁷ *Id.* at 9.

seems to be going on now”⁵⁸ and that there are no “grounds to argue that the Town bars all alternative energy projects in the rural district.”⁵⁹

When further queried as to whether Apple Hill’s efforts to amend the Project to comply with the Town Plan succeeded, the Town’s counsel opined that “my advice to the [Select]board is not to take the position that they [Apple Hill] have failed.”⁶⁰ Town counsel further stated that the Selectboard’s approval of the resolution would serve to “direct their lawyers not to oppose on Town Plan grounds the issue of the permit before the Public Utility Commission.”⁶¹

After listening to this advice of counsel, and the comments of the Bennington residents in attendance at the August 14, 2017, Selectboard meeting, including Ms. Harris, the Selectboard voted 5-1 in favor of a resolution that the Town “not oppose Apple Hill on the grounds that the Project fails to comply with the Town Plan in effect when the application was filed.”

On September 29, 2017, Apple Hill deposed the Bennington Town Planner, Daniel Monks, to assess the impact of the Selectboard vote on this case. Mr. Monks indicated that the Selectboard vote is now reflected in Town development policy and stated that there is nothing in the 2010 Town Plan that is violated by the Project.⁶²

Reconsideration of the Chelsea Determination

Having taken the position not to oppose the Project as amended on the grounds that it does not violate the Town Plan, the Town now argues on other grounds against the Project. The Town contends that Apple Hill is precluded from asserting that the Bennington Town Plan does not contain a clear, written community standard because of the Commission’s determination in *Chelsea*.⁶³ The Town argues that the doctrines of *stare decisis* and collateral estoppel bar the relitigation of the issue of whether the 2010 Town Plan contains a clear, written community standard that would prohibit the Project.⁶⁴ The Town’s argument, if accepted, would have the result of disallowing the Project.

⁵⁸ *Id.* at 15.

⁵⁹ *Id.*; *see also id.* at 38 (“I have never read the Town Plan as prohibiting alternative energy projects everywhere in the [Rural Conservation] district.”).

⁶⁰ *Id.* at 30.

⁶¹ *Id.* at 31.

⁶² Exh. AHS-ECOS-32 at 23, line 7.

⁶³ Bennington Response at 2 and 3.

⁶⁴ *Id.* at 2-5.

The Town now also argues that the Town resolution that the Town “not oppose Apple Hill on the grounds that the Project fails to comply with the Town Plan in effect when the application was filed” does not mean that that the Town “has taken [a] position as to the Project’s overall compliance with the Town Plan” and therefore “such claims should be stricken from a Final Order on the Petition.”⁶⁵

In the Apple Hill Rebuttal, Apple Hill presents a number of arguments supporting its position that “[t]he Town is wrong” and Apple Hill is not “barred from relitigating the issue” of whether the 2010 Town Plan constitutes a clear, written community standard by the doctrines of *stare decisis* and collateral estoppel.⁶⁶

While I am not persuaded by many of Apple Hill’s various arguments, I do agree that the issue of the Town Plan could and should be relitigated here.

There are two reasons why I am not persuaded by the Town’s argument that Apple Hill cannot relitigate the issue of whether the 2010 Town Plan constitutes a clear, written community standard. First, while there was a final order in the *Chelsea* decision as first proposed, the Chelsea project is not yet final and therefore the issue has not yet been finally resolved. Second, this case, like this Project, is different from the *Chelsea* case and the initial Chelsea project.

1. *Chelsea is Not Final*

The Town’s argument that collateral estoppel prohibits Apple Hill from relitigating *Chelsea* is premised, in part, on the Town’s assertion that *Chelsea* “was litigated to a conclusion.”⁶⁷ While review of Docket 8302 has come to an end, the Chelsea project is being reconsidered in an amended form by the Commission as the Willow Road project in Case No. 17-5024-PET.

The Commission is now aware that the Town does not consider the Town Plan to prohibit commercial solar development in the Rural Conservation District. The developer in the revised Chelsea project has amended the project, reducing its size by using more efficient solar panels in the same way that Apple Hill has been amended. The Commission’s decision to reconsider Chelsea was based on both that project’s amendment and Chelsea’s representation that the Town

⁶⁵ *Id.* at 7.

⁶⁶ Apple Hill Rebuttal at 1.

⁶⁷ Bennington Response at 5.

no longer opposed the amended Apple Hill Project.⁶⁸ Because of these developments, in which the Town was an active participant, the Commission's decision with respect to the amended Chelsea project will not be final until after the Commission's decision in Case No. 17-5024-PET, whatever that decision might be, has been fully litigated by the parties.

2. Apple Hill is not Chelsea

This case is different from *Chelsea*. The Project has been significantly amended in response to the Town. The Town's interpretation of the impact of the 2010 Town Plan on the Project has changed, and the Town Plan is no longer capable of serving as a source of a clear, written community standard as contemplated in the Commission's application of the Quechee test.

In February 2016, the Commission, persuaded by Ms. Harris's comments on the proposal for decision and the Town's public comments that the Chelsea (and Apple Hill) project violated the 2010 Town Plan, further reviewed the language of the Town Plan and did not adopt the hearing officer's recommendations. Rather, the Commission determined that the Chelsea project violated clear, written community standards in the Town Plan and denied the petition.

In August 2017, the Town determined not to oppose the Apple Hill Project, as amended, on the grounds that it violated those same Town Plan standards. By making that determination, the Town did not clearly and consistently apply the language of the Town Plan. As a result, the 2010 Town Plan can no longer serve as a clear, written community standard that unequivocally identifies the Rural Conservation District as a resource that needs protection in the manner the Commission determined in *Chelsea*.

This case is also different from *Chelsea* because, as discussed above, the Town's interpretation of its own Town Plan changed as it became more informed about the Project and its other decisions supporting commercial solar development in the Rural Conservation District. When the Selectboard voted to oppose both Chelsea and Apple Hill in August 2015, it did so after an incomplete briefing on those projects by one of the neighbors who opposed the Project. Since that time, the Town has not objected to other commercial solar projects in the Rural Conservation District and has worked with Apple Hill to learn about the Project and reduce the

⁶⁸ Docket 8302, Order of 10/12/17, at 4.

Project's potentially adverse impacts. As a result of knowing more about the Project and participating in its amendment, the Selectboard voted to "not oppose Apple Hill on the grounds that the Project fails to comply with the Town Plan in effect when the application was filed." These circumstances only arose after *Chelsea* and make this case different from *Chelsea*.

The Town also argues that the Commission "must give due consideration" to the Town Plan, and I agree. This should include giving due consideration to the interpretation of the Town Plan provided by the Town about the amended Project. The Commission should consider as persuasive the Town's revised interpretation of the Town Plan language as it applies to this amended Project in the same way that the Commission found the Town's interpretation of the Town Plan persuasive in *Chelsea*.

After giving the Town's revised interpretation of the Town Plan due consideration here, it is my recommendation that the Commission conclude 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.

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?

Ms. Harris and the AHHA argue that "by choosing to site the array in the middle of a highly prominent hillside which is a focal point of the viewshed," Apple Hill failed to take reasonable mitigating steps.⁶⁹

I am not persuaded by Ms. Harris's and the AHHA's argument. There is sufficient evidence to conclude that Apple Hill has taken generally available mitigating steps in proposing to site the Project at this location. The final amended form of the Project reflects Apple Hill's reasonable efforts to mitigate the impacts of the Project and to reduce its visibility within the viewshed. Findings 97, 99, 101, 102, 104, and 105, above, summarize many of the available mitigating steps taken by Apple Hill to improve the harmony of the proposed Project with its surroundings. I recommend that the Commission approve these findings and accept my

⁶⁹ Harris-AHHA Brief at 27.

recommendation that Apple Hill took 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?

Ms. Harris and the AHHA argue that the Project “will clearly offend the sensibilities of any reasonable person when viewed objectively from the long duration views from many public roads and properties in the area.”⁷⁰

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.”⁷¹ Additionally, the Commission has concluded that the greater the distance a viewer is from a project the less overwhelming the project and consequently the less likely “an average viewer would find its observation shocking or offensive” even if the project “may be seen as ‘out of character’ with the surrounding area.”⁷² 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 but is bordered by extensive and high-speed highway infrastructure, beyond which lies commercial and residential development that is part of Bennington’s urban core. The Project will be new but not be out of context with the electric infrastructure elements otherwise located in the Rural Conservation District.

⁷⁰ Harris-AHHA Brief at 25.

⁷¹ *In re UPC Vermont Wind*, 185 Vt. 296, 309 (2009).

⁷² *Id.* at 311.

While the Project site is located on a hillside⁷³ 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. Apple Hill 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 site will also be visible from more than a mile away across the valley at the Mt. Anthony Country Club and nearby 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. The Quechee test does not guarantee that the aesthetic qualities of an area will not change. However visible, the Project will not be a dominant element in the landscape, but rather, will come to be seen as a land use consistent with the other urban, highway, and electric infrastructure development that dominates the region. Further, in its amendment to the Project, Apple Hill 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 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.

⁷³ See Findings 89 and 90. See also Docket 8302, Order of 4/14/17 at 15 ("As a topographic reference point, the Project site is at an elevation above the Vermont Welcome Center on a hillside.").

In the DPS MOU, as amended, the stipulating parties agree to proposed conditions in the CPG for the Project requiring Apple Hill to install, review, and maintain the landscape mitigation proposed by Apple Hill for the Project and the GMP line extension. The stipulating parties agree that the conditions are necessary to avoid undue adverse effects on aesthetics, and I agree and recommend that the Commission include the conditions in the CPG.

Historic Sites

114. DHP has reviewed the Project's potential effects on above-ground historic structures and identified any potential precontact and historic archaeological resource areas and concluded that the Project will not have an undue adverse effect on historic sites. Exh. AHS-ECOS-28 at 2.

Rare and Irreplaceable Natural Areas

115. Neither the Project nor the GMP line extension will have an undue adverse impact on rare and irreplaceable natural areas ("RINA"). Neither the Project nor the GMP line extension will destroy or significantly imperil RINA locations because none of these resources are located on or near the proposed construction. Barton. pf. at 4, pf. supp. at 10-6, pf. supp.2 at 4, and pf. supp.3 at 1.

Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)(A)]

116. The Project will not have an undue adverse impact on rare, threatened, and endangered ("RTE") species or necessary wildlife habitat. This finding is supported by findings 117 through 120, below.

117. Arrowwood Environmental ("AE") conducted an RTE plant survey of the Project area on August 14, 2014. The following rare or uncommon species were found during the inventory: arrow-leaved American aster (*Symphyotrichum urophyllum*), nimblewill muhly (*Muhlenbergia schreberi*), spreading sedge (*Carex laxiculmis*) and rough-leaved goldenrod (*Solidago patula*). Barton pf. supp. at 6; exh. AHS-DB-2.

118. AE worked with ANR and Apple Hill 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 AE personnel conducted the transplanting. Barton pf. supp. at 6; exh. AHS-DB-2.

119. In response to the presence of these RTE plants, Apple Hill established a plant conservation area and has agreed to follow a detailed protocol in the Amended ANR MOU to mitigate Project impacts so that such impacts are not unduly adverse. Exh. Joint-ANR-AH-1 at ¶ 14.

120. Neither the Project area nor the GMP line extension contain necessary wildlife habitat and are not in close proximity to any necessary wildlife habitat. Barton pf. at 5, pf. supp.2 at 1, pf. supp.3 at 1-2, and pf. reb. at 1; exh. AHS-DB-2; tr. 3/22/18 at 68 (Barton).

Discussion

Ms. Harris and the AHHA argue that because wildlife is present at the Project site, the Project will have an undue adverse impact on necessary wildlife habitat. I am not persuaded because the presence of some wildlife does not demonstrate the existence of necessary wildlife habitat and Ms. Harris and the AHHA 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 recommend that the Commission conclude that the Project will not have an undue adverse impact on necessary wildlife habitat.

In the Amended ANR MOU, the stipulating parties agreed to proposed conditions in the CPG for the Project related to RTE plant conservation areas, Project fencing, and RTE plant surveys. 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)]

121. 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 122, below.

122. Existing adjacent public investments are limited to the interchange at the junction of US Route 7 and VT Route 279, including the Vermont Welcome Center, and GMP's nearby overhead distribution circuit. There are no Project impacts that would endanger or interfere with the highway complex and the Vermont Welcome Center. 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 interconnection provided certain system upgrades are implemented. Wilson pf. at 22; exh. AHS-ECOS-5.

Public Health and Safety

[30 V.S.A. § 248(b)(5)]

123. 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 the 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 14, pf. supp. at 20.

Discussion

Ms. Harris and the AHHA argue that the Project will cause an undue adverse impact on public safety because Apple Hill did not conduct a traffic study detailing the impact of the Project construction on Willow Road and because wildlife present at the Project site may cause a traffic hazard. Their arguments were unsupported by any evidence that the Project would endanger public health and safety.

I recommend that the Commission conclude that 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.

Consistency With Company's Least Cost Integrated Plan

[30 V.S.A. § 248(b)(6)]

124. 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)]

125. 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)]

126. 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)]

127. The Project can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers. The Project will interconnect to the utility distribution system rather than the utility transmission system, and 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 23; exh. AHS-ECOS-5.

Woody Biomass Facilities

[30 V.S.A. § 248(b)(11)]

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

V. DECOMMISSIONING PLAN AND FUND

129. 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 16-17; exh. AHS-ECOS-6.

130. 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. The decommissioning plan also addresses decommissioning in the event of Project abandonment. A detailed cost estimate totaling \$109,500 is included in the decommissioning plan. The Petitioner has agreed to establish a decommissioning fund in this amount, prior to Project construction, naming the Public Utility Commission as beneficiary. Wilson pf. at 16-17; exh. AHS-ECOS-6.

131. The decommissioning fund would initially be funded by an irrevocable standby letter of credit ("LC") that includes an auto-extension provision (i.e., "evergreen clause"), and would be issued by an A-rated financial institution solely for the benefit of the Commission, or a security deposit to be held in a federally insured bank in the United States. No other entity, including Apple Hill, shall have the ability to demand payment under the LC 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 prior to commencement of construction. Exh. AHS-ECOS-6.

132. Apple Hill proposes to establish the fund in the amount of \$109,500 based on a cost estimate that it prepared. The amount represents the full estimated cost of decommissioning in 2015 dollars and does not net out salvage value. Exh. AHS-ECOS-6.

133. Upon completion of decommissioning, Apple Hill would seek a certification of completion from the Commission. The certification would be provided to the entity issuing the LC or holding the security deposit with instructions to release and terminate the LC or security deposit account. Thereafter, Apple Hill or its successor or assignee would be entitled to the remainder of the decommissioning fund. Exh. AHS-ECOS-6.

134. The Commission would have the right to draw on the LC or the security deposit to pay the costs of decommissioning in the event that Apple Hill 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. AHS-ECOS-6.

Discussion

Commission Rule 5.402(C)(2)⁷⁴ requires non-utility petitioners proposing to construct generation facilities greater than 1 MW in capacity to include with their petition a plan for decommissioning the project at the end of its useful life.

Apple Hill agrees to decommission the Project at the end of its useful life and has submitted a detailed plan for decommissioning that estimates it would cost \$109,500 to decommission the Project.

Previously, the Commission has approved plans for decommissioning that include: (1) a detailed plan for decommissioning the proposed project and an estimate of the decommissioning costs; and (2) a plan for the creation of a decommissioning fund. Apple Hill has provided a detailed plan for decommissioning the Project and an estimate of the decommissioning costs. Apple Hill proposes that the decommissioning fund would be funded with an irrevocable, standby LC from an A-rated financial institution or other institution approved by the

⁷⁴ On August 15, 2017, the Commission adopted Commission Rule 5.900 which addresses requirements for project decommissioning. Commission Rule 5.402(C)(2) was in effect on March 15, 2015, when Apple Hill filed this Petition, and is applicable here.

Commission, that includes an auto-extension provision (i.e., “evergreen clause”), and names the Commission as the sole beneficiary, or, in the alternative, a security deposit to be held in a federally insured bank in the United States.

Apple Hill’s plan for decommissioning and the proposed funding amount are consistent with the requirements the Commission has imposed on decommissioning plans in the past, provided Apple Hill increases the amount of the fund as necessary in response to any adjustments for inflation. I have proposed conditions for inclusion in the draft CPG accompanying this proposal for decision.

VI. MEMORANDA OF UNDERSTANDING

135. The Department and Apple Hill executed and filed an MOU with the Commission and a memorandum updating that MOU after the Project’s amendment in which they agree on matters related to the Project. Exhs. Joint-DPS-AH-1 and Joint-DPS-AH-2.

136. ANR and Apple Hill executed and filed an initial MOU and an amended MOU on matters related to the Project. The Amended ANR MOU includes their agreement that the amended MOU supersedes the initial MOU. Exh. AHS-MOU-ANR and Joint-ANR-AH-1 at ¶ 2.

137. The MOUs provide that if the Commission does not approve the MOUs in their entirety, then the agreements contained in the MOUs may terminate. Exh. Joint-DPS-AH-1 at ¶ 10; exh. Joint-ANR-AH-1 at ¶ 26.

Discussion

I recommend that the Commission accept the Department MOU as amended and the Amended ANR MOU with all of their provisions, updates, and conditions without material change or condition and require Apple Hill to comply with the terms and conditions of the MOUs as a condition of the Commission’s approval of the Project.

VII. CONCLUSION

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

(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;

(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;

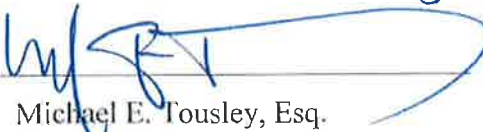
(i) does not involve a waste-to-energy facility;

(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 hereby rejected.

Dated at Montpelier, Vermont, this 2nd day of July, 2018.



Michael E. Tousley, Esq.
Hearing Officer

VIII. COMMISSION DISCUSSION

On July 23, 2018, Ms. Harris and the AHHA (together, the “Intervenors”), the Town, and ANR filed comments on the proposal for decision (“PFD”) issued by the hearing officer in this proceeding. The Intervenors also requested that the Commission conduct a site visit. This request was granted, and the Commission’s site visit occurred on August 20, 2018. Further, the Intervenors moved that the Commission reopen the evidentiary record to allow for the admission of additional evidence. We denied this motion on September 5, 2018.

On July 24, 2018, Apple Hill also filed comments on the proposal for decision.

On September 17, 2018, the Town of Bennington withdrew from this proceeding.⁷⁵

No other comments on the proposal for decision were filed.

The Intervenors’ PFD Comments

The Intervenors “strongly disagree with the hearing officer’s proposal for decision and ask the Commission to deny issuance of a certificate of public good to Apple Hill Solar.”⁷⁶ The Intervenors argue that the amendments to the Project made after the Commission’s denial of the neighboring Chelsea Solar project did “not overcome the earlier perceived deficiencies in the Project plan. The Commission must deny Apple Hill Solar for the same reasons as it did Chelsea Solar.”⁷⁷

Specifically, the Intervenors contend that:

1. “[T]he Project would create an unduly adverse aesthetic impact and would violate the clear written community standard already determined by the Commission to apply to the site in the contiguous Chelsea Solar case”,⁷⁸
2. The fact that the natural beauty of Bennington has been degraded by developments near the Project site does not make the Project acceptable;⁷⁹

⁷⁵ In light of the Town’s withdrawal, we did not consider the Town’s comments in our review of the PFD.

⁷⁶ Intervenors’ PFD Comments at 1.

⁷⁷ *Id.* at 5 (citing *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont* Docket 8302, Order of 2/16/16.).

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 9-10.

3. The focus in the proposal for decision on the views of the Project from roads in the immediate vicinity ignores the more distant adverse views from the Mt. Anthony Country Club, the Bennington Battle Monument, and the Orchard House Mansion that is the main building of Southern Vermont College;⁸⁰
4. Apple Hill's proposed mitigation of the views of the Project above Apple Hill Road by installing mitigating plantings would be in violation of AHHA deed restrictions;⁸¹
5. The evidence does not adequately address the Project's impacts to wildlife, increased air pollution, sound and wind, public health and safety, including groundwater contamination by perfluorooctanoic acid ("PFOA"), and greenhouse gas emissions created by cutting down more than nine acres of trees;⁸² and,
6. The proposed decommissioning fund is inadequate.⁸³

Response to the Intervenor's Comments

Ms. Harris opposed the Project as first filed,⁸⁴ and now, with the AHHA, the Intervenor's oppose the Project as amended. Having participated in the extended proceedings summarized above, the Intervenor's observe:

This case originated in 2015 and has dragged on for more than three years. It has exacted a serious toll of time, money and stress on *pro se* intervenors and interfered with the ability of members of AHHA to conduct normal lives.⁸⁵

We appreciate the perseverance and continued thoughtful involvement of the Intervenor's. Nonetheless, we are not persuaded by their arguments. Despite Apple Hill's efforts to reduce the Project size and shield it from public and private views, the Intervenor's oppose the Project and assert that the Commission should deny Apple Hill a CPG for several reasons noted above and discussed below.

⁸⁰ *Id.* at 11.

⁸¹ *Id.* at 2.

⁸² *Id.* at 12-16.

⁸³ *Id.* at 16-17.

⁸⁴ *See, e.g.,* Harris 1st Hearing Brief.

⁸⁵ Intervenor's PFD Comments at 1.

1. Clear, Written Community Standard

We adopt the hearing officer's recommendation that we find the Town Plan does not constitute a clear, written community standard. 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. Further, the Town has determined that the Commission was incorrect in Docket 8302 when the Commission determined that the Town Plan prohibited commercial alternative energy projects in the Rural Conservation District. For these reasons, we agree with the hearing officer and conclude that the Town Plan language that we relied on in the Docker 8302 denial does not now serve as a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. We therefore do not accept the Intervenor's argument that the Project violates a clear, written community standard.

2. Pre-existing Aesthetic Degradation

The Intervenor's argue that the fact that the natural beauty of Bennington has already been degraded by developments near the Project site does not justify further degradation by the Project. This argument is inconsistent with our application of the Quechee test. Rather, the presence of other development in the proximity of the Project is evidence that the Project would not be out of context with its setting and thus would not have an undue adverse impact on aesthetics.

3. Long-Range Views of the Project

The Intervenor's contend that the Project will have an undue, adverse impact on aesthetics because it will be visible to the public from the Mt. Anthony Country Club, the Bennington Battle Monument, and the Orchard House Mansion that is the main building of Southern Vermont College. We do not agree. As the hearing officer observed, distance serves as a mitigating factor in reducing the adverse impact of a project on aesthetics.⁸⁶ We are not

⁸⁶ Citing *In re UPC Vermont Wind*, 2009 VT 19, ¶ 33, 185 Vt. 296; see also *Petition of Next Generation Solar Farm, LLC*, Docket 8523, Order of 1/27/17, at 40, 50, and 57 (distance of 2.2 MW solar project from roads mitigates aesthetic impact); *Petition of Bennington Kobelia GLC Solar, LLC*, CPG #NMP-6523, Order of 10/14/15, at 8 (distance from public views mitigates aesthetic impact of 500 kW solar project); and, *Application of Seneca*

persuaded by the Intervenor's argument that the long-range views of the Project are sufficient to create an undue, adverse impact on the aesthetics or the natural beauty of the area.

4. Deed Restrictions

The Intervenor's assert that we should not consider Apple Hill's proposed installation of trees to mitigate views along the northern edge of the apple orchard adjacent to Ms. Harris's property because it would violate a deed restriction. These plantings would further screen Ms. Harris's and the other AHHA residences from views of the Project site at the opposite edge of the apple orchard. Apple Hill represents that it has the authority to install these plantings. There is no evidence in the record that what Apple Hill proposes to do is contrary to the terms of the deed. Therefore, we are not persuaded by this argument.

5. Inadequate Evidence

We are also not persuaded by the Intervenor's arguments that Apple Hill has not adequately addressed the Project's impacts on wildlife, increased air pollution, sound and wind, public health and safety, including groundwater contamination by PFOA, and greenhouse gas emissions created by cutting down more than nine acres of trees. The Intervenor's presented limited evidence to support their arguments or to rebut the substantial expert and lay witness testimony provided by Apple Hill that has been admitted into evidence and is reflected in the hearing officer's findings and recommendations.

6. Decommissioning Fund is Inadequate

There is significant evidence in the record to support the adequacy of the decommissioning fund.⁸⁷ The Intervenor's argue that the decommissioning funds are inadequate but provide no evidence to support this argument. And we are not persuaded by it.

ANR's PFD Comments and Response

ANR requests that the Commission modify the language in CPG condition 25, which relates to stormwater, and condition 40, which addresses the fence around the Project, to more

Mountain Wind, LLC, Docket 7867, Order of 8/9/13, at 15 (distance from potential views mitigates aesthetic impact of four meteorological towers).

⁸⁷ Findings 129-134.

closely reflect the language of the memorandum of understanding between ANR and Apple Hill. These modifications have been made as requested.

Apple Hill's PFD Comments and Response

Apple Hill offers fifteen comments, the first of which is that it "is pleased to receive the PFD's recommendation that a CPG be issued"⁸⁸ for the Project.

Comments 2 through 12 ask for minor modifications to the text of the proposal for decision. The hearing officer has edited the proposal for decision and made administrative corrections and clarifications in response to Apple Hill's comments 2-9, 11, and 12.

In comment 10, Apple Hill asks that the words "reduce the adverse impacts from the Project" be replaced with the words "eliminate the adverse impacts from the Project."⁸⁹ We deny this request because we agree with the hearing officer's conclusion and recommendation that the Project still has adverse impacts.

Relatedly, in comment 13, Apple Hill writes that it "needs to state for the record that it disagrees with the PFD's conclusion that the Project would have an adverse effect on aesthetics."⁹⁰ Apple Hill relies on the testimony of its aesthetics consultant to recommend that the Commission not accept the hearing officer's recommendation that the Project will have an adverse impact on aesthetics. This is because, Apple Hill argues, the Project as amended will not be visible to the public. We do not agree that the Project will be invisible to the public. Rather, there is evidence that the Project will be minimally visible from various vantage points.⁹¹ The Project revisions have, however, mitigated the adverse impact of that visibility.

In comment 14, Apple Hill agrees with the hearing officer's conclusion that because of the Town's selective application of the design standards for the Rural Conservation District, the Town Plan cannot be considered a clear, written community standard.⁹²

⁸⁸ Apple Hill's PFD Comments at 1.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 6.

⁹¹ Findings 92, 93, 102, and 103.

⁹² *Id.* at 8 (citing *In re Handy*, 171 Vt 336, 349 (2000) ("Flexibility cannot be a synonym for ad-hoc decision making that is essentially arbitrary.")).

In comment 15, Apple Hill states that it also supports the hearing officer's conclusion that the Commission's February 16, 2016, decision to deny the petition of the neighboring Chelsea Solar project in Docket 8302 is not binding upon the Commission decision in this case.

Conclusions

This case has been one of the longest and most litigated solar siting cases to come before the Commission. The extended effort put into this Project by the parties and the Commission is the result of three factors.

First, our February 16, 2016, decision denying the petition of the neighboring Chelsea Solar project in Docket 8302 and the subsequent appeals process in that case created delay in this case. The hearing officer deferred issuing a proposal for decision in this case to see what direction the Chelsea case took in the appeals process. Ultimately, Chelsea withdrew its appeal of our denial in Docket 8302 and filed a new petition for a smaller project at approximately the same location using different, more efficient solar panels. Like this Project, Chelsea's new petition in Case No. 17-5024 is accessed from Willow Road and we refer to it as the Willow Road project. The introduction of the Willow Road project delayed final action in this Project and shaped its final form.

Second, the delay in the Project's final review gave Apple Hill an opportunity to reshape this Project. Apple Hill amended the Project to reduce its footprint from 13.6 acres to 7.35 acres by using the same more efficient solar panels proposed in the Willow Road project. Apple Hill also had an opportunity to consult with the Town and the Intervenors. As a result, Apple Hill made other changes to the Project to reduce the potentially adverse impacts of the Project. Apple Hill documented these changes with additional evidence that both reflected its amendment of the petition to a smaller size and responded to the various concerns of the Intervenors.

Third, the delay in the Project's final review gave the Town an opportunity to reassess and alter its position regarding the Project.

The three factors that caused the delay in making a final determination in this case, in particular the continued potential for a project proposed next to Apple Hill first in Docket 8302

and now in Case No. 17-5024-PET, also shaped the factual and legal bases for the Intervenor's and the Town's arguments against the Project discussed above.

After careful consideration of the proposal for decision, the parties' comments thereon, and the evidentiary record in this matter, we are approving the petition, adopting a modified version of the hearing officer's proposal for decision, and issuing the CPG.

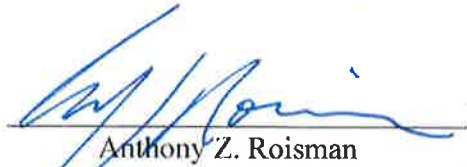
IX. ORDER

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 photovoltaic electric generation facility proposed for construction and operation by Apple Hill Solar LLC (the "Petitioner") at 1133 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 26th day of September, 2018.


Anthony Z. Roisman

) PUBLIC UTILITY
)
)


Margaret Cheney

) COMMISSION
)
)


Sarah Hoffmann

) OF VERMONT
)
)

OFFICE OF THE CLERK

Filed: September 26, 2018

Attest: Julie C. Whitney
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.