

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

CASE NUMBER 20-1611-INV

INVESTIGATION PURSUANT TO 30 V.S.A. SECTIONS 30  
AND 209 INTO WHETHER THE PETITIONER INITIATED SITE  
PREPARATION AT APPLE HILL IN BENNINGTON, VERMONT,  
FOR ELECTRIC GENERATION IN VIOLATION OF 30 V.S.A.  
SECTION 248(a) (2)

June 26, 2020  
8:30 a.m.  
-----  
112 State Street  
Montpelier, Vermont

Evidentiary Hearing held before the Vermont  
Public Utility Commission via GoToMeeting video  
conference on June 26, 2020, beginning at 8:30 a.m.

P R E S E N T

Commissioners: Anthony Z. Roisman, Chairman  
Margaret Cheney  
Sarah Hofmann

Staff: Steph Hoffman, Staff Attorney  
Kyle Landis-Marinello, General Counsel  
Michael E. Tousley, Staff Attorney

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23      BY: L. BROOKE DINGLEDINE, ESQUIRE

24      Annette Smith, Vermonters for a Clean Environment

25      Veronica Ung-Kono, PUC

26      Lora Block, Intervenor

27      Libby Harris, Intervenor

28      Maru Leon, Intervenor

29      Joseph Schoenig, Intervenor

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1           CHAIRMAN ROISMAN: Good morning. This is an  
2 Evidentiary Hearing in Case Number 20-1611-INV, which  
3 is an investigation pursuant to 30 V.S.A. Sections 30  
4 and 209 into whether the Petitioner initiated site  
5 preparation at Apple Hill in Bennington, Vermont, for  
6 electric generation in violation of 30 V.S.A. Section  
7 248(a)(2). My name is Anthony Roisman. I am the chair  
8 of the Vermont Public Utility Commission, and with me  
9 are my fellow commissioners, Margaret Cheney and Sarah  
10 Hofmann. In addition, also with me are Kyle  
11 Landis-Marinello, our general counsel, and Mike  
12 Tousley, a staff attorney. Stephanie Hoffman of the  
13 Commission staff is serving as the GoToMeeting platform  
14 manager for the hearing.

15           I appreciate the flexibility and responsiveness  
16 you have all shown by being here for this emergency  
17 hearing to address whether site clearing being  
18 conducted on Apple Hill in Bennington, Vermont,  
19 violates Section 248(a)(2) of Title 30 and whether a  
20 temporary restraining order under Commission Rule 2.406  
21 is necessary to avoid harm.

22           This case is not about the merits of the proposed  
23 Willow Road or Apple Hill solar facilities. We are  
24 here because the Commission has jurisdiction over any  
25 company that may be engaging in preparation of a site

1     for an electric generation facility. We're here to see  
2     if the tree clearing occurring on Apple Hill is site  
3     preparation under 30 V.S.A. 248(a)(2) and, if so,  
4     whether we should restrain further site preparation by  
5     issuance of a temporary restraining order. We also  
6     need to determine if further proceedings are  
7     appropriate in this investigation pursuant to 30 V.S.A.  
8     Sections 30 and 209.

9             If a party or a participant intends to record the  
10    hearing via video or audio, please indicate this when  
11    you provide your name to the court reporter. We  
12    realize feelings about these two projects are strong on  
13    all sides, and we appreciate the intense interest and  
14    effort by all parties to make their cases persuasively.  
15    However, ad hominem attacks and similar lines of  
16    argument are not appropriate and will not be tolerated.  
17    The purpose of this proceeding is to receive facts and  
18    legal arguments.

19            We'll start with participants' appearances, and  
20    I'll start with asking each party to indicate who their  
21    representative is for the purpose of this hearing,  
22    whether they support or oppose the granting of a TRO,  
23    and whether they will be presenting evidence and, if  
24    so, in what form. We'll start with the Department of  
25    Public Service.

1 MS. ACEVES: Good morning. My name is Sarah  
2 Aceves representing the Department of Public Service  
3 today regarding a temporary restraining order. The  
4 Department does not oppose such a restraining order.

5 CHAIRMAN ROISMAN: Does the Department  
6 support?

7 MS. ACEVES: We are not prepared to say  
8 whether or not we support a temporary restraining order  
9 at this time. We have reviewed all of the filings.  
10 However, we still have reservations as to whether the  
11 criteria for a temporary restraining order has been met  
12 and would be prepared to weigh in on that in a  
13 briefing.

14 CHAIRMAN ROISMAN: Okay. The Agency of  
15 Natural Resources?

16 MR. EINHORN: Good morning. This is Don  
17 Einhorn. I apologize. I don't have video. I am  
18 representing the Agency. We filed yesterday a  
19 memorandum along with two affidavits with the company  
20 exhibits. One affidavit is from Robert Lowkes, and he  
21 is available and, I understand, on the phone  
22 participating. I would ask that he be allowed to go  
23 first, if at all possible, because he does have prior  
24 plans for today. And then our other witness who also  
25 we filed an affidavit for was, is Bob Popp, and he is

1 available as well.

2 CHAIRMAN ROISMAN: Okay. Thank you.

3 Intervenor of Apple Hill Homeowners Association? Ms.  
4 Block, I see you've turned on your microphone, but I'm  
5 not hearing anything.

6 MS. BLOCK: Well, I didn't say anything yet,  
7 because I thought our attorney, Brooke Dingledine, was  
8 about to speak, but she is muted. So I am here as an  
9 intervenor to listen.

10 CHAIRMAN ROISMAN: Okay. Will you have a  
11 representative who will speak for the Apple Hill  
12 Homeowners Association on this, in this hearing today?

13 MS. BLOCK: Yes. That is Brooke Dingledine,  
14 who I see her photo on the screen, but her mic is  
15 muted, and she will be speaking for the Apple Hill  
16 Association.

17 CHAIRMAN ROISMAN: All right. Ms.  
18 Dingledine, could you please enter your appearance?  
19 Apparently, she does not hear us. Ms. Block, could you  
20 give her a call and let her know that, for whatever  
21 reason, she doesn't appear to be hearing us.

22 MS. BLOCK: Sure, yeah. I will try to  
23 contact her. Yes, I will. I will mute myself while  
24 I'm trying to call her.

25 CHAIRMAN ROISMAN: Okay. Thank you, Ms.

1 Block. Any other parties other than the petitioner who  
2 are on this call who are participating today? Okay.  
3 The petitioner, Mr. Melone?

4 MS. STONE: Sorry. This is Alison Stone from  
5 the Agency of Agriculture. I was having trouble  
6 unmuting here.

7 CHAIRMAN ROISMAN: Oh, okay. Sorry.

8 MS. STONE: Good morning. The Agency is not  
9 taking a position at this time, but I'm here to, I'm  
10 here representing them, and we will not be requesting  
11 or taking a position on the TRO at this time.

12 CHAIRMAN ROISMAN: Will you be participating  
13 in the hearing in any way, Ms. Stone, by examining  
14 witnesses or making legal arguments?

15 MS. STONE: No, I will not.

16 CHAIRMAN ROISMAN: Thank you. All right.  
17 Ms. Dingledine, I see that your phone seems to be on.  
18 Can you hear us?

19 MS. DINGLELINE: I don't know if you folks  
20 can hear me, but I can't hear anything.

21 CHAIRMAN ROISMAN: We can hear you.

22 MS. DINGLELINE: So perhaps I will leave the  
23 meeting and sign back in. I don't know why I can't  
24 hear anything.

25 CHAIRMAN ROISMAN: Okay. We'll wait a moment

1     for Ms. Dingleline. Mr. Melone, I'm going to put you  
2     on hold for a moment. We'll see if we can get her back  
3     on the line. And, Ms. Steph Hoffman, is there anything  
4     that you can do at the platform to see if there's a  
5     problem as to why Ms. Dingleline would not be hearing  
6     us?

7                 MS. HOFFMAN: I can't see anything on my end,  
8     but I will reach out to her and see if I can  
9     troubleshoot with her computer if she can't hear us  
10    still. Here she is.

11                CHAIRMAN ROISMAN: All right. Ms. Dingleline,  
12    can you hear us now?

13                MS. DINGLELINE: Yes, I can. Thank you.

14                CHAIRMAN ROISMAN: All right. Thank you.

15                MS. DINGLELINE: I'm sorry.

16                CHAIRMAN ROISMAN: Okay. Well, we're all new  
17    to this technology. It's a different world. Before  
18    Mr. Melone, I'll ask you now if you will enter an  
19    appearance and indicate whether you are the  
20    representative who will be speaking for the Apple Hill  
21    Homeowners Association and Libby Harris. Ms.  
22    Dingleline, you're muted.

23                MS. DINGLELINE: I beg your pardon. I did  
24    not hear you. I think I need to leave my mic on, I  
25    believe, because, when I'm turning it to mute, I'm not

1     hearing anything for some reason.

2             CHAIRMAN ROISMAN:   Okay.   You can also use a  
3     telephone.   You can use the telephone line.   We've  
4     sometimes had people who were, they were visually  
5     online, but they spoke through the telephone.   But it's  
6     okay if you leave your speaker on.   There doesn't seem  
7     to be any background noise there.

8             So my question is, Are you going to be the  
9     representative who will be speaking for the Apple Hill  
10    Homeowners Association and Libby Harris?

11            MS. DINGLELINE:   Yes, and also the Mount  
12    Anthony Country Club.

13            CHAIRMAN ROISMAN:   Okay.   And are you  
14    supporting or opposing the TRO?

15            MS. DINGLELINE:   We are supporting the TRO.  
16    And, if I could just add some information briefly --

17            CHAIRMAN ROISMAN:   No, not at this point, Ms.  
18    Dingledine.

19            MS. DINGLELINE:   Okay.

20            CHAIRMAN ROISMAN:   But will you be offering  
21    any witnesses?

22            MS. DINGLELINE:   This morning I filed an  
23    affidavit of Joseph Schoenig.   It's a very brief  
24    affidavit relating to activity, site activity on the  
25    Lot Number 1 that's part of the Apple Hill project, but

1     it's in the residential development.

2             CHAIRMAN ROISMAN: All right. And will he be  
3     appearing as a witness today, or are you going to offer  
4     his affidavit without him appearing?

5             MS. DINGLEDINE: I will offer an affidavit.  
6     If there is a desire to cross-examine, I may be able to  
7     arrange that.

8             CHAIRMAN ROISMAN: Okay, all right. We'll  
9     wait until that time comes and, and deal with it at  
10    that time. All right. Now, Mr. Melone, after  
11    postponing you on behalf the Petitioner.

12            MR. MELONE: Thank you, Mr. Chairman. Good  
13    morning, commissioners and others. My name is Tom  
14    Melone. I'm representing the landowner, Vineyard Sky  
15    or PLH Vineyard Sky, LLC; Apple Hill Solar, LLC; and  
16    Chelsea Solar, LLC. We oppose the issuance of a  
17    temporary restraining order. Last night we filed  
18    affidavits from myself and from Bob Kobelia, the  
19    contractor that is actually doing the clearing. I am  
20    obviously available for cross-examination, and I'm  
21    expecting Mr. Kobelia to join at some point as well if  
22    anyone wants to cross-examine him.

23            CHAIRMAN ROISMAN: Okay, thank you. All  
24    right. Now, are there any members of -- well, first of  
25    all, I see that some people are here who are part of

1 government agencies. Mr. Coster, Mr. Porter, would you  
2 please identify yourselves for the record?

3 MR. PORTER: Yes. Jim Porter with the  
4 Department of Public Service.

5 CHAIRMAN ROISMAN: All right. Mr. Coster?

6 MR. COSTER: This is Billy Coster with the  
7 Agency of Natural Resources. I'm just going to monitor  
8 this briefly. Then I'll have to step off at 9:00.  
9 Thank you.

10 CHAIRMAN ROISMAN: Okay. And Ms. Ung-Kono?

11 MS. UNG-KONO: Veronica Ung-Kono, intern at  
12 the Public Utility Commission, and I will also be  
13 hopping off at 9:00. I'm just monitoring this briefly.  
14 Thank you.

15 CHAIRMAN ROISMAN: Okay. And, Ms. Harris,  
16 would you identify yourself for the record, please?  
17 Ms. Harris, can you hear us?

18 MS. HARRIS: Yes. I'm sorry. This is Libby  
19 Harris.

20 CHAIRMAN ROISMAN: Okay, thank you. And Ms.  
21 Maru?

22 MS. LEON: Hi. This is Maru Leon.

23 CHAIRMAN ROISMAN: Okay. And Ms. Smith?

24 MS. SMITH: This is Annette Smith, and I am  
25 video-recording this for the public.

1 CHAIRMAN ROISMAN: All right. Thank you.

2 MS. HARRIS: Okay. Mr. Tousley?

3 CHAIRMAN ROISMAN: I'm sorry.

4 MS. HARRIS: This is Libby Harris. I just  
5 want to let you know that Joe Schoenig is here with me,  
6 and I will have to leave for a meeting shortly, but he  
7 will stay through the whole hearing.

8 CHAIRMAN ROISMAN: Okay, all right. Thank  
9 you. Thank you, Ms. Harris. Okay. I think we've  
10 gotten everyone. The court reporter, I'm not going to  
11 have you identify yourself, but thank you again for  
12 being with us.

13 And, as you know, everything is different since  
14 the COVID-19 pandemic, and the Commission is limiting  
15 in-person contact, and, as a result, the parties have  
16 agreed to conduct this hearing remotely. I'd like to  
17 take a moment to confirm that all parties have  
18 consented to having a remote hearing. If anyone no  
19 longer consents to conducting this hearing remotely,  
20 they must speak up now.

21 We're using the web-based platform GoToMeeting,  
22 and this hearing will use some special procedures  
23 uniquely related to a web-based platform. Those  
24 procedures were discussed with the parties prior to the  
25 start of this hearing and are available on the

1 Commission's website under the COVID-19 changes link,  
2 and they are being added to the record of this case,  
3 those guidelines, as Commission Exhibit Number 1 so the  
4 record is clear on what the guidance was. If anybody  
5 has any objection to that, please speak up now.

6 (Exhibit marked Commission Exhibit 1 was  
7 admitted into the record.)  
8 <https://puc.vermont.gov/about-us/changes-public-utility>  
9 [-commissions-operations-due-covid-19-pandemic](https://puc.vermont.gov/about-us/changes-public-utility)

10

11 Finally, as we discussed in our procedural order  
12 yesterday, the hearing will begin by the parties each  
13 making a brief, five-minute opening statement and  
14 presenting evidence, including any affidavits or live  
15 testimony. This will be followed by cross-examination  
16 of any witnesses by the parties and the Commission,  
17 redirect examination, and closing arguments of no more  
18 than ten minutes by each of the parties.

19 Given the fact that the Department has indicated  
20 that it will, at this time, not take a position either  
21 for or against the issuance of a TRO, I would propose  
22 that the Department's time occur after the presentation  
23 of those who support the TRO and just before the  
24 presentation of the parties who oppose the TRO. Does  
25 the Department have any problem with that process?

1 MS. ACEVES: No. I think that makes sense.

2 Thank you.

3 CHAIRMAN ROISMAN: Okay. Then, I think we'll  
4 start, and, Mr. Einhorn, I think we can start with the  
5 Agency of Natural Resources, both because you are the  
6 party that has moved for the TRO and also, as you  
7 requested, if you would like to begin with your first  
8 witness, Mr. Lowkes, to accommodate his schedule, I  
9 think that will help. So, Mr. Einhorn, the, the  
10 platform is yours, and I believe that Ms. Hoffman has  
11 explained to you how you can become a presenter so  
12 that, if you have exhibits that you wish us to see, you  
13 can put them on the screen.

14 MR. EINHORN: Thank you, Chairman Roisman. I  
15 guess, with regard to that, we did, the Agency, file a  
16 memorandum yesterday, two affidavits and exhibits  
17 accompanying the affidavits. So, in that regard, is  
18 that something I need to share, or they are in, filed  
19 in ePUC, so I'm not sure.

20 CHAIRMAN ROISMAN: I don't think you need to  
21 share them on the screen, unless someone wants to ask a  
22 question about them and feels that it's important for  
23 them to be seen, but I do think you need to decide  
24 whether you wish to offer them in evidence, and, if so,  
25 this would be the time to do that, and then the parties

1 will have an opportunity to express their view as to  
2 whether they should be admitted into evidence.

3 MR. EINHORN: Yes, absolutely, the Agency  
4 does ask that they be moved into evidence, and I have  
5 both witnesses here who are available to testify in  
6 that regard. And, you know, as far as just a quick  
7 overview of the Agency's position, Mr. Chairman, you're  
8 correct. The Agency does support a temporary  
9 restraining order.

10 I think there are essentially two issues here to  
11 deal with in this matter. The first issue is certainly  
12 the overarching issue, and that is, Is there site  
13 preparation or site clearing in violation of the  
14 prohibition contained in Section 248(a)(2)? The Agency  
15 believes that there is. I think the evidence presented  
16 both from the Agency and from Petitioner itself  
17 indicates that there is site clearing taking place. So  
18 the question is, Is that in violation of the  
19 prohibition?

20 The second issue is, What is the harm? What is  
21 the harm of the clearing that's taking place? And I  
22 think there are really two parts to that. If this is  
23 determined to be site preparation without a certificate  
24 of public good, then the degree of harm will, will  
25 naturally be factored into what an ultimate penalty is.

1 The other issue, which is, I guess, a little more  
2 urgent at this point in time, is, Is there a need for a  
3 temporary restraining order?

4 As Mr. Melone pointed out in his filing last  
5 night, the Agency, in, in our memorandum yesterday, did  
6 not get into the four elements or factors of a  
7 temporary restraining order. My main objective  
8 yesterday was to get, in a very timely manner, the  
9 facts and our observations in evidence before the  
10 Commission and all the parties so they could examine  
11 those.

12 I'm certainly prepared to discuss how those facts  
13 then fall into the four factors that are analyzed as to  
14 whether or not a temporary restraining order is  
15 appropriate. My preference is I can do that at the  
16 end. That would take a little bit more time. I can  
17 also address at the end in closing the argument set  
18 forth by the Petitioner as to why this isn't site  
19 preparation. I think the three cases cited, Beaverwood  
20 Energy, Monument Farms, Georgia Mountain, are clearly  
21 distinguishable and frankly have nothing to do with  
22 what's going on here in, in this case.

23 CHAIRMAN ROISMAN: So, Mr. Einhorn.

24 MR. EINHORN: Yes.

25 CHAIRMAN ROISMAN: I think it is appropriate

1 for you to hold that for the argument at the end.

2 MR. EINHORN: Great. So, with that, I again  
3 move the, the two affidavits and accompanying exhibits,  
4 and I would offer our witnesses for cross-examination,  
5 the first being Mr. Lowkes.

6 CHAIRMAN ROISMAN: All right. First, let's  
7 see if any party objects to the admission of those  
8 documents. Ms. Dingledine?

9 MS. DINGLELINE: No objection.

10 CHAIRMAN ROISMAN: Okay. Ms. Aceves?

11 MS. ACEVES: No objection.

12 CHAIRMAN ROISMAN: Mr. Melone?

13 MR. MELONE: No objection.

14 CHAIRMAN ROISMAN: Okay. Then those  
15 documents will be admitted. Mr. Einhorn, for purposes  
16 of the record, can you identify each document and give  
17 it an exhibit number so that it will be clear in the  
18 record which document is ANR Exhibit 1 and ANR Exhibit  
19 2, etc.?

20 MR. EINHORN: Okay, sure. I would then  
21 designate the affidavit of Patrick Lowkes dated June  
22 24, 2020 consisting of two pages to be ANR Exhibit 1,  
23 and the four photos that accompany that affidavit,  
24 which are identified as Exhibits A through D in that  
25 affidavit, I would designate them as ANR Exhibits 2, 3,

1 4, and 5. And then the second affidavit filed by the  
2 Agency is the affidavit of Robert Popp, also of June  
3 24, and that I would designate as ANR Exhibit 6, and  
4 that had three exhibits attached to it identified as A,  
5 B and C, and I would designate those as ANR Exhibits 7,  
6 8, and 9.

7 (Exhibits marked ANR 1 through 9 were admitted  
8 into the record.)

9 <https://epuc.vermont.gov/?q=downloadfile/415891/150086>  
10 <https://epuc.vermont.gov/?q=downloadfile/415892/150086>  
11 <https://epuc.vermont.gov/?q=downloadfile/415893/150086>  
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17 <https://epuc.vermont.gov/?q=downloadfile/415904/150086>  
18 <https://epuc.vermont.gov/?q=downloadfile/415905/150086>

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25

1           CHAIRMAN ROISMAN: Okay. Thank you, Mr.  
2     Einhorn. Mr. Einhorn, we're going to go through this  
3     just as if we were sitting in the hearing room. So you  
4     may now call your first witness, and Commissioner  
5     Cheney will swear the witness in.

6           MR. EINHORN: Thank you. I call Patrick  
7     Lowkes.

8           PATRICK LOWKES,  
9     Having been duly sworn to tell the truth,  
10    testifies as follows:

11          COMMISSIONER CHENEY: And will we be seeing  
12    Mr. Lowkes on camera?

13          MR. EINHORN: I believe he is calling in by  
14    phone.

15          COMMISSIONER CHENEY: All right.

16          CHAIRMAN ROISMAN: Okay, Mr. Einhorn.

17          DIRECT EXAMINATION BY MR. EINHORN

18    Q. Thank you. Mr. Lowkes, would you state, spell  
19    your name, and identify your position with the Agency?

20    A. Yes. Patrick Lowkes, L-O-W-K-E-S. I am an  
21    enforcement officer with the Vermont Department of  
22    Environmental Conservation.

23    Q. And on June 24th did you sign a two-page  
24    affidavit?

25    A. I did.

1 Q. And is the information contained in that affidavit  
2 true and accurate?

3 A. It is.

4 Q. And the four photographs that accompany that  
5 affidavit, were they taken by you?

6 A. They were.

7 Q. And do they accurately depict what you observed at  
8 that time?

9 A. I believe they do.

10 MR. EINHORN: Okay. Mr. Lowkes is available  
11 for questioning.

12 CHAIRMAN ROISMAN: Okay. Ms. Dingleline, do  
13 you have any questions for Mr. Lowkes?

14 MS. DINGLELINE: Yes, yes. Thank you.

15 CROSS-EXAMINATION BY MS. DINGLELINE

16 Q. Mr. Lowkes, this is brook Dingleline. I had a  
17 question for you. Were you able to determine when you  
18 were on the site where the rare species were relative  
19 to the pictures and the viewing of the property that  
20 you engaged in?

21 A. Thank you, Ms. Dingleline. I was charged with  
22 visiting the site to determine whether site activity  
23 had commenced, land clearing, so on and so forth. I am  
24 not a botanist. I was not asked to identify, locate,  
25 or assess their location for clearing of said rare

1 and/or threatened species.

2 Q. And, in terms of what you observed when you were  
3 on the site, we saw some pictures that looked like a  
4 dirt road had been created. Is that a fair assessment  
5 that it looked like a road, roads that were cleared?

6 A. At the end of Willow Lane, Road -- I don't  
7 remember which it is. At the end of Willow Lane, it  
8 appeared as though a turnaround area or a log landing,  
9 if you will, had been cleared, and beyond that it  
10 appeared as though a swath of cleared land along the  
11 property line had been established.

12 CHAIRMAN ROISMAN: Mr. Lowkes, for clarity,  
13 Mr. Lowkes, for clarity, could you identify which of  
14 the photographs you're talking about when you're  
15 describing an area that looked like it might be a  
16 logging area, a log landing area, and an area that  
17 looked like it was a more general clearing?

18 MR. LOWKES: I, I need to open up that email.  
19 Bear with me for a second.

20 CHAIRMAN ROISMAN: Sure.

21 MR. LOWKES: I have Exhibit, Exhibit B  
22 depicts the, the log landing area, the cleared area at  
23 the end of Willow, Willow Lane, Willow Road.

24 CHAIRMAN ROISMAN: Okay. And, Mr. Einhorn,  
25 if I remember correctly, that's what's been marked as

1 ANR Exhibit 3?

2 MR. EINHORN: That is correct, Mr. Chairman.

3 Thank you.

4 CHAIRMAN ROISMAN: Okay. Thank you, Mr.

5 Lowkes. Go ahead, Ms. Dingledine.

6 BY MS. DINGLEDINE:

7 Q. Thank you. And, Mr. Lowkes, as I view ANR's  
8 Exhibit Number 3, that photograph, can you describe  
9 what I'm looking at in terms of it looks like there are  
10 things sticking out of the dirt on the ground? Can you  
11 identify what those squiggly things are? Are those  
12 roots of trees or sticks or --

13 A. Of course, I had to mute my computer, because I  
14 have a clock with birds that chirp on the hour. I  
15 apologize for that. Exhibit, Exhibits A through D, you  
16 had referenced 3. Can I assume that's Exhibit C?

17 Q. B, like boy.

18 A. B, like boy?

19 Q. Right. The one you were just discussing and  
20 talking about.

21 A. I believe those are, are sticks or tree roots, if  
22 that's what you're asking.

23 Q. So is it fair to say that, not only soils have  
24 been excavated on site, but it also appears that trees  
25 have been removed, pushed down and bulldozed over?

1     A.    Having not been to the site prior to this day, I,  
2     I'm not sure if trees had been cut down in that  
3     location or if, if that's native soil, if fill had been  
4     brought in. I didn't inquire about that. I don't know  
5     the answer.

6     Q.    Okay. In terms of all the areas that you saw, are  
7     your conclusions that trees were removed, however that  
8     might have happened, in terms of what you saw and  
9     observed as the remaining area, or -- go ahead.

10    A.    Again, I, I was not there to assess the, the  
11    degree of, of land clearing or tree removal. I was  
12    charged with determining whether any site activity had,  
13    had begun. I can't speak to whether this area that  
14    we're looking at had trees or other vegetation prior to  
15    my site visit, and the same would go for areas along  
16    the property line as depicted in, in my other exhibits.  
17    I can't say what vegetation was there prior to my site  
18    visit.

19    Q.    So your conclusion after visiting the site and  
20    observing it is that there was physical action on the  
21    land and site preparation was commenced; is that  
22    correct?

23    A.    I would agree with that statement, yes.

24    Q.    And would that be on both areas, on the Apple Hill  
25    site and the Chelsea Solar site, or the Willow Road

1     it's known as now?

2     A.    I only visited, I believe this would be the Willow  
3     Road area, this log landing, if you will, and the  
4     property line extending from this log landing by not  
5     more than 200 meters would be my estimate is how far I  
6     walked from this log landing.  At that point, I had  
7     established or had determined that site activity had  
8     begun.

9                 MS. DINGLELINE:  Thank you very much.  That's  
10    all I have.

11                CHAIRMAN ROISMAN:  Ms. Aceves, do you have  
12    any questions for this witness?

13                THE WITNESS:  You're welcome.

14                MS. ACEVES:  Not at this time.  Thank you.

15                CHAIRMAN ROISMAN:  Okay.  Mr. Melone?

16                MR. MELONE:  Thank you, Mr. Chairman.

17                         CROSS-EXAMINATION BY MR. MELONE

18    Q.    Good morning, Officer Lowkes.  So I just want to  
19    confirm that you were not asked to identify any  
20    conservation areas or RTE areas; is that correct?

21    A.    That is correct.

22    Q.    And could you look at your Exhibit A?

23                CHAIRMAN ROISMAN:  Mr. Melone, I believe  
24    that's ANR Exhibit 1.

25                MR. MELONE:  Okay.  Sorry about that, Mr.

1 Chair.

2 CHAIRMAN ROISMAN: No, that's okay.

3 BY MR. MELONE:

4 Q. Now, let me know when you have that available.

5 A. I have Exhibit A loaded on my screen, correct.

6 Q. Okay. So, on the left side about halfway up,  
7 there is a yellow or an orange silt fence, you see, or  
8 an orange fence. Do you see that?

9 A. I do.

10 Q. And then to the right of that there is orange  
11 tape. Do you see that?

12 A. I do.

13 Q. So did you ask Robert Kobelia what is behind the  
14 orange tape or why that area was set off from what he  
15 was clearing?

16 A. I did not ask Mr. Kobelia what the orange tape was  
17 for. However, Mr. Kobelia did explain that he was  
18 clearing along the property line and that two things  
19 were being installed, silt fencing as well as perimeter  
20 tape. He identified the orange tape as perimeter tape.

21 Q. And, when you were there, did he show you a map at  
22 all?

23 A. He did.

24 Q. And did he say or did he point on that map to  
25 where he was told the conservation areas were?

1 A. I don't recall him identifying conservation areas.  
2 When we looked at the map together, he located where  
3 his truck was parked or the, the log landing, the first  
4 exhibit we looked at, as well as our location at the  
5 time along the property line.

6 Q. Okay. Do you remember if anything on the map  
7 indicated where conservation areas were?

8 A. I remember conservation areas being located on the  
9 map. I did not inquire about their location relative  
10 to our location at the, at that time.

11 Q. Okay. And, when you saw the map, you did not go  
12 and actually locate the conservation areas that were on  
13 the map; is that correct?

14 A. That is correct.

15 Q. And about how long were you at the site?

16 A. I was at the site for less than, approximately 15  
17 minutes.

18 MR. MELONE: Okay, all right. Thank you,  
19 Officer Lowkes. No further questions.

20 MR. LOWKES: You're welcome.

21 CHAIRMAN ROISMAN: Okay. Ms. Hofmann,  
22 Commissioner Hofmann, do you have any questions for  
23 this witness?

24 COMMISSIONER HOFMANN: I do not. Thank you,  
25 Mr. Chairman.

1           CHAIRMAN ROISMAN: Commissioner Cheney, do  
2     you have any questions for this witness?

3           COMMISSIONER CHENEY: Not now, thank you.

4           CHAIRMAN ROISMAN: Mr. Landis-Marinello, do  
5     you have any questions for this witness?

6           MR. LANDIS-MARINELLO: No, I don't.

7           CHAIRMAN ROISMAN: Okay. Mr. Einhorn, do you  
8     have any redirect examination for Mr. Lowkes?

9           MR. EINHORN: I do. Thank you.

10           REDIRECT EXAMINATION BY MR. EINHORN

11     Q.    Mr. Lowkes, I believe it was Ms. Dingleline had  
12     asked you a question something along the lines of, Did  
13     you look at the Apple Hill site portion or the Chelsea,  
14     also known as Willow Road, site portion, and you said  
15     you looked at the Willow Road area. By saying you  
16     looked at the Willow Road area, are you referring to  
17     the 27-acre parcel that essentially begins at the end  
18     of Willow Road?

19     A.    That is correct.

20           MR. EINHORN: Thank you. That's all I have.

21           CHAIRMAN ROISMAN: All right. Mr. Lowkes,  
22     you're excused. Thank you for your testimony. Mr.  
23     Einhorn, do you have another witness?

24           MR. EINHORN: I do. Thank you. The Agency  
25     calls Bob Popp.

1           CHAIRMAN ROISMAN: All right. As soon as Mr.  
2 Popp comes on, we will have Commissioner Cheney swear  
3 him in. He's not live at the moment. There he is.  
4 Okay. Commissioner Cheney. Commissioner Cheney,  
5 you're muted. Commissioner Cheney, you're still muted.  
6 Commissioner Cheney, we're not hearing anything.  
7 Commissioner Hofmann, would you be available to swear  
8 in the witness, please?

9           COMMISSIONER HOFMANN: I would, if I could  
10 only remember the words after all these years.

11           CHAIRMAN ROISMAN: You're asking him to tell  
12 us the truth.

13           COMMISSIONER HOFMANN: Yes, I was just going  
14 to say, Do you swear or affirm to tell the truth, Mr.  
15 Popp?

16           COMMISSIONER CHENEY: Oh, can you hear me  
17 now? All right. I'll give you the full question. Do  
18 you swear or affirm under penalty of perjury that the  
19 testimony you are about to give will be the truth, the  
20 whole truth, and nothing but the truth?

21           MR. POPP: I do.

22           COMMISSIONER CHENEY: Thank you and my  
23 apologies for the technical difficulties.

24           CHAIRMAN ROISMAN: We're all, we're all  
25 getting used to this. Mr. Einhorn?

1                   ROBERT POPP,  
2           Having been duly sworn to tell the truth,  
3           testifies as follows:

4                   DIRECT EXAMINATION BY MR. EINHORN

5       Q.   Thank you, Mr. Chairman.  Mr. Popp, would you  
6       please identify yourself, spell your name, and indicate  
7       your position with the Agency?

8       A.   My name is Robert Popp, and I'm the botanist for  
9       the Fish and Wildlife Department, and I keep track of  
10      all the rare and endangered plants throughout the  
11      state.

12     Q.   Did you sign a four-page affidavit on June 24 in  
13     connection with this matter?

14     A.   I did.

15     Q.   And is your affidavit true and accurate?

16     A.   It is.

17     Q.   And you included three exhibits with your  
18     affidavit; is that correct?

19     A.   That is correct.

20     Q.   And, just for the record, those, those are now in  
21     evidence as ANR 7, 8, and 9.  And, Mr. Popp, are you  
22     familiar with those three exhibits?

23     A.   I am.

24               MR. EINHORN:  Thank you.  The Witness is  
25     available for questioning.

1           CHAIRMAN ROISMAN: Ms. Dingleline, do you  
2 have any questions for this witness?

3           MS. DINGLELINE: No, I do not. Thank you.

4           CHAIRMAN ROISMAN: Okay. Ms. Aceves, do you  
5 have any questions for this witness?

6           MS. ACEVES: I do not. Thank you.

7           CHAIRMAN ROISMAN: Mr. Melone, do you have  
8 any questions for this witness?

9           MR. MELONE: Good morning, Mr. Chairman.  
10 Yes, I do.

11                   CROSS-EXAMINATION BY MR. MELONE

12 Q. Good morning, Mr. Popp. What are the, the rare  
13 species which you're concerned about on this site?

14 A. There are two of them present on the site, the  
15 arrow-leaved aster and the Muhly grass. So, yeah,  
16 that's one of the common names of it.

17 Q. And the white arrow-leaved aster, that's still  
18 classified as S1 in Vermont; is that correct?

19 A. That is correct.

20 Q. Now, can you explain, in the case of the white  
21 arrow-leaved aster, what that really means in terms of  
22 the plant's viability or as a species?

23 A. Well, the ranking S1 is the rarest rank in the  
24 state. All the native plants in the state are ranked  
25 S1 through S5, S1 being very rare, S5 being ubiquitous,

1 common everywhere. The arrow-leaved aster is presently  
2 known from only three populations in the state, all of  
3 them in Bennington County. So it is, it's considered  
4 to be quite rare and limited in the state.

5 Typically, S1 designates plants with five or fewer  
6 populations in the state, and then S2 would be between  
7 5 and 20 populations in the state, and then it  
8 increases accordingly to the S ranks, which we don't  
9 need to go into. So it means -- yeah, I'll stop there,  
10 unless you have further questions.

11 Q. Okay. And, and how, how do you define a  
12 population for that purpose?

13 A. Generally, a population is, consists of a group of  
14 plants that we use approximately one kilometer  
15 distance. So, if the plants are, you know, within a  
16 few, like, hundred yards or something, that would be  
17 one population, but, if there's a separation distance  
18 of one kilometer or there's a major fragmenting  
19 feature, such as Super 7 would be a major fragmenting  
20 feature, because it would be hard for the plants to  
21 jump across that. But it's, that's, yeah, it's, it's  
22 subjective, and it's, yeah, that's the rule of thumb  
23 that we follow.

24 Q. Okay. So how many populations are there in the  
25 state?

1 A. We're aware of three, three populations.

2 Q. And one would be on this site; is that correct?

3 A. That is correct.

4 Q. One would be west of this site in the area of what  
5 are generally known as the Battle Creek, Warner, and  
6 Stark Solar projects; is that correct?

7 A. Yes, I know of it on the Warner site.

8 Q. And so on the Warner site the rail line that  
9 separates the, or that divides the property on each  
10 side, that would not be considered something that would  
11 fragment the, a population, correct?

12 A. Correct.

13 Q. And where is the third site?

14 A. The third site is at the south end of Bennington.  
15 It's a, it's on the edge. It's south of the cemetery.  
16 I don't know specifically the name of the cemetery.  
17 And it's a property that's owned by, it's like a  
18 conservation organization that was there, like a  
19 nursery. Yeah. I'm not sure if they're even still  
20 there anymore.

21 Q. Okay. Now, does the Agency of Natural Resources  
22 make any affirmative efforts to go out and scan for,  
23 for populations of these plants?

24 A. I have not done a dedicated search for it. We've  
25 known of the population in the cemetery for quite some

1 time, and, when I would visit that periodically to  
2 monitor it, I would search in the general area, but,  
3 yeah, just, I didn't just wander around everywhere  
4 looking for it.

5 Q. And is there any way for an ordinary landowner to  
6 know that they have any kind of rare plants on their  
7 site?

8 MS. DINGLEDINE: I'm going to object to that  
9 as irrelevant. This is Brooke Dingledine, for the  
10 record.

11 CHAIRMAN ROISMAN: We'll overrule the  
12 objection. You can answer the question, Mr. Popp.

13 MR. POPP: Okay, thank you. I'm sorry.  
14 Would a normal person know they had it on their  
15 property? Not unless, I mean, unless they could  
16 identify it themselves or somebody who is skilled in,  
17 you know, botanical identification could, would show it  
18 to them, a consultant or myself or whatever, and we go  
19 onto private property and, and do that on occasion.

20 BY MR. MELONE:

21 Q. And, when you do that on private property, is that  
22 at the request of the landowner?

23 A. Sometimes, or sometimes, you know, like, if it's  
24 adjacent to a known site, we may specifically ask if we  
25 could go on their property and look for a particular

1 plant. So it could go either way.

2 Q. So does ANR have anything, say, posted on its  
3 website that asks people in Vermont to report the  
4 identification of listed species and showing them a  
5 picture of what they look like and when they would be  
6 likely to appear?

7 A. We have some information on our website, fact  
8 sheets, what have you, and I, I'm pretty sure that it's  
9 mentioned that, if you think you have one of these  
10 plants, to let us know. But, yeah, it's, it's a mixed  
11 bag. We, we, there is just one of me for the whole  
12 state. So, if everybody started sending me photos of  
13 plants to identify, that's all I would be doing.

14 Q. Right. So, if I wanted, if I owned some property  
15 in Vermont and I saw a flower, you know, that I hadn't  
16 seen all year, it sounds like there's no easy way for  
17 me to go to ANR's website and kind of match the picture  
18 to something.

19 A. There is a website where you can do that. It's  
20 run by the New England Wildflower Society, or now  
21 called the Native Plant Trust, and it's for all of New  
22 England, and it's very, very good, and it's very  
23 user-friendly, and we send people to that, and I always  
24 provide links to that when I get requests for plants.  
25 I'll identify it, and I'll say, you know, go to this

1 website, and there's lots of photos, and there's lots  
2 of identification information, and it also gives  
3 conservation status in all six New England states.

4 Q. So is it fair to say that you actually have no  
5 idea as to whether or not there are just three  
6 populations in Vermont or whether there are many more  
7 of the white arrow-leaved aster?

8 MR. EINHORN: I'm going to object to this.  
9 I'm not sure of the relevancy of this. The Petitioners  
10 in Apple Hill, Chelsea, and Willow Road have  
11 consultants working for them who have filed evidence in  
12 the record of those cases confirming that we're dealing  
13 with an S1 very rare species here. So I think we can  
14 move past that.

15 CHAIRMAN ROISMAN: Mr. Melone, can you give  
16 us some idea of what your motivation is here with this  
17 line of questioning?

18 MR. MELONE: Yes, yes, I will, Mr. Chairman.  
19 Earlier, Attorney Einhorn mentioned the harm that's  
20 being, you know, potentially being done and the, the  
21 rareness or lack thereof of the plants, and the, the  
22 ability to verify if and how rare they, in fact, are,  
23 not whether they're just listed based on a rule of  
24 thumb, goes directly to, to the harm, and that's why,  
25 in my view, it's very relevant.

1                   CHAIRMAN ROISMAN: All right. I'll allow  
2 this for a little bit, Mr. Melone.

3                   MR. MELONE: Okay, thank you, Mr. Chairman.

4 BY MR. MELONE:

5 Q. So, Mr. Popp, again, is it fair to say that you  
6 actually have no idea how many populations there are of  
7 these plants in the state of Vermont?

8 A. That's not true at all. We have a, a very good  
9 idea of the status and distribution of the rare plants  
10 in the state. To say that we know of 100 percent of  
11 all the populations of the rare plants is, is, you  
12 know, just unfair, because we're, there's always places  
13 where we haven't looked. Plants move around. So  
14 there's always the potential for new populations. This  
15 plant is known only from the Town of Bennington, and I  
16 doubt very much it's much more widespread than that.  
17 To say that it's, you know, more common, I find that  
18 very, very unlikely.

19 Q. Okay. Now, you're also aware that part of the  
20 population of white arrow-leaved asters near the Warner  
21 solar site includes the rail corridor; is that correct?

22 A. Yes, it does.

23 Q. And is it fair to say that there are thousands of  
24 white arrow-leaved aster plants located in the rail  
25 corridor?

1 A. We've never received a complete account from the  
2 consultant that was hired. I think it came up to maybe  
3 a few hundred plants. I was out there with the  
4 consultant. We did not do a complete count. I think  
5 it's fair to say there's a few hundred. To say  
6 thousands, I doubt that.

7 Q. But, now that you know or since you've known about  
8 where that location is, have you gone out there on your  
9 own to check to see how many plants are out there?

10 A. The Warner site, I was out there just once with  
11 the consultant from working on the project, and we did  
12 not count them that day. He was supposed to do that  
13 and provide us a number, which we have not yet received  
14 to my knowledge.

15 Q. Okay. And, to your knowledge, for the white  
16 arrow-leaved asters in the rail corridor, has the  
17 Agency of Natural Resources done anything to try to  
18 protect them?

19 CHAIRMAN ROISMAN: Mr. Melone, this does seem  
20 to be getting a little off the point. What's the  
21 linkage between what is happening at a different site  
22 and the question that's in front of us today?

23 MR. MELONE: Well, the linkage, Mr. Chairman,  
24 is that ANR's claiming harm for potential destruction  
25 of these plants when, basically, they've known that

1     there is a huge population of these plants on the rail  
2     corridor and have taken no action to stop the railway  
3     from destroying them, which the railway, in fact, does.

4             CHAIRMAN ROISMAN:  Are you going to offer  
5     some evidence on that?

6             MR. MELONE:  If we get to the point of the  
7     question of harm, we will.

8             MR. EINHORN:  Yeah, again, I'm going to  
9     object to this line of questioning.  If Mr. Melone  
10    wants to ask the Witness about how the activities that  
11    have been observed have the potential to harm the  
12    asters at this site, I think that's fine and that's  
13    fair game.  The, the discussion about asters at other  
14    sites are, are irrelevant.

15            This is a 248 proceeding before the Commission.  
16    The Commission has jurisdiction over these plants at  
17    this site by virtue of the regulatory regime, namely  
18    Section 248(b) (5), and I think that's what we're here  
19    to review and discuss.  I'd prefer that the questioning  
20    be focused on the asters that are present at the site  
21    in question.

22            CHAIRMAN ROISMAN:  Mr. Melone, I tend to  
23    think that Mr. Einhorn has a point.  If you have one or  
24    two more questions about this, I think we'd allow it.  
25    Otherwise, I think we're sort of getting down a rabbit

1 hole.

2 MR. MELONE: Okay. I'll just ask two more  
3 questions then.

4 BY MR. MELONE:

5 Q. Mr. Popp, for the population that includes this  
6 site, what harm do you think there is to the white  
7 arrow-leaved aster and the other S2 plant if the, if  
8 the areas that were designated as conservation areas  
9 are left intact?

10 A. I'm sorry. So what harm would there be if, if  
11 those areas were left intact but the rest of the site  
12 were to be cleared; is that what you're asking?

13 Q. Yes.

14 A. Okay. Assuming all the plants have been  
15 transplanted, and I know the developer contracted with  
16 Arrowwood Environmental to move the plants, then, if  
17 the conservation areas are retained, then those, then  
18 those plants would be protected, then, yeah, I'm  
19 assuming that would be acceptable. I'd have to go back  
20 and make sure they've all been moved. I can't recall,  
21 because they got moved over a period of three years, as  
22 I recall. Some were moved in 2014, some in 2017, 2018.  
23 So it's kind of a convoluted, you know, transplantation  
24 plan, but, if they were moved, then it would be, it  
25 wouldn't be any harm to the plants.

1 Q. Okay. Thank you, Mr. Popp. That ends my  
2 questions.

3 A. There was a monitoring plan that was established  
4 with the conservation area, and I'm assuming that would  
5 be followed. So the plants were watered, and then they  
6 would be monitored for a period of years and weeded, if  
7 need be, etc. So that would all, I'm assuming that  
8 would all occur.

9 MR. MELONE: I have no further questions, Mr.  
10 Chairman, for this witness.

11 CHAIRMAN ROISMAN: Okay. Commissioner  
12 Hofmann, do you have any questions for this witness?

13 COMMISSIONER HOFMANN: I do not. Thank you.

14 CHAIRMAN ROISMAN: Commissioner Cheney?

15 COMMISSIONER CHENEY: Yes. When you said  
16 that the maintenance would occur, to put that in  
17 context, do you mean that the maintenance would occur  
18 if a certificate of public good were granted and that  
19 were a condition in the CPG?

20 MR. POPP: I'm sorry. I'm not sure I  
21 followed the question. You're talking about  
22 maintenance in the, in the conservation area?

23 COMMISSIONER CHENEY: Yeah. You mentioned  
24 that they would be watered, potentially weeded, etc.

25 MR. POPP: Right.

1           COMMISSIONER CHENEY: Would that occur only  
2 under certain circumstances, for example, if that were  
3 required in a condition of a certificate of public  
4 good?

5           MR. POPP: Well, if there were a CPG issued,  
6 then that would be required, yes. Outside of that, I'm  
7 not sure what, you know, what agreement there is to, to  
8 maintain that conservation area. I'm not sure. Does  
9 that answer your question?

10          COMMISSIONER CHENEY: Yes, thank you.

11          MR. POPP: There's, typically, when we reach,  
12 like, an MOA within an, you know, such an agreement as  
13 this, there's a transplantation and monitoring plan  
14 that gets incorporated into the CPG as a condition. So  
15 that's what I was referring to. If there's no CPG, I  
16 don't know what the status of that monitoring plan  
17 would be.

18          CHAIRMAN ROISMAN: Mr. Landis-Marinello, do  
19 you, do you have any questions for this witness?

20          MR. LANDIS-MARINELLO: Yes, one question. So  
21 in Paragraph 10 of your affidavit, you say you have not  
22 been informed of any measures being taken to avoid rare  
23 plants at the Willow Road parcel in connection with the  
24 site clearing that is taking place. What do those  
25 measures normally look like?

1           MR. POPP: Well, we would want -- I mean,  
2 typically, if an area is being developed and it has  
3 rare plants on it that are going to be protected or  
4 avoided, we would want the area certainly flagged,  
5 maybe silt barriers put up around it, just so they're  
6 not inadvertently destroyed during the, the  
7 ground-disturbing activities, the bulldozing that we  
8 saw in the photos, and, to my knowledge, there was no  
9 such flagging established on the site, and I couldn't  
10 see any in the photos. So that's what we would want to  
11 see at a minimum.

12           CHAIRMAN ROISMAN: Anything else, Mr.  
13 Landis-Marinello? Mr. Popp, one question related to  
14 this topic. When there is a conservation area like the  
15 ones that apparently exist at the, at the Willow Road  
16 site, is there usually also a buffer zone the way you  
17 would do with a wetland, or is it just sort of right up  
18 to the edge of where the endangered plant is located  
19 that you must protect?

20           MR. POPP: Typically, there, there is a  
21 buffer zone. So we would, when the plants get moved,  
22 we would leave at least 10 or 20 feet around it,  
23 because, as you know, plants, plants do move, they can  
24 expand, and it also gives some, you know, some, just a  
25 little bit of buffer between any ground-disturbing

1 activities, just so there's not any inadvertently,  
2 inadvertent disturbance to the conservation area.

3 CHAIRMAN ROISMAN: Okay, thank you. Mr.  
4 Einhorn, do you have any redirect for this witness?

5 MR. EINHORN: I do. Thank you, Mr. Chairman.

6 REDIRECT EXAMINATION BY MR. EINHORN

7 Q. Mr. Popp, with your affidavit you had included a  
8 Rare Plant Monitoring Report from 2018, which was  
9 Exhibit C in your affidavit, and in, in this matter  
10 it's been marked as ANR Exhibit 9. Do you have that  
11 2018 Rare Plant Monitoring Report handy?

12 A. I, I can open it up in a second. Okay.

13 Q. If you could, turn to Page 3 in that, please.

14 A. Yeah.

15 Q. And on Page 3 there is a figure, essentially a map  
16 of the Apple Hill project site, that shows the location  
17 of the rare plant conservation area, and it shows the  
18 location of both the S1 very rare and the S2 rare  
19 plants within the area that was to be cleared for Apple  
20 Hill; is that correct?

21 A. It is.

22 Q. And is it also correct that the S2 plant, the  
23 nimblewill, is not all transplanted to the conservation  
24 area? In fact, there are plants that exist in four  
25 locations throughout the area to be cleared; is that

1 correct?

2 A. It's correct they're not, they have not all been  
3 moved, nor have all the aster plants been moved.  
4 There's some in the lower left quadrant that are still  
5 extant, still on site, because there was no activity  
6 planned for there.

7 Q. Right. But the, the nimblewill that has not been  
8 moved, and there's a discussion on that on Page 2 just  
9 above, is within the area to be cleared, but it's not  
10 within the conservation area, correct?

11 A. That is correct. You're referring to one, there's  
12 like a cluster at Site D, for instance?

13 Q. Yes. And there's Site A, Site B, and Site C as  
14 well where my understanding based on the description,  
15 the language on Page 2, is that plants were left in  
16 place at those areas as well.

17 A. Right. Some plants, I believe, were transplanted,  
18 and some remained.

19 Q. So, to the earlier question that you had that, if  
20 the two rare plant conservation areas were to be, that  
21 were established, were to not be cleared, that would  
22 still not protect all of the plants that exist on the  
23 site at this time, correct?

24 A. It seems it would not protect all the Muhly grass  
25 plants; that is correct, that they were not all moved.

1 That was an oversight on my part, because it looks like  
2 some plants were moved from Sites A, B, and C, but not  
3 all of them, and in Site D no plants were removed. So  
4 it is correct. They would be impacted.

5 Q. And so then, in order to avoid that impact, not  
6 only would the designated conservation area need to be  
7 effectively barriered off with a buffer as, as you  
8 explained to Chairman Roisman, but that the same  
9 approach should be done for areas A, B, C and D where  
10 the S2 plants remain?

11 A. That is correct. I mean, what we ideally want to  
12 see is have a consultant go out there and mark where  
13 the plants are, and then we would act accordingly, flag  
14 those areas off or potentially move those plants to the  
15 conservation area.

16 Q. And, to your knowledge, has that been done?

17 A. I'm not aware of any such activity.

18 MR. EINHORN: Thank you. I don't have any  
19 further questions.

20 CHAIRMAN ROISMAN: Okay. Are there any  
21 additional questions from any party based upon any of  
22 the redirect? Ms. Dingleline?

23 MS. DINGLELINE: Thank you, Mr. Roisman. I  
24 do have a question or two.

25

1                    CROSS-EXAMINATION BY MS. DINGLEDINE

2        Q.    Mr. Popp, the questions that you got from Mr.  
3        Melone about the rarity of these species, apparently,  
4        Mr. Melone has claimed that you can just order these  
5        species from some nursery and they can bring them on in  
6        and you can plant, replant these species. Is that a  
7        correct statement for either the S1 or the S2 species  
8        that are a subject of this MOU and that are supposed to  
9        be protected?

10      A.    I have not personally looked into that. I, I  
11      would not be surprised if you could get the American  
12      Aster plant through a nursery. Many of Vermont's rare  
13      and endangered plants are available through nurseries.  
14      We don't know the provenance of those. They're  
15      generally from big nurseries out in the Midwest or down  
16      south somewhere, so the genetics are completely  
17      different than our plants. So we don't encourage  
18      people to plant those out in the wild or introduce them  
19      into native populations.

20      Q.    So that doesn't have any impact on the ranking and  
21      the legal protection of these species once they are  
22      determined to exist, correct?

23      A.    That is correct.

24      Q.    And the other question I had had to do with you  
25      were talking about the monitoring plan, and there's a

1 responsibility to notify you as things are progressing,  
2 and, and then you stated you assume that would occur.  
3 Has it occurred to date?

4 A. We've received a 2018 and a 2019 monitoring plan,  
5 monitoring report from Arrowwood Environmental.

6 Q. What, what month of those years do you typically  
7 get that?

8 A. When did we receive them? Generally, I mean, I, I  
9 don't know. We generally get them in the winter,  
10 because that's typically when folks write reports,  
11 because they're out doing field work in the summer.  
12 So, usually, by January we're supposed to get them.

13 Q. Okay. So, so are you saying, like, January of  
14 2020 you would have gotten the '19 report?

15 A. Yes.

16 Q. Okay.

17 A. On or around then.

18 Q. Okay. And there's been no interim reporting to  
19 you to notify ANR that any activity was happening on or  
20 near the rare species mapping areas, correct?

21 A. That is correct. We have not heard that from any  
22 consultants or people doing the monitoring.

23 Q. So you have not had the opportunity to review or  
24 consult with anyone regarding any construction or site  
25 commencement activities out at the site; fair to say?

1 A. Correct.

2 Q. So you cannot, as you sit here, testify to any  
3 measures that were taken to try to buffer or protect  
4 the areas at issue, correct?

5 A. Correct.

6 MS. DINGLELINE: Thank you. That's all I  
7 have.

8 CHAIRMAN ROISMAN: Ms. Aceves, any additional  
9 questions just based upon the redirect?

10 MS. ACEVES: Not at this time. Thank you.

11 CHAIRMAN ROISMAN: Mr. Melone, any additional  
12 questions?

13 MR. MELONE: Yes, Mr. Chairman.

14 RECROSS-EXAMINATION BY MR. MELONE

15 Q. Mr. Popp, in one of your answers to Attorney  
16 Einhorn, you had noted that not all the Muhly grass  
17 plants were transplanted. If a landowner in Vermont  
18 had Muhly grass on their land and planned to dig  
19 everything up to plant crops, is there any restriction  
20 on doing that in the State of Vermont?

21 MS. DINGLELINE: I'm going to object, Your  
22 Honor.

23 MR. EINHORN: I'm going to object to that as  
24 well. Again, we're dealing with an investigation as to  
25 whether site preparation without a certificate of

1 public good is taking place here, and that, that  
2 prohibition doesn't apply to any landowner in Vermont.

3 MS. DINGLELINE: Mr. Roisman, if I can just  
4 add, I'm also getting very concerned about the time. I  
5 need to be in another PUC hearing in a half an hour.  
6 So I really would like to cross-examine Mr. Melone to  
7 hear from him.

8 CHAIRMAN ROISMAN: Ms. Dingleline, we've done  
9 all we can to accommodate your conflict. I don't know  
10 that we can do anything beyond that. The question that  
11 Mr. Melone has asked of Mr. Popp was objected to. The  
12 commissioners are going to go offline now, and we're  
13 going to consult on that question. We'll come back on.

14 COMMISSIONER HOFMANN: Tony, you're muted.

15 CHAIRMAN ROISMAN: Okay. I was just saying  
16 we're going offline.

17 (A discussion was held off the record.)

18 CHAIRMAN ROISMAN: Okay. We're back. We're  
19 going to overrule the objection, but, Mr. Melone, we'd  
20 like to not have this go on for many more questions,  
21 couple more questions along this line.

22 MR. MELONE: Thank you, Mr. Chairman. I will  
23 restrict the questioning to a few questions.

24 BY MR. MELONE:

25 Q. So, Mr. Popp, getting back to the question, if a

1 landowner in Vermont had Muhly grass on their site or  
2 on their land and they wanted to plant crops on the  
3 land and the consequence of that would be to, to  
4 basically destroy all the Muhly grass, is there  
5 anything in Vermont that prevents that?

6 A. The taking of the grass would be prohibited only  
7 if, say, a project went through Act 250 or Section 248.  
8 So, barring the need to get such a permit, then that  
9 activity would not be restricted to a farm.

10 Q. And, and the same would apply to the white  
11 arrow-leaved aster, correct? If there are white  
12 arrow-leaved aster on a person's land and they were  
13 going to plant crops on the land and the consequence of  
14 that would be the destruction of the white arrow-leaved  
15 aster? Okay.

16 A. Yeah.

17 MR. MELONE: Thank you. I have no other  
18 questions, Mr. Chairman.

19 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, I'm  
20 going to give you one last shot, and then we're going  
21 to be done with this witness. Is there anything that  
22 you feel that you need to ask him?

23 MR. EINHORN: There is not. Thank you.

24 CHAIRMAN ROISMAN: Okay, all right.

25 MS. DINGLELINE: Mr. Roisman, will you

1 dismiss him to ask a question? It's Brooke Dingleline.

2 CHAIRMAN ROISMAN: Ms. Dingleline, you're the  
3 one who wants us to move this along. I'm trying to do  
4 that.

5 MS. DINGLELINE: I know, Your Honor, but, if  
6 I could just ask --

7 COMMISSIONER HOFMANN: And, Mr. Chairman, I  
8 believe Mr. Tousley has a question.

9 CHAIRMAN ROISMAN: Yes, I'm going to get to  
10 the Commission's questions last. All right, Ms.  
11 Dingleline, one question.

12 RE-CROSS EXAMINATION BY MS. DINGLELINE:

13 Q. Yeah. So your testimony just now about whether or  
14 not it's under anyone's jurisdiction, you said Act 250  
15 and Section 248, and this property right now is, in  
16 fact, submitted to act, to Section 248 to seek CPGs,  
17 and so the what you testified to a moment ago is that,  
18 if the property is not seeking a CPG or Act 250, it's  
19 not under your jurisdiction, but, in fact, the land at  
20 issue for Chelsea and Apple Hill solar sites are under  
21 your jurisdiction, because they are seeking a CPG,  
22 correct?

23 A. That is correct.

24 MS. DINGLELINE: Thank you.

25 CHAIRMAN ROISMAN: Now, Mr. Tousley, you had

1 a question for Mr. Popp?

2 MR. TOUSLEY: Yes. Thank you, Mr. Chairman.  
3 Good morning, Mr. Popp. There's been a lot of  
4 discussion of the conservation areas and the, the prior  
5 moving of plants. Did you participate in that whole  
6 process that's, you know, that began back in 2014?

7 MR. POPP: I, I did not participate directly.  
8 I reviewed the management plan and the transplantation  
9 plan that Arrowwood submitted and worked with them to  
10 modify that.

11 MR. TOUSLEY: Okay. Are you aware if -- you  
12 know, in this case, both the, the petitions for both or  
13 for Chelsea, Willow Road, and Apple Hill have all been  
14 denied by the Commission, and are those conservation  
15 areas binding upon the landowner in the absence of CPGs  
16 related to those proposed projects?

17 MR. POPP: I don't think I can answer that.  
18 That sounds like a legal question. So I don't know.  
19 I'm sorry.

20 MR. TOUSLEY: Okay, okay. Were they  
21 developed in response to the requests for CPGs?

22 MR. POPP: Yes, absolutely.

23 MR. TOUSLEY: Are you otherwise aware if  
24 those areas are binding upon the landowner?

25 MR. POPP: Again, I'm not sure outside of a

1 CPG what, what legal authority there would be.

2 MR. TOUSLEY: Okay, thank you.

3 CHAIRMAN ROISMAN: Okay. Unless someone has  
4 something that's really pressing, I think we should  
5 excuse this witness. Hearing no objection, Mr. Popp,  
6 thank you very much. We appreciate your attendance.  
7 Mr. Einhorn, do you have any further witnesses?

8 MR. EINHORN: I do not. Thank you.

9 CHAIRMAN ROISMAN: Okay. Ms. Dingleline, do  
10 you have any witnesses?

11 MS. DINGLELINE: Your Honor, if I may move  
12 the admission of the affidavit of Joseph Schoenig into  
13 the record.

14 CHAIRMAN ROISMAN: Okay, all right. Ms.  
15 Aceves, do you have any objection to that affidavit  
16 being received in evidence?

17 MS. ACEVES: No objection.

18 CHAIRMAN ROISMAN: Mr. Melone?

19 MR. MELONE: No objection.

20 CHAIRMAN ROISMAN: Okay. It's received in  
21 evidence. We'll mark it as -- how you do you want to  
22 designate it, Ms. Dingleline?

23 MS. DINGLELINE: Intervenors Exhibit 1.

24

25

1                   (Exhibit marked Intervenor 1 was admitted  
2                   into the record.)

3       <https://epuc.vermont.gov/?q=downloadfile/415963/150086>

4                   CHAIRMAN ROISMAN:   Okay, that will work.  
5       Anything, anything else, Ms. Dingleline?

6                   MS. DINGLELINE:   May I make the opening  
7       statement?  I'll do it really quick.  I won't take five  
8       minutes.

9                   CHAIRMAN ROISMAN:   Sure.

10                  MS. DINGLELINE:   Thank you.  We would not  
11       only support the request for a TRO or a preliminary  
12       injunction, but we would like to ensure and request  
13       that the TRO and/or preliminary injunction that issues  
14       in this case, if it does, that it applies to both  
15       Chelsea Solar and Apple Hill project sites, including  
16       Lot Number 1 that Mr. Melone has first designated that  
17       there would be buffer trees on.

18                  He's off in court in Chittenden County trying to  
19       figure out if he has the rights to do that now many  
20       years after he proposed it, and also about the road  
21       that he wants to use through the Apple Hill solar  
22       development that is an easement and a private road and  
23       is not allowed to be used for commercial purposes.

24                  So, because of the level of bad faith, ill will,  
25       and bad motive here -- interestingly, Mr. Melone has

1 not even responded to, other than claiming, I get to do  
2 agriculture, and you can't stop me, he hasn't even  
3 responded to the questioning of, you know, why did he  
4 do this?

5 And it's clear from his 11th and 59-minute hour  
6 attempt before the oral argument in Apple Hill solar.  
7 At 4:29 the day before the oral argument, he tried to  
8 amend and tried to make an amendment that said, I'm  
9 going, I'm not going to plant the trees on Lot 1 to  
10 screen the view from Libby Harris's house. Instead,  
11 I'm going to build a spite building. And we have a  
12 spite, we have an unnecessary building statute in  
13 Vermont that does not allow him to do this. And so --

14 CHAIRMAN ROISMAN: Ms. Dingleline, it sounds  
15 like you're raising an objection about something that's  
16 not the subject of this particular proceeding. You're  
17 referring to a number of facts that, as far as I know,  
18 are not part of this particular proceeding. I suggest  
19 that, if those are issues that you believe the  
20 Commission needs to address, then you follow the normal  
21 procedure, ask us to open an investigation into any  
22 matter that you think we have jurisdiction over, but  
23 that this proceeding is related to this very narrow  
24 question, whether or not there should be a TRO issued  
25 with regard to the proposed clearing of this site by

1     what Mr. Melone has described as the intent to have a  
2     sheep farm and a hemp farm on this location.

3             MS. DINGLELINE:   That's right.

4             CHAIRMAN ROISMAN:  Those other matters are  
5     not currently in front of us.  So I know you're short  
6     on time.  I would suggest that you stay focused on  
7     those items that we are going to be addressing shortly.

8             MS. DINGLELINE:  Okay.  Before -- did I take  
9     it off?  Before I, I finish what I wanted to say, I do  
10    want to address the issue of me being double-booked by  
11    the Public Utility Commission.  Are you aware that my  
12    other hearing is a Public Utility Commission hearing in  
13    Bradford Solar?  And, you know, I don't know why you  
14    folks double-booked me, but you act like it's my fault  
15    that I have some other folly to go to when it's --

16            CHAIRMAN ROISMAN:  Not at all.  Ms.  
17    Dingledine, you brought this to our attention.  You  
18    asked us to move this hearing to 9:00 o'clock.  We  
19    moved it to 8:30.  If you thought that we should cancel  
20    this hearing or that we should cancel the other  
21    hearing, you had an opportunity to ask us to do that.  
22    We didn't double-book you.  You will note, we note that  
23    you entered the other case only last Friday.  And so,  
24    if you thought that this hearing shouldn't proceed, we  
25    did exactly -- we did more than you asked us to do.  So

1 I'm sorry, but I don't feel that, that we are at fault  
2 if the hearing is taking longer than what you had  
3 thought it was going to take.

4 MS. DINGLELINE: I asked for, I asked for  
5 more time. You gave -- you shorted me an hour on the  
6 other end, on the other case. You didn't give me what  
7 I asked for there. I just, I just find this  
8 outrageous. And I'm sorry. It needs to be on the  
9 record. It's an objection. I didn't cancel the  
10 hearing because we need them not to cut the trees.  
11 That's the problem. That's why this is so important.

12 So I will move on, and I would like you to look at  
13 the affidavit of Joseph Schoenig. It, it details the  
14 fact that Kobelia was up there, and there have been  
15 surveyors, there have been all sorts of people, and  
16 Kobelia told Joseph Schoenig that they're going to cut  
17 down the, that he was there as well hired for three  
18 areas, the Chelsea solar, the Apple Hill solar and then  
19 the orchard, the apple orchard that is Lot 1. So this  
20 is three different things happening, not only two, and  
21 we are asking that the TRO extend to the entire project  
22 sites.

23 They are not allowed to do any site preparation.  
24 Therefore, they can't instead put a building that's 160  
25 feet long and 30 feet high and 16 feet deep to block my

1 client's view instead of putting the trees. The trees  
2 are part of his application, and he's obligated to put  
3 them in, and he can't do anything until he gets a CPG,  
4 including putting up a building and a hemp farm instead  
5 of the buffer trees that he was going to be planting.

6 That's what we are asking for. Please extend it  
7 to make sure it covers Lot 1, and, also, if the TRO  
8 issues, we would like it to issue to Kobelia and any  
9 other contractors so that we don't have any concerns  
10 about any miscommunications if somebody goes and cuts a  
11 bunch of trees because they didn't get the message.  
12 Thank you very much.

13 CHAIRMAN ROISMAN: Okay. And anything  
14 further in the way of evidence, Ms. Dingleline, beyond  
15 what you've already put in the record?

16 MS. DINGLELINE: Not at this time, but I  
17 would reserve the right, if there are any further  
18 proceedings, to provide -- we have photographs that  
19 pertain to the affidavit. There just wasn't time to  
20 put the information together in this short timeframe.  
21 So we're happy to continue to engage, thank you, but I  
22 have nothing further.

23 CHAIRMAN ROISMAN: Okay, Ms. Aceves, does the  
24 Department have anything to offer in the way of  
25 evidence at this point?

1 MS. ACEVES: We do not. Thank you.

2 CHAIRMAN ROISMAN: Okay. Mr. Melone?

3 MR. MELONE: Thank you, Mr. Chairman. I'd  
4 like to move for the admission of the affidavit, my  
5 affidavit that was filed last night. We're going to  
6 designate that as PLH Exhibit 1. And the affidavit of  
7 Kobelia, we're going to designate that as Exhibit 2.  
8 They each have the nine attached photos as Exhibit 2-1,  
9 2-2, etc.

10 CHAIRMAN ROISMAN: Okay. Ms. Aceves, any  
11 objection to the admission of those documents?

12 MS. ACEVES: No objection.

13 CHAIRMAN ROISMAN: Mr. Einhorn?

14 MR. EINHORN: I have no objection.

15 CHAIRMAN ROISMAN: Ms. Dingleline?

16 MS. DINGLELINE: No objection.

17 CHAIRMAN ROISMAN: Okay. They will be  
18 admitted.

19 (Exhibits marked PLH 1 and 2 were admitted into  
20 the record.)

21 <https://epuc.vermont.gov/?q=downloadfile/415953/150086>

22 <https://epuc.vermont.gov/?q=downloadfile/415954/150086>

23

24

25

1           CHAIRMAN ROISMAN: Mr. Melone, who are you  
2 calling as your first witness?

3           MR. MELONE: Mr. Chairman, the only one  
4 that's available right now is me. I just sent a text  
5 to see if Mr. Kobelia is available to join us, but I  
6 certainly am available right now if anyone wants to ask  
7 me questions.

8           CHAIRMAN ROISMAN: All right. Commissioner  
9 Cheney, will you swear in Mr. Melone?

10                   THOMAS MELONE,  
11           Having been duly sworn to tell the truth,  
12           testifies as follows:

13           CHAIRMAN ROISMAN: Mr. Melone, do you have  
14 anything preliminarily that you need to do, like  
15 verifying that the affidavit is yours or anything to  
16 that nature?

17           MR. MELONE: Well, I can verify that the  
18 affidavit that was filed as PLH Exhibit 1 is mine, it's  
19 true and accurate, and I'm available for any questions  
20 on it.

21           CHAIRMAN ROISMAN: Okay. Ms. Dingledine, do  
22 you have any questions for Mr. Melone?

23           MS. DINGLELINE: Thank you, Your Honor. I  
24 do.

25

1                    CROSS-EXAMINATION BY MS. DINGLEEDINE

2        Q.    Mr. Melone, your current proposal for Apple Hill  
3        Solar includes buffer trees to be planted on Lot 1 that  
4        is part of the residential development known as Apple  
5        Hill, correct?

6        A.    That's, that's not correct. We amended the  
7        proposal, and those are no longer in it, right?

8        Q.    Well, we had a conversation a couple weeks ago  
9        wherein I called you to verify that, even though the  
10       PUC had denied your request to amend your petition as  
11       you tried to on the day before the oral argument. Do  
12       you remember saying to me, well -- I said, "Why are you  
13       doing this?", and you said, "Well, they don't want  
14       trees planted. So they're going to get a nice, big  
15       building".

16            Do you remember saying words just like that or to  
17       that effect in our telephone conversation when I  
18       verified you were still going to plant hemp and put the  
19       building up?

20       A.    No. That is categorically untrue.

21       Q.    Okay. Would you agree with me that the building  
22       that you are proposing for up there is designed to  
23       completely screen the view of Libby Harris from her  
24       home?

25       A.    That's not true. The entire plan has nothing to

1 do with the neighbors. It's purely to make productive  
2 use of the property for an agricultural use.

3 MS. DINGLEDINE: I don't have anything  
4 further, Mr. Roisman.

5 CHAIRMAN ROISMAN: Thank you, Ms. Dingledine.  
6 Mr. Einhorn?

7 MR. EINHORN: I don't have any questions.  
8 Thank you.

9 CHAIRMAN ROISMAN: Commissioner Hofmann?

10 COMMISSIONER HOFMANN: Thank you. Mr.  
11 Melone, I'm a tad confused. Are you now saying this  
12 area, this place you have the CPG for, is now just for  
13 your sheep and hemp, or are you continuing to pursue  
14 your solar project?

15 MR. MELONE: We are still continuing to  
16 pursue the petitions for a CPG.

17 COMMISSIONER HOFMANN: Thank you. I have  
18 nothing further.

19 CHAIRMAN ROISMAN: Commissioner Cheney?

20 COMMISSIONER CHENEY: Yes. I'm looking at  
21 Page 6 of your testimony where you say the landowner's  
22 activities would serve the purpose of and are done for  
23 the purpose of using the land for productive use  
24 unrelated to the purpose of constructing an electric  
25 generation facility.

1           How do the purposes that you mentioned in the  
2 beginning, which I assume were agriculture, hemp  
3 growing, sheep farming, etc., not overlap or make it  
4 impossible to also construct an electric generation  
5 facility or vice versa?

6           MR. MELONE: Well, I guess, the first thing  
7 is that, for the next year, two, three years, the land,  
8 if we didn't put it to use for an agricultural use,  
9 would potentially be unused. In terms of the question  
10 of compatibility, certainly, sheep farming is, in fact,  
11 compatible with, with the solar project. Hemp is  
12 potentially. Depending upon what the row spacing is,  
13 we certainly can put hemp around the facility. And,  
14 certainly, on Lot Number 1, which is not subject to any  
15 CPG, that's completely unconstrained by, by a Section  
16 248 proceeding.

17           COMMISSIONER CHENEY: Please continue.

18           MR. MELONE: Yeah. But, but what our basic  
19 point is is that, right now, we have let the property  
20 sit for no purpose or for no productive use. Now hemp  
21 is a viable crop, and, certainly, in the interim and  
22 even, you know, continuing if there is a solar facility  
23 up there, we would still intend to either have a  
24 combination of hemp where we can and/or sheep that  
25 would coexist with any potential solar facility that

1 would be there.

2 COMMISSIONER CHENEY: So you are going into  
3 the sheep-farming business?

4 MR. MELONE: We have enough -- yeah, I guess,  
5 the answer to that question is "yes", because we have,  
6 like I think we said in the amendment, we have a  
7 sufficient body of solar projects in the northeast  
8 where it makes sense for us to own the sheep. I mean,  
9 we actually own sheep already in California for solar  
10 projects there. We've owned sheep there for probably  
11 three or four years. So it's not new to us in terms  
12 of, you know, owning and using sheep for solar, which  
13 is what we intend to do here.

14 And, in terms of hemp, it basically just became a  
15 viable crop in 2018 when, when it was legalized across  
16 the country.

17 COMMISSIONER CHENEY: Would the activities  
18 that were necessary for sheep farming and hemp growing  
19 coincide with the activities necessary to build a solar  
20 site in this case, the clearing of trees?

21 MR. MELONE: Well, I mean, certainly, if you  
22 have a piece of property that has trees on it, you're  
23 not going to be able to grow hemp or put sheep there,  
24 unless the trees are cleared. Same thing with a solar  
25 facility. If there are trees on the site, you need to

1 clear the trees to put solar.

2 COMMISSIONER CHENEY: That's all I have.

3 CHAIRMAN ROISMAN: Mr. Landis-Marinello, do  
4 you have any questions for Mr. Melone?

5 MR. LANDIS-MARINELLO: How much clearing  
6 would happen if it continues?

7 MR. MELONE: I'm going to have to check.  
8 There is a plan which we gave to, to Kobelia.  
9 Basically, Lot Number 1, all 5.63 acres would be  
10 cleared there. That's not subject to the CPG petition.  
11 And at the -- I mean, I think most of the other parcel  
12 would end up being cleared, but not all of it yet.

13 CHAIRMAN ROISMAN: Commissioner Hofmann?

14 COMMISSIONER HOFMANN: Little bit of a  
15 follow-up on that, Mr. Melone. Is the clearing  
16 continuing while we're having this, since you have  
17 gotten notice of this hearing?

18 MR. MELONE: Yes, it is, Commissioner  
19 Hofmann.

20 CHAIRMAN ROISMAN: Mr. Landis-Marinello,  
21 anything else?

22 MR. LANDIS-MARINELLO: Yes. I'm just trying  
23 to remember some of the history with the underlying CPG  
24 cases. I believe there is an amendment that lessened  
25 the amount of tree clearing that would occur. If you

1 go forward with the plan you have now, would it be more  
2 than the amount of clearing than was agreed to in the  
3 last amendment in that project?

4 MR. MELONE: As of now for the Chelsea solar  
5 petition, it would not be any more. As for the Apple  
6 Hill solar project, that's reflected in the amendment  
7 we filed in March, and that does clear the entire site  
8 or what would have been the entire site of that  
9 project.

10 MR. LANDIS-MARINELLO: But that amendment  
11 wasn't approved or allowed, correct?

12 MR. MELONE: Well, I think we have a, a legal  
13 disagreement on whether there is, there is the  
14 discretion to allow or approve the amendment, and we  
15 briefed that issue.

16 MR. LANDIS-MARINELLO: And so I'm just trying  
17 to figure out. Is it your position that there could be  
18 an agreement with parties to only clear, say, ten acres  
19 in order to do the CPG project, but then you could  
20 additionally clear another ten acres for sheep farming  
21 at that same site?

22 MR. MELONE: Well, we aren't asking for that.  
23 We're not in that position, because we filed the  
24 amendment to the CPG application, and it indicated back  
25 in March that we now were, or that the site would, in

1 fact, be cleared by the time any solar facility might  
2 be approved or, or considered.

3 MR. LANDIS-MARINELLO: And I guess I'm  
4 asking, Is that hypothetical that that's your position  
5 that you can do that?

6 MR. MELONE: Well, yeah, our position is that  
7 we can amend the CPG application at any time, yeah,  
8 certainly before there's a final order, and that's what  
9 we did.

10 MR. LANDIS-MARINELLO: But I guess what I'm  
11 getting at is it sounds to me like your position here  
12 is you don't need our approval for that amendment,  
13 because you're arguing that the sheep farming is  
14 outside our jurisdiction. Is that correct?

15 MR. MELONE: Well, the amendment was not  
16 seeking approval for, for the clearing. I mean, the  
17 agricultural activities are completely independent. So  
18 the amendment was just to reflect the fact that now the  
19 solar project would have to be evaluated based on the  
20 agricultural use that was going to be put into place.

21 MR. LANDIS-MARINELLO: I don't have anything  
22 more.

23 CHAIRMAN ROISMAN: Okay. Mr. Tousley?

24 MR. TOUSLEY: I don't have anything. Thank  
25 you, Mr. Chairman.

1           CHAIRMAN ROISMAN: Mr. Melone, the, the two  
2 sites here, that is, the sites identified in the CPG  
3 applications, are the subject of standard offer  
4 contracts, correct?

5           MR. MELONE: That's correct, Mr. Chairman.

6           CHAIRMAN ROISMAN: And, pursuant to those,  
7 you had obligations to be diligent about pursuing  
8 getting the CPGs and getting the projects built,  
9 correct?

10          MR. MELONE: Correct.

11          CHAIRMAN ROISMAN: Can you tell me, what  
12 steps have you taken to effectuate the completion of  
13 those projects in terms of ordering equipment or any  
14 other activities that you've engaged in so that, if and  
15 when you get a CPG, the projects are ready to start  
16 construction?

17          MR. MELONE: Well, at, I think it was,  
18 probably 2018, maybe, when the Apple Hill solar CPG was  
19 granted that we ordered the solar modules for that  
20 site. Those have since been redeployed to other sites.  
21 In terms of equipment, we ordered the inverters or the  
22 inverter for one of the projects probably in 2016,  
23 which is in the process of now being redeployed to, to  
24 another site, finally. We have paid for the upgrades  
25 for Green Mountain Power for the line extension to the

1 extent of \$850,000. Those are the ones that come to  
2 mind.

3 We certainly have always diligently pursued trying  
4 to get a solar project on there, but we've also learned  
5 from our experiences in Massachusetts in particular  
6 about how solar can coexist with agricultural  
7 activities, and we have some projects planned for  
8 there, specifically with solar and agricultural  
9 activities at the same time.

10 CHAIRMAN ROISMAN: And I take it it is still  
11 your intent, if you are able to succeed in the various  
12 legal proceedings that you're engaged in, to put the  
13 two solar projects on these sites that you've applied  
14 for and for which CPGs have been sought from the  
15 Commission, correct?

16 MR. MELONE: Correct.

17 CHAIRMAN ROISMAN: And, tell me, what have  
18 you done, other than starting the site preparation for  
19 the sheep farm and the hemp, what have you done to  
20 prepare for that operation?

21 MR. MELONE: Well, in terms of the sheep  
22 farm, we have an arrangement with, with a woman named  
23 Ashley Bridge. I think we mentioned that in the  
24 amendment. The plan was for her to basically be the  
25 one that maintains the sheep on the site, brings the

1 sheep from there when we need them to our other solar  
2 sites in Connecticut, Vermont, and Massachusetts.

3 And then, in terms of hemp, I have a good friend  
4 of mine who is a significant investor in a hemp company  
5 in New York, and we've agreed to work with them to  
6 provide the seeds and, and the growing expertise, and  
7 we have already filed our application with AAFM for  
8 hemp farming, and, just so we, you know, address any  
9 possible issue, we've, we've sought permission or a  
10 license to grow on the entire site.

11 CHAIRMAN ROISMAN: And these arrangements  
12 that you have with the woman who would be tending the  
13 sheep and with the, the hemp company, do you have  
14 binding contracts?

15 MR. MELONE: We haven't -- yeah. No, we  
16 don't have any binding contracts yet. When we were --  
17 at the beginning of the pandemic, once everything was  
18 put on hold, we decided that we needed to see what the  
19 actual timing would be for our ability to clear the  
20 site and have it ready and for, buy the sheep on our  
21 behalf. Same thing with hemp, I mean, we were close.  
22 But, you know, we don't have any binding contracts  
23 right now.

24 CHAIRMAN ROISMAN: And on your current  
25 schedule -- excuse me. Based upon what you currently

1 are anticipating, what is the soonest, if there were no  
2 TRO issued, what is the soonest that you could have the  
3 site cleared under your current plans and have sheep on  
4 the site and hemp seeds planted?

5 MR. MELONE: Well, we had initially planned  
6 to bring the sheep in in September, but the pandemic  
7 has set that, you know, clearly set that back. So I  
8 don't have an exact timeframe for you. We would, we  
9 would try to get them -- well, for the hemp, clearly,  
10 we had intended to be ready for the next growing  
11 season. So, as soon as we're, we have the ability to  
12 start growing, that's when we would do that. I would  
13 anticipate that would be next year. In terms of how  
14 soon the site could be cleared, that, I'd have to get  
15 an answer from, from Bob Kobelia on.

16 CHAIRMAN ROISMAN: Okay. So is it, is it  
17 fair to say that, if logging didn't continue at this  
18 time, and/or you would not automatically fail to meet  
19 some built-in deadline that you have for either the  
20 sheep or the hemp, but that those are things that look  
21 like they're more likely to happen starting in 2021, in  
22 the case of the hemp when the growing season starts,  
23 and the sheep -- I'm sorry. I don't know enough about  
24 sheep to know when you can start grazing sheep, if you  
25 could do it in the middle of the winter or not. But is

1       that, is that fair; we're talking 2021, not 2020?

2               MR. MELONE: Well, I think it's likely we're  
3       talking 2021 for the actual implementation, but  
4       everything takes a little longer now to order  
5       equipment, to get stuff built. We're not going to  
6       order, order equipment or sheep, unless we know for  
7       sure we have a place to put them. And this is clearly  
8       the best time of year. This is clearly the best time  
9       of year in Vermont to clear the trees.

10              I mean, it's got pushed back. It could be in the  
11       winter, which would be more expensive for us. It would  
12       be more difficult. So I, I think there's clear harm to  
13       us if there's any delay, any further delay at this  
14       point, and it takes a long time to get people to  
15       actually do this work now.

16              CHAIRMAN ROISMAN: So I take it that your,  
17       your logger is not recommending that you do your  
18       logging in the winter when the ground is frozen and  
19       when it's easier to bring the large equipment in  
20       without worrying about mud and all that other stuff,  
21       but that he prefers to when the ground might be more  
22       soft and more difficult to traverse. Is that fair that  
23       he's not telling you that?

24              MR. MELONE: I'll have to let him answer that  
25       question. He has never told me that one way or the

1     other. I mean, but, from prior experience of clearing  
2     solar sites, it seems to me the winter is the most  
3     difficult time to remove the, the stumps and the roots  
4     and actually get, get the soil prepared for  
5     agricultural use, and that's the difference.

6             There's a lot more to do to get the soil prepared  
7     for agricultural use as opposed just to build the farm,  
8     solar facility, because for a solar facility you could  
9     leave stumps in, you can cut them to the ground,  
10    because you've got to put your posts in. For an  
11    agricultural use you can't do that. You've got to get  
12    the soil ready for, for the planting.

13            CHAIRMAN ROISMAN: Okay, all right. And --

14            MS. DINGLELINE: Mr. Roisman, I'm so sorry to  
15    interrupt. I have to go to the other hearing, and I  
16    just have two things to tell you and to ask Mr. Melone.  
17    Would I be able to interrupt?

18            CHAIRMAN ROISMAN: Yes, Ms. Dingledine.

19            MS. DINGLELINE: Thank you, Mr. Roisman.

20            FURTHER EXAMINATION BY MS. DINGLELINE

21    Q. Mr. Melone, you previously testified when I talked  
22    with you a moment ago that you aren't going to plant  
23    trees on the northern side of Lot Number 1, and I'm  
24    confused. And you call, you call Lot Number 1 the  
25    orchard lot, because there's an apple orchard on it,

1 correct, right?

2 A. Correct.

3 Q. Okay.

4 A. Right.

5 Q. Now, Mr. Roisman, I would like to admit the  
6 amendment that Mr. Melone was talking about with you a  
7 moment ago that he brought in the day before the oral  
8 argument. I would like to submit it to you, because in  
9 the Page Number 3 of the amendment itself that Mr.  
10 Melone wrote in Paragraph 6, it states, "No additional  
11 plantings on the north side of the orchard lot are  
12 needed for visual screening and are removed from the  
13 plans", because he's building the big hemp building  
14 instead. Number, Paragraph Number 7, talks about the  
15 sheep houses at the south are expected to be painted in  
16 vivid colors and would distract from any potential view  
17 of the project.

18 Mr. Melone, my question is, Were you mistaken a  
19 little while ago when you said, Oh, there aren't any  
20 trees to be planted on the north side of Lot 1 to  
21 screen Ms. Harris's view?

22 A. No. I think what you read clearly says that there  
23 are no trees planned for that area.

24 Q. Fine. But you had planned them, and now you are  
25 saying, if you got your amendment, you were not going

1 to be planting the trees, which is part of your plan,  
2 because you're putting the building there instead,  
3 correct?

4 A. I view our plan as the plan as amended, that --

5 Q. So, even though the PUC has denied your amendment,  
6 you're doing it anyway?

7 A. Well, I don't understand your question. I mean --

8 Q. Okay. So you, you came in the day before oral  
9 argument and said, I'm going to amend my plan, and I'm  
10 not going to plant trees to, to screen Libby Harris's  
11 view. We're not going to need that anymore, because  
12 I'm putting this huge building up, right?

13 A. The amendment reflects what work is planned to be  
14 done for the agricultural use.

15 Q. Okay. Well, and then you had Mark Kane's  
16 testimony on Page 4 of 32 pages of his fourth  
17 supplemental prefiled direct testimony. Question  
18 Number 6, was, "Is the project visible from any  
19 neighboring residences?" And the answer of Mr. Kane  
20 was, "No, the project is not visible from any  
21 neighboring residences. The project was already fully  
22 screened by existing natural vegetation and the  
23 supplemental landscape mitigation plan on the north  
24 side of the orchard lot, as explained in my third  
25 supplemental testimony. The addition of the new

1 storage facility for a hemp-growing operation serves to  
2 reinforce my original conclusion, i.e. that the project  
3 will not be visible from any residences". Here's the  
4 important part. "And it", meaning the new building,  
5 "It obviates the need for any supplemental plantings on  
6 the north side of the orchard lot and, two, using any  
7 black panels for the project".

8 Would you agree with me that, instead of planting  
9 trees that you were going to to buffer and screen Ms.  
10 Harris's view, you've decided on your own to remove  
11 that from your plan, because that's what you and Mark  
12 Kane are saying you're doing, because you're going to  
13 actually build a hemp building, right?

14 A. I think the amendment's clear. We described what  
15 we were going to do, and you accurately read what Mark  
16 Kane says. I don't understand what the question is.

17 Q. So, instead of the trees that you planned to put  
18 there and you told the PUC you would be planting on the  
19 north side of the orchard lot, which is known as Lot  
20 Number 1 which is near the boundary line of your  
21 abutting property to Libby Harris, your plan said you  
22 were going to put a row of trees there, and, instead,  
23 you're building a building, and that's what this  
24 testimony of Mark Kane says, and it's what your  
25 pleading that you signed under Rule 11 as a lawyer in

1 Vermont, correct?

2 A. Yes, that's what it says, that the trees are no  
3 longer needed, and they were taken off the plan.

4 Q. Yeah, but did the PUC say you could take them off  
5 the plan and build the building instead?

6 A. The PUC --

7 Q. They denied your amendment application, correct?

8 A. Again, we have a legal dispute as to whether the  
9 amendment is valid when it's defined. I think this is  
10 way outside this proceeding.

11 MS. DINGLELINE: I'll leave it there, Your  
12 Honor, but I would like to admit or have the PUC take  
13 judicial notice of this document. I'll be happy to  
14 mark it as Intervenor's Exhibit Number 2. I would like  
15 to put this whole packet in so that you can see for  
16 yourself all the plans, all the pictures showing the  
17 huge building in front of Libby's view of the beautiful  
18 monument and her lovely landscape view, and I will,  
19 I'll leave it there. You would admit that --

20 CHAIRMAN ROISMAN: Mr. Melone, do you have  
21 any objection to having --

22 MR. MELONE: No, I have no objection. I  
23 think, as long as the entire amendment is admitted, I'm  
24 fine with that.

25 CHAIRMAN ROISMAN: Okay. Ms. Aceves, any

1 objection?

2 MS. DINGLELINE: Your Honor, just one last  
3 question of Mr. Melone.

4 CHAIRMAN ROISMAN: Wait. Let's, just a  
5 moment. Let's finish deciding whether this is being  
6 admitted, Ms. Dingledine.

7 MS. DINGLELINE: Oh, I beg your pardon. I'm  
8 so sorry.

9 CHAIRMAN ROISMAN: Ms. Aceves, any objection  
10 to admitting this document?

11 MS. ACEVES: No, no objection.

12 CHAIRMAN ROISMAN: Mr. Einhorn?

13 MR. EINHORN: No objection.

14 CHAIRMAN ROISMAN: Okay. It will be admitted  
15 as Intervenor's Exhibit 2 now, Ms. Dingledine.

16 (Exhibit marked Intervenor's 2 was admitted into  
17 the record.)

18 <https://epuc.vermont.gov/?q=downloadfile/416526/150086>

19

20 BY MS. DINGLELINE:

21 Q. Thank you. Just one last question, Mr. Melone.  
22 So me reading your amendment and Mark Kane's testimony,  
23 does that jog your memory at all and give you any  
24 different recollection of the phone call that I had  
25 with you a couple weeks ago wherein you said, "They

1     don't want trees, so they're going to get a nice, big  
2     building", or words to that effect? Does that jog your  
3     memory that that was not categorically false when I  
4     stated that, that it actually is true?

5     A.    It is not true. I never said that.

6                 MS. DINGLEDINE: I'll leave it there, Your  
7     Honor. Thank you. And I will have to leave. Thank  
8     you.

9                 (Ms. Dingledine leaves the hearing.)

10                CHAIRMAN ROISMAN: Okay. Thank you, Ms.  
11     Dingledine. Mr. Melone, I think we were, we were  
12     discussing the, the sheep and the hemp and preparations  
13     for that and the timing of that. What is the, what is  
14     the plan that you have with regard to the size of the  
15     operation that you're proposing now if you were to get  
16     the CPGs approved for the two sites? Would you have to  
17     cut back on the amount of the hemp, and would you have  
18     to cut back on the number of sheep that would be at the  
19     site, or would it still be the, the amount of hemp and  
20     sheep that a fully cleared site would accommodate?

21                MR. MELONE: We would not have to cut back on  
22     the hemp that we indicated in the amendment that we'd  
23     be planting, because that's on the adjacent lot. We  
24     would, we would not have to cut back on the sheep,  
25     because there would still be plenty of room within the

1 rows and on the property for 30 or 40 sheep to live on  
2 that site. So the, you know, as far as we can tell at  
3 the moment, that we wouldn't have to cut back on it.

4 You know, the solar project, if it ever gets  
5 approved, in fact, would, you know, continually shrink  
6 as module efficiency improves. I think the last, last  
7 iteration of one of the, of the, the solar projects --  
8 I can't remember if it was Chelsea or Apple Hill --  
9 they assumed a solar wattage module or a wattage of a  
10 solar module in the high 300s. Now, you know, we're  
11 looking at getting modules that are rated 460 watts.  
12 Next year it will be, say, 10 percent greater than  
13 that. So that, just by definition, is going to shrink  
14 the size of what's occupied by the solar modules,  
15 providing more room for the sheep.

16 So, at this point in time, I don't see any, any  
17 cause to have us to have to reduce the size of either  
18 the sheep operation or the hemp operation that's  
19 described in the amendment if one or both of the CPGs  
20 were approved.

21 CHAIRMAN ROISMAN: All right. And you said  
22 something about the, about the clearing for the hemp.  
23 Are, did I understand you to say that the only area  
24 that you're clearing for the hemp is the area that's  
25 not part of the land that the CPG is proposing to use?

1           MR. MELONE: That's what's described in the  
2 amendment, the hemp, but we have applied for a license  
3 to grow hemp on the rest of the site, because it may  
4 be, depending on the way the pandemic goes, that, you  
5 know, we just can't get a person in there to establish  
6 the sheep when we want to, in which case then we would  
7 plant hemp across the entire property.

8           CHAIRMAN ROISMAN: But, currently, you know,  
9 as you know, litigation is always a snapshot. This is,  
10 it's this moment in time. At this moment in time, your  
11 plans for hemp include clearing an area that is not  
12 part of the area on which you're proposing a, a, to  
13 construct a solar project, correct?

14          MR. MELONE: Well, that's what was described  
15 in the amendment. I mean, our current plan, you know,  
16 from a business perspective, we have to have the  
17 ability to decide whether, because of delays in getting  
18 the sheep farm up and running, maybe we plant hemp  
19 there for a year. But it depends on how, how the facts  
20 and conditions evolve over the next few months, which  
21 we don't know, but we're going to do either what we've  
22 said in the amendment, or, if we have the option, or  
23 we're, we're retaining the option, because we applied  
24 for the greater license, to do hemp on the entire site,  
25 because that may be an easier thing to do during the

1 pandemic.

2 CHAIRMAN ROISMAN: And you testified a few  
3 moments ago, you were talking about, I think, 30 or 40  
4 sheep. Is that the number of sheep that you're  
5 proposing at this time is, is what you want to have  
6 once you've got the land cleared?

7 MR. MELONE: Yes, that's right.

8 CHAIRMAN ROISMAN: And for how long does the  
9 land have to sit and regrow grass for the land to be  
10 usable for sheep after the forest, after the clearing  
11 has been done?

12 MR. MELONE: Well, that, I don't know. I  
13 mean, that's why we've been assuming that we would  
14 clear in the summer and plant the grass now, and then  
15 that would allow the option to bring in the sheep when  
16 we can, and it would also allow for us to, you know, if  
17 we can't bring the sheep in right away, to plant hemp  
18 for, for the next year.

19 CHAIRMAN ROISMAN: But, when I asked you  
20 earlier about how long the clearing was going to take,  
21 you said that you, you really needed your logger to  
22 testify to that, that that's not knowledge that you  
23 have. Is that true?

24 MR. MELONE: That's true. So I don't know if  
25 it can, you know, it's done in two weeks, I mean, four

1 weeks. I mean, I don't think it would be any more than  
2 six weeks from now, and that all works out fine,  
3 because I think there's time to then grow grass before  
4 it gets too cold in Vermont.

5 CHAIRMAN ROISMAN: Okay.

6 MR. LANDIS-MARINELLO: Chairman Roisman, I'm  
7 sorry to interrupt. I just want to make sure that  
8 we're aware of the time, that the court reporter may  
9 need a break as we've been going more than two hours.

10 CHAIRMAN ROISMAN: Yeah, I'm almost finished  
11 here, and I was hoping to finish with Mr. Melone before  
12 we took a break, Mr. Landis-Marinello. Mr. Melone.

13 MR. MELONE: Yes.

14 CHAIRMAN ROISMAN: I have not seen on our  
15 screen that your logger has, pardon the pun, logged in.

16 MR. MELONE: Okay. Let me see. Bob, are you  
17 there? I mean, I got a text that says he was  
18 supposedly on the call, but muted.

19 CHAIRMAN ROISMAN: Okay. Well, I'm not  
20 seeing him here.

21 MR. MELONE: Yeah, I don't see him either.

22 MR. EINHORN: Mr. Chairman, if you're  
23 finished, I do have -- this is Don Einhorn. I'm sorry.  
24 I do have some questions for Mr. Melone based on the  
25 Commission's questions at the appropriate time at your

1 discretion.

2 CHAIRMAN ROISMAN: All right. Well, why  
3 don't we take a break now for 15 minutes? Mr. Melone,  
4 see if you can find your logger, because I'm concerned  
5 that there's testimony that can only come from him that  
6 seems relevant to the issues that are in front of us,  
7 and it would be good to have him, even if it's only on  
8 the phone so that, first of all, we can't admit his  
9 exhibit if anyone wants to cross-examine him and he's  
10 not available, and, secondly, I think it would help  
11 fill out the record. That would give us a little break  
12 here.

13 So we're going to break until 10:55, and you all  
14 can either just mute and turn off your cameras, or you  
15 can log out and then log back on again using the same  
16 link that you used to log on before. We're in  
17 adjournment until 10:55. Thank you.

18 (A recess was taken from 10:38 a.m. to 11:20 a.m.)

19 CHAIRMAN ROISMAN: We are now going to move  
20 to Mr. Einhorn, who is the attorney for the Agency of  
21 Natural Resources who had some questions for Mr. Melone  
22 based on the questions that I had asked him and the  
23 answers that he gave to those. So, Mr. Einhorn --

24 MR. KOBELIA: I'll just sit off to the side.

25 CHAIRMAN ROISMAN: Okay, all right. You'll

1 be called on, you'll be sworn in as a witness, and  
2 you'll be answering questions from all of the parties.  
3 Thank you. Thanks for your patience.

4 MR. KOBELIA: Whenever you're ready.

5 CHAIRMAN ROISMAN: Okay. Mr. Einhorn?

6 CROSS-EXAMINATION BY MR. EINHORN

7 Q. Thank you, Mr. Chairman. Good morning, Mr.  
8 Melone.

9 A. Good morning, Attorney Einhorn.

10 Q. I have a few questions for you in follow-up to  
11 some of the question-and-answer you had with the  
12 Commission. So you are familiar with the amendment  
13 that you filed on March 23rd for Apple Hill, which, at  
14 this point, has been admitted into evidence as  
15 Intervenor Exhibit 2, correct?

16 A. Correct, yes.

17 Q. And you, you, in fact, you signed that filing,  
18 correct?

19 A. Correct.

20 Q. And Chris, Chris Little, or Christopher Little, is  
21 your project manager for that project, correct?

22 A. Correct, yes.

23 Q. And that filing included prefiled testimony from  
24 him?

25 A. That's right.

1 Q. And in his prefiled testimony he represented that  
2 the, the hemp growing, the intent was to register with  
3 Ag. for hemp growing for the 2021 season; is that  
4 correct?

5 A. That's right.

6 Q. And so, as I understand it, in that regard it  
7 sounds like your plans haven't changed as far as  
8 accelerating that. If anything, it might even be  
9 pushed out further?

10 A. Well, no, that hasn't been pushed out. I mean, we  
11 have filed the application with AAFM. So there is, you  
12 know, there's really no intention for it to go past  
13 that season. I mean, that, that's why we're trying to  
14 get the site ready now.

15 Q. Understood. But there's no intention to grow hemp  
16 in 2020?

17 A. Right now, no. I mean, you know, the opportunity  
18 arose, which I don't, I don't see it arising at this  
19 time we would do it, but right now there's no intention  
20 to do that. It doesn't mean to say, if we could do it,  
21 you know, we, in fact, might, but it's --

22 Q. But that wasn't the plan with the amendment that  
23 was filed, correct?

24 A. That's right.

25 Q. And you're presently asking the Commission to

1 reconsider that amendment, correct?

2 A. Yes.

3 Q. In, in that amendment there was a revised site  
4 plan sponsored by your engineer, Ian Jewkes, and, and  
5 that site plan was actually attached to Mr. Popp's  
6 testimony and referred to in, in his, or attached to  
7 his affidavit and referred to, and that's what has been  
8 marked as ANR-7. Are you familiar with that plan?

9 A. Yes.

10 Q. And that shows the area to be cleared for the  
11 sheep-grazing activities in, in the arrow, Apple Hill  
12 solar facility location, correct?

13 A. That's correct.

14 Q. And part of the amendment at that time was a  
15 statement in the document you filed, and I believe in  
16 Mr. Little's testimony, that said, for purposes of the  
17 CPG application for Apple Hill, there's no longer the  
18 need to clear trees, correct?

19 A. That's right.

20 Q. And, and that's because you were contemplating  
21 clearing the trees for the sheep grazing?

22 A. Correct.

23 Q. And so would you agree with me that that means  
24 that the area that needed to be cleared for the Apple  
25 Hill project will have been cleared for the sheep

1 grazing?

2 A. Yes.

3 Q. And would you agree with me that, if the area  
4 wasn't cleared at all, you could not build the Apple  
5 Hill project, correct?

6 A. If there were trees there, yeah, we couldn't, we  
7 obviously could not put solar modules where trees were.

8 Q. Right. So the clearing is necessary to build the  
9 project?

10 A. Well, a cleared area is necessary to build the  
11 project.

12 Q. The Apple Hill project location that's proposed  
13 requires that trees be cleared before the Apple Hill  
14 solar facility can be constructed, correct?

15 A. Not as we amended it, no.

16 Q. I'm not talking about when, how, why they're  
17 cleared. I'm simply saying, You would agree with me  
18 that, before you can build a solar project where you  
19 want to build one for the Apple Hill facility, trees  
20 will need to be cleared?

21 A. I would agree that, if trees were there, they  
22 would have to be cleared; that's right.

23 Q. Are trees there today?

24 A. A lot of trees are there today. That's, yes.

25 Q. And those would need to be cleared before the

1 facility can be built?

2 A. Those would need to be cleared before the facility  
3 is built, correct.

4 Q. Okay. Your March 23rd amendment mentioned nothing  
5 about changing the Apple Hill project plan to reflect  
6 that stumps will have been removed in addition to the  
7 trees being cleared, but, as I understand, your  
8 response to Chairman Roisman is that your plan right  
9 now, the activities that are being conducted right now  
10 seems to involve removing stumps as well.

11 A. That's correct, yeah, and that's one difference  
12 between clearing for agricultural use and clearing for  
13 the solar use.

14 Q. Okay. So the removal of stumps was not  
15 contemplated for the solar use?

16 A. I think, in general, only if they were in the way  
17 of the posts.

18 Q. Yeah, that was, that was my recollection as well.  
19 Again, the sheep clearing site plan, we'll call it,  
20 that was included with that amendment, it shows the  
21 area to be cleared, it shows an area where buildings  
22 would be constructed on the southern end of the parcel,  
23 correct?

24 A. Correct, yes.

25 Q. It does not show any rare plant conservation area,

1 does it?

2 A. No.

3 Q. And it does not show the location of where plants  
4 that exist within what's depicted as the array area,  
5 correct?

6 A. That's correct.

7 MR. EINHORN: Okay. I don't have any further  
8 questions.

9 CHAIRMAN ROISMAN: Okay. Commissioner  
10 Hofmann?

11 COMMISSIONER HOFMANN: I have no further  
12 questions. Thank you.

13 CHAIRMAN ROISMAN: Commission Cheney?

14 COMMISSIONER CHENEY: No further questions.

15 CHAIRMAN ROISMAN: Ms. Aceves?

16 MS. ACEVES: No questions. Thank you.

17 CHAIRMAN ROISMAN: Mr. Landis-Marinello?

18 MR. LANDIS-MARINELLO: Nothing, thanks.

19 CHAIRMAN ROISMAN: Mr. Tousley?

20 MR. TOUSLEY: I have no further questions.  
21 Thank you.

22 CHAIRMAN ROISMAN: Well, Mr. Melone, we're  
23 now in a place where you can do redirect of yourself.  
24 I want to give you that opportunity, but we can do it  
25 without the Q-and-A aspects of it.

1           MR. MELONE:   Okay.

2           CHAIRMAN ROISMAN:   Is there anything that you  
3 would like to add to your testimony?

4           MR. MELONE:   I think there are only two short  
5 points that I would make clearer is just what I covered  
6 with Attorney Einhorn was that it is more expensive to  
7 do the agricultural use clearing.   You have to remove  
8 the stumps.   You have to make the ground ready to do  
9 it.   So, if, you know, that's something we'd need to do  
10 now to get ready for next year.

11          And, you know, I just wanted to emphasize the  
12 point that came up before that we already own sheep.  
13 We are already in the sheep business in the state of  
14 California.   So it's not something that we invented  
15 because of the Bennington projects.   I mean, we use  
16 sheep to clear or to, or to mow the grass wherever we  
17 can, because that's the right thing to do, and now  
18 we're just taking one step further so that, now that we  
19 have a whole bunch of projects in the northeast, we  
20 have to put the sheep somewhere, and this is the place  
21 we're planning to put it, because we own the land, and,  
22 right now, there's no prospect of anything else going  
23 there for the next couple of years, at least, and it  
24 can coexist with a solar farm if one eventually is put  
25 there.   That's all, Mr. Chairman.

1           CHAIRMAN ROISMAN: Okay. Mr. Melone, just  
2 one question about that last point that you made. It  
3 sounds as though the purpose of these sheep -- I mean,  
4 as you know, a typical sheep farmer raises sheep for  
5 one of two purposes, to shear the sheep and sell the  
6 wool or to harvest the sheep and sell the meat.

7           MR. MELONE: Yeah.

8           CHAIRMAN ROISMAN: It sounds like the sheep  
9 that you're proposing here is primarily sheep to be  
10 used to graze at solar projects and that it, maybe you  
11 want to use this area as a, as a way station for sheep  
12 that you would be transporting around to sites that  
13 have solar projects already built and that need sheep  
14 to graze there. Is that a fair characterization?

15          MR. MELONE: Yeah, I think that's, that's the  
16 primary aspect. Let me just see. I mean, I think it,  
17 the, the plan that the sheep farmer has given to us, I  
18 think, does contemplate also the wool being sold as a  
19 commodity, and some of the, and I guess some of the  
20 sheep as well would be sold. I guess, to the extent  
21 that there are new sheep that are born and that are  
22 more than we need, then she has that in the business  
23 plan, too, as far as a revenue stream.

24          So, I mean, so it really would be while we're  
25 getting into the business because of all the solar

1 farms that we operate in the northeast. The business  
2 plan does also contemplate the normal sheep operations  
3 and income of selling the wool and selling some of, of  
4 the sheep, you know, if it's more than we need in terms  
5 of sheep there.

6 CHAIRMAN ROISMAN: Okay, all right. Well,  
7 Mr. Melone, you're excused as a witness. You now can  
8 go back to being an attorney, and, if you would, you  
9 can call your next witness.

10 MR. MELONE: Thank you, Mr. Chairman. Robert  
11 Kobelia, I'd like to confirm that you're on, Bob.

12 MR. KOBELIA: I am on the phone, somewhat  
13 hampered because I don't have hands-free ability. I  
14 have to hold the phone to my ear to get a strong enough  
15 audio, but I can make this work. There's no more echo.

16 MR. MELONE: Okay, great. So I just want to  
17 ask you a couple of preliminary questions.

18 COMMISSIONER CHENEY: Well, I'm going to  
19 start first by swearing Mr. Kobelia in. Hello, Mr.  
20 Kobelia, thanks for going to all the trouble to get on.

21 MR. KOBELIA: Good morning.

22 COMMISSIONER CHENEY: Good morning. And I'm  
23 Margaret Cheney. I'm one of the three commissioners,  
24 and I'm going to swear you in, as I have all the other  
25 witnesses today. So I will ask you to answer this

1 question. Do you swear or affirm under penalty of  
2 perjury that the testimony you are about to give will  
3 be the truth, the whole truth, and nothing but the  
4 truth?

5 MR. KOBELIA: I do.

6 COMMISSIONER CHENEY: Thank you very much.

7 CHAIRMAN ROISMAN: Okay, Mr. Melone.

8 MR. MELONE: Thank you Mr. Chairman.

9 ROBERT KOBELIA,  
10 Having been duly sworn to tell the truth,  
11 testifies as follows:

12 DIRECT EXAMINATION BY MR. MELONE

13 Q. Bob, we submitted your affidavit to the  
14 Commission. We've marked it as PLH Exhibit 2, and all  
15 the photos, 1 to 9 as 2-1, 2-2, etc. Can you confirm  
16 that your affidavit is true and accurate?

17 A. I can, and I do.

18 Q. Thank you. And did you take the photos that were  
19 attached to your affidavit?

20 A. I did, with the very same phone I'm speaking on.

21 Q. And do those photos, or are those photos an  
22 accurate representation of the, of the image that's  
23 depicted there in each photo?

24 A. The music was nice, but it stomped on you. Could  
25 you repeat the question?

1 Q. Okay, sorry. Is the image in each of those photos  
2 an accurate representation of what, what the site  
3 represents?

4 A. I believe so.

5 Q. Okay.

6 A. I tried not to bias anything and show an accurate  
7 representation of what I've done heretofore.

8 MR. MELONE: Okay, all right. I'll turn him  
9 over for cross-examination, Mr. Chairman.

10 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, do you  
11 have any questions for this witness?

12 MR. EINHORN: I do, thank you, Mr. Chairman.  
13 I have just a few questions.

14 CROSS-EXAMINATION BY MR. EINHORN

15 Q. Hi, Mr. Kobelia, can you hear me?

16 A. I can hear you, and good morning to you.

17 Q. Great. Good morning to you as well. It's a  
18 beautiful day, at least up here in northern Vermont.

19 I, I read over your affidavit that was filed last  
20 night. I just have a few questions concerning what's  
21 contained in there.

22 A. Of course.

23 Q. The first being you indicate that, when Officer  
24 Lowkes visited the site on June 16th, you showed him a  
25 map, and you indicated the map, I believe, was prepared

1 by Krebs & Lansing, but can you provide any further  
2 detail on that map, in other words, to identify it more  
3 specifically? Was it, was it called something? Did it  
4 have a date? That sort of information.

5 A. Sure. It's a working field map that I have on a  
6 8.5-by-11 sheet that I can put into my pocket, and I  
7 was using this particular map to identify where I was  
8 along the boundary perimeter, as the first task for me  
9 was to identify those lines subject to what Krebs &  
10 Lansing had showed me the other day. They used an  
11 orange-and-blue flagging, and there were some areas  
12 flagged there, specifically the FTEs (sic.) that we  
13 walked together and flagged blue and orange for a safe  
14 zone so that we wouldn't enter any of those. Where I,  
15 where I met the officer was within a hundred yards of  
16 one of those sites.

17 So the map I had was a working, that I put field  
18 notes on, and the master map is identified as CD-001.  
19 It's a clearing plan. That was what I had for my  
20 notes. I do know that there is a .pdf now that, if I  
21 was there, I could hand you that. But the .pdf shows  
22 things perhaps a little more clear, just because of  
23 what they are, but it clearly had the sites identified  
24 for the rare and endangered, and mine has more  
25 information on it as potential berm sites.

1           So, again, you can get too much information on a  
2 map for many people. I know how to read them. That's  
3 what I do for a living. But for my working map that's  
4 what I showed them. So it could have been a little  
5 cluttered.

6       Q.    So this what you're calling your working map, that  
7 has a label somewhere on it that is CD-001 clearing  
8 plan?

9       A.    Yes, sir. It's a Krebs & Lansing prepared. The  
10 clearing plan that I have -- my glasses are bifocals,  
11 so pretty small print. The clearing, it does say a  
12 draft, but my understanding is it hasn't been modified  
13 much. The .pdf that, if I had shown him that one, is  
14 dated recent after our meeting. Well, they're all  
15 2000. I just don't know when the master. You know,  
16 they say "draft", the ones I have. Looking at the one  
17 that's in play now is, of course, what they've decided  
18 finally about the time that I had my written contract  
19 with PLH.

20       Q.    So, again, this, this draft clearing plan, CD-001  
21 that you showed Officer Lowkes, does it have a date on  
22 it?

23       A.    Yes, sir.

24       Q.    And what is that date?

25       A.    It is stamped "draft". Does say proposed area for

1 ag. use, and the one I photocopied, I believe it was  
2 February 12th, but it could have been May 12th. I'm  
3 sorry. I cannot read the first digit. It's definitely  
4 a 12/2020, but I cannot make out the numbers. It's  
5 really small print.

6 Q. Okay, I understand. And you, in your affidavit,  
7 you talk about two conservation areas. Are they shown  
8 on that map?

9 A. They are. The map that I showed him, I installed  
10 them myself, and those two areas have, the big one, FTE  
11 Number 2, starts at the edge of Willow Road and is the  
12 northeast corner of the bigger parcel. It has  
13 three-foot-high orange plastic fencing around the  
14 entirety. Really difficult to not see that. And what  
15 Krebs & Lansing surveyors showed me on a walk was their  
16 flagged line, which was at least an average about five  
17 feet west of the line.

18 When I -- I'm sorry. Depends which. There's  
19 always a buffer of about five feet. It depends which  
20 angle you're coming. But that lot's rectangular, and  
21 it was clearly identified, and that's what I tried to  
22 pass that information where it was. It was pretty  
23 close to where you park your car.

24 And the other lot is in the northeast corner of  
25 the Apple Hill site, and it contained a butternut tree

1 with canker, dying, but it's there, and it's about 50  
2 feet by 50 feet. That, the purpose of all of those is  
3 that, and my photos as well, they're very easy to find.  
4 I had, first step, placed my -- I walked the line.  
5 Then we built the silt fence and put up the barrier  
6 ribbon thereon. So they're like triple-protected right  
7 now for visibility. No excuse for anybody not to find  
8 them.

9 Q. Wait. Let me just back up a few steps so I  
10 understand you. You made reference to, I think you  
11 said, FTE Number 2.

12 A. Yes, sir.

13 Q. Okay. Is, that's what you're calling the, that is  
14 what you're calling one of the conservation areas?

15 A. Yes, sir.

16 Q. Okay. And that is in the southeast corner near  
17 the term, the end of Willow Road, or is that in the  
18 northeast corner?

19 A. Number 2 is in the southeast corner, and it's, for  
20 quick dimensions, roughly 150 feet north to south and  
21 about 350 feet east to west.

22 Q. Okay. And the one you described as just, just a  
23 few minutes ago, 50 feet by 50 feet in the northeast  
24 corner by the butternut tree with a canker --

25 A. Yes, sir.

1 Q. -- is FTE Number 3; is that what that's called?

2 A. That is correct.

3 Q. Okay. Is there --

4 A. The latest -- yeah, I'm sorry. The .pdf that I  
5 have now, that's very clear, and they're clearly  
6 labeled Plant Conservation Area Number 3 --

7 Q. Okay.

8 A. -- and Number 2. it may beg the question, Where's  
9 Number 1? But that's on state land off the site of  
10 this project.

11 Q. Okay. You read my mind. That's what I was --  
12 okay. And I think by FTE maybe my understanding is  
13 we're, we're talking these are typically called RTE  
14 plants.

15 A. Oh, that's, maybe, maybe the audio's not good.  
16 I'm sorry for that. R, as in Robert; T, as in Tom; E,  
17 as in Edward.

18 Q. Got it, great. And you said you, you sketched  
19 these on the map yourself based on what, based on the  
20 flagging you observed in the field or based on some  
21 other map that you, you're looking at?

22 A. Combination of the two. I've been on the site  
23 multiple times, once with Krebs & Lansing, and I  
24 visually, physically paced those distances. I  
25 subsequently obtained the working maps and, being used

1 to recycling, I don't throw away my old paperwork. I  
2 just add to it, and that's how I had the map in my  
3 pocket.

4 MR. EINHORN: Okay. I think, and just one  
5 moment, Mr. Kobelia. I'll get back to you in a moment.  
6 Mr. Chairman, I think it would be helpful if these maps  
7 that we're discussing in, including, I guess, this  
8 newer one that shows areas were somehow submitted in  
9 this case so the parties could look at them.

10 CHAIRMAN ROISMAN: First of all, does anyone  
11 have any objection to admitting the maps as exhibits?  
12 Mr. Melone?

13 MR. MELONE: I have no objection. I don't  
14 have the maps with me. So I have to figure out what  
15 maps they are, but I don't have any objection.

16 CHAIRMAN ROISMAN: Okay. Ms. Aceves?

17 MS. ACEVES: No, no objection.

18 CHAIRMAN ROISMAN: Okay. So they'll be  
19 admitted, and then we'll deal with the logistics. Mr.  
20 Einhorn, do you have these maps, or is it only Mr.  
21 Kobelia who has the maps?

22 MR. EINHORN: Yeah, I don't. I'm not  
23 familiar with these based on how they were described as  
24 being, how they're described. I'm not familiar with  
25 them.

1           CHAIRMAN ROISMAN: All right. And, Mr.  
2 Kobelia, I think we've been talking about two maps.  
3 Are they both 8.5-by-11, or is one much larger than  
4 that?

5           MR. KOBELIA: They could be as big as Krebs &  
6 Lansing prepared them at their site. I'm using a .pdf  
7 that I printed out on an 8.5-by-11, and it is the one  
8 dated that -- because it's a .pdf, the clarity's great.  
9 It is dated 5/21/2020, and the sketch was drawn by JBC  
10 of Krebs & Lansing. So that's the best perimeter map  
11 out there for this.

12          I have a second map that had a location of  
13 proposed berms made out of wood chips to additionally  
14 help control erosion on the site. So that's a, you  
15 know, we keep taking the same base map and using it for  
16 different purposes, and the berm construction is part  
17 of my charge.

18          CHAIRMAN ROISMAN: But it seems to me that  
19 the maps that, that, and correct me if I'm wrong, Mr.  
20 Einhorn, the maps that you're interested in are this  
21 .pdf map that Mr. Kobelia just talked about and the map  
22 that was shown to the representative of ANR who was on  
23 the site, which is a different map than the .pdf map.  
24 Is that correct, Mr. Kobelia?

25          MR. KOBELIA: They all use the same basis.

1     You know, the, the boundaries are the boundaries. It's  
2     the interesting features that are being highlighted  
3     that can be talked about and, and placed. On my map I  
4     have three different interesting things on there. So  
5     it's a bit muddy. It's easier, if you're talking about  
6     RTEs, just to have those identified. So mine had  
7     everything on it, contour lines and, and staging areas  
8     and, and quite a bit. It's a busy map.

9             CHAIRMAN ROISMAN: Mr. Einhorn, which is it,  
10     or which ones are, are they that you would like to have  
11     admitted?

12            MR. EINHORN: The CD-001 clearing plan, which  
13     has a date of potentially February 12th 2020. It's a  
14     proposed area for ag. use. It seems it's what Mr.  
15     Kobelia described it as. And the .pdf, which he  
16     described as being dated after the meeting, with a date  
17     of 5/21/2020.

18            CHAIRMAN ROISMAN: Okay. Mr. Melone, what,  
19     what mechanisms do you have by which those might get  
20     filed in ePUC very quickly?

21            MR. MELONE: Well, I'm assuming I can find  
22     the .pdfs or obtain the .pdfs that don't have Bob's  
23     notes or, or whatever else he's put on them, if that's  
24     acceptable. Or, if Attorney Einhorn wants what Bob has  
25     in his possession, Bob would have to scan them in, and

1     then he could send them to us, and we could admit them  
2     into evidence.

3             CHAIRMAN ROISMAN:   Okay.   Mr. Einhorn, do you  
4     want the ones that have Mr. Kobelia's notes on them,  
5     the one that was shown to the ANR representative, or is  
6     the .pdf one adequate?

7             MR. EINHORN:   I think, for the second one,  
8     it's the .pdf one if that's easier.   The first one, I  
9     guess I'm, I'm trying to ascertain the documentation of  
10    the existence of the RTE areas, and, as I understood  
11    it, the map, the working map, is the only one that  
12    shows that, because Mr. Kobelia indicates that he  
13    sketched those in.

14            CHAIRMAN ROISMAN:   And, Mr. Kobelia, is Mr.  
15    Einhorn correct that the only one of these maps that  
16    will show the RTE areas is the one that you put your  
17    own notes on?

18            MR. KOBELIA:   I doubt that that's accurate.  
19    I've got, must be, eight different maps to my right.  
20    I'm sitting in my car at the Albany Airport, and, if  
21    you give me pause, I'll rifle through those and see if  
22    there's others besides the, the May 21st draft, which  
23    clearly has them on.   I know there were other sitings  
24    thereon.   So while -- may I put the phone down and look  
25    at those?

1           MR. EINHORN: Maybe I can cut to the chase  
2 here. I think it would be beneficial to have whichever  
3 one it is you're actually using to inform your  
4 activities in a way that they're conducted to avoid  
5 these RTE areas that you are calling Numbers 2 and  
6 Number 3.

7           MR. KOBELIA: Well, I'm looking right at the  
8 draft that was carried by Krebs & Lansing's field crew  
9 at the time they walked me around the property and did  
10 their flagging. Not having a copy of that map that was  
11 roughly four feet by three feet, we laid it on the  
12 ground, and I took a photo, with this phone, of it.  
13 Albeit it's got grass around the border and a little  
14 crinkled as it's not a perfect, flat surface, but it's  
15 legible, not as legible as the one that I just referred  
16 to, but it, it was a photocopy that I used on my phone.  
17 So I could send that to you posthaste, but I'd have to  
18 hang up the line to do it. I think I --

19           CHAIRMAN ROISMAN: I don't think we need to  
20 see it at the moment. If it's something that you can  
21 make a photocopy of and send directly to Mr. Melone,  
22 then he can file it in the appropriate way with us.

23           MR. KOBELIA: Sure.

24           CHAIRMAN ROISMAN: Mr. Einhorn, would that be  
25 satisfactory?

1 MR. EINHORN: Yes, that's fine.

2 CHAIRMAN ROISMAN: Okay. Let's do that. All  
3 right. Go on, Mr. Einhorn.

4 BY MR. EINHORN:

5 Q. Oh, thank you. Mr. Kobelia, you, in Paragraph  
6 Number 5 of your affidavit, you indicate that the  
7 bright orange fence was installed by Krebs & Lansing to  
8 identify the conservation areas?

9 A. I thought they had. Somebody did, but it was way  
10 before my time. That fencing's been there for several  
11 years, and my new work was definitely put up by theirs.  
12 I was following their blue-and-orange flagging. But  
13 the original orange plastic fence, I don't know who was  
14 the party that put that up.

15 Q. And that's the fence you're referring to as being  
16 installed by Krebs & Lansing?

17 A. Yeah. I, I don't have firsthand knowledge of it.  
18 I have secondhand knowledge that that's who did it.

19 Q. Okay.

20 A. So, you know, so we could be splitting hairs, but  
21 somebody that knew where it was to go put it in.

22 Q. Okay. I'm looking at what you've identified and  
23 attached to your exhibit as Photo Number 3. It says --

24 A. Okay.

25 Q. -- looking north. Do you have that?

1     A.    I have my notes that I accompanied every one of  
2     those.  You could help me out to be sure we're on the  
3     same one, because I identified them as screenshots, and  
4     what I saw for the submittal, the first screenshot of  
5     my pictures was Number 7, and they went to Number 20.  
6     Any chance you can see a screenshot down in the bottom  
7     left corner?

8     Q.    No, there is, there is not, but I can, I can tell  
9     you how it's described in your affidavit.

10    A.    Sure.  Yes, sir.

11    Q.    It says, "Looking north along the westerly  
12    boundary of RTE Number 2", which, as I understand it,  
13    is the southeastern one, "a small buffer was left  
14    between the RTE and the silt fence", and I see your  
15    silt fence.

16    A.    Yes, sir.

17    Q.    I see the orange flagging tape pinned to trees, it  
18    looks like, above the silt fence, and then I see some  
19    orange barrier or snow fence beyond that.  Do you know  
20    the size of the buffer?

21    A.    Yes, I do.  It varies as the buffer went  
22    tree-to-tree, and so does my silt fence and the barrier  
23    ribbon.  By convenience, the barrier ribbon, we want  
24    everybody to see it, and it was typically sometimes  
25    wrapped around some existing vegetation that might be

1 two or three, four inches in diameter and then stapled  
2 to the tree for extra support. So it's more of a  
3 zigzagged line that's running, on average, four to five  
4 feet apart.

5 There may be a later picture that shows my German  
6 shepherd black dog in the foreground with a lot of  
7 green vegetation and that older fence in the  
8 background, and that's probably ten feet apart at that  
9 spot. So, when Krebs put that flagging up, there's, we  
10 casually tried to always make sure it was on the side  
11 of extra buffer. That area is covered with some nasty  
12 vegetation like multiflora rose, autumn olive,  
13 hawthorn, and there's some places that are so thick it  
14 will tear a man to pieces. So the bulldozer does a  
15 nice job on it.

16 But the flagging went where the guys could go  
17 without bleeding to death, and it's a little easier to  
18 work now that -- that's the purpose of that initial  
19 walk-through with the dozer was to be able to make it  
20 so a man could get through it and be reasonably  
21 straight with putting the fence up.

22 Q. I understand. So, at its narrowest width, what  
23 would you say that that buffer is?

24 A. I'd say that the buffer, there could even be a  
25 couple of trees that we had mutual ribbon, barrier

1 ribbon, and silt fence on it, because it could have  
2 been the only tree that was perfect for that job. The  
3 buffer itself, there's two types of buffers, as I see  
4 it.

5       These individual planting sites had clearly been  
6 staked and are out in the middle of this thing much  
7 like a checkerboard, and there is none of that near the  
8 outside perimeter. So I was not the one that laid it  
9 out initially. So it just appeared as if this barrier  
10 ribbon may have already incorporated all of the rare  
11 and endangered planting sites, and nothing was closer  
12 than 50 to 100 feet of this line so that, whatever the  
13 agreement was at the time of install, it, it appeared  
14 as if there was never any of that vegetation, special  
15 plots with tomato stakes marking the corners anywheres  
16 near the line.

17       So, as a minimum, I'm probably always three to  
18 five feet away from that existing plastic fence, and,  
19 just like when we run boundary lines in woodlots, you  
20 know, we always used to use the length of an axe  
21 handle. I think that's what you'd find was run here as  
22 a minimum.

23 Q. Okay, great. Thank you. The, the orange flagging  
24 that was put up and the silt fence, do you know if  
25 that's been inspected by a botanist since it went in?

1 A. I don't control the site schedule of who comes and  
2 goes to the site. I've only been there a short period  
3 of time and, in my duration of time on site, had very,  
4 very few visitors. The land is posted, and I did see  
5 someone approach from the Apple Hill apple orchard way  
6 and disappear when I was in there, but I don't think it  
7 was Bigfoot. I just think it was somebody seeing what  
8 I was doing, but they didn't identify themselves. I  
9 don't think it was a botanist.

10 Q. What I'm asking you is, As you are talking today,  
11 can you affirmatively say that the silt fence and the  
12 flagging has been inspected by a botanist?

13 A. I'm a forester. I know my trees. If I can't  
14 climb it, I may not know it. So I know what I've seen,  
15 and I'm a forester, and I don't believe that area was  
16 threatened in any shape, manner, but I am not a  
17 botanist, and I saw no botanist come, and they didn't  
18 check in with me about it. So that I, I would say I  
19 have no privy to know.

20 Q. Okay, all right. That's helpful. Thank you. For  
21 the purposes of the clearing work that you are planning  
22 to do, as I understand it, you're, you're intending to  
23 clear the site in five-acre chunks, more or less; is  
24 that accurate?

25 A. I think that's fair to say. And the reason for

1     that is to have ability to get some vegetation growing  
2     on the site. As I mentioned, we just pretty much got  
3     there, and this didn't happen on day one, but we  
4     haven't done much yet, except install the silt fence  
5     and barrier ribbon and make a place to turn around. In  
6     that timeframe, I have brought over from my own farm  
7     fifteen five-foot hay bales for use to help stabilize  
8     the ground, as there's some ground disturbance, and my  
9     intent is not to have too big of an area get to what  
10    would be a stumped needing restoration. I'm going to  
11    look to keep up with that process.

12           So, yeah, we have a five-acre proposal that  
13    doesn't meet working as I proposed it, and, and I, I  
14    would tend to keep up with the work.

15    Q.    Okay. So, with regard to the clearing that, that  
16    you're intending to do, what is your understanding of,  
17    of these two RTE areas, Number 2 and Number 3, with  
18    regard to your clearing activities? What will happen,  
19    or what will --

20    A.    My, yeah, my understanding is that we will not  
21    have any entry with any equipment. We've got the small  
22    buffer to even keep farther back than working right up  
23    to the boundary line, but and no trees would be felled  
24    into that same working area. So I'm not looking to  
25    have trees dropped or any entry by machinery. Au

1 naturel is a good thing. So these would basically be  
2 as the same today as they would have been ten years  
3 from now or vice versa. Whatever Mother Nature does is  
4 her business.

5 Q. Now, is your, is your clearing operation, and I'm  
6 not interested in what's been referred to as the  
7 orchard lot, which is kind of a little bit to the north  
8 and it has apple trees, right?

9 A. Right.

10 Q. I'm interested in, in this other lot that's, you  
11 know, currently wooded and you're foresting.

12 A. Sure.

13 Q. Are those activities limited to, you know, what I  
14 would describe generally as the eastern, southern leg  
15 of, of that parcel, which is, the entire parcel is 27  
16 acres, as I understand it, or are you also going to be  
17 clearing in the west, in other words, the entire  
18 27-acre parcel?

19 A. Just for clarification, those 3 parcels total  
20 27-and-change acres. So, if you take out the apple  
21 orchard that's about 5.7, it leaves roughly 21 acres,  
22 and my charge is, and that 21 acres includes the FTE.  
23 So we may be looking at 20 acres of land being  
24 protected for erosion control. The silt fence goes all  
25 around the eastern, southern, and western perimeter.

1 Boundary ribbon does go all the way to the north end,  
2 just so that someone walking in the woods would know  
3 that they're entering that. But my charge is to clear  
4 as much as they ask me to do in the time that I'm  
5 there.

6 So, originally, there's lots of stone walls. 200  
7 years ago, there was probably sheep on this land, and  
8 not that many years ago even out away from the apple  
9 orchard there were apple trees throughout this lot.  
10 So, if you imagine a two-tiered stand, there's some  
11 apple trees that just got overgrown over the last 50  
12 years, and there's, there's a mixture on a lot of this  
13 property of, of that. Terrible underbrush of  
14 honeysuckle, invasives, autumn olive and that.

15 Q. Mr. Kobelia, I don't want to interrupt you, but  
16 this has been a long proceeding at this point.

17 A. Sure.

18 Q. All I'm simply asking is, Is the plan to clear  
19 that entire parcel exclusive of these two RTE areas  
20 you've identified and exclusive of the orchard lot?

21 A. At the end of the process, it would be.

22 Q. So my question for you is, Are you aware of  
23 another RTE plant conservation area in the southwest  
24 portion of the property as you head toward the ramp for  
25 Route 7 and, I believe, it's 279 there?

1     A.     The map I have shows RTE 1 as being identified on  
2     that land between PLH's property and the highway. So I  
3     assume it's in the state right-of-way jurisdiction. It  
4     doesn't fall on this site. So there would be no entry  
5     into it. If it's mismarked, then it's mismarked, but  
6     on my map it clearly shows it off the property, and the  
7     2 and 3 are the only ones that are on the PLH property.

8     Q.     Okay. So I just have a couple more questions for  
9     you. We'll shift back to the area that we were just  
10    discussing with the RTE 3 being in the northeast  
11    corner, RTE 2 being in the southeast corner and much  
12    larger.

13           Are you aware of any other RTE areas north of RTE  
14    2 and west of RTE 3 in between Willow Road and the  
15    orchard lot's southern terminus?

16    A.     Prior to my visitation, I was on site in the  
17    wintertime before the leaves came out, and there was a  
18    large volume of miscellaneous ribbons and markings that  
19    could confuse anyone, and I asked the question, and  
20    that's why Krebs & Lansing came out and specifically  
21    laid out this plots that they said were no-go zones,  
22    and we no go there. I'm not aware of any official site  
23    anywheres else on this parcel.

24    Q.     So there are no other sites on the parcel that  
25    you've been told to avoid?

1 A. That is correct. And a lot of this old ribbon  
2 that's been on site for multiple years has been taken  
3 down just to get rid of the confusion.

4 Q. Do you know who took it down?

5 A. Krebs & Lansing, as they were doing their work,  
6 were taking down any confusing ribbons in the time that  
7 they were doing that marking. But, because there was  
8 other ribbon elsewhere, I'm not privy to know, and I'm  
9 not privy to know if they were legitimate sites in the  
10 first place. Someone, a third-party, could put it in  
11 just to be a stinker.

12 Q. Yeah, I understand.

13 A. Yeah.

14 Q. Do you recall what the color of that ribbon was  
15 that you were --

16 A. Sure.

17 Q. Okay.

18 A. Sure. In the northeast corner, Number 3, that was  
19 kind of odd. It almost looked like the yellow strap  
20 that you'd use to bind a load of lumber on a trailer.  
21 And, when I saw that, I had put some additional caution  
22 ribbon around it. I have caution ribbon labeled as  
23 such. So I put that up myself. I had seen caution  
24 ribbon in many places on, on this lot, and some of that  
25 has subsequently been picked up and pulled.

1           I'll give you an example. Where you parked your  
2 car on Willow Road there was an old trail that went  
3 right through the, the Area 2 near the western  
4 boundary, and it went all the way to the apple orchard  
5 vis-a-vis an old farm road, hiking trail, and there was  
6 danger boundary ribbon on both sides of that, and I was  
7 informed by Krebs that that didn't, that was not  
8 identified as anything that's rare and endangered.  
9 It's the old farm trail. So that's gone.

10 Q. And what do you -- that specific ribbon, do you  
11 recall what color it was?

12 A. Oh, sure. It was approximately 2.5 inch wide.  
13 Comes in rolls with the big words "caution", and there  
14 was even some staking there, and some of that's on the  
15 hedgerow now.

16 Q. Okay. And so, where that was removed, you're  
17 planning to clear that area?

18 A. Oh, sure. It would be like taking all the land  
19 north of the RTE and saying, yeah, if that's no-go,  
20 then take away four or five acres.

21 Q. All right. Thank you very much, Mr. Kobelia. I  
22 don't have any further questions.

23 A. Sure.

24           CHAIRMAN ROISMAN: Ms. Aceves, do you have  
25 any questions for this witness?

1 MS. ACEVES: I do not. Thank you.

2 CHAIRMAN ROISMAN: Commissioner Hofmann, any  
3 questions?

4 COMMISSIONER HOFMANN: Thank you. I just  
5 have a couple. Mr. Kobelia, you actually indicated in  
6 your testimony that you had been out in the winter.  
7 Was that in the earlier this year of 2020?

8 MR. KOBELIA: Yes, ma'am. I've been on the  
9 site a couple times, just because I've done other work  
10 for the folks, Tom Melone, and one of his people asked  
11 me to take a look at it and let me know what I thought  
12 about it for clearing issues, and, certainly, you can  
13 tell a lot more walking a property without the  
14 vegetation. So my recollection is that I was skiing on  
15 what little snow we had this winter, and I went there  
16 before I flew to Florida on March 13th. So not sure  
17 what day it was I was up there, but, yes, I was up  
18 there probably early March.

19 COMMISSIONER HOFMANN: Okay. And then your  
20 affidavit says that you then walked the site with Krebs  
21 & Lansing, and I wondered if that was the same trip or  
22 that was a subsequent trip to the property.

23 MR. KOBELIA: Oh, that was a different day,  
24 for sure, and I came back from Florida by car the first  
25 day or two of May and quarantined and that sort of

1     thing, but, when Krebs had their appointment, I was  
2     asked if I could accompany them. We maintained good  
3     social distancing and exchanged the map that they had,  
4     but we walked the whole boundary line.

5             COMMISSIONER HOFMANN: And, by that time, had  
6     the new marked-off flagging been done, or was that done  
7     after that visit?

8             MR. KOBELIA: Oh, that was the very same day.  
9     We met there early. We walked all the area, and, as we  
10    walked, they were putting up their ribbons. They had a  
11    two-man crew, and they were using the proper surveying  
12    equipment to identify the corners and pins and to make  
13    life easy of putting up ribbon on the right location.

14            It was my understanding they were going to also  
15    survey the easterly boundary of the 5.7-acre apple lot  
16    at the very same time, but there was no need for me to  
17    see the finished product until they got done. So I was  
18    with them for a couple hours, but they may have taken a  
19    good part of the day to do their project.

20            COMMISSIONER HOFMANN: And then were they  
21    taking down -- you talked about these ribbons that just  
22    were confusing. Were they taking those down as you  
23    walked along?

24            MR. KOBELIA: Oh, absolutely, yeah. And, at  
25    that time, I'll give you an example. There's a painted

1 hiking trail with ribbon on it. It's red, kind of runs  
2 through the northerly part of the 21-acre lot, and it's  
3 obviously someone that did it there for convenience for  
4 hiking, and there was associated ribbon with that. I  
5 mean, there was -- I asked them if it meant anything,  
6 and they said that doesn't mean anything to the rare  
7 and endangered sites.

8 COMMISSIONER HOFMANN: And, Mr. Kobelia, you  
9 said you're at the Albany Airport now, but when was the  
10 last time you were at the site at 1033 Willow Road or  
11 the Apple Hill Road site?

12 MR. KOBELIA: Yesterday.

13 COMMISSIONER HOFMANN: Okay. And how much of  
14 that property has been cleared, or, of the area you are  
15 clearing, how much has been accomplished?

16 MR. KOBELIA: I have, at this time, basically  
17 created a access much like a fire lane on the east  
18 north of the RTE 2 and on the southern boundary and  
19 westerly boundary so that we could carry silt fence to  
20 all the portions that needed it. And so that's all in,  
21 and that whole area, a lot of it is slated to have a  
22 wood chip berm. So, at the same time, I had, it's not  
23 perfectly smooth yet. It needs to be back-bladed, but  
24 it's roughed in.

25 COMMISSIONER HOFMANN: So can you give a

1 percentage?

2 MR. KOBELIA: That's about 3 acres, when I go  
3 that perimeter, and 20 to 30 feet across. So there's  
4 about 3 acres and a small area created to put some wood  
5 and stumps, which, over time, we could use much more  
6 space than that, for sure. But, as of this moment, I  
7 didn't accomplish a lot this week. I don't like  
8 working when it's 90.

9 COMMISSIONER HOFMANN: I don't blame you. Do  
10 you have a crew working there when you're away?  
11 Because you said you were at the Albany Airport.

12 MR. KOBELIA: Yes, ma'am, but I don't have --  
13 I just put my grandson on a plane at 8:00 o'clock, and  
14 I've been online since 8:30, except for the times I had  
15 to try to call in again.

16 COMMISSIONER HOFMANN: Yes, and I understand  
17 that, but do you have a crew that's working there, at  
18 the Willow Road site and the Apple Hill sites, do you  
19 have a crew working there while you are not there?

20 MR. KOBELIA: Right now, I'm doing most of  
21 the work that requires my guidance. That doesn't mean  
22 later in the project I'll have manpower far exceeding  
23 me, but, right now, in a typical day I may have a  
24 helper with me, but right now I put him on the plane.

25 COMMISSIONER HOFMANN: I understand. Thank

1     you very much.

2                 MR. KOBELIA:    Sure.

3                 CHAIRMAN ROISMAN:  Commissioner Cheney?

4                 COMMISSIONER CHENEY:  Yes, this is Margaret  
5     Cheney again, and I just have a question following up  
6     on what you just told Commissioner Hofmann that you had  
7     created an access to carry the silt fence.  Is that  
8     what we see in two photos that also show your German  
9     shepherd?  Is that the -- if you can remember those  
10    photos, they were the north line of RTE Number 2.  Is  
11    that the same as what you just described?

12                MR. KOBELIA:  Yeah.  It would have been  
13    extremely difficult to carry the fence with the stakes  
14    on it through the vegetation.  It's just way too thick.

15                COMMISSIONER CHENEY:  So those -- go ahead.

16                MR. KOBELIA:  Oh, that, it, there's, like,  
17    multiple steps.  The more you travel on it, the more  
18    the root systems get taken out, and, if there was small  
19    vegetation, they came out easy and pushed to the side.  
20    All of that would be chipped.  There wasn't anything  
21    that was pushed out and away that -- you know, as work  
22    is in progress, we chip it, use some of the chips for  
23    the silt fence, for the berm.

24                COMMISSIONER CHENEY:  And I'm just trying to  
25    make sure that what I'm looking at in the photos is

1     what you just described as the --

2             MR. KOBELIA:  Oh, yeah.  Maybe the best  
3     picture, that, that line with the dog, the land goes  
4     up, and then it goes down.  So, if you were at the  
5     picture, that's the northwest corner of FTE 2 (sic.),  
6     it makes a 90-degree turn and then runs due east.  So I  
7     tried to identify these as directions, and you can see,  
8     basically, that's the whole length of the thing, up the  
9     hill to a couple of dead ash, and the closer picture  
10    was of the dead ash up close with the corner, the  
11    northeast corner, in the distance.  So I tried to piece  
12    it as if you would walk and have a string of photos.

13            COMMISSIONER CHENEY:  That's great.  Thank  
14    you.  I thought that's what it might be.  And that's  
15    the only question I have.  Thank you.

16            MR. KOBELIA:  You bet.

17            CHAIRMAN ROISMAN:  Mr. Landis-Marinello, do  
18    you have any questions for Mr. Kobelia?

19            MR. LANDIS-MARINELLO:  Yes, I had just a  
20    couple.  So, if you include the orchard parcel, then is  
21    my math right that the plan is to clear about 26 of  
22    these 27 acres?

23            MR. KOBELIA:  I think that's accurate.

24            MR. LANDIS-MARINELLO:  And that's a clear-cut  
25    that's going to be happening?

1           MR. KOBELIA: My instructions were to have  
2 the sun hit the ground and get rid of all the stumps.  
3 I don't believe we've had a complete understanding of  
4 how to treat the hedgerows. For example, there's a  
5 nice hedgerow between the apple orchard and the north  
6 corner. Might have been Chelsea. And, if they need to  
7 go, they'll go, but we might have trouble stumping that  
8 because of a 200-year-old stone wall.

9           MR. LANDIS-MARINELLO: And so, for this 26  
10 acres that are going to be cleared, have you or anyone  
11 at Krebs & Lansing, at any point in 2020, walked that  
12 area to look for RTE?

13           MR. KOBELIA: I've walked it. I know some of  
14 the plants, but I'm not a botanist. So no one's asked  
15 me to take them for an excursion.

16           MR. LANDIS-MARINELLO: And just one more  
17 question. Has Mr. Melone or anyone else made you aware  
18 of the Commission's May 7th 2020 order that denied the  
19 amendment to his projects with the amendment being what  
20 formed the basis for this plan for clearing?

21           MR. KOBELIA: I have nothing in writing, and  
22 I can only go by what I was told that what we were  
23 doing was perfectly fine. So, you know, I didn't do a  
24 title search to, up-to-date to see if there was  
25 anything pending that would affect my ability.

1           On the other hand, in my contractual agreement,  
2           and they've agreed to do it, is that they include me as  
3           an additional insured because of the folks have been  
4           continually suing them all the time. I'm not that dumb  
5           that I want to do any work and not be hung out to dry.  
6           So, you know, I guess you know what I just said. I'm  
7           covered by Ecos, PLH.

8           MR. LANDIS-MARINELLO: Okay, thanks.

9           MR. KOBELIA: Sure.

10          CHAIRMAN ROISMAN: Mr. Tousley, any  
11          questions?

12          MR. TOUSLEY: Yeah, just, just one to sort of  
13          summarize some of the other questions folks have asked,  
14          answers you've given. I'm looking for a percentage. I  
15          think what you've said is that, of the 26 acres,  
16          approximately 3 have been clear-cut, which would make  
17          somewhere around 10, 12 percent completed. Is that, is  
18          that a good understanding of what's out there?

19          MR. KOBELIA: If you said I did it with a  
20          bulldozer, not a chainsaw, correct. The trees have  
21          been pushed down, haven't been utilized yet, but we've  
22          not even started chainsaw. So, you know, basically,  
23          the path for much like a forest access road. It's just  
24          the vegetation has been stripped off, and water bars,  
25          where necessary, have been put in.

1 MR. TOUSLEY: Okay.

2 MR. KOBELIA: Albeit the ground isn't  
3 particularly steep. There's hardly any steep there.  
4 There's no running water, no snow to melt right now.  
5 Probably, the site sits on gravel. So it's very dry.  
6 From an environmental standpoint, it's a perfect time  
7 to be doing the work. It's bone dry, no mud.

8 MR. TOUSLEY: So 10 to 12 percent is probably  
9 a high number in terms of how much you've done, and, if  
10 you were to estimate what percentage is complete, what  
11 percentage is left to do of your project, what would be  
12 the percentage complete now?

13 MR. KOBELIA: Well, none of its complete,  
14 because part of my job is stumping and reseeding. So I  
15 can't do any of that until you get to steps A and B  
16 first. So it's work in progress.

17 MR. TOUSLEY: Okay. Let's say the whole  
18 project with all, with everything you've got to do,  
19 stumping and reseeding and everything.

20 MR. KOBELIA: Yeah.

21 MR. TOUSLEY: How much of it is -- are you,  
22 like, at the 1 to 2 percent? Are you at the 10  
23 percent? How far along are you?

24 MR. KOBELIA: I'm 100 percent done with  
25 boundary work and silt fence. So that I think of it as

1 segments to get the tasks completed. So the  
2 environmental part, boundary lines and that, that's all  
3 done. So we're basically just starting, and maybe 10  
4 percent of actual putting a blade to the ground is  
5 accurate. But job closure is at the very end, and it  
6 will be, as portions get secured and I'm able to put  
7 them to sleep, I'm never going to have anything more  
8 than five acres at a time. So they'll be, between now  
9 and, let's say, mid-September, it would be normally an  
10 orderly process to clear and reseed and have the whole  
11 acreage finished by mid-September.

12 MR. TOUSLEY: Okay, thank you.

13 MR. KOBELIA: Sure.

14 CHAIRMAN ROISMAN: I just had one question  
15 for you, Mr. Kobelia. What's the date your contract  
16 was signed?

17 MR. KOBELIA: Could you hold on a minute? I  
18 have it with me.

19 CHAIRMAN ROISMAN: Sure.

20 MR. KOBELIA: And I will get to that date. I  
21 know I brought it for a reason. Entered as of June 8.

22 CHAIRMAN ROISMAN: This is 2020, I assume.

23 MR. KOBELIA: Oh, yes, sir, yeah.

24 CHAIRMAN ROISMAN: Okay, all right. And is  
25 there a time provision in the contract? In other

1 words, you, in order to fulfill the contract, you have  
2 to complete your work by, and there's some date in  
3 there or not?

4 MR. KOBELIA: This contract does not have a  
5 termination date. It also doesn't have any penalty to  
6 me if it's not done by that date that's not stated.  
7 But we've had a verbal agreement that our goal was to  
8 not get there and sit on it, and with the idea of  
9 having vegetation established before the fall growing  
10 season. And, if you ask alfalfa and, you know, and the  
11 hay that I have, it's beautiful hay and the normal  
12 grasses that you'd have around my farm, that will be a  
13 good start. It will get a good start. They can put on  
14 other things next season.

15 But I'm looking at using a combination of rye, the  
16 quick rye that we call winter wheat, and that comes up  
17 very fast. I might throw some buckwheat out there.  
18 But the whole idea is to have a quick catch for erosion  
19 control. And then we've had it wicked dry down here.  
20 Probably, you have too. So, if I was trying to seed  
21 right now, it wouldn't establish, but I want -- I've  
22 got my hay on site right now to use as needed, and we  
23 are starting to get a few thunderstorms in the  
24 afternoon, and, as you know, that will all help.

25 CHAIRMAN ROISMAN: And how soon -- let's

1     assume that, that your schedule is as you've outlined  
2     it and that you actually are able to finish the project  
3     and get your seeding done by, say, mid-September. How  
4     soon after that would it be feasible for sheep to be  
5     grazing without destroying all the seeding work that  
6     you will have done?

7             MR. KOBELIA: Well, if you can make me have  
8     an analogy, that's what the Cattle Wars were all about  
9     out west.

10            CHAIRMAN ROISMAN: I know, out west, I know  
11     what they were about, yes.

12            MR. KOBELIA: Yeah. And, and, you know, the,  
13     the longer you can let a site establish itself, the  
14     better, and it doesn't take a lot of greenery for a  
15     sheep to mow it down, and cattle aren't the same. So  
16     they could be there eating the weed brush, and they  
17     would. You know, I won't get every root out of the  
18     ground. So there will be sprouts that are natural  
19     vegetation. If I did nothing, there will be weeds  
20     growing right behind me. Hopefully, it's not poison  
21     ivy. But it's a, it's not the same as if it was a cow.

22            So I think you understand. There's, there will be  
23     something immediately there, even the 1st of August, on  
24     areas that I've treated. Whether it's the kind of  
25     vegetation I'd prefer to see grown at the same time,

1     it, it would be good. But they're not looking at  
2     having 24/7 for all year long pasturing on this thing.  
3     They're going to be rotating, and that's a good thing.  
4     Just like BLM does out west, they rotate it through.

5             CHAIRMAN ROISMAN: Okay, all right. Mr.  
6     Einhorn, do you have any additional questions based on  
7     the Commission's questions? If not, I'll turn it back  
8     to Mr. Melone for any redirect.

9             MR. EINHORN: I do not have any additional  
10    questions. Thank you.

11            CHAIRMAN ROISMAN: Okay. Mr. Melone, do you  
12    have any redirect for this witness?

13            MR. MELONE: Yes, Mr. Chairman. I just want  
14    to focus on one of the, one of the questions that Bob  
15    was being asked about RTE Conservation Area 1.

16            REDIRECT EXAMINATION BY MR. MELONE

17    Q. Now, Bob, on the map or the plan that you have,  
18    RTE Conservation Area 1 is outside of the area to be  
19    cleared, correct?

20    A. Yes, sir. It's southwest by maybe a hundred feet  
21    or more.

22    Q. And, going north along Route 7 on that plan,  
23    there's also a significant amount of area that is also  
24    scheduled not to be cleared; is that correct?

25    A. Precisely.

1 Q. And, along the northern boundary, if we turn right  
2 and go north, there's also a significant amount that's  
3 not to be cleared; is that correct?

4 A. That is correct.

5 MR. MELONE: Okay, thank you. That's all I  
6 have.

7 CHAIRMAN ROISMAN: All right. Well, Mr.  
8 Kobelia, we're going to free you from the Albany  
9 Airport parking lot, which I know you'll be glad to be  
10 able to do.

11 MR. KOBELIA: It's a good thing I have  
12 E-ZPass Plus. No lunch for me.

13 CHAIRMAN ROISMAN: I hope you have a safe  
14 drive back home. Thank you for your testimony this  
15 morning, now this afternoon.

16 MR. KOBELIA: Well, thank you for allowing me  
17 to do it the way we did. I was combobulated a little  
18 bit on how I was going to make it work. So appreciate  
19 your time.

20 CHAIRMAN ROISMAN: Well, and yours too.  
21 Thank you.

22 MR. KOBELIA: Okay. Goodbye.

23 CHAIRMAN ROISMAN: Does any party have any  
24 other evidence that we need to hear today? And, if  
25 not, we can go to closing. No?

1 MR. MELONE: None from me.

2 CHAIRMAN ROISMAN: Okay, all right. Mr.  
3 Einhorn, as the proponent, you can go first.

4 MR. EINHORN: Thank you, Chairman Roisman.

5 MS. ACEVES: Mr. Chairman, I'm sorry to  
6 interrupt. Would I be able to go first, just because I  
7 do have to leave in five minutes?

8 CHAIRMAN ROISMAN: Sure.

9 MS. ACEVES: I just had one quick thing to  
10 say regarding the TRO, and I appreciate all the  
11 evidence presented to assist the Department in taking a  
12 position, and so I just wanted to say that, despite the  
13 procedural issues that were raised by Mr. Melone in his  
14 filing, the Department is in support of a TRO based on  
15 what Mr. Popp, as well as Mr. Kobelia, said in their  
16 affidavits and their testimony.

17 Both have raised concerns that the Department is,  
18 is in agreement with regarding whether there have been  
19 rare plants harmed by the clearing that could merit  
20 further investigation. Between that and Mr. Melone's  
21 assertions that the agricultural schedule is somewhat  
22 flexible, we'd support a TRO to allow ANR to further  
23 investigate the issue. So I wanted to just have our  
24 position on the record there.

25 That said, the Department does have concerns

1     regarding the Commission's jurisdiction over the Willow  
2     Road parcel in particular given that the, as we said in  
3     our filing, the, the June 2019 Willow Road order is  
4     currently on appeal with the Vermont Supreme Court, and  
5     that, that concern is based on the Commission's October  
6     2017 order in Docket 8302, where the Commission stated  
7     it lacked jurisdiction over certain subject matter on  
8     appeal.

9             That could be temporary if the, if the Supreme  
10     Court remands the case, but I did want to just say that  
11     that remains an issue for the Department. And, unless  
12     you have any questions for me, I will need to drop off  
13     at this time, and Mr. Porter has agreed to represent  
14     the Department in my absence.

15             CHAIRMAN ROISMAN: Well, you have a good  
16     second chair, Ms. Aceves.

17             MS. ACEVES: Okay. Thank you very much.

18             CHAIRMAN ROISMAN: Thank you. Okay. Mr.  
19     Einhorn?

20             MR. EINHORN: Thank you, Chairman Roisman. I  
21     just want to express the Agency's appreciation to the  
22     Commission for taking this up on such short notice and  
23     devoting, obviously, a lot of, a lot of staff time and  
24     effort into this, as everybody is here. So that's  
25     greatly appreciated.

1           I think, based on the evidence that has been  
2       admitted and the testimony that I've heard today, there  
3       certainly are grounds for a TRO. You know, the first  
4       factor is, Is there a threat of irreparable harm? That  
5       factor is met. As Mr. Popp has testified, the clearing  
6       activities would destroy these plants, both the very  
7       rare and rare plants, if they were to take place, those  
8       activities, in the area where the plants are. Based on  
9       Mr. Kobelia's testimony --

10           CHAIRMAN ROISMAN: Mr. Einhorn, let me  
11       interrupt you while you're on that point so that I get  
12       clear on this. Does the Agency believe that there are  
13       protective measures that could be taken, but you don't  
14       feel have yet been taken, that would protect those  
15       endangered species and allow the clearing of everything  
16       other than those protected areas to occur without  
17       danger to endangered species?

18           MR. EINHORN: Yes, I believe so, and,  
19       unfortunately, my client, primary client here, our  
20       botanist, isn't here to consult with, but I've worked  
21       with him on many cases, and I think there would be a  
22       number of steps that would need to be taken. I think,  
23       first and foremost, is a botanist, qualified botanist,  
24       should go to the site and look and see what is there  
25       now.

1           As Mr. Popp testified, plants do move around. As  
2 we know from the records in these cases and the  
3 exhibit, at least the 2018 monitoring report, which is  
4 ANR-9, many plants have been relocated, but some plants  
5 have been left in place. I'll get to that in a moment.

6           So I think, first and foremost, is a botanist  
7 should go and assess what's out there today. Then,  
8 based on what's out there today, either plants need to  
9 be moved to the conservation areas to make sure that  
10 they're secured and protected if, if that type of  
11 activity would be appropriate as far as moving them.  
12 But, if there are other plants that aren't accounted  
13 for right now, and I'll get to this in a moment,  
14 because there are, then those areas would need to be  
15 off limits for clearing.

16           So I think we need to, one, establish what's there  
17 now; two, take measures to protect what's there now,  
18 and, with those things in place, then I think there  
19 would be the ability to conduct clearing outside of  
20 those areas.

21           CHAIRMAN ROISMAN: And can you give us any  
22 estimate? Assuming that the, that the Agency were,  
23 were able to start next Monday, how long would it take  
24 to get from where we are now to where you say the  
25 Agency might be comfortable in terms of endangered

1 species with site clearing?

2 MR. EINHORN: Well, I don't know. I mean,  
3 these aren't listed, so they're not threatened or  
4 endangered, but they're rare and very rare. My  
5 understanding is, in these situations in 248, the  
6 Petitioner has the burden of production and persuasion,  
7 and so we typically have the Petitioner demonstrate  
8 that they're avoiding impacts, which means first  
9 they've got to see what's there.

10 We could probably accompany the Petitioner's  
11 botanist to look. It's not a huge site. We already  
12 know from past monitoring activities and surveys where  
13 plants are, but, frankly, I don't know how long that  
14 would take. And then it's a matter of, Can plants be  
15 protected in place? Can plants be moved? If they can  
16 be protected in place, I think it's pretty simple to  
17 just designate that area, take some GPS points, and  
18 fence it off, like what sounds like is happening to  
19 what Mr. Kobelia described as RTE Areas 2 and 3.

20 I don't know how long that will take, but I think  
21 it's a matter of days and weeks rather than months.  
22 And so, as I understand it right now, there are areas  
23 that Mr. Kobelia is going to stay away from or has been  
24 directed to stay away from. It's unclear whether  
25 they've been secured in a manner that's acceptable to a

1     botanist, but what is also clear is that the 2018  
2     monitoring report, which is ANR-9, on Page 3 contains a  
3     map that shows the location of the Muhly grass along  
4     what Mr. Kobelia described as the old farm road, which  
5     runs from kind of the end of Willow Road northerly  
6     across the Apple Hill site and to the hedgerow south of  
7     the apple orchard.

8             Those plants exist in place and are labeled in  
9     that exhibit as Site A, Site B, and Site C. So he has  
10    indicated that, not only are there no protective  
11    measures being taken, but that the flagging that was  
12    there was actually, that he observed, was actually  
13    removed, and he described that flagging as caution  
14    tape, and, if you look further in on in that exhibit,  
15    on page -- where was I? Don't have the page off the  
16    top of my head, but there are photos of the, the plants  
17    that were transplanted into plots in that same exhibit,  
18    and the Muhly plants, some of which were transplanted,  
19    are depicted on Page 12 of that exhibit in the  
20    conservation area with yellow caution tape around that  
21    area. So there are plants out there that were never  
22    moved that are not being protected right now based on  
23    what I heard today.

24             The same goes for the conservation area in the  
25    southwest, which is more on the Willow Road, formerly

1 known as Chelsea site. The sheep farm plan that is ANR  
2 Exhibit 7 shows in the southwest portion of the  
3 property a demarcation or barrier fence, which is the  
4 actual conservation area that was designated in  
5 connection with the Chelsea or Willow Road project.

6 And so I've not seen any plans. I know Mr.  
7 Melone, in his redirect, alluded to the fact that  
8 there, that the clearing was not going to go all the  
9 way to the edge of the property or the edge of the  
10 VTrans right-of-way there, but I have not seen anything  
11 that says that that area is off limits or that shows  
12 that area being protected, and, apparently, Krebs &  
13 Lansing hasn't staked that out, according to what I  
14 heard from Mr. Kobelia.

15 So there is a, there is a threat of harm. The  
16 harm is irreparable, because the plants would be  
17 destroyed. That harm, it outweighs the potential to  
18 harm to the other parties. This would not be a very  
19 long process, I think, to sort this all out. The  
20 landowner is not planning to do hemp growing until 2021  
21 at the earliest. They can wait to clear this land.  
22 Meanwhile, the threat to the plants is high right now.

23 A likelihood of success on the merits, there is a  
24 resource, namely rare plants, that are protected by the  
25 248 process. The standard in 248 is no undue adverse

1     impact.  There's a reason for not commencing site  
2     preparations before obtaining a CPG, and one of those  
3     reasons is to be able to assess the potential for  
4     impacts and take measures to avoid, minimize, and  
5     mitigate those impacts if they're necessary to lessen  
6     the impacts from undue to simply adverse.  Given the  
7     history of this, given all the documentation from the  
8     developer's consultants and what we know here, I think  
9     it's very likely that we would have success,  
10    ultimately, if these plants were harmed.

11           And, finally, the fourth factor is, Is the  
12    injunctive relief in the public interest?  It is, one,  
13    because this is a protected resource under 248, but,  
14    beyond that, what we're talking about here is the  
15    integrity of the Section 248 process, and it's very  
16    clear that, as Mr. Melone said, he can't build the  
17    Apple Hill solar facility without clearing trees.  What  
18    the reason for clearing them is or the timing of  
19    clearing them is really irrelevant, because it is  
20    necessary to construct the project, and the project is  
21    still being pursued.

22           And that goes as well for the Willow Road, or  
23    formerly Chelsea project, based on what I've heard  
24    today and based on the, on the circumstances.  There is  
25    a Green Mountain Power line that's been run to

1     interconnect these projects at substantial expense  
2     from, from the developer. So I would, based on the  
3     history, based on the circumstances, and based on those  
4     factors, think that the developer will continue to  
5     pursue solar projects here.

6             So the integrity of the 248 process, I think,  
7     requires that the 248 requirements, including a  
8     restriction on site preparation in advance of a CPG, be  
9     adhered to.

10            CHAIRMAN ROISMAN: Mr. Einhorn, I have one  
11     other question for you.

12            MR. EINHORN: Yes.

13            CHAIRMAN ROISMAN: I understand the Agency's  
14     position with regard to the rare species, and you've  
15     indicated that you think there are things -- you're not  
16     sure exactly what they are yet and how long they would  
17     take -- but there are things that could be done such  
18     that the site could be cleared and the endangered  
19     species or the rare species could be protected.

20            My question is, Assuming all of that's done, does  
21     the Agency believe that a TRO should be issued in this  
22     case because this is site preparation occurring without  
23     a CPG? Are you taking a position on that issue?

24            MR. EINHORN: Yes, because, frankly, as I  
25     understand the law, the 248 CPG process is what gives

1 the Commission jurisdiction over the natural  
2 environment and these very rare and rare plants for  
3 which no independent agency jurisdiction, vis-a-vis the  
4 Threatened and Endangered Species Act, applies.

5 CHAIRMAN ROISMAN: Okay, thank you. Mr.  
6 Porter, I had one question for you. I would have asked  
7 it of Ms. Aceves, and I forgot. Are you available to  
8 answer? All of a sudden, you've gone into paused. I  
9 didn't mean to startle you. Mr. Porter? All right.  
10 Well, Mr. Melone, if his answer provokes you to want to  
11 have another 30 seconds or minute once he comes back on  
12 and I ask his question, I'll give it to you, but why  
13 don't you do your closing now, if you will? Thank you.

14 MR. MELONE: Okay. Thank you, Mr. Chairman  
15 and the commissioners. What I've heard today is that  
16 ANR's position is that, because of things it doesn't  
17 know, a TRO should issue and that they're putting on  
18 the landowner the evidentiary burden to prove that a  
19 TRO should not issue, but that's not the way the law  
20 works.

21 If ANR wants to send their botanist to our site,  
22 we'll let them spend as much time on our site as they  
23 want. They can inspect the areas that are marked off  
24 as the RTE areas 1, 2, and 3 and look for whatever  
25 plants they think exist there. But you'll see when you

1 get the clearing plan that, from, that Bob Kobelia has  
2 in his hand, that only 20 of the 27 acres of what would  
3 be the site where the solar facilities would be is  
4 actually scheduled to be cleared, and what's not  
5 scheduled to be cleared is the area along the western  
6 edge of what would be the Chelsea solar site. What's  
7 not scheduled to be cleared is RTE Area 1, 2, and 3.  
8 What's not schedule to be cleared is the area north of  
9 what would be the Chelsea solar site.

10 So we, we don't have the obligation to prove that  
11 a TRO shouldn't issue. The initial burden is on ANR to  
12 come up with the facts. They have not done that. They  
13 have not met any of the factors here. If they want to  
14 come and show or get, gather the evidence, we're fine  
15 to let them come to the site and do so. But on this,  
16 the larger issue, the clearing here has nothing to do  
17 with an electric facility. This is a plan to put the  
18 property in productive use for agricultural purposes,  
19 and on that score the Commission does not have any  
20 jurisdiction. So that's the initial threshold  
21 question.

22 ANR has not introduced any evidence that shows  
23 that this is for an electric facility. All they're  
24 doing is saying, Well, if this somehow benefits,  
25 potentially, in the future, makes it easier to install

1 a facility, then that means it's site preparation, but  
2 that's not what the statute says. That's not what the  
3 Commission precedent says.

4 There's no protection in Vermont for rare plants.  
5 This may be rare in Vermont, but it's not unlike the  
6 palm tree that's probably rare in Vermont too, but  
7 there are plenty of palm trees available in the United  
8 States. Plenty of these white arrow-leaved asters are  
9 available in the United States as well. And, in terms  
10 of ANR's focus on the 248(b) process and how this sort  
11 of ties into an ultimate determination of undue adverse  
12 effect on the natural environment, (b)(5) requires a  
13 balancing test.

14 So, if ANR was correct that somehow what is solely  
15 an agricultural activity could still be subject to  
16 248(b)(5), then, not only would they have to prove that  
17 there is an undue adverse effect on the natural  
18 environment, which they have not introduced any  
19 evidence of, because we have protected the three RTE  
20 areas, and (b)(5) also requires a balancing test  
21 based on the potential benefits in terms of greenhouse  
22 gases of a CPG, and, of course, a CPG is not even  
23 issued here.

24 So, at the end of the day, I don't think they've  
25 met their burden. They haven't met any of the four

1 factors. All it is is based on what they say they  
2 don't know. We'll give them an opportunity to find out  
3 what they want to know, but it's not up to us to have  
4 our people go out there and then prove to them certain  
5 things. We'll, we'll provide the plan that will show  
6 what's being protected, and, beyond that, it really is  
7 up to ANR to come out and then come back to the  
8 Commission and, and try to make its case, as opposed to  
9 doing what it's doing now and just saying that, based  
10 on what they don't know, they think a TRO should issue.  
11 That's all I have, Mr. Chairman.

12 CHAIRMAN ROISMAN: Okay. Commissioner  
13 Hofmann, Commissioner Cheney, or Mr. Landis-Marinello,  
14 did you have any questions you wanted to put to Mr.  
15 Melone on his closing argument?

16 COMMISSIONER HOFMANN: I do not.

17 MR. PORTER: Mr. Chairman?

18 CHAIRMAN ROISMAN: Yes.

19 MR. PORTER: This is Jim Porter. I just  
20 wanted to apologize. I was on two different hearings  
21 on two devices and had some difficulties. I can answer  
22 your question -- I heard half of it -- if it's still  
23 relevant or not. But I apologize. I was gone for a  
24 minute.

25 CHAIRMAN ROISMAN: I like to think that any

1 question I wanted to ask was relevant. That may be  
2 subject to debate. But the question I wanted to ask  
3 you was pretty much the same question I asked Mr.  
4 Einhorn. There's sort of two separate issues here that  
5 relate to the TRO. One is the endangered or rare  
6 plants and whether or not they are, there's imminent  
7 risk of damage to them, and the other is the question  
8 of whether or not we have a situation in which site  
9 preparation is being done before a CPG has been issued  
10 for an electricity facility.

11 My question is, What is the Department's position  
12 on each of those issues? I know Ms. Aceves said that  
13 the Department is supportive of a TRO issuing, but I  
14 wasn't clear, and I should have asked her, on which  
15 grounds, or is it on both?

16 MR. PORTER: Yes, sir. Certainly, the  
17 Department is supportive of a TRO as it relates to the  
18 rare plants and whether they're going to be protected,  
19 as has been discussed. As to a TRO and in reference to  
20 site clearing for a CPG, I think that's a little more  
21 complicated, and I think I request -- I do think that  
22 some further investigation of what's going on down  
23 there is probably necessary before the Department can  
24 opine as to whether we think it is site clearing under  
25 248. But, clearly, we support the TRO in reference to

1 the plants and having that issue worked out.

2 CHAIRMAN ROISMAN: Okay, all right. Thank  
3 you. We're going to, we're going to adjourn for just a  
4 few minutes, and the commissioners are going to  
5 consult, and we will be back, not at so long that those  
6 of you who feel like lunch is an important part of your  
7 day will feel that you've been cheated out of one, but  
8 I imagine it's about five or ten minutes, and we'll be  
9 right back with you.

10 (A recess was taken from 12:55 p.m. to 1:20 p.m.)

11 CHAIRMAN ROISMAN: All right. We've decided  
12 to issue a TRO today. We will issue an order to  
13 explain our reasoning later today. We will schedule a  
14 hearing in the near future for an injunction hearing to  
15 determine whether or not the TRO should be turned into  
16 a permanent injunction and, if so, what the scope of it  
17 will be. But, at this moment in time, we are convinced  
18 that there is sufficient evidence from this record to  
19 justify the issuance of a TRO, and we will explain the  
20 basis for our position in an order that will come out  
21 later today, quite likely after the normal 4:30 closing  
22 time of the Commission, but before midnight.

23 We thank all of you for your time, your attention,  
24 your contributions today, and all the effort that  
25 everyone's put into this, and particularly to our court

1 reporter. It's always a great benefit to us that you  
2 guys are so reliable. Thank you very much. This  
3 hearing is concluded. Thank you.

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6 (Whereupon at 1:21 p.m. the hearing was adjourned.)

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