

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

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

**MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER
OF APPLE HILL SOLAR LLC**

*“[A] petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.”
~Georgia Mountain, Docket No 7508, Order of January 5, 2012*

On June 24, 2020, this matter was opened up by the Vermont Public Utility Commission (the “Commission”) on its own motion in response to a complaint by Annette Smith filed in docket 8454. Apple Hill Solar LLC (“AHS”) is the “petitioner” in docket 8454. On June 26, 2020, the Commission issued a temporary restraining order (the “TRO”) in the above-captioned matter, which order also scheduled a preliminary injunction hearing for July 9, 2020.¹ AHS has filed a motion to vacate the preliminary injunction because the Commission has no authority to issue preliminary or permanent injunctive relief in this matter. “It is manifest that the Public [Utility] Commission cannot grant this relief.” *West Rutland v. Rutland R.R. L. & P. Co.*, 98 Vt. 379, 383 (1925). On July 1, 2020, the Commission adjourned the preliminary injunction hearing and requested further briefing from the parties.

¹ The TRO was electronically made available at 10:31p.m. on June 26, 2020, and physically served on June 27, 2020.

Now AHS moves to dissolve the TRO because the linchpin of the TRO is not based upon an accurate recollection of the testimony by the Commission. Specifically, factual finding #5 is the linchpin of the TRO's conclusion that PLH's proposed activities are not farming. *See* TRO at 4 ("The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location 'primarily' to serve the proposed solar projects. This does not qualify as farming.") At no time did Mr. Melone state (as Finding #5 claims) that "[t]he sheep grazing is being done 'primarily' to control vegetative growth at the petitioner's planned solar projects at the site." The landscaping benefit to the Apple Hill solar site is incidental compared to the overall sheep business. The hoped-for solar projects at the site (which the Commission has denied CPGs for both) would be a small portion of the solar projects that would be serviced by the sheep, both Allco-related projects and third-party projects (in New York, Vermont, Massachusetts and Connecticut). For this reason alone, the TRO should be dissolved as an incidental benefit cannot rise to the level of "site preparation".

In addition, the Commission has no authority to issue the TRO, and even if it had the authority and "[t]he petitioner's [tree-clearing] activities constitute site preparation without a CPG," there is (i) no irreparable injury from such site preparation, (ii) no basis to conclude that any of the other parties are likely to succeed on the merits and (iii) the wrong procedure was followed and the TRO is causing irreparable harm to the landowner. AHS also moves to dissolve the TRO on the grounds that (iv) the restriction on site preparation is unconstitutionally vague, (v) the TRO lacks substantial evidence and is arbitrary and capricious, (vi) the TRO violates the *Cady Hill* requirement of administrative consistency, (vii) the TRO violates due process because of lack

of fair notice, and (viii) the TRO is based upon a rare plant classification system that is invalid, is beyond ANR's authority and is unscientific.

At the end of the day, the ANR rare plant classification is not based upon evidence (scientific or otherwise) but on the absence of evidence. It is right in line with the Trump-style logic that if there is less testing, there will be less Covid-19 cases. In other words, if you do not have proof that it exists, then it does not exist. That is the logic of the ANR rare plant system.

In accordance with V.R.C.P. 65(a),² AHS provides notice to all parties of this motion to dissolve or modify the TRO, and moves the Commission to hear this motion at the earliest possible time as required by V.R.C.P. 65 because the TRO is causing irreparable injury to the persons covered by the TRO.

I. The Prohibition On Site Preparation Is Unconstitutionally Vague and Standardless.

“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480 (2000) (“*Hill*”). The prohibition on site preparation is impermissibly vague under both tests.

The Vermont Supreme Court's recent case on the issue, *In re Snyder Group*, 2020 VT 15, is instructive. In *Snyder*, a developer received approval from the City of South Burlington for a

² V.R.C.P. 65(a) provides:

On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

planned unit development. Neighbors argued that the bylaws under which the developer received the approval were unconstitutionally vague. The developer's project needed to rely on the statutory ability to transfer development rights from one property to another. Specifically, the issue was the number-equivalency of development rights (i.e., an objective standard) that are transferred from one property to another. In other words, were such rights transferable on a 1:1 basis (as the Court decided) or some other unknown basis (as the neighbors argued)? The City had in all previous cases applied a 1:1 ratio. The Court held that the *objective* 1:1 ratio was what followed from the city's regulation and past practice.

Notably, what was upheld in *Snyder* was a regulation and practice that was a plainly objective test, *i.e.*, 1:1 equivalency, and admitted *no discretion* of any kind. That is precisely the type of *objective* standard that would allow landowners to develop proposed land uses. Here, the situation is the polar opposite—there are no objective standards of any kind.

“[T]he adoption of new laws restricting liberty is supposed to be a hard business, the product of an open and public debate among a large and diverse number of elected representatives. Allowing the legislature to hand off the job of lawmaking risks substituting this design for one where legislation is made easy, with a mere handful of unelected judges and prosecutors free to condemn all that they personally disapprove and for no better reason than they disapprove it.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (“*Sessions*”) (Gorsuch, J. concurring in part and concurring in the judgment) (internal quotations and citations omitted).

“Vague laws invite arbitrary power. Before the Revolution, the crime of treason in English law was so capaciously construed that the mere expression of disfavored opinions could invite transportation or death. ... Today's vague laws may not be as invidious, but they can invite the

exercise of arbitrary power all the same—by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.” *Id.* at 138 S. Ct. 1223-4. “[V]ague laws are ‘not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute.’ *Giaccio v. Pennsylvania*, 382 U. S. 399, 402, 86 S. Ct. 518, 15 L. Ed. 2d 447 (1966). So the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive.” *Id.* at 138 S. Ct. 1229.

It is the Legislature, not the PUC, that needs to make the tough decisions through the political process and not, as here, lay down vague and standardless concepts that allow *ad hoc* and arbitrary decisions and provide no ability for a landowner to know what is permitted and what is not.

A. The Phrase “Site Preparation For ... An Electric Generation Facility” Provides No Standard For Ordinary People To Understand What Is Permissible And What Is Not And It Authorizes And Encourages Arbitrary And Discriminatory Enforcement.

30 V.S.A. §248(a)(2)(A) provides:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.

The phrase “site preparation for ...an electric generation facility” is not defined. Nor does the statute provide any standards as to the meaning or implementation of that phrase. “The restrictions of zoning statutes and zoning ordinances authorized by statute are in derogation of the common law and should be strictly construed.” *In re Willey*, 120 Vt. 359, 365 (1958). Section 248 is a state-level zoning statute that restricts development “in derogation of the common law.” Such restrictions, including the restrictions that might flow from the phrase “site preparation for ...an electric generation facility,” are valid “only if it is accompanied by some ability of landowners to

predict how discretion will be exercised and to develop proposed land uses accordingly.” *In re Handy*, 171 Vt. 336, 349 (2000). *See also, Sheedy v. Merrimack County Superior Court*, 128 N.H. 51, 54 (1986) (a statute or regulation is void for vagueness when it either forbids or requires "the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning *and differ as to its application*," quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) (emphasis added). Such restrictions are also invalid if they authorize or encourage “arbitrary and discriminatory enforcement.” *Hill*, 530 U.S. at 732.

1. The Phrase “Site Preparation For ... An Electric Generation Facility” Provides No Standard For Ordinary People To Understand What Is Permissible And What Is Not. Persons Of Common Intelligence Must Guess At Its Meaning *And Differ As To Its Application*.

Not only is the phrase “site preparation for ...an electric generation facility” not sufficient for “ordinary people to understand,”³ even sophisticated developers and the PUC are left guessing as to what it means. The Commission has no objective standard for determining what “site preparation for ... an electric generation facility” means, and the statute reveals none.

The Commission has stated that “a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.” *Georgia Mountain*, Docket No 7508, Order of January 5, 2012. The Commission has also recognized that section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011).

³ *See, Synder* at P25 quoting *In re Beliveau*, 2013 VT 41, P15.

The Commission has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not solely related to the electric generating facility, even when those were expressly incurred for federal and state tax purposes as part of construction of the electric generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”)

Yet here, the Commission ignores that precedent (without addressing it) and concludes that a landowner’s farming activities are site preparation for an electric generation facility merely because trees need to be cleared for the farming activity and trees would be needed to be cleared for a proposed solar facility if the solar facility were built now.

In addition, there is no understandable limitation of what is now espoused as the site preparation limitation. If there were an old house on the site that would need to be removed for a farming use but also would be required to be removed for a solar use, is that site preparation? What if there were a rock wall in the middle of an otherwise cleared parcel that would need to be removed for a farming use but also would be required to be removed for a solar use, is that site preparation? What if one tree, ten trees, or a hundred trees were in the middle of an otherwise cleared parcel that would need to be removed for a farming use but also would be required to be removed for a solar use, is that site preparation?

What if a landowner needed to clear trees to install an electronic billboard and access to that billboard that would communicate non-commercial First Amendment protected speech to the

more than 9,000 cars that pass the site per day, but those same trees also would be needed to be removed for a solar use if one were built now, is that site preparation?

There is simply no standard for ordinary people to understand what is permissible and what is not and persons of common intelligence must guess at its meaning and differ as to its application. Here “statute that fails to provide adequate guidance, thus leading to unbridled discrimination by the court and the [Commission] charged with its interpretation.” *In re JAM Golf, LLC*, 2008 VT 110 at P13 (internal citations and quotations omitted).

2. The Phrase “Site Preparation For ... An Electric Generation Facility” Authorizes And Encourages Arbitrary And Discriminatory Enforcement.

The lack of any objective standard authorizes and indeed encourages arbitrary and discriminatory application of the statute. Without being constrained by objective guide posts the Commission can just make it up as it goes along, which it did here. Further, the Commission might completely ignore the issue if no one complains. The arbitrary and discriminatory enforcement is shown by the Commission’s own decisions.

The Commission has never previously issued a temporary restraining order restraining a landowner from engaging in lawful activities on its land. When previously presented with the issue, the Commission has recognized that section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011). The Commission has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not *solely related to* the electric generating facility, even when those were expressly incurred for federal and

state tax purposes as part of construction of the electric generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”) *See also, Georgia Mountain*, Docket No 7508, Order of 1/5/2012 (“a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.”) It is also indisputable that site preparation related to agricultural use “constitute[s] ‘farming’.” *Re: Scott Farm, Inc.* 2003 VT ENV LEXIS 6 (2003). The different treatment here plainly shows how the vagaries of the statute result in arbitrary and discriminatory enforcement.

The result is *ad hoc* arbitrary application that allows the Commission and ANR to “condemn all that they personally disapprove and for no better reason than they disapprove it.” *Sessions v. Dimaya*, 138 S. Ct. at 1229.

II. The Commission’s TRO Is Arbitrary And Capricious.

“A fundamental norm of administrative procedure requires an agency to treat like cases alike.” *In re Petition of Stowe Cady Hill Solar, LLC*, 2018 VT 3, ¶21, 182 A.3d 53, 59 (“*Cady Hill*”). The Vermont Supreme Court in *Cady Hill* held that the Commission’s application of its rule regarding completeness of net meter applications ran counter to the Commission’s own previous application of the same rule in a like case, and accordingly struck down the Commission’s decision denying Cady Hill Solar a CPG. *Cady Hill*, 2018 VT 3, ¶22. Applying this rule of administrative procedure, the Commission has an obligation to treat this case like it has treated similarly situated cases regarding the issue of site preparation for an electric generation facility.

The PUC failed to do so. When previously presented with the exact issue, the Commission has recognized that section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011). *See also, Georgia Mountain*, Docket No 7508, Order of January 5, 2012 (“[A] petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.”)

III. The Commission’s TRO Violates Due Process And The Fair Notice Requirement.

“It is a fundamental tenet of due process that ‘[n]o one may be required at peril of life, liberty or *property* to speculate as to the meaning of penal statutes.’” *United States v. Batchelder*, 442 U.S. 114, 123 (1979), *quoting Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (emphasis added). “[N]otions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Here those basic tenets of due process were violated. *First*, the statute speaks of no criteria that provides clear standards as what would constitute site preparation for an electric generation facility. *Second*, the Commission’s prior precedent makes it clear that a CPG petitioner may conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Commission and here no CPG has been issued. Indeed, the Commission has denied CPGs. The Commission now seeks to change its prior precedent and retroactively apply it, preventing the landowner from engaging in lawful

farming activities. A clearer case of lack of fair notice and a violation of due process is difficult to imagine.

IV. The Commission Lacked Authority To Open This Investigation And It Lacks Authority To Maintain It.

The Vermont Supreme Court has recently reviewed the powers of the Commission. *In re Investigation Into Solarcity Corporation*, 2019 VT 23, P11-13, the Court stated:

The Legislature has granted the Commission oversight of electricity companies and electric-generation facilities, and the Commission shares this responsibility with the Department. *See, e.g.*, 30 V.S.A. § 203 (“The Public Utility Commission and the Department of Public Service shall have jurisdiction over the following described companies within the State, ... and of all plants, lines, exchanges, and equipment of ... [a] company engaged in the manufacture, transmission, distribution, or sale of gas or electricity ...”). The Commission and the Department are wholly separate bodies. *See id.* §§ 1, 3. Some powers of oversight belong only to the Department, and others belong only to the Commission. *See, e.g., id.* § 2(a)(5) (authorizing Department to act as state's representative in purchasing electricity from out-of-state producers); *id.* § 9 (granting Commission authority to act as court of record in proceedings under its jurisdiction). Other powers the Commission and the Department share. *See, e.g., id.* § 18 (authorizing Commission and Department to “examine the books, accounts, and papers of any company ... operating any line, plant, or property, subject to the Commission's or the Department's jurisdiction”).

The investigation here was *sua sponte* opened by the Commission. But as the Vermont Supreme Court has recently explained, the powers of the Commission to open investigations is limited. *See, In re Investigation Into Solarcity Corporation*, 2019 VT 23, P12:

With regard to investigations, in various sections throughout Title 30 the Legislature has authorized the Department to petition the Commission to open an investigation, and it has also authorized the Commission to open investigations on its own initiative. *See, e.g., id.* § 218(a) (authorizing Commission to open investigation and make findings and judgment regarding rates, tolls, charges, or schedules); *id.* § 227a(c) (authorizing Commission to investigate whether to reimpose regulatory requirements for telecommunications services, either upon Department's petition or upon its own initiative); *id.* § 4002a(b)(1) (authorizing Commission to investigate certain contracts if Department opposes contract or upon Commission's own motion).

The investigation here is not one authorized under Title 30 that can be opened by the Commission. The type of investigation involved here can only be opened by the Department of Public Service (“DPS” or the “Department”) under 30 V.S.A. §30(h). As a result, the TRO must be vacated and this case closed. If the Department decides to pursue the matter it certainly may do so by following the proper procedures.

V. The Commission Has No Jurisdiction To Grant Or Maintain The TRO.

30 V.S.A. §10(e) provides that the Commission may grant a temporary restraining order in the manner provided by, and subject to limitations prescribed by, the Vermont Rules of Civil Procedure. That provision invests the authority to issue a temporary restraining order involving an issue *over which it already has jurisdiction*. Section 10(e) does not broaden the Commission’s jurisdiction. Otherwise there would be no limit to what the Commission or a single Commissioner could temporarily restrain.

Here, the Commission has jurisdiction over two separate petitions under section 248 for a certificate of public good (“CPG”). But jurisdiction to consider a CPG *application* does not give the Commission jurisdiction over a purported violation of section 248. 30 V.S.A. § 9 provides that the “Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.” “[T]he Commission is a body of special and statutory powers, as to which nothing is presumed in favor of its jurisdiction. ... Its powers include only those expressly granted by the Legislature and such incidental powers as are necessarily implied to carry out its express grant.” *In re Petition of Swanton Wind LLC*, 2018 VT 141, P9 (internal quotations and citations omitted.) “The

Legislature has invested the Commission with ‘the powers of a court of record,’ ... but the Commission ‘is not a court in the strict sense.’” *In re Investigation Into Solarcity Corp.*, 2019 VT 23, P13.

Title 30 of Vermont Statutes Annotated provides for the jurisdiction to issue a temporary restraining order in limited circumstances. The authority of the Commission to issue a restraining order is limited to its authority under 30 V.S.A. §209(a)(6) “to restrain *any company* subject to supervision under this chapter from violations of law, unjust discriminations, usurpation, or extortion.” (emphasis added). None of AHS nor any of the other entities listed in the TRO are a “company” under Title 30. *See*, 30 V.S.A. § 201. Thus, none of the persons defined in the TRO as “Allco” are a company,⁴ and as a result none are subject to the Commission’s authority under §209(a)(6) to “restrain.”

A. Section 248 And Commission Precedent Clearly Establish That None Of AHS Nor Any Of The Other Entities Listed In The TRO Are A “Company” Under Title 30.

There is an albatross around the necks of the proponents of Commission jurisdiction in this arena—it is section 248(b)(6) (“With respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company’s approved least-cost integrated plan.”) The Department claims that AHS is a “*company* subject to the Commission’s Section 209 authority.” DPS Resp. 7/15/20 at 4 (emphasis added.) Yet *every* section 248 application submitted by an independent developer has not been required to meet the

⁴ *See also*, section 248(b)(6).

criteria of section 248(b)(6) because it is beyond cavil that such an applicant is not a company under section 201 or 209.

There is simply no support for the position that either AHS or the landowner is “a company.” Neither one files a least-cost integrated plan. Neither one provides any product or service to the public. Neither one conducts a public service business. Neither one owns any property used in connection with the conduct of a public service business.

The proponent parties’ only claim for jurisdiction is that the filing of a section 248 application by a non-company somehow turns it into a company. But as this Commission has previously held, that position is vacuous. The filing of a section 248 application is not the operation of a public service business. The filing of a section 248 application does not constitute the owning of any property used in connection with the conduct of a public service business. Indeed section 248 itself lays bare the lack of merit in that position. Section 248(a)(2)(A) provides that “no company, as defined in section 201 of this title, *and no person*, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility ... within the State that is designed for immediate or eventual operation at any voltage.” (emphasis added.) The language that expands the site preparation and construction prohibition to “persons” would be superfluous under the Department’s view that the filing of a CPG application turns the applicant and all “related” entities into section 201 and 209 regulated companies because the first part of section 248(a)(2)(A) would do the job without the additional language referencing “persons.”

The proponent parties’ position is truly extraordinary. It not only tosses out and ignores decades of precedent under section 248 (and the statute) as to who is, and who is not, a “company,” but it also, without any authority, treats any party “related” or somehow connected to the applicant

as also subject to the Commission's jurisdiction under section 209 as a company. The result is massive expansion of the Commission's jurisdiction to regulate entities inside and outside of Vermont. Thus, under the Department's new expansive view of jurisdiction of related companies, the Commission would have supervision over Green Mountain Power's parent companies that sell natural gas in parts unknown and could regulate "(1) the purity, quantity, or quality of [that] product furnished or sold by any [such related entity because it would be a] company subject to supervision under this chapter." 30 V.S.A. § 209(a)(1). When NextEra submits its applications for CPGs for its standard-offer projects, under the Department's new view of related-party jurisdiction, the Commission could now regulate Florida Power and Light, and a host of other related companies both inside and outside of Vermont.

The reality is that none of the above is possible, but yet that is precisely the logical result from the Department's assertion that certain persons that have overlapping indirect ownership or that have some profit connection (like a landowner that leases its land for a project), all then become subject to the Commission's jurisdiction over any and all businesses and activities they conduct.

From the case citations advanced by the other parties it is clear that no court of competent jurisdiction has endorsed the position taken by the Department, ANR and the Intervenors. The only case cited is *Global Naps v. Vt. Pub. Serv. Bd.*, Case No. 2:09-cv-292, 2010 U.S. Dist. LEXIS 159081 (D. Vt. February 24, 2010), a case involving the Telecommunications Act of 1996 (47 USCS § 252-253). But that case provides no support for the Department's position. First, the issue present here was never decided. Second, no party apparently raised the issue of whether the Commission had jurisdiction to issue preliminary or permanent injunctive relief. Third, Judge

Sessions referenced Rule 2.406(D) merely in connection with his observation that Rule 2.406(D), like the federal rules, places the burden of proof on the party seeking the injunction. *Global Naps* at *6-7 (“Under the PSB's rule, therefore, Global bore the burden of establishing that a preliminary injunction should issue. This is consistent with federal case law and Supreme Court precedent.”) Fourth, no part of that opinion can be viewed as an implicit recognition of the Commission’s jurisdiction to issue preliminary or injunctive relief. Rather, the issue of whether the Commission had the jurisdiction to issue a preliminary injunction was irrelevant as the Commission denied the request. The Federal District Court did not disagree with the Commission’s conclusion that the movant had not met the required burden, thus jurisdiction was irrelevant and never raised or argued.⁵

B. The Path Set Forth By The Legislature In Section 30(h) Is Exclusive.

To the extent that there is an alleged violation of section 248 by a “person” as alleged here, the Legislature provided for the path that must be followed and that is laid out in 30 V.S.A. § 30(h). Section 30(h) provides: “In accordance with the process set forth in this subsection, the Department may issue an administrative citation to a person the Department believes after investigation

⁵ The other case cited by the Department, *In re Bloch*, 133 Vt. 326, 327 (1975) dealt with public service companies and did not involve injunctive relief. While the Commission may issue a temporary restraining order to cause a temporary stop to a company’s actions that may endanger public safety, injunction proceedings under Title 30 are governed by under 30 V.S.A. §32, which only applies to a “company” and which provides that the Department of Public Service is required to seek injunctive relief in Superior Court, not before the Commission. There is no authorization for injunction proceedings before the Commission in the case of a company, and certainly not in the case of a person that is not a company.

Notably, the Legislature provided a clear check on the issuance of injunctive relief in utility matters in section 32 by providing for the waiver of sovereign immunity if the injunctive relief requested was not justified. Here, the Commission seeks to place AHS and the other persons included in the TRO’s sweep in a worse position than if they were in fact a company.

violated section 246, 248, 248a, or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections.”

Here the allegation is that some entity has violated section 248’s prohibition on site preparation. That allegation falls squarely within 30 V.S.A. §30(h). The Vermont Supreme Court has consistently held that the more specific provision governing conduct applies, which here is 30 V.S.A. §30(h). *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, P19 (“when two statutes appear to apply to the same situation in conflicting ways, and one statute is enacted later and is more specific than the other statute, we construe the later-enacted and more-specific statute as controlling.”) In any case, 30 V.S.A. §30(h) does not authorize the Department or the Commission to issue a TRO. 30 V.S.A. §30(h) does authorize the Department to seek remedial retrospective relief, but not injunctive relief.

Even in the case of a company subject to the jurisdiction of the Commission or DPS that is alleged to have violated section 248, the law commits to the DPS under 30 V.S.A. §32 the authority to initiate injunction proceedings *in Superior Court* if there is an alleged violation.⁶ Only the Superior Court is vested with the jurisdiction to issue injunctive relief in those circumstances.

⁶ 30 V.S.A. §32: Injunction proceedings

Whenever the Department of Public Service is of the opinion that a company subject to its supervision is failing or omitting or is about to fail or omit to do anything required of it by law or by order of the Commission or is doing anything or permitting anything or is about to do anything or to permit anything to be done contrary to or in violation of law or of any order of the Commission, the Department of Public Service may commence an action or proceeding in the Superior Court for the purpose of having such violations or threatened violations stopped and prevented by injunction. Such action or proceeding shall begin by a petition alleging the violation complained of and praying for appropriate relief by way of injunction. It shall thereupon be the duty of the court to specify the time, not exceeding 21 days after service of a copy of the petition, within which the company complained of must answer the petition, and the court may grant a temporary injunction in accordance with the laws of the State and rules in such case made and provided. The obtaining of a temporary injunction shall constitute a waiver by the State of its sovereign immunity to pay the person enjoined damages as such person may sustain by reason for such injunction if the court shall eventually decide that the State was not equitably entitled thereto and the State shall be liable to pay

The only provision of Title 30 that authorizes the Commission to take action to pursue injunctive relief is section 7061 which authorizes the Commission to “file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter.”

Finally, no CPG has been issued to AHS or Chelsea Solar LLC for the site in Bennington. The Commission only attains jurisdiction over the operation of those facilities and the petitioners once the CPG is issued.

The Commission’s attempt to place itself in the position of a tribunal that could issue injunctive relief against AHS and the other entities described in the temporary restraining order would render multiple provisions in Title 30 superfluous, such as, §10(e), §32, §209(a)(6), §7061 § 218(a), § 227a(c), § 4002a(b)(1), to name a few.

Further, as the caption of this case states, the Commission is relying on 30 V.S.A. §30 and 30 V.S.A. §209. Section 209 simply has no applicability to AHS or any of the other entities that the TRO seeks to sweep within its scope as none of them are a “company.” Under section 30, the investigation must proceed under section 30(h), and to the extent injunctive relief is sought, it must be done so in Superior Court.

to the person enjoined such sums as would be payable by any other person in the premises. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances in such manner as the court directs without other or formal pleadings and without respect to any technical requirement. Such other persons or corporations as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment, or writs effective may be joined as parties upon application of counsel to the Department. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that an injunction be issued as prayed for in the petition or in such modified form as the court may determine will afford appropriate relief.

VI. ANR Has Conceded That Its Rare Plant Classifications Are Not Based Upon Scientific Evidence, Resulting In A Lack Of Foundation For The TRO.

ANR has one person assigned to rare plants—Bob Popp. Mr. Popp has many other tasks as well. Here, ANR seeks to enforce its rare plant classification system, involving two purportedly rare plants—the white-arrow leaved aster and the Nimblewill. ANR ranks the White Arrow-Leaved Aster as S1 (very rare) in Vermont. Its range extends from the Midwest: Ontario to Arkansas and east to the Carolinas, Pennsylvania, and New York. It is not a rare plant, and it has been discovered in abundance in Bennington, and especially in the State-owned railway corridor in Bennington where the State allows the plant to cut without restrictions.

At the June 26, 2020, hearing, Mr. Popp conceded that not only has he not looked into whether it is easy to acquire replacements for the white-arrow leaved aster but that he would not be surprised to find that they are readily available from Wal-mart and Home Depot type nurseries throughout the United States. *See Tr. at 47:*⁷

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

A. I have not personally looked into that. I, I would not be surprised if you could get the American Aster plant through a nursery.

Mr. Popp further explained, a rarity classification of S1 or S2 means nothing about the existence of the plant species, it only means that it is considered by Mr. Popp and some cohorts as very rare or rare in Vermont. Thus, a palm tree would be considered very rare in Vermont, but as a species, it thrives in other areas of the country.

⁷ The transcript is available at: <http://epuc.vermont.gov/?q=downloadfile/417596/150086>.

Mr. Popp also admitted, there are no surveys done by those classifying the plants under the Vermont “S-scale”, thus there is no way to determine whether the white-arrow leaved aster or the Nimblewill are properly classified. As Mr. Popp explained, he needs to rely on reports from others. But as Mr. Popp also explained, an ordinary person would not know whether the white-arrow leaved aster or the Nimblewill existed on her property. Tr. at 34. But even in that scenario there is simply no ability of those doing the classifying to know whether, in fact, the ranked plants are properly ranked because no one knows with any certainty how many exist in Vermont, and if Vermonters started reporting plant species the system, Mr. Popp would be unable to process them. See Tr. at 35:

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

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

At the end of the day, the ANR rare plant classification is not based upon evidence (scientific or otherwise) but on the absence of evidence. It is right in line with the Trump-style logic that if there is less testing, there will be less Covid-19 cases. In other words, if you do not have proof that it exists, then it does not exist. That is the logic of the ANR rare plant system.

The arbitrariness of and lack of evidentiary support for the ANR rare plant classification system really shines when it comes to the Nimblewill, a noxious weed whose fate is usually a dose of Roundup. The S2-ranked Nimblewill Muhly (*Muhlenbergia schreberi*) is easily replaced. The S2-Nimblewill, *muhlenbergia schreberi* is classified by the USDA as a “noxious weed.”

<https://plants.usda.gov/core/profile?symbol=MUSC>. It is present in all New England States. *See*, <https://gobotany.nativeplanttrust.org/species/muhlenbergia/schreberi/>. In Massachusetts it is classified as S5-“widespread.”

Although classified as S2 in Vermont, when actual surveys were done (i.e., *when minimal investigation was undertaken*), the Nimblewill was found to be widespread and *unable to be eradicated* even on land that is regularly farmed. For example, a survey was conducted in 2013 by UVM. Out of 25 farms surveyed, the Nimblewill was present on 6, i.e., 40% and in dense quantity (10 per square foot). *See, Weed Seedbank Summary of Vermont Organic Farms*, by Sid Bosworth, Extension Agronomist, and Ann Hazelrigg, Extension Plant Pathologist, UVM Extension, as part of Northern New England Collaborative Research Project "Assessing the potential for emergence of new cropland weeds in the Northern New England region as a consequence of climate change", University of Vermont, University of New Hampshire and University of Maine available at https://pss.uvm.edu/vtcrops/research/Weeds_Seedbank_Summary_Vermont_2013.pdf (last visited July 3, 2020).

Thus, when someone actually surveyed land that had been actively farmed for years, the Nimblewill was still present with an average density of 10 per square foot.⁸ But the fate of the

⁸ *See id.* “The locations of the farms ranged across the whole state from Brattleboro to Alburgh. A single field was sampled from each farm in early June. All of the fields had been recently tilled and had been in annual crops for at least three years or more. Within each field, 10 soil cores were collected to a depth of six inches. The soil was thinly spread on flats and placed in the University of Vermont greenhouse. On a weekly basis for six months, weed seedlings were counted, recorded and pulled. The assumption is that a germinated seedling represents one seed in the seedbank and that a majority of the seed will germinate within six months of time. Although this method does not measure the entire seedbank (since long term dormant seed is unlikely to germinate in such a short period of time), it does represent the potential seed that could likely germinate within a short period of time (one to two years).”

Nimblewill is normally a dose of Roundup, as it is a noxious aggressive weed. A 2015 Plant health care report from the Morton Arboretum⁹ provides a good summary:

Pest Updates: Weeds

Nimblewill (Aggressive)

Nimblewill (*Muhlenbergia schreberi*) is a grassy weed that has been showing up in a number of lawns this year. The Plant Clinic at The Morton Arboretum has received several samples of this weed. Nimblewill is a warm-season grass so it greens up later than our bluegrass lawns. That makes it easy to spot in spring. Look for the brown patches in your green lawn. In summer, it differs from our bluegrass in that it has smaller leaves giving it a finer texture (fig. 21). It spreads by thin, wiry stolons which give the plant a looser look. Because of the stolons it can spread fairly aggressively. It can also spread by seed. Nimblewill may be misidentified as bentgrass, but bentgrass is a cool season grass and will be green in spring and fall, when nimblewill is brown.



Figure 21 Nimblewill (photo credit: Tim Murphy, Univ. of Georgia, Bugwood.org)

Management: Nimblewill is hard to control because it is a perennial grass just as your lawn is. Most common lawn herbicides cannot select out one perennial grass and not kill the other. There is an herbicide on the market now that is selective for nimblewill. The product is Tenacity and contains the active ingredient mesotrione. Read the label for instructions on proper usage. Small patches of nimblewill can also be killed using glyphosate (RoundUp). Glyphosate is non-selective, so apply it only to the nimblewill.

The tale of the Nimblewill proves that ANR’s rare plant system is merely based upon Trump-style logic that relies on the absence of evidence, and is not based upon and scientific evidence or investigation. Moreover, “rare” does not necessarily equate to “good” for the State of

⁹ See, http://stage.mortonarb.org/files/Plant_Health_Care_Report_2015_5.pdf (last visited July 3, 2020).

Vermont as the protection of plants like the white arrow-leaved aster and the Nimblewill can have unintended negative consequences in Vermont.

As a result, the TRO lacks any credible foundation.

VII. Even If The Tree-Clearing Activity Constitutes Site Preparation, There Is No Irreparable Injury.

Section 248(a)(2) states that “(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility ... within the State that is designed for immediate or eventual operation at any voltage ... unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.”¹⁰

On March 23, 2020, pursuant to Commission Rule 2.204(G), AHS filed an amendment (the “Amendment”) to its petition for a certificate of public good in docket 8454.¹¹ In accordance with

¹⁰ 10 V.S.A. 6001(14) provides:

(A) "Person":

(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership;

(ii) means a municipality or State agency;

(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land;

(iv) includes an individual's parents and children, natural and adoptive, and spouse, unless the individual establishes that he or she will derive no profit or consideration, or acquire any other beneficial interest from the partition or division of land by the parent, child or spouse;

(B) The following individuals and entities shall be presumed not to be affiliated for the purpose of profit, consideration, or other beneficial interest within the meaning of this chapter, unless there is substantial evidence of an intent to evade the purposes of this chapter:

(i) a stockholder in a corporation shall be presumed not to be affiliated with others, solely on the basis of being a stockholder, if the stockholder and the stockholder's spouse, and natural or adoptive parents, children, and siblings own, control or have a beneficial interest in less than five percent of the outstanding shares in the corporation;

(ii) an individual shall be presumed not to be affiliated with others, solely for actions taken as an agent of another within the normal scope of duties of a court-appointed guardian, a licensed attorney, real estate broker or salesperson, engineer or land surveyor, unless the compensation received or beneficial interest obtained as a result of these duties indicates more than an agency relationship;

(iii) a seller or chartered lending institution shall be presumed not to be affiliated with others, solely for financing all or a portion of the purchase price at rates not substantially higher than prevailing lending rates in the community, and subsequently granting a partial release of the security when the buyer partitions or divides the land.

¹¹ Commission Rule 2.204(G)(1) provides: “Proposed amendments may be filed at any time.”

Rule 5.406 and 5.407 and 30 V.S.A. § 248(a)(4), AHS requested a public hearing on the petition as amended and provided the required notice of the Amendment to persons entitled to such notice.

The TRO concludes that “[t]he petitioner’s [tree-clearing] activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2).” While AHS disagrees with that legal conclusion, even assuming *arguendo* that conclusion is correct, and assuming this investigation was validly opened,¹² and assuming that the Commission has the authority to address that alleged violation, there is no irreparable injury from such site preparation.

The Vermont Supreme Court

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

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

See, Vt. Democratic Party v. Republican Governors Ass'n, No. S1285-04 CnC, 2004 Vt.

Super. LEXIS 93 (Sup. Ct. Chittenden County 2004).

¹² *See, In re Investigation Into Solarcity Corporation*, 2019 VT 23, P12 discussing the powers of the Commission to *sua sponte* open an investigation. *Id.* (“it has also authorized the Commission to open investigations on its own initiative. *See, e.g., id.* § 218(a) (authorizing Commission to open investigation and make findings and judgment regarding rates, tolls, charges, or schedules); *id.* § 227a(c) (authorizing Commission to investigate whether to reimpose regulatory requirements for telecommunications services, either upon Department's petition or upon its own initiative); *id.* § 4002a(b)(1) (authorizing Commission to investigate certain contracts if Department opposes contract or upon Commission's own motion).”)

Similarly, Commission Rule 2.406(B) provides:

A temporary restraining order may be issued only where it clearly appears from specific facts shown by the affidavits or the verified petition, and by testimony if required by the Commission, that substantial immediate and irreparable injury, loss or damage, or danger to health or safety, will result to the petitioner before a hearing can be held upon proper notice.

The United States Supreme Court has similarly emphasized that a temporary restraining order is an “extraordinary remedy” that a court should award only when a plaintiff *makes a clear showing* that she is entitled to such relief. *See Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

The TRO cites the following two reasons as “substantial immediate and irreparable harm” that would occur from the petitioner’s site activity:

First, the proposed clearing of more than 20 acres of trees constitutes substantial immediate and irreparable harm. Second, the proposed site activity threatens one very rare and will negatively impact one rare plant species that have been documented to exist at this site.

TRO at 6.

A. The Tree Clearing Does Not Constitute Irreparable Harm.

The TRO asserts that “the proposed clearing of more than 20 acres of trees constitutes substantial immediate and irreparable harm.” TRO at 7. The TRO’s rationale is that “once those trees are cut, they cannot be restored.” *Id.* The notion that once the trees are cut, they cannot be easily restored, is undoubtedly true (at least as to some trees). But that does not answer the right question as the cases cited by the TRO demonstrate. The first case cited by the TRO is *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). The TRO cites that case for the proposition that “courts routinely hold that the logging of trees constitutes irreparable harm: ‘The logging of mature trees, if indeed incorrect in law,

cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage.” But there the plaintiffs claimed that they had a legal right to continue to use that portion of a United States National Forest with the forest remaining as is. There, the binary choice was the trees would stay or the trees would go.

Here, under both scenarios the trees go. None of the adversary parties in this case have the right to use the private land at issue here, and none have claimed that they do. As the testimony at the TRO hearing indicates, and as ANR and the Commission agree, a ground-mounted solar project cannot be built if there are trees in the way. Thus, if the CPGs are approved, the trees must go. Under the landowner’s agricultural use, the trees must also go. There is no circumstance under which the trees do not go, so there is no irreparable harm.

Tellingly, neither ANR nor its witness stated that removal of the trees in and of themselves would constitute irreparable harm. Rather, Mr. Popp testified that if all the white-arrow leaved asters and the Nimblewill have been transplanted to the conservation areas, then there would be no irreparable harm. *See*, Tr. at 40 (Mr. Popp: “Assuming all the plants have been transplanted . . . , then, if the conservation areas are retained, then those, then those plants would be protected, then, yeah, I’m assuming that would be acceptable.”)

The Commission simply created the basis of irreparable harm from loss of trees on its own by relying on cases that are mixing apples and oranges. Rather ANR’s position is that the tree-clearing activity on the portion of the land (*that excluded the Orchard lot*) might result in adverse consequences to either the white-arrow leaved aster or the noxious weed known as the Nimblewill Muhly (*Muhlenbergia schreberi*), but not if they had been or are transplanted. *See*, Tr. at 40 (“if they were moved, then it would be, it wouldn’t be any harm to the plants.”)

B. There Is No Irreparable Injury From The Purported Site Preparation.

The TRO asserts that “the proposed site activity threatens one very rare and will negatively impact one rare plant species that have been documented to exist at this site.” TRO at 7. The TRO’s statement does not constitute irreparable harm.

1. *There Is No Irreparable Harm To The White-Arrow Leaved Aster.*

Unlike the logging cases relied on by the TRO, here the S1-ranked white-arrow leaved aster plants have doubled in the conservation areas since transplantation, and are easily replaced. Any white-arrow leaved asters that might still exist in the areas that would be cleared have already been effectively replaced by the explosive growth of the asters that were transplanted in the conservation areas. Even if some white-arrow leaved aster plants would be destroyed through tree-clearing outside of the conservation areas, the annual reports submitted to ANR show that the white-arrow leaved aster is thriving in the conservation areas.

At the June 26, 2020 hearing ANR’s expert, Mr. Popp, conceded that not only has he not looked into whether it is easy to acquire replacements for the white-arrow leaved aster but that he would not be surprised to find that they are readily available from Wal-Mart and Home Depot type nurseries throughout the United States. *See Tr.* at 47:

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

A. I have not personally looked into that. I, I would not be surprised if you could get the American Aster plant through a nursery.

There is simply no evidence provided by the proponents of the TRO that clearly establishes irreparable harm and a right to the issuance of a TRO.

2. *There Is No Irreparable Harm To The Nimblewill Noxious Weed.*

Unlike the logging cases relied on by the TRO, here the S2-ranked Nimblewill Muhly (*Muhlenbergia schreberi*) is easily replaced. The S2-Nimblewill, *muhlenbergia schreberi* is classified by the USDA as a “noxious weed.” <https://plants.usda.gov/core/profile?symbol=MUSC>. It is present in all New England States. *See*, <https://gobotany.nativeplanttrust.org/species/muhlenbergia/schreberi/>. In Massachusetts it is classified as S5-“widespread.”

As Mr. Popp explained, a classification of S1 or S2 means nothing about the existence of the plant species, it only means that it is considered very rare or rare in Vermont. Thus, a palm tree would be considered very rare in Vermont, but as a species, it thrives in other areas of the country.

As Mr. Popp admitted, there are no surveys done by those classifying the plants under the Vermont “S-scale”, thus there is no way to determine whether the white-arrow leaved aster or the Nimblewill are properly classified. As Mr. Popp explained, he needs to rely on reports from others. But as Mr. Popp also explained, an ordinary person would not know whether the white-arrow leaved aster or the Nimblewill existed on her property. Tr. at 34. But even in that scenario there is simply no ability of those doing the classifying to know whether, in fact, the ranked plants are properly ranked because no one knows with any certainty how many exist in Vermont, and if Vermonters started reporting plant species the system, Mr. Popp would be unable to process them. *See* Tr. at 35:

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

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

Although classified as S2 in Vermont, when actual surveys were done, the Nimblewill was found to be widespread and *unable to be eradicated* even on land that is regularly farmed. For example, a survey was conducted in 2013 by UVM. Out of 25 farms surveyed, the Nimblewill was present on 6, i.e., 40% and in dense quantity (10 per square foot). *See, Weed Seedbank Summary of Vermont Organic Farms, supra.*

Thus, when someone actually surveyed land that had been actively farmed for years, the Nimblewill was still present with an average density of 10 per square foot. But the fate of the Nimblewill is normally a dose of Roundup, as it is a noxious aggressive weed. *See also, 2015 Plant health care report from the Morton Arboretum, supra.* There is simply no evidence provided by the proponents of the TRO that clearly established irreparable harm related to the Nimblewill and a right to the issuance of a TRO.

VIII. The Commission's And ANR's Legal Premise Is Flawed.

The Commission's jurisdiction, assuming *arguendo* it has any at all here, would be solely derived from section 248's prohibition on "site preparation" for an electric generation facility. ANR's claim is that an adverse harm to some S1 and S2 plants is *ipso facto* an undue adverse effect on the natural environment under section 248(b)(5) and thus any purported "site preparation" that would harm such a handful of plants is irreparable harm entitling ANR to the extraordinary relief of an injunction.

A. Except For The Specific Criteria Listed For Due Consideration, The “Natural Environment” Criterion In 30 V.S.A. § 248(b)(5) Provides No Standard For Ordinary People To Understand What Is Permissible And What Is Not And It Authorizes And Encourages Arbitrary And Discriminatory Enforcement.

“A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill*, 530 U.S. at 732. The “natural environment” criterion is impermissibly vague under both tests.

One of the findings that is required for a solar energy project to obtain a CPG under 30 V.S.A. § 248 is that the facility “will not have an undue adverse effect on ... the natural environment ... with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K) ... and greenhouse gas impacts.”

The “due consideration” factors in 10 V.S.A. §§ 1424a(d) and 10 V.S.A. §§ 6086(a)(1) through (8) and (9)(K) (Act 250 criteria) and greenhouse gas impacts are the only specific criteria that are listed as being related to the “natural environment” and are not at issue here.¹³ The due

¹³ 10 V.S.A. § 1424a(d) (relating to outstanding resource waters), 10 V.S.A. §6086(a)(1) (relating to undue water or air pollution), 10 V.S.A. §6086(a)(2) (relating to sufficient water availability), 10 V.S.A. §6086(a)(3) (relating to unreasonable burden on an existing water supply), 10 V.S.A. §6086(a)(4) (relating to unreasonable soil erosion), 10 V.S.A. §6086(a)(5) (relating to unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed), 10 V.S.A. §6086(a)(6) (relating to unreasonable burden on the ability of a municipality to provide educational services), 10 V.S.A. §6086(a)(7) (relating to unreasonable burden on the ability of the local governments to provide municipal or governmental services), 10 V.S.A. §6086(a)(9)(K) (relating to development affecting public investments) are not at issue here.

consideration factors are the only factors that can be considered¹⁴ and even then, there is no standard as to how they should be relevant.

As such, the “natural environment” criterion is not sufficient for “ordinary people to understand.”¹⁵ Sophisticated developers and even the Commission are left guessing as to what the “natural environment” means. In practice, other than the specific sub-criteria in the statute, it means what ANR says it means on an *ad hoc* basis.

The “natural environment” criterion is clearly vague. For that reason, the Legislature specified several Act 250 criteria that relate to the natural environment. AHS does not challenge those specified sub-criteria. Rather the Commission and ANR (based upon ANR’s “guidance” and unscientific and unlawful rare plant classification) conclude that there is more to the “natural environment” criterion than the many specific due consideration factors enacted by the Legislature. It is those unknown and extra statutory sub-criteria that infect the natural environment criterion and make it vague and standardless.

The natural environment criterion is also made vague and standardless because the ANR rare plant classifications are not based upon any evidence or standards. Rather, the ANR rare plant classifications are based upon the absence of evidence.

The concept of “natural environment” is precisely the type of vague language that was struck down by the Vermont Supreme Court in *In re JAM Golf, LLC*, 2008 VT 110. There the Court struck down a Burlington ordinance as standardless that required a proposed land use to

¹⁴ In *In re Programmatic Changes* 2014 VT 29, ¶11, the Vermont Supreme Court rejected the PUC’s attempt to inject factors such as proximately and common ownership into the definition of a “project” under section 30 V.S.A. §8002(14) because those factors were not in the statute. The Legislature then amended the definition of “plant” to add the factors as being relevant.

¹⁵ See, *Snyder* at P25 quoting *In re Beliveau*, 2013 VT 41, P15.

"protect important natural resources including streams, wetlands, scenic views, wildlife habitats and special features such as mature maple groves or unique geologic features." *Id.* at P12. In striking down the criteria the Court stated it violated the landowner's property rights:

Unfortunately, the ordinance as written is essentially standardless. Although applicant challenges the court's interpretation of the ordinance, rather than attacking the ordinance itself, § 26.151 is flawed, since it provides no standards for the court to apply in determining what would constitute a failure to "protect" the listed resources. Zoning ordinances must "specify sufficient conditions and safeguards" to guide applicants and decisionmakers. *Town of Westford v. Kilburn*, 131 Vt. 120, 122, 300 A.2d 523, 525 (1973). We will not uphold a statute that "fail[s] to provide adequate guidance," thus leading to "unbridled discrimination" by the court and the planning board charged with its interpretation. *Id.* at 125, 300 A.2d at 526; see also *In re Handy*, 171 Vt. 336, 348-49, 764 A.2d 1226, 1238 (2000); *State v. Chambers*, 144 Vt. 234, 239, 477 A.2d 110, 112-13 (1984).

JAM Golf at P13.

The Court also focused on the word "protect" which is similar in its vagueness to unduly affect the natural environment.

[*P14] "Protect," as defined in § 26.151, cannot be the equivalent of total preservation, because the same regulations allow for development, which, by necessity, must reduce wildlife habitat and affect scenic views. How much less than total preservation qualifies as sufficient protection, however, we cannot know, because the regulations do not say. Even had the trial court endeavored to apply a "reasonableness" measure to this term, § 26.151 would be unworkable. The language of the regulations offers no guidance as to what degree of preservation short of destruction is acceptable under the statute. From a regulatory standpoint, therefore, § 26.151(g) provides no guidance as to what may be fairly expected from landowners who own a parcel containing wildlife habitat or scenic views -- both common situations in Vermont -- and who wish to develop their property into a PRD. Such standardless discretion violates property owners' due process rights. *In re Miserocchi*, 170 Vt. 320, 325, 749 A.2d 607, 611 (2000). We thus strike this provision of the ordinance and reverse the Environmental Court's conclusion that the project fails to meet its requirements.

JAM Golf at P14.

Here, as in *JAM Golf*, the “language of the [statute] offers no guidance as to what degree of preservation short of destruction is acceptable under the statute. From a regulatory standpoint, therefore, [the non-specific natural environment criterion] provides no guidance as to what may be fairly expected from landowners who own a parcel containing wildlife habitat or [or plants] -- both common situations in Vermont -- and who wish to develop their property.” *Id.*

Except for the enumerated sub-criteria, the “statute that fails to provide adequate guidance, thus leading to unbridled discrimination by the court and the [Commission] charged with its interpretation.” *Id.* at P13 (internal citations and quotations omitted). It therefore is unconstitutionally vague and violates AHS’s due process rights.

B. Except For The Specific Criteria Listed For Due Consideration, The “Natural Environment” Criterion In 30 V.S.A. § 248(b)(5) Authorizes And Encourages Arbitrary And Discriminatory Enforcement.

The lack of any objective standard authorizes and indeed encourages arbitrary and discriminatory application of the statute. Without being constrained by objective guide posts, ANR and the Commission can just make it up as they go along after a landowner has already invested over a hundred thousand dollars in a project. Further, the Commission might completely ignore the issue if no one complains. And that is what has been done with ANR’s rare plant classifications. ANR has just made it up without any scientific evidence or investigation.

The natural environment criterion is unconstitutionally vague and standardless and invalid both on its face and as-applied. The criterion denies AHS the ability “to predict how discretion will be exercised and to develop proposed land uses accordingly.” The meaning of undue adverse effect on the natural environment is simply left to the *ad hoc* discretion of the then current Commissioners, after considering the coercive effects of ANR’s *de facto* rules, making it

essentially arbitrary. Such abstract language has been held unconstitutionally vague in the First Amendment context. *See, Epona v. Cty. of Ventura*, 876 F.3d 1214, 1223 (9th Cir. 2017) (“*Epona*”) (holding as unconstitutional a law that has requirements that structures may not "have a harmful effect upon the health or welfare of the general public" or be "detrimental to the welfare of the general public . . . [or] to the aesthetic quality of the community or the surrounding land uses"). It has also been held unconstitutionally vague by the Vermont Supreme Court. *See, JAM Golf, supra*.

No court can determine how the decision will be made and no reasonable applicant can determine what is required to meet the "unduly interfere" standard. More specifically, no one can determine how the Commission applies the individual elements in (b)(5) to find some undue interference and thus to conclude that the applicant did not meet its burden of proof. The Commission's decisions thus become pure *ad hoc* decision-making.

Section 248(b)(5) sets out some specific due consideration criteria based upon Act 250 criteria. The doctrine of *expressio unius est exclusio alterius* means that the expression of one thing is the exclusion of another. *Expressio unius* generally reflects an inference that any omissions in a statute are intentional. *Clymer v. Webster*, 156 Vt. 614, 625 (1991). To conclude additional criteria would need to be adhered to renders the due consideration Act 250 criteria superfluous, and contradicts the maxim of statutory interpretation of *expressio unius*.

But here that is what is at issue—the invisible criteria—those that are not in the statute—which under ANR's and the Commission's view can just be made up on an *ad hoc* basis. While the statute sets out the ultimate finding the Commission must make regarding the natural environment, nothing in section 248 provides any guidance to an applicant as to the meaning of

the term except for the specific due consideration Act 250 criteria. Likewise, the statute provides no guidance on the ANR-created criteria and no explanation of how the ANR-created criteria are to be taken into account.

B. ANR Has No Authority To Classify Plants Outside of the Vermont Endangered Species Law.

Title 10, Ch. 123, 10 V.S.A. § 5401 et seq. (the "Vermont Endangered Species Law" or "ESL") establishes statutory criteria for the protection of threatened and endangered species by the Secretary of ANR. Under the Vermont Endangered Species Law, the Secretary of ANR is granted the authority to develop a State endangered species list and a State threatened species list. 10 V.S.A. § 5402(a). The statute prescribes the characteristics of endangered species to be a plant or animal species that "*normally occurs in the State* and its continued existence as a sustainable component of the State's wildlife or wild plants is in jeopardy." 10 V.S.A. § 5402(b) (emphasis added).

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

In determining whether a species is threatened or endangered, the ANR Secretary must "use the best scientific, commercial, and other data available," and "at least 30 days prior to commencement of rulemaking, notify and consult with appropriate officials in Canada, appropriate State and federal agencies, other states having a common interest in the species, affected landowners, and any interested persons". 10 V.S.A. § 5402(e). The Vermont Endangered Species

Law directs the Secretary of ANR to issue general permits to utilities to conduct vegetation management in utility rights-of-way that permit the taking of threatened or endangered species if such takings would not affect the continued survival of the species. 10 V.S.A. § 5402(1)(1), (5). As used in the statute, the term “utility” “means an electric company, telecommunication company, pipeline operator, or railroad company.” 10 V.S.A. § 5402(1)(5). The Vermont Endangered Species Law does not mention nor authorize the Secretary of ANR to list and protect rare species, by rule, guidance, or otherwise.

As an administrative body, ANR “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.” *Perry v. Med. Practice Bd.*, 169 Vt. 399, 403, 737 A.2d 900, 903 (1999) (quotations omitted). In addition to these substantive limitations on the powers of a state agency, the Vermont Administrative Procedure Act (“VAPA”) also prescribes the procedural powers of Vermont agencies to implement the statutory mandates that they do have. Under the VAPA, 3 V.S.A. § 835(b), an agency “procedure or guidance document shall not have the force of law.” 3 V.S.A. § 835(b) (emphasis added).

The VAPA, 3 V.S.A. §801(b)(9), defines a “rule” as “each agency statement of general applicability that implements, interprets, or prescribes law or policy and that has been adopted in the manner provided by sections 836-844 of this title.” The VAPA requires that prior to issuing a “rule,” the agency must follow a specific notice and comment procedure. 3 V.S.A. §836. Part of that procedure also gives a veto power to the Legislature. 3 V.S.A. §842. While “there is no bright line between exempt procedures and those rules requiring adoption pursuant to rulemaking requirements,” *King v. Gorczyk*, 2003 VT 34, P23, here ANR’s “guidance” constitutes “the

creation of a rule consisting of an ‘agency statement of general applicability which implements, interprets, or prescribes law or policy.’” *In re Woodford Packers Inc.*, 2003 VT 60, P15.

C. ANR Has No Injury And Has No Authority To Seek A TRO.

ANR’s role in a section 248 proceeding is defined in section 248(a)(4)(E)

(E) The Agency of Natural Resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding.

There is a full record in which the Commission has already concluded that if the site for the proposed solar facilities were cleared of trees that there would be no undue adverse effect on the 248(b)(5) criterion related to the natural environment. In light of those findings, ANR’s claim now that the same tree-clearing is causing irreparable harm is without merit. But in any case, neither section 248(a)(4)(E) nor the Vermont ESL provide ANR with the authority to seek a TRO or other equitable relief to enforce its classification system that does not have the force of law and that is unauthorized by the Vermont ESL.

A TRO must have a proponent that has made the requisite clear showing of entitlement to relief. Here, ANR cannot be such a proponent as no statute authorizes ANR to seek a TRO for plants not covered by the Vermont ESL.

IX. A Commission Rule Cannot Expand Its Jurisdiction; Commission Jurisdiction Is Limited By The Statutory Grant Of Authority.

The other parties rely heavily on Rule 2.406(C) which references temporary restraining orders as well as preliminary injunctions and permanent injunctions. But a Commission Rule cannot give the Commission jurisdictional authority that it does not possess under the statute.

In terms of statutory authority, the other parties reference 30 V.S.A. § 9 and § 209 as the sources of the Commission’s jurisdiction to issue TROs and preliminary injunctions and permanent injunctions. But section 9 does not *expand* the Commission’s jurisdiction. The Vermont Supreme Court so stated in *In re Investigation Into Solarcity Corporation*, 2019 VT 23, P11, where it noted that section 9 “grant[s] Commission authority to act as court of record in proceedings *under its jurisdiction*.” (emphasis added.) If the parties’ position were correct that would mean that the Commission could issue an injunction in the full range of cases as the superior court.¹⁶

X. The Filing Of A Section 248 Application Does Not Create Section 209 Jurisdiction.

The nub of the parties’ position is the assertion that once a person *submits* an application for a certificate of public good, the applicant and the landowner become “companies” under 30 V.S.A. § 201(a) and thus subject to general regulation under section 209 (which in the other parties’ view includes unlimited power to order injunctive relief).

That assertion is clearly wrong. Neither AHS nor the Landowner file a least-cost integrated plan. Neither one provides any product or service to the public. Neither one conducts a public

¹⁶ The Department’s citation of proceedings where the Commission has entertained motions for preliminary injunctions similarly does not establish that the jurisdiction exists or existed. Rather it means only that the issue was either never raised and/or never adjudicated by a court of competent jurisdiction.

service business. Neither one owns any property used in connection with the conduct of a public service business.

Clearly unable to point to a statutory grant of jurisdiction over this matter, the parties reframe their claim into a more generic one – namely (i) that a section 248 applicant submits itself to the jurisdiction of the Commission when it files a CPG application, and (ii) that the landowner submitted itself to the jurisdiction of the Commission by entering into a lease for the one parcel when a solar facility is proposed and by agreeing to let the section 248 applicant plant trees on a sliver of a second parcel.

It is axiomatic that parties or litigants cannot confer jurisdiction on an agency or a tribunal. In the case of an administrative agency, subject matter jurisdiction and jurisdiction over the person must come from its enabling statutes. *See, Trybulski* 112 Vt. at 7 (“It has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.”)

Here, neither the TRO nor the parties cite any statute as the source of Commission jurisdiction over the landowner. With respect to AHS, the Department asserts that “Apple Hill Solar LLC is a company subject to the Commission’s Section 209 authority.” DPS Resp. 7/15/20 at 4. That is plainly incorrect, and the Department offers no analysis to support its barebones assertion.

The first part of section 209 provides that “the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under this chapter.” That sentence does not apply because (i) there is nothing at issue under either

AHS' and the landowners' charter or articles of incorporation, (ii) neither AHS nor the landowner operate any plant, line or property subject to the supervision of the Commission under Title 30, Chapter 5, and (iii) neither AHS nor the landowner own any plant, line or property subject to the supervision of the Commission under Title 30, Chapter 5.

The filing of a section 248 application does not provide the Commission general jurisdiction over either the applicant, connected persons, or the land. The Commission's jurisdiction is limited to making a decision on the application itself. Only if a CPG is issued might there attach conditions to the use of the land on which the solar facility sits, but until then the Commission has no jurisdiction and no authority to issue an injunction to prevent a landowner from using its land for farming.¹⁷

XI. The Linchpin Of The TRO Is Not Based Upon An accurate Recollection Of The Testimony. The Landowner's Activities Do Not Constitute Site Preparation For An Electric Generation Facility.

Factual finding #5 states:

The sheep grazing is being done "primarily" to control vegetative growth at the petitioner's planned solar projects at the site. Melone Testimony of June 26, 2020.

Factual finding #5 is the linchpin of the TRO's conclusion that PLH's proposed activities are not farming. *See* TRO at 4 ("The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location 'primarily' to serve the proposed solar projects. This does not qualify as farming.")

¹⁷ In the Act 250 context, farming does not constitute a development. Similarly, even if a parcel is subject to an active Act 250 permit, farming does not require an amendment or trigger amendment jurisdiction. *See*, 10 V.S.A. 6081(s)(1) ("No permit amendment is required for farming that: (A) will occur on primary agricultural soils preserved in accordance with section 6093 of this title; or (B) will not conflict with any permit condition issued pursuant to this chapter. (2) Permits shall include a statement that farming is permitted on lands exempt from amendment jurisdiction under this subsection.")

As an evidentiary matter, the TRO's finding misstates what was said. Set forth below is the entire unedited relevant question and answer:

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

MR. MELONE: Yeah, I think that's, that's the primary aspect. Let me just see. I mean, I think it, the, the plan that the sheep farmer has given to us, I think, does contemplate also the wool being sold as a commodity, and some of the, and I guess some of the sheep as well would be sold. I guess, to the extent that there are new sheep that are born and that are more than we need, then she has that in the business plan, too, as far as a revenue stream. So, I mean, so it really would be while we're getting into the business because of all the solar farms that we operate in the northeast. The business plan does also contemplate the normal sheep operations and income of selling the wool and selling some of, of the sheep, you know, if it's more than we need in terms of sheep there.

Tr. 93-94.

PLH's proposed activities clearly constitute farming under Vermont law. The AAFM web page cited by the Commission provides the following definition of farming, which definition follows 10 V.S.A. § 6001(22):

Section 2.16 of the Required Agricultural Practices (RAPs) states that "farming" means:

- (a) the cultivation or other use of land for growing food, fiber, Christmas trees, maple sap, or horticultural, viticultural, and orchard crops; or
- (b) the raising, feeding, or management of livestock, poultry, fish, or bees; or
- (c) the operation of greenhouses; or
- (d) the production of maple syrup; or
- (e) the on-site storage, preparation, and sale of agricultural products principally produced on the farm; or

(f) the on-site storage, preparation, production, and sale of fuel or power from agricultural products or wastes principally produced on the farm; or

(g) the raising, feeding, or management of four or more equines owned or boarded by the farmer, including training, showing, and providing instruction and lessons in riding, training, and the management of equines.¹⁸

There is no exception for sheep that may also be grazing on a site that maintains a solar facility. Indeed, such a concept would be antithetical to the concept of farming. Mr. Melone testified that the primary aspect of PLH *getting into the business of sheep farming* was “to graze at solar projects” throughout the Northeast. At no time did Mr. Melone state (as Finding #5 claims) that “[t]he sheep grazing is being done ‘primarily’ to control vegetative growth at the petitioner’s planned solar projects at the site.” The landscaping benefit to the Apple Hill solar site is incidental compared to the overall sheep business. The hoped-for solar projects at the site (which the Commission has denied CPGs for both) would be a small portion of the solar projects that would be serviced by the sheep, both Allco-related projects and third-party projects (in New York, Vermont, Massachusetts and Connecticut). Prior to the existence of any solar facility that may be approved for and placed on part of the site, the sheep would primarily be grazing—but only while they were on the site and not at some other site. After any solar facility might be placed on part of the site, the sheep would *primarily be doing the same thing on a daily basis*—grazing—but only while they were on the site and not at some other site. Contrary to the TRO’s inaccurate factual finding, the grazing at the Bennington site is not dependent at all on a solar facility being on the site one day. The raising, feeding, and management of the sheep is a completely separate business and farming activity. The landowner and owner of the sheep, PLH, would be operating a farming

¹⁸ <https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations>

business that would not depend at all, much less primarily on the prospect of a solar facility on the Bennington site. They are two distinct activities occurring on the same parcel of land.

It is undisputed that PLH would be engaging in farming and the property would be considered a farm both before and after any solar facility that might be placed in service on the land. Notwithstanding that fact, under the TRO's reasoning, a farm is not a farm, and farming is not farming if at some point in the future there might be a solar facility on the site, regardless of who might own the solar facility. There is no legal basis for such a conclusion and the TRO cites to none.

The TRO also makes no defense of how the Orchard parcel gets wrapped up in the TRO other than the Commission taking on the role of a court of equity. In that connection, the Commission's order of July 1, 2020, *Procedural order re: guidance for injunction hearing*, stated at footnote 4:

While the Developer has moved for clarification on whether the TRO extends to the "Apple Orchard Lot," no clarification is necessary because the Apple Orchard Lot was identified as the site of "mitigation planting" in the revised site plan for the Apple Hill facility, filed by the Developer in Docket 8454 as exhibit AHS-MK-12. The Developer also agreed that this property was protected from any development in the Developer's Settlement Agreement with the Town of Bennington dated September 14, 2018, filed by the Developer in Case No. 17-5024-PET. Thus, while the Developer is free to argue for a different outcome in the upcoming preliminary injunction hearing, the current status is that the TRO by its clear terms extends to the Apple Orchard Lot.

The Commission's reference to the settlement agreement not only misstates what the agreement provides, but shows that the Commission believes it has the powers of a court of equity to enforce its interpretation of an entirely unrelated agreement. What the settlement agreement may or may not provide is wholly outside the scope of the Commission's jurisdiction. Moreover, the mitigation plantings that were previously proposed for the very north end of the Orchard Lot,

have no relevance to the purported irreparable injury, and are in a location that is already cleared and has been so prior to PLH purchasing the property. There is simply no justification for expanding the scope of the TRO – the sole effect of which is to cause irreparable injury to the landowner by preventing the preparation of the land for farming.

PLH’s proposed activities of raising, feeding and management of sheep fit squarely with clause (b) above. PLH’s proposed activities of selling lambs and wool fit squarely with clause (e) above. PLH’s proposed activities of growing, storing and processing hemp fit squarely with clauses (a) and (e) above. Moreover, the Commission has no jurisdiction to say what constitutes a farm or farming.

The Commission has recognized that section 248 was not intended to cover farming related or otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011). The Commission has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not solely related to the electric generating facility, even when those were expressly incurred for federal and state tax purposes as part of construction of the electric generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”) *See also, Georgia Mountain*, Docket No 7508, Order of 1/5/2012 (“a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided

that these activities do not conflict with any requirements contained in a CPG issued by the Board.”) It is also indisputable that site preparation related to agricultural use “constitute[s] ‘farming’.” *Re: Scott Farm, Inc.* 2003 VT ENV LEXIS 6 (2003).

As is plainly shown by the transcript, the TRO is based upon a factual finding (#5) that is unsupported. Then, from the unsupported factual finding, the TRO adjudicates what constitutes “farming” and a “farm” under Vermont law. *See*, TRO at 4 (“The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is ‘devoted primarily to farming.’ The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location ‘primarily’ to serve the proposed solar projects. This does not qualify as farming.”)

The Commission has no jurisdiction to decide what constitutes “farming” or a “farm” under Vermont law. That jurisdiction is for the judiciary.

XII. The Application Of The TRO To The Orchard Lot Is Overbroad.

The clearing activities for the Orchard Lot are not “site preparation” for an electric generating facility. Those clearing activities are clearly outside of the “site preparation area.”

The Commission has no authority where, as here, no CPG has been issued, and the tree-clearing is occurring outside of any area that would be part of the “preparation” for the proposed solar facility. While it is true that the old plan for the AHS proposed project would call for the planting of a line of trees on the northern edge of the Orchard lot, those trees do not exist now. Therefore, there is simply no basis for covering the Orchard lot in the TRO, and neither the TRO nor any party advance any valid justification for doing so.

XIII. Even If The Legislature Gave Jurisdiction To The Commission to Decide What Is Site Preparation, the Commission Could Not Constitutionally Be Given The Power To Stop The Landowner's Activities.

The Commission is not a court of equity. It cannot be delegated the powers of a court of equity. The landowner is in the process of tree-clearing for agricultural use.

If the Commission were given the power by the Legislature to stop certain uses of real property, such a delegation would violate the separation of powers. The Vermont Supreme Court has generally interpreted the separation of powers in the Vermont Constitution along the line of the United States Constitution. Under “the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government” adopted in the Constitution, “the 'judicial Power of the United States' . . . can no more be shared” with another branch than “the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.” *United States v. Nixon*, 418 U.S. 683, 704, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (quoting U.S. Const., Art. III, § 1).

Here, use of an injunction against a use of real property based upon a dispute of what is permitted and what is not is for traditional courts of equity to handle.

When a suit is made of “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” *Northern Pipeline*, 458 U.S., at 90, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (Rehnquist, J., concurring in judgment), and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts. The Constitution assigns that job-resolution of “the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law”-- to the Judiciary. *Id.*, at 86-87, n. 39, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (plurality opinion).

Stern v. Marshall, 131 S. Ct. 2594, 2609 (2011).

Here, the use of an injunction against a use of private real property based upon a dispute of what is permitted and what is not is the stuff of what traditional courts of equity would handle, and thus could not be delegated to the Commission.

Conclusion

For the reasons, stated above the TRO should be promptly vacated, and this case closed.

Dated: August 16, 2020

Respectfully submitted,

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