STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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

DEPARTMENT OF PUBLIC SERVICE RESPONSE TO APPLE HILL SOLAR LLC MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER

On August 17, 2020, Apple Hill Solar LLC ("Developer") filed a motion to dissolve the temporary restraining order ("TRO") issued by the Public Utility Commission ("Commission") on June 26, 2020. For the reasons stated herein,[1] the Department of Public Service ("Department") recommends that the motion be denied.

I. THE COMMISSION HAS AUTHORITY TO ISSUE PRELIMINARY OR PERMANENT INJUNCTIVE RELIEF

The Developer states that the TRO should be dissolved because the Commission has no authority to issue preliminary or permanent injunctive relief in this matter.[2] For the reasons explained in the Department's July 15, 2020 response to the Developer's motion to vacate preliminary injunction hearing and the Commission's August 26, 2020 Order ("Order"), the Commission has jurisdiction over the Developer under 30 V.S.A. §§ 209(a)(8) and 248(a)(2)(A) and has authority to grant injunctive relief under 30 V.S.A. § 9. The Developer's arguments regarding the Commission's authority are rendered moot by the Order.

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[1] The Department defers to the Agency of Natural Resources ("ANR") regarding the validity of the rare plant classification system and ANR's authority.
[2] The Developer states that even if the Commission had authority to issue a TRO, that the clearing activities do not meet the criteria to issue a permanent injunction. The Department does not address that criteria herein but reserves the right to do so during or after the September 8, 2020 evidentiary hearing.

The Developer further states that the Commission only has jurisdiction over the Apple Hill and Willow Road facilities once a Certificate of Public Good ("CPG") is issued. This is incorrect under the plain language of the statute, which clearly states that site preparation shall not occur *before* a CPG is issued. This is also incorrect given the legislative intent of Section 248, which is to address the environmental, economic and social impacts associated with a proposed project. A petition for a CPG therefore clearly falls under the purview of the Commission and to find otherwise would render § 248(a)(2)(A) as well as numerous sections of the entirety of Title 30 meaningless.

II. THE DEVELOPER'S ACTIVITIES ARE SITE PREPARATION IN VIOLATION OF 30 V.S.A. § 248(a)(2)(A)

The Developer asserts that its activities to not constitute site preparation for an electric generation facility in violation of 30 V.S.A § 248(a)(2). The Developer states that the activities comprise sheep farming unrelated to solar site preparation and that the Commission mischaracterized the purpose of the sheep grazing as primarily being done to control vegetative growth at the Developer's planned solar projects at the site.

The fact remains that the site is proposed to host a solar facility that falls under Commission jurisdiction and the Developer will not be able to build the facility without clearing the site. Why the site is cleared is irrelevant. The Developer is actively seeking a CPG to construct a solar facility at the site and engaging in site clearing. The Commission correctly concluded in the Order that the Developer is subject to Commission jurisdiction under 30 V.S.A. § 248(a)(2)(A) and that any actions taken by the Developer render the Developer subject to the

Commission's jurisdiction.[3] Such acts include clear cutting and therefore the actions are a violation of § 248(a)(2)(A).

The Developer's reliance on *Beaver Wood, Georgia Mountain and Monument Farms* to support the assertion that its activities are not site preparation in violation of the statute is misplaced. Not only are the cases clearly distinguishable from this one, but also, the Developer fails to recognize significant procedural differences that affect the respective outcomes of each.

Beaver Wood addressed a request to commence construction activities prior to receipt of a CPG. Notably, the Commission recognized that while it "only has such powers that are expressly conferred upon it by the Legislature," it can "fully review the impacts of the construction and operation of the proposed generation facilities under the criteria of § 248 without also exercising jurisdiction over the wood-pellet facilities."[4] The Commission explained that its "jurisdiction over the wood-pellet facilities is "necessary to the full exercise of" our authority over BWE's proposed electric generation facilities."[5] The same conclusion applies here. The Commission has the authority to review the impacts of the site clearing under the criteria of § 248 without exercising jurisdiction over sheep farming. The immediate purpose of the clearing does not change the fact that it involves a parcel subject to the jurisdiction of the Commission and that clearing took place in violation of § 248(a)(2)(A). To do otherwise would cause the Commission to abdicate its responsibility to enforce a clear violation of the statute.

The complaints at issue in *Georgia Mountain* had to do with activities that fell outside CPG requirements. The Commission concluded that the activities that were the subject of two

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[3] *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)*, Case No. 20-1611-INV, Order of 8/26/20 at 9-10.
[4] *Petition of Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven, LLC,* Dockets 7678 and 7679, Order of 4/1/11 at 14.
[5] *Id.*

complaints did not involve commencement of construction of a wind generation facility, for which a CPG was issued.[6] Although the Developer is correct in stating 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,"[7] it is important to note that no CPG has been issued in the present case. The Developer has not potentially violated a CPG because no CPG has been issued. But because there is a petition for a CPG before the Commission, the Developer remains subject to the authority of the Commission under 30 V.S.A. § 248(a)(2)(A). While sheep farming activities are presumably lawful, clearing a site that is the subject of a CPG petition without first being granted a CPG to conduct said clearing is not.

Finally, *Monument Farms* involved a request by a petitioner that already had a CPG to commence construction of a digester at a farm prior to obtaining approval of an amended CPG.[8] Here, there is no CPG or request to commence activities prior to obtaining approval of a CPG. Instead, Developer commenced clearing activities on a site subject to the jurisdiction of the Commission without a CPG in violation of the plain language of the statute.

III. DEVELOPER'S CONSTITUTIONAL ARGUMENTS ARE INADEQUATELY BRIEFED AND FAIL ON THE MERITS

The Developer argues that § 248(a)(2)(A) is unconstitutionally vague and standardless as it applies to site preparation. Generally, courts presume statutes to be constitutional, and "the proponent of a constitutional challenge has a very weighty burden to overcome." [9] Void-for-vagueness challenges are generally grounded in the Due Process Clause of the Fourteenth

[6] *Petition of Georgia Mountain Community Wind, LLC,* Docket 7508, Memorandum of 1/5/12 at 3.
[7] *Id.*
[8] *Petition of Monument Farms Three Gen LLC,* Docket 7592, Order of 10/22/10.
[9] *In re LaBerge NOV,* 2016 VT 99, ¶ 18, 203 Vt. 98, 152 A.3d 1165.

Amendment.[10] Statutes will be considered unconstitutionally vague and violate the Due Process Clause when they either: "(1) fail to provide sufficient notice of what conduct is prohibited, or (2) authorize or encourage arbitrary and discriminatory enforcement by failing to provide explicit standards."[11] Courts aim "to decide cases on nonconstitutional grounds if possible, and to adopt a construction of the statute that avoids constitutional deficiencies."[12]

Developer's argument fails because it has not adequately shown how "site preparation" is constitutionally vague either on its face or as applied. The Developer has not properly laid a foundation for its "as-applied" claim because it has not presented any evidence to support its challenge. Further, the Developer has not demonstrated that "site preparation" is facially vague because there is no evidence that the law as written has not been reasonably applied.[13]

The Developer's arguments concerning the constitutionality of "site preparation" also fail on their merits. The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for adjudication.[14] Although § 248(a)(2)(A) does contain broad language, it is reasonable to conclude that "site preparation" includes clear-cutting for the purpose of siting a solar facility. To decipher any ambiguity, the traditional tools of statutory construction must be examined to

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[10] U.S. Const. amend XIV, § 1. *See also In re LaBerge NOV*, 2016 VT 99, ¶ 17.
[11] *State v. Green Mountain Future,* 2013 VT 87, 194 Vt. 625, 86 A.3d 981.
[12] *State v. Schenk*, 2018 VT 45, ¶ 10, 207 Vt. 423, 190 A.3d 820. *See also State v. Green Mountain Future,* 2013 VT 87, ¶ 48 ("State courts have wide latitude for assigning narrowing constructions to potentially unconstitutional statutes," and "may give [a statute] a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent." (quotation omitted)).
[13] *See Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 127 (2d Cir. 2014) ("where plaintiffs asserting both facial and as-applied challenges have failed to [lay] the foundation for an as-applied challenge, courts have proceeded to address the facial challenge") (quotations omitted); *Id* at 128 ("A facial vagueness challenge will succeed only when the challenged law can never be validly applied"). *See also Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) ("A law that does not reach constitutionally protected conduct…may nevertheless be challenged on its face as unduly vague, in violation of due process; however, to succeed, complainant must demonstrate the law is impermissibly vague in all of its applications").
[14] U.S. Const. amend. XIV, § 1. *See also State v. Green Mountain Future,* 2013 VT 87, ¶ 18.

discern the intent of the Legislature.[15] Section 248 was enacted to address the environmental, economic and social impacts associated with a particular project. Here, it is logical to conclude that the Legislature intended for § 248(a)(2)(A) to include activities like clear-cutting trees – which have a direct impact on Vermont's environment – as site preparation.

IV. CONCLUSION

For the reasons stated herein, the Department recommends that the Commission deny the Developer's motion.

Dated at Winooski, Vermont, this 31st day of August, 2020.

Vermont Department of Public Service

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[15] *Tarrant* v. Dep't of Taxes, 169 Vt. at 197, 733 A.2d at 739 (1999).