

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

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

**VERMONT AGENCY OF NATURAL RESOURCES RESPONSE TO MOTION
TO DISSOLVE TRO**

Background

On June 26, 2020, the Vermont Public Utility Commission (“Commission”) issued a temporary restraining order (“TRO”) after conducting an evidentiary hearing in this matter. The Commission also scheduled an injunction hearing for July 9, 2020.

On July 1, 2020, the Developer filed a motion to vacate the injunction hearing.

On July 2, 2020, in response to the Developer’s motion, the Commission postponed the injunction hearing and set a briefing schedule on the Developer’s motion.

On August 17, 2020, the Developer filed a motion to dissolve the TRO.

On August 26, 2020, after briefing by the parties, the Commission issued an order denying the Developer’s July 1 motion to vacate (“Denial Order”). The Denial Order also established a comment deadline of noon August 31, 2020 for comments in response to the Developer’s August 17 motion and scheduled an evidentiary hearing for September 8, 2020.

The Vermont Agency of Natural Resources (“Agency”) now provides the following comments as requested by the Commission.

Discussion

Commission Jurisdiction

The Developer devotes a substantial portion of its most recent motion to challenging the Commission's jurisdiction and legal authority over the Developer's site clearing activities at the Apple Hill site in Bennington, Vermont, as well as the legality of the statutory prohibition, contained in 30 V.S.A. § 248(a)(2)(A), which prohibits site preparation of an electric generation facility prior to the issuance of a certificate of public good ("CPG"). The Commission, in its Denial Order, determined that it has jurisdiction over the Developer and that it has the authority restrain activities which would be violative of the prohibition in 30 V.S.A. § 248(a)(2)(A) against site preparation without a CPG. The Agency agrees with the Commission's analysis and conclusions in the Denial Order.¹ The Denial Order renders the Developer's arguments to the contrary moot.

Evidence of Record

The Developer's most recent motion mischaracterizes the evidence of record already established in this matter and, to the extent that the motion purports to call into question the authenticity or basis of the rarity status of the plants which are at risk of harm, lacks credibility. For example, on page 19 of its motion, the Developer argues that the white arrowed-leaved aster (*Symphytotrichum urophyllum*) "is not a rare plant" and suggests, without any factual basis, that "replacement" plants could easily be purchased from Home Depot or many other sources. The Developer attempts to support its contention by (mis)quoting the testimony of the Agency's witness, Bob Popp, at the June

¹ It defies logic and undermines the entire Section 248 regulatory review process to posit that the Commission is without the authority to enjoin an activity which is explicitly prohibited by the same regulatory scheme which vests the Commission with regulatory review jurisdiction in the first instance.

26 TRO hearing. The problem is that the Developer omits the substantive portion of Mr. Popp's testimony which, obviously, undermines the Developer's newly adopted position that this plant is now common (i.e., not rare).²

The entire question and response, which appears on page 47 of the June 26 transcript, is as follows:

Question by Attorney Dingleline: 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?

Popp Response: I have not personally looked into that. I, I would not be surprised if you could get the American Aster plant through a nursery. Many of Vermont's rare and endangered plants are available through nurseries. We don't know the provenance of those. They're generally from big nurseries out in the Midwest or down south somewhere, so the genetics are completely different than our plants. So we don't encourage people to plant those out in the wild or introduce them into native populations. (emphasis added)

Simply stated, the very rare asters which exist at the Apple Hill parcel in Bennington, Vermont are not available for purchase at Home Depot or anywhere else.

It is also worth noting that Mr. Popp's above quoted response is consistent with his testimony filed seven months ago on January 30, 2020, in the Warner Solar case (PUC Case No. 19-0516). There, Mr. Popp explains the genetic differences of the Vermont plants and why this is important. The Developer is certainly familiar with the

² A position which is very much at odds with the testimony and reports filed by the Developer over the past half-dozen years in connection with its three separate Section 248 petitions related to the 27-acre Apple Hill parcel. See, various testimony of Dori Barton and Arrowwood Environmental natural resources and RTE plant reports in Docket 8302, Docket 8454, and Case 17-5024.

Warner Solar case as another one of its affiliates is the petitioner in that matter and is represented by the same counsel.³

Based on the record evidence in Docket 8302, Docket 8454, Case 17-5024, and Case 20-1611, it is established that the white arrow-leaved aster and the nimblewill muhly (*Muhlenbergia schreberi*) plants which exist at the 27-acre Apple Hill parcel are rare plants in Vermont.⁴ The only question which remains is what is the degree of harm presented by the Developer's site clearing activities?

Site Preparation

The Developer cites to the same three cases to support its proposition that it can conduct any activities, which are otherwise legally permissible, at a property for which it has applied for, and clearly intends to construct, facilities which are subject to the Commission's Section 248 jurisdiction.⁵ However, none of these cases are applicable to the situation which exist here: activities (tree clearing); conducted in the same area (proposed solar project area); where the activities (tree clearing); are necessary to prepare the area (proposed solar project area); for construction of a proposed electric generation facility for which a CPG has not been issued; *and* where the record in the Section 248 proceedings establishes that the proposed electric generation facility has the potential for significant impacts to, at the very least, natural resources, aesthetics, and orderly development.

³ The discussion concerning genetic traits, and the importance of protecting genetically distinct species, may be found on pages 14-16 (Answers 15-16) of Mr. Popp's January 30 testimony.

⁴ More precisely, the aster is *very rare* and the muhly is *rare*.

⁵ *Beaver Wood Energy*; *Monument Farms*; and *Georgia Mountain Wind*.

Conclusion

The Developer's motion should be denied because it neither supported in fact or law.

Dated August 31, 2020, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



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