



DOCKETING STATEMENT

Vermont Rule of Appellate Procedure (V.R.A.P.) 3(e)

Supreme Court Docket No. (if known): 2020-
Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner
Case Name: initiated site preparation at Apple Hill in Bennington, Vermont
Filed by or on behalf of: PLH LLC, Allco Renewable Energy Ltd., et al.
(party name)
Choose One: ☒ Appellant
☐ Appellee

Appellee need not complete Sections A or B unless Appellee disagrees with Appellant's answers.

A. Original Court/Board Information

1. Court/Board Name: Vermont Public Utility Commission
2. Court/Board Docket No.: Case No. 20-1611-INV
3. Judge Name (if applicable): _____
4. Date of Decision Being Appealed: August 26, 2020, June 26, 2020
5. Date Notice of Appeal Filed: September 1, 2020

B. Brief Description of Case. (Separate sheet may be attached)

The case involves whether the Vermont Public Utility Commission ("PUC") has the authority to enjoin farming and other activities of landowners on land that is also a proposed site for an electric generation facility seeking a certificate of public good under 30 V.S.A. 248, and if it does, the scope of that authority.

C. Statement of Issues to be Raised on Appeal. (Separate sheet may be attached)

See attached separate statement.

- D. Is the decision being appealed a written order?
(If yes, please attach)

☒ Yes ☐ No

E. Transcripts

Are transcripts necessary for the appeal?

☒ Yes ☐ No

If yes, have you ordered transcripts?

☒ Yes ☐ No

If ordered, attach a copy of the receipt from the transcription company.

If you have already ordered and received transcripts that you want to include in the record on appeal, you must list those hearing dates below and arrange to have the transcription service transmit the transcript to the Court.

June 26, 2020, August 31, 2020

For Appellee Only:

Do you agree as to which transcript(s) are necessary for the appeal?

☐ Yes ☐ No

If not, see V.R.A.P. 10(b)(5).

F. Expedited Resolution

Is this matter appropriate for expedited disposition by a three-Justice panel?

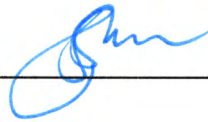
☐ Yes ☒ No

See criteria in V.R.A.P. 33.2(b).

Please Explain. *(Separate sheet may be attached)*

This case involves issues of first impression in Vermont and a constitutional challenge to prohibition on site preparation in 30 V.S.A. 248.

Signature: _____



Date: September 1, 2020

Name: Thomas Melone

Mailing address: Allco Renewable Energy Limited
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Attorney for: Appellants PLH LLC, Allco Renewable Energy Limited et al.

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)

STATEMENT OF ISSUES

1. Does the Commission have jurisdiction to grant or maintain injunctive relief against landowners or applicants for certificates of public good?
2. Does the Commission have jurisdiction to grant or maintain injunctive relief prohibiting landowners from engaging in farming on land that is also a proposed site for an electric generation facility seeking a certificate of public good under 30 V.S.A. § 248?
3. Does the Commission have jurisdiction to grant or maintain injunctive relief prohibiting landowners from engaging in farming on land that is not a proposed site for an electric generation facility seeking a certificate of public good under 30 V.S.A. § 248?
4. Is the prohibition on site preparation in 30 V.S.A. § 248 unconstitutionally vague and standardless?
5. Does the Commission lack authority to open the investigation and the authority to maintain it?
6. Does the Commission's temporary restraining order violate due process and the fair notice requirement?
7. Did the Commission act beyond its authority in basing its orders on an unlawful plant classification system created by the Agency of Natural Resources?
8. Are the PUC's orders otherwise clearly erroneous, arbitrary and capricious, unsupported by substantial evidence, in excess of its jurisdiction and/or otherwise affected by an error of law?

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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)	
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Order entered: 08/26/2020

**ORDER DENYING DEVELOPER’S MOTION TO VACATE PRELIMINARY INJUNCTION HEARING
AND NOTICE OF RESCHEDULED PRELIMINARY INJUNCTION HEARING**

I. INTRODUCTION

On July 1, 2020, Apple Hill Solar LLC, with related entities Allco Renewable Energy Limited, and its affiliates, which include Chelsea Solar LLC, Apple Hill Solar LLC, and PLH LLC (collectively, the “Developer”) filed a motion with the Vermont Public Utility Commission (“Commission”) to vacate the injunction hearing scheduled for July 9, 2020. We had scheduled that hearing following our issuance of a temporary restraining order (“TRO”) on June 26, 2020, to provide the Developer with the earliest opportunity to challenge the TRO.

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 submitted a motion to dissolve the TRO.

In today’s Order, we deny the Developer’s motion to vacate and provide notice to the parties that an oral argument and evidentiary hearing to address whether to grant an injunction or dissolve the TRO will be held by videoconference on September 8, 2020, at 1 P.M. The hearing will be before all three members of the Commission. Comments in response to the Developer’s motion to dissolve the TRO are due by noon on August 31, 2020. A status conference in preparation for the September 8, 2020, evidentiary hearing will be conducted by videoconference at 3:00 P.M on August 31, 2020, with the Commission staff.

II. BACKGROUND

On May 16, 2013, the Commission approved the Developer's petition for a standard-offer contract for the electrical energy to be generated by the "Bennington" facility, which is one of two proposed 2.0 MW solar electric generation facilities to be located on a 27-acre parcel on Apple Hill in Bennington, Vermont. The Commission also denied the Developer's request for a standard-offer contract for the second proposed facility, the adjacent Apple Hill facility.

On June 20, 2013, the Developer executed a standard-offer contract for the Bennington facility. Paragraph 7 of that contract contained development milestones, including a requirement that the Petitioner commission the project by no later than June 19, 2015.¹ In later orders, the Commission extended the deadlines for these development milestones.²

After the Commission's denial of a standard-offer contract for the Apple Hill facility, the Developer successfully appealed that determination to the Vermont Supreme Court, which reversed the Commission's determination.³

On May 13, 2014, Apple Hill Solar LLC, on behalf of the Developer, was awarded a standard-offer contract for the electrical energy to be generated by the second of the two solar facilities proposed for the Apple Hill site. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than May 12, 2016. In later orders, the Commission extended the deadlines for these development milestones.⁴

¹ The Vermont Standard Offer Purchase Power Agreement is between Ecos Energy, LLC and VEPP Inc., a Vermont nonprofit corporation.

² *In re request of Sudbury Solar, LLC and Chelsea Solar, LLC for an extension of time to commission their respective solar electric generating projects*, Order of 1/8/15; **Error! Main Document Only.** *In re request of Chelsea Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*, Order of 3/31/16; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 17-4695-PET, Order of 3/15/18; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

³ *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29.

⁴ **Error! Main Document Only.** *In re request of Apple Hill Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*; Order of 3/31/16; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 18-3727-PET, Order of 12/27/18; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

On February 16, 2016, in Docket 8302, the Commission denied the Developer's request for a certificate of public good ("CPG") for the Chelsea Solar facility located on the site of the Bennington facility for which a standard-offer contract was executed on June 20, 2013.⁵

On September 26, 2018, in Docket 8454, the Commission approved the Developer's request for a CPG for the Apple Hill solar facility for which a standard-offer contract was issued on May 13, 2014.⁶ Neighbors appealed the Commission's approval of the Apple Hill facility. The Vermont Supreme Court then reversed the Commission's approval determination in part and remanded the case to the Commission for further action consistent with its remand.⁷

On December 27, 2018, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the proposed Apple Hill facility a second time.⁸ The commissioning deadline in the Developer's May 13, 2014, standard-offer contract for Apple Hill was extended to twelve months after the date the Vermont Supreme Court issues a mandate letter for any appeal taken with respect to the Commission's final order in Docket 8454.

On June 12, 2019, in Case No. 17-5024-PET, the Commission denied an amended petition for the Bennington facility, now referred to as the Willow Road facility, for which a standard-offer contract was executed on June 20, 2013.⁹ The Willow Road determination has been appealed to the Vermont Supreme Court, where that matter is still pending.

On August 20, 2019, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the Bennington/Chelsea/Willow Road facility a fourth time.¹⁰ In this fourth extension, the commissioning deadline in the Developer's June 20, 2013, standard-offer contract was extended to twelve months after the date the Vermont Supreme

⁵ *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, filed 6/19/14.

⁶ *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454.

⁷ *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

⁸ *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 18-3727-PET, Order of 12/27/18.

⁹ *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024.

¹⁰ *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

Court issues a mandate letter for an appeal taken with respect to the Commission's final order in Case No. 17-5024-PET.

On March 12, 2020, the Commission issued an order extending the commissioning deadline for the proposed Apple Hill facility a third time to twelve months after the Commission issued its decision on remand in Docket 8454.¹¹

On May 7, 2020, the Commission issued a final order on remand denying a CPG for the proposed Apple Hill facility in Docket 8454.

On Friday, June 26, 2020, in this proceeding (Case No. 20-1611-INV), the Commission conducted an evidentiary hearing into whether the Developer initiated site preparation for electric generation in violation of 30 V.S.A. § 248(a)(2) at Apple Hill in Bennington, Vermont. During the hearing the Developer testified that it still plans to build a combined 4.0 MW of solar electric generation at the Apple Hill site using two facilities, that it had engaged a forester to clear-cut trees at the Apple Hill site that is the subject of the two standard-offer contracts, and that the clear-cutting was occurring.¹²

On the same day as the hearing, the Commission issued the TRO against the Developer and the Developer's subsidiaries and contractors. The TRO prohibited any further tree clearing at the Apple Hill site. This includes the proposed sites of the Bennington and Apple Hill facilities that are the subject of the Developer's two standard-offer contracts, as well as the proposed Chelsea, Apple Hill, and Willow Road facilities, including any and all property identified in the applications for those facilities as being part of the proposed project. The Commission scheduled a hearing on July 9, 2020, into whether to issue a preliminary or permanent injunction under Commission Rule 2.406, and whether an injunction is necessary to avoid irreparable harm.¹³

On July 1, 2020, the Developer filed the motion to vacate the injunction hearing scheduled for July 9, 2020 (the "Developer's Motion").

On July 2, 2020, the Commission issued an order postponing the injunction hearing. The Commission interpreted the Developer's Motion as indicating that the Developer did not object

¹¹ *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

¹² Tr. 6/26/20, at 11, 64-70, 81, 82, 89, 90 (Melone).

¹³ TRO at 1 and 7.

to a later scheduling of the injunction hearing in this matter so that the Commission could rule upon the Developer's pending motion. The Commission set a deadline of July 15, 2020, for the parties to respond to the Developer's Motion.

On July 15, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors"), the Vermont Department of Public Service ("Department"), and the Vermont Agency of Natural Resources ("ANR") filed comments opposing the Developer's Motion (the "Intervenors' Comments," the "Department's Comments," and "ANR's Comments," respectively).

On July 16, 2020, the Developer filed a reply to the parties' comments (the "Developer's Reply"). The Developer did not challenge the Commission's July 2, 2020, conclusion that the Developer did not object to a later scheduling of the injunction hearing in this matter so that the Commission could rule upon the Developer's pending motion.

III. POSITIONS OF THE PARTIES

The Developer

In the Developer's Motion, the Developer contends that "the Commission has no authority to issue preliminary or permanent injunctive relief in this matter."¹⁴ The Developer argues that the Commission's statutory authority is limited and that it may not issue a temporary restraining order in this circumstance because the Developer is not a "company" as defined under Title 30.¹⁵

The Developer asserts that, if it were a company, Title 30 only allows for the Department to seek injunctive relief "in Superior Court, not before the Commission."¹⁶ The Developer contends that if the Developer were "some entity that violated section 248's prohibition on site preparation," such an allegation "would fall squarely within 30 V.S.A. § 30(h)," which does not allow the Department to seek injunctive relief.¹⁷

Finally, in its motion the Developer argues, without support, that the "Commission only attains jurisdiction over the operation of those facilities and the petitioners once the CPG is

¹⁴ Developer's Motion at 1.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ *Id.* at 6.

issued” and that, because no CPG has been issued, the Commission has no jurisdiction over the Developer.¹⁸

In the Developer’s Reply, the Developer responds to the parties’ comments by reiterating the arguments made in the Developer’s Motion. The Developer also asserts that the parties do not “explain how their view is remotely consistent with section 7061, which is the only provision of Title 30 that authorizes the Commission to take action to pursue injunctive relief.”¹⁹ The Developer argues that its clear-cutting activities on Apple Hill are being done to allow for sheep grazing incidental to solar electric generation and concludes with the assertion that:

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.²⁰

The Department

In its comments, the Department argues that “the Commission has the authority to grant injunctive relief where such an extraordinary measure is merited” because the Commission is a court of record under 30 V.S.A. § 9 and because the procedure for the Commission to issue a TRO is stated in Commission Rule 2.406, which is “analogous” to Vermont Rule of Civil Procedure 65.²¹ The Department contends that the Commission’s ability to issue a TRO has been reviewed and recognized by the federal district court for the District of Vermont.²²

The Department asserts that the Developer’s argument provides an incomplete picture because the authority referenced by the Developer applies only when the Department is seeking injunctive relief, not when other parties seek that relief. The Department observes that the

¹⁸ *Id.* at 7.

¹⁹ Developer’s Reply at 6.

²⁰ Developer’s Reply at 8-9 (citing 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.”)).

²¹ Department’s Comments at 1-2.

²² *Id.* at 3 (citing *Global NAPS, Inc.*, No. 2:09-CV-292, 2010 WL 11537869).

Commission has a long history of relying on different statutory authority to provide injunctive relief.²³

The Department argues that the Developer made itself subject to the jurisdiction of the Commission when it filed its petition for a CPG because that action made the Developer a “company” along with its affiliates and subordinate entities doing business at the Apple Hill site.²⁴ The Department therefore recommends that the Commission amend the TRO to accurately reflect the respondent’s parent company name of Allco Renewable Energy Limited “over which the Commission has regulatory authority.”²⁵

ANR

ANR agrees with the Department’s position that the Commission has jurisdiction to issue a TRO in this matter. ANR asserts that “the Commission’s jurisdiction in this matter extends to the entire 27-acre parcel on which the Apple Hill and Willow Road (formerly Chelsea) solar projects have been proposed, and to all entities affiliated with the petitioners for those two projects.”²⁶ ANR recommends that the “TRO be amended to reflect that the Commission has

²³ *Id.* (citing *Application of Green Mountain Power Corp. for A Certificate of Pub. Good for an Interconnected Grp. Net-Metered Wind Turbine.*, No. NM-1646, Order of 7/11/13 (where petitioners requesting preliminary injunction were adjacent landowners); *Vermont Legal Aid Request for Moratorium on Util. & Telecommunications Shutoffs During State of Emergency*, Case No. 20-0703-PET, Order of 3/18/20 (where petitioner requesting temporary relief under Commission Rule 2.406 was Vermont Legal Aid)). The Department also noted that where circumstances call for it, the Commission has waived the procedural requirements of Rule 2.406. *Id.* (citing NM-1646, Order of 7/11/13 at 11. (“While they have not termed it as such, the Mammolitis’ request is properly treated as a motion for preliminary injunction pursuant to [Commission] Rule 2.406(A)(2)”); Case No. 20-0703-PET, Order of 3/18/20 at 2 (“While Rule 2.406(B) ordinarily requires affidavits or a verified petition, we waive this requirement in light of the emergency situation presented to us today.”)).

²⁴ *Id.* at 4. The Department asserts that PLH LLC as the parcel landowner submitted itself to the jurisdiction of the Commission upon the filing of its sister company Apple Hill’s petition for a certificate of public good to install and operate a solar facility on the same parcel. *Id.* (citing 30 V.S.A. § 201(a) (“[T]he word “company” or “companies” means and includes individuals, partnerships, associations, corporations, and municipalities *owning or conducting any public service business or property* used in connection therewith and covered by the provisions of this chapter.”) (emphasis added); 10 V.S.A. § 6001(14)(A)(iii) (““Person”...includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land...”)).

²⁵ Department Comments at 5 (citing *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 6/12/19 at 56 nn.70, 71).

²⁶ ANR Comments at 1.

regulatory jurisdiction over PLH LLC, PLH Vineyard Sky, LLC, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC.”²⁷

The Intervenors

The Intervenors assert that the Commission has the authority to issue injunctive relief because it is a court of record under 30 V.S.A. § 9 and can issue orders under Commission Rule 2.406, which “clarifies that the Commission has the authority to issue injunctions and provide procedural direction on the decision-making process.”²⁸ The Intervenors also argue that “the notion that Apple Hill Solar LLC is not subject to the jurisdiction of the [Commission] when they are a party in interest seeking the CPG is totally without merit.”²⁹

IV. DISCUSSION

We are not persuaded by the Developer’s arguments that the Commission does not have jurisdiction over the Developer and its associated entities.³⁰ We have the authority to provide injunctive relief in this matter to address any violations of the prohibition in 30 V.S.A. § 248(a)(2)(A) against site preparation without a certificate of public good.

The Commission has Jurisdiction over the Developer

We have jurisdiction over the Developer pursuant to 30 V.S.A. §§ 209(a)(8) and 248(a)(2)(A). The Developer has two standard-offer contracts and it is in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts. Having submitted two petitions for CPGs for the proposed Chelsea Solar/Willow Road facilities and an original petition that was later amended for the proposed Apple Hill facility, the Developer has been continuously engaged in seeking CPG authorization to build these facilities since it acquired the standard-offer contracts in 2013 and 2014. The Developer’s actions on Apple Hill continue to be

²⁷ *Id.* at 2.

²⁸ Intervenors’ Comments at 4.

²⁹ *Id.*

³⁰ The respondents in this investigation include PLH LLC, PLH Vineyard Sky, LLC, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC.

part of the Developer's plan to develop the site for the two facilities that are the subject of its standard-offer contracts.

Section 209 of Title 30 addresses the Commission's jurisdiction, in part, as follows:

(a) General jurisdiction. On due notice, 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*, and shall have like jurisdiction in all matters respecting:

(8) the sale to electric companies of electricity generated by facilities:

(A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and

(B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8).³¹

In 2013 and 2014, the Developer signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont. By doing so, the Developer became subject to the Commission's jurisdiction. As long as the Developer does not relinquish the two standard-offer contracts at the Apple Hill site and abandon development of the facilities to be located there, the Developer is subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 209(a)(8).

The Developer is incorrect in its unsupported argument that the Commission's jurisdiction over the Apple Hill site would only arise after a CPG is issued. As long as the Developer's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, the Developer is subject to the Commission's jurisdiction. Such actions by the Developer include both the filing and amendment of any CPG petitions for the Apple Hill facilities, the clear-cutting activities that the Developer was engaging

³¹ 30 V.S.A. § 209 (emphasis added); *see also*, *Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248 authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont*, Docket 7970, Order of 8/4/14 at 3 (Commission temporarily halted all soil-disturbing activity of pipeline project pending completion of soil management plan pursuant to its general supervisory jurisdiction as a precautionary measure to protect public health and safety).

in here and that would have an impact on rare plants on the site, and any other acts in preparation of the site for electric generation.

Additionally, Section 248(a)(2)(A) provides the Commission with the authority to oversee and limit preparation of the Apple Hill site by the Developer:

(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 Developer is a “person” as defined in 10 V.S.A. § 6001(14):

“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; ...
- (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.

If 30 V.S.A. § 248(a)(2)(A)’s prohibition on site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission’s jurisdiction over a “proposed site” attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a “proposed site” remains within the Commission’s jurisdiction until there is a “ceasing and abandoning” of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review.³² The general jurisdiction conferred under Section 209 over “property subject to supervision under this chapter” further enhances the Commission’s particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, such as those proposed by the Developer here.

Otherwise, developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval, thereby mooted out ANR, the Agency of Agriculture Foods & Markets, and other agencies’ review of such facilities under the Section 248 criteria. Agency-proposed conditions or objections would be meaningless and facilities that would otherwise present an undue impact under the Section 248 criteria could

³² *In re Audet*, 2004 VT 30, ¶ 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (providing analysis of abandonment in Act 250 context).

perform the work that creates that impact before approval. Contrary to statute, the Commission would then be reviewing the site for a proposed facility not at the time it is filed, but instead, at the moment before the CPG is issued. Thus, jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.

Further, the denial of the Chelsea Solar, Apple Hill Solar, and Willow Road Solar facilities by the Commission is not evidence of ceasing and abandoning those projects. In addition, in this instance, there is sufficient evidence to demonstrate a commitment to proceed, including the following: the Developer still has standard-offer contracts for two 2.0 MW solar electric generation facilities on Apple Hill, the Developer is actively pursuing reconsideration and appeal of denials of its petitions, and clearing the trees from the 27-acre plot would serve to prepare the site for development of the proposed solar electric generation facilities.

The Developer admitted at the hearing that it intends to pursue these electric generation facilities and has not abandoned those proposals. The Developer acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility. The Developer also states that it plans to build solar facilities on the Apple Hill site in order that it may sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts. Therefore, the Commission has the jurisdiction to oversee the Developer and has the jurisdiction to take the extraordinary step of providing injunctive relief pursuant to Commission Rule 2.406, if appropriate.

The Commission has the Authority to Grant Injunctive Relief

As discussed by the parties, pursuant to 30 V.S.A. § 9:

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.

As observed by the Department and ANR, Commission Rule 2.406 has long been used by the Commission to address requests by parties for injunctive relief, like the case here.

The Developer's arguments that Section 30(h) and Section 7061 of Title 30 limit the Commission's authority are wholly misplaced. That statutory guidance in Title 30 is

inapplicable to the Commission but instead applies to the Department and the Enhanced E911 Board, respectively.

Section 7061 is in Chapter 87 of Title 30, which applies to Enhanced 911; Emergency Services. The Developer refers to Section 7061(a), which states: “The Board may 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. The court shall award the Board its costs and reasonable attorney's fees in the event that the Board prevails in an action under this subsection.” Under Chapter 87 of Title 30, the “Board” means the Vermont Enhanced 911 Board established under section 7053 of Title 30.³³ Contrary to the Developer’s arguments, this reference to the “Board” is not a reference to the Public Utility Commission.

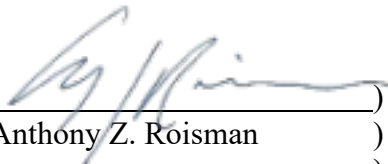
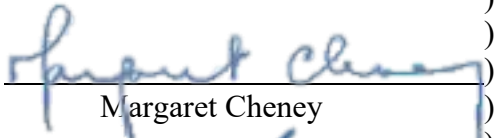
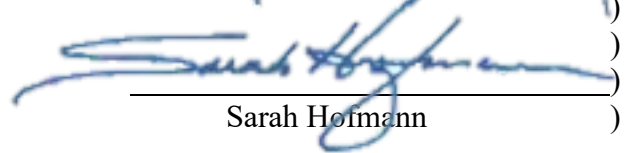
V. CONCLUSION

We are not persuaded by the Developer’s arguments and deny its motion to vacate the order scheduling an injunction hearing. An oral argument and evidentiary hearing to address whether to grant an injunction or dissolve the TRO will be held by videoconference before the Commission on September 8, 2020, at 1 P.M. The hearing will be before all three members of the Commission. Comments in response to the Developer’s motion to dissolve the TRO are due by noon on August 31, 2020. A status conference in preparation for the September 8, 2020, evidentiary hearing will be conducted by videoconference at 3:00 P.M on August 31, 2020, with the Commission staff. With the exception of the time and date, the guidance for the injunction hearing provided in our procedural order of July 1, 2020, remains applicable.

SO ORDERED.

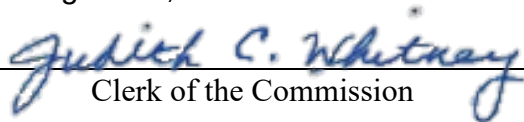
³³ See 30 V.S.A. § 7051 Definitions at (4).

Dated at Montpelier, Vermont, this 26th day of August, 2020.

 _____ Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
 _____ Margaret Cheney	)	COMMISSION
	)	
 _____ Sarah Holmann	)	OF VERMONT

OFFICE OF THE CLERK

Filed: August 26, 2020

Attest: 

Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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)	
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Order entered: 06/26/2020

**ORDER GRANTING TEMPORARY RESTRAINING ORDER AND
NOTICE OF PRELIMINARY INJUNCTION HEARING**

I. INTRODUCTION

In this order, pursuant to 30 V.S.A. §§ 8, 10, 30, 203, 209, and 248(a)(2), and Commission Rule 2.406, the Vermont Public Utility Commission (“Commission”) issues a temporary restraining order against Allco Renewable Energy Limited, PLH Apple Hill Solar LLC, and PLH Chelsea Solar LLC, and its affiliates, subsidiaries, and contractors (collectively, “Allco” or “petitioner”) from any further tree clearing on any of the property for the proposed projects identified in any Certificate of Public Good (“CPG”) applications and any property identified in those applications as intended to be part of the projects, including any amendments to those applications that have been approved by the Commission, in the Apple Hill area in Bennington, Vermont (“the Apple Hill site”).

II. BACKGROUND

On June 19, 2020, public comments were filed by Annette Smith of VermonTERS for a Clean Environment alleging that tree clearing was occurring on Apple Hill on the sites of two proposed 2.0 MW solar electric generation facilities. Ms. Smith also alleged that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity.

Also on June 19, 2020, Thomas Melone of Allco, PLH Apple Hill Solar LLC, and Chelsea Solar LLC filed a response to Ms. Smith’s comments. Mr. Melone states that:

It is my understanding that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Environmental Enforcement Officer Patrick

Lowkes at the request of Don Einhorn. While [the Vermont Agency of Natural Resources (“ANR”)] can certainly make its own comments, Officer Lowkes’ inspection confirmed that NO [rare, threatened, or endangered species] area was being disturbed and that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion.¹

On June 23, 2020, ANR filed preliminary comments in response to Ms. Smith’s public comments. ANR stated that it “has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed.”²

ANR stated that the tree-clearing activity raises two concerns. The first concern is that the petitioner is conducting site preparation without a CPG. The second concern is that the site clearing has not been reviewed to ensure that it does not have an undue adverse effect on the environment.

Specifically, ANR is concerned that the site clearing presents a substantial and immediate harm to “very rare” and “rare” plants at the site. ANR believes that a cease-and-desist order may be necessary to prevent irreparable harm to the plants. ANR stated that it would file more comprehensive comments on Friday, June 26, 2020.

On June 24, 2020, the Vermont Department of Public Service (“Department”) also filed comments stating:

In this case, based on the Agency of Natural Resources Environmental Enforcement Officer’s initial findings regarding the site clearing activity, cause appears to exist meriting further investigation into whether petitioner initiated preparing the Apple Hill site for electric generation in violation of 30 V.S.A. § 248(a)(2).³

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the “Intervenors”) filed comments in response to Ms. Smith’s public comments. The Intervenors assert that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission, and (2) the petitioner has engaged in site preparation in violation of 30 V.S.A.

¹ Email from Thomas Melone to the PUC Clerk, at 7:07 P.M. on June 19, 2020.

² ANR Comments at 2.

³ Department Comments at 2.

§ 248 and the Commission should declare the petitions for those facilities to be withdrawn or abandoned.

On June 25, 2020, ANR filed additional comments with supporting affidavits and exhibits and requested that the Commission issue a temporary restraining order pursuant to Commission Rule 2.406.

Also on June 25, 2020, Allco filed comments with supporting affidavits and exhibits and requested that the Commission deny the request for a temporary restraining order.

On June 26, 2020, the Commission held an evidentiary hearing to hear argument and admit evidence. The hearing addressed whether a temporary restraining order should or should not be issued to stop Allco from conducting site preparation in violation of Section 248(a)(2) and to prevent Allco's ongoing site clearing from having an undue adverse effect on "rare" and "very rare" plants on the 27-acre Apple Hill site.

III. FINDINGS

At the evidentiary hearing on June 26, 2020, the Commission admitted those exhibits listed in the transcript from that proceeding, including Commission Exhibit 1, ANR Exhibits 1-9, PLH Exhibits 1 and 2 and their attachments, and Intervenor's Exhibit 1. That list of exhibits and the transcript of that proceeding will be available in ePUC shortly. Based on the exhibits admitted in the record and the testimony provided in today's hearing (not all of which can be cited, given the timing of this proceeding), the Commission makes the following findings.

1. On June 16, 2020, the Apple Hill site was visited by Vermont Environmental Enforcement Officer Patrick Lowkes, who observed that site-clearing activity was occurring on Apple Hill on the 27-acre parcel on which the Apple Hill and Willow Road solar facilities are proposed to be constructed. Thomas Melone email of June 19, 2020; preliminary comments by the Vermont Agency of Natural Resources ("ANR").

2. Allco's forester has carved out a truck turnaround spot at the end of Willow Road on the Apple Hill site and cleared a path around the site to install soil-erosion fencing. This work has cleared approximately 3 of the 27 acres. Allco's forester anticipates completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020. Kobel's Testimony of June 26, 2020.

3. Allco had previously surveyed the site for rare, threatened, and endangered plants and located both rare and very rare species, most recently updated in 2018. Some of the very rare plants were relocated to conservation areas set aside on the 27-acre site. These conservation areas were marked by Allco and enclosed with soil-erosion fencing. The rare plants were not relocated. Popp testimony of June 26, 2020 and ANR Exhibits.

4. There are several areas outside the conservation areas where the rare plant species are located. These would be harmed by the proposed site-clearing activities. Popp testimony of June 26, 2020 and ANR Exhibits.

5. Although Allco states that it is clearing the site to allow for grazing sheep and growing hemp, those activities would not begin until the 2021 growing season. Melone Affidavit and Melone Testimony of June 26, 2020.

6. The petitioner still plans to build a combined 4.0 MW of solar generation at this site.

7. 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.

IV. DISCUSSION

The petitioner’s activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The petitioner’s claim in his affidavit that his activities are solely for farming purposes is not credible. The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is “devoted *primarily* to farming.”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. Further, the petitioner testified that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. This violates 30 V.S.A. § 248(a)(2).

A substantial immediate and irreparable injury is all that is required under Commission Rule 2.406 to warrant the issuance of a temporary restraining order. However, all of the factors that apply to a preliminary injunction also weigh in favor of granting preliminary relief here.

⁴ Vermont Agency of Agriculture, Food and Markets, *Farm Definitions and Determinations*, <https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations>.

The Vermont Supreme Court has held that four factors must be considered in determining whether to grant a preliminary injunction: “(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest.”⁵

First, for the reasons noted in detail below, ANR and the Intervenor have established a threat of irreparable harm. In fact, they have established a substantial immediate and irreparable injury.

Second, the record demonstrates that there is little, if any, harm to the petitioner from being enjoined at this time. The only possible harm to the petitioner is a delay in his site-clearing activities, if he is ultimately allowed to undertake those activities. But there would not appear to be even a delay here, as the petitioner testified that he is unlikely to do any sheep farming or hemp growing in 2020. Further, even if there were a delay, other courts have held that when the “anticipated revenues from the logging” are “delay[ed]” due to an injunction, the harm is “at most the time value of the profit component of that revenue, a value which no one has bothered to quantify and which probably is trivial.”⁶ The same could be said here.

Third, regarding the likelihood of success on the merits, we find that 30 V.S.A. § 248(a)(2) precludes the petitioner from site-clearing activities while he is still pursuing CPGs and has certainly not received them. As explained above, Vermont law explicitly prohibits site preparation for electric generation without a CPG, and the petitioner admits that he continues to seek to place electric generation at this site.

Fourth, the public interest favors a preliminary injunction here. As other courts have noted, there is a “well-established public interest in preserving nature and avoiding irreparable environmental injury.”⁷ Further, “once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost.”⁸ Additionally, as counsel for ANR noted in oral argument, the petitioner’s activities challenge the integrity of the Section 248 permitting process. The Commission issued an order on May 7, 2020, explicitly

⁵ *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596, 178 A.3d 313, 319 (2017).

⁶ *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

⁷ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quotation omitted); *see also*, e.g., *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (finding a public interest in “the need to preserve meaningful relief” throughout all stages of the litigation).

⁸ *Id.* at 1137.

denying the petitioner's request to amend a pending application for a certificate of public good.⁹ Although the petitioner seeks reconsideration of that order, that order remains binding on the petitioner unless and until the Commission grants his request for reconsideration. Yet, the petitioner has gone ahead with making the very same permanent changes to the landscape that we told him he could not make when we denied his amendment request. As ANR correctly notes, this is an affront to the Section 248 permitting process. It creates a significant risk that undue adverse effects to the environment will occur before the Commission has had a chance to review the proposed project. This does not comply with the applicable statutes or serve the public interest.

Substantial Immediate and Irreparable Harm Under Commission Rule 2.406

The Vermont Supreme Court has recognized that preliminary relief is appropriate to avoid "irreparable damage during the pendency of the action" where "the injunction is required to preserve [the] status quo."¹⁰ A temporary restraining order or preliminary injunction "preserves the status quo."¹¹ This type of relief is particularly appropriate to prevent actions that "cannot be undone through monetary remedies."¹² The Vermont Supreme Court has thus denied preliminary relief when the challenged action "can be 'undone.'"¹³ On the other hand, when there is no way to undo something at a later time, a stay is necessary to avoid irreparable harm.

Here, substantial immediate and irreparable harm exists for at least two reasons. 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.

The proposed tree clearing constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored. Thus, 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

⁹ Docket 8454, Order of 5/7/2020 at 23-25.

¹⁰ *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450, 365 A.2d 243, 247 (1976).

¹¹ *Bank of New York Co. v. Ne. Bancorp, Inc.*, 9 F.3d 1065, 1067 (2d Cir. 1993).

¹² *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

¹³ *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 42, 205 Vt. 586, 606, 178 A.3d 313, 326.

money damages can normally remedy such damage.”¹⁴ Consequently, the logging of trees “is irreparable for the purposes of the preliminary injunction analysis.”¹⁵

As for harm to rare plant species, ANR has established that rare species are found in areas on the site that are currently slated for clearing. In particular, at least three locations contain nimblewill muhly. Yet the petitioner’s forester stated that he plans to avoid only two locations on these 27 acres. This means that at least one location of nimblewill muhly will likely be destroyed if the clearing goes forward. Further, one of ANR’s witnesses testified that plants often move to new locations. The petitioner’s forester admitted that he is relying on a 2018 survey and that, although he and others visited the site in 2020 to look at the flagging that is currently in place, that visit did not include walking the 27 acres to look for new locations of rare plants. It is therefore likely that rare plants will be destroyed if this area is cleared. This constitutes substantial immediate and irreparable harm.

V. ORDER

Based on the foregoing, the Commission, pursuant to Board Rule 2.406, issues the following temporary restraining order and notice of hearing:

1. Allco and its affiliates and contractors shall immediately cease all tree clearing on the Apple Hill site;
2. Allco shall be prepared to show cause during this investigation why the tree-clearing activity shall not be considered site preparation as defined in Title 30; and
3. Allco shall cooperate fully with the Commission in its further investigation of this matter.
4. Pursuant to 30 V.S.A. §§ 8, 10, 203, and 209, and Commission Rule 2.406, an evidentiary hearing on whether to grant a preliminary injunction will be held by videoconference before the Public Utility Commission on July 9, 2020, at 9:30 A.M. This hearing will address whether the restraining order should be lifted and whether Allco’s tree-clearing activities were

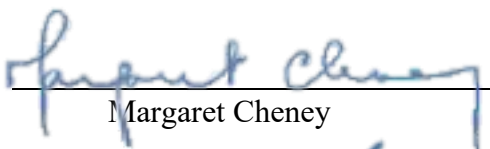
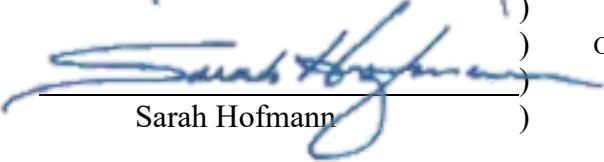
¹⁴ *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

¹⁵ *Id.*; see also, e.g., *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that the logging of trees “satisfies the ‘likelihood of irreparable injury’ requirement”); *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that “trees cut down this fall will not have grown back to their present height” during the lifetime of most of the plaintiffs).

site-clearing operations without a certificate of public good in violation of 30 V.S.A. § 248(a)(2). A pre-meeting to address videoconferencing procedures will take place before the hearing at 9:15 A.M. The evidentiary hearing will be held remotely using a web-based online platform, GoToMeeting.¹⁶ Participants and members of the public may access the hearing online at <https://global.gotomeeting.com/join/134692885>, or call in using the following information: Phone number: +1 (646) 749-3112; access code: 276-668-837. Participants may wish to download the GoToMeeting software application in advance of the hearing at <https://global.gotomeeting.com/install/134692885>. Guidance on how to join the meeting and system requirements may be found at <https://www.gotomeeting.com/meeting/online-meeting-support>.

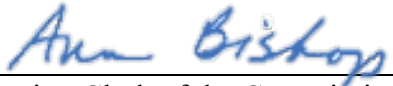
¹⁶ Pursuant to V.R.C.P. 43.1(c)(5), because of the COVID-19 pandemic, the Commission is waiving the 28-day requirement for notice of video hearings contained in V.R.C.P. 43.1(c)(3). Any party that objects to the evidentiary hearing being held remotely shall file its objection by July 2, 2020.

Dated at Montpelier, Vermont, this 26th day of June, 2020.

	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
Margaret Cheney	)	COMMISSION
	)	
	)	
Sarah Hofmann	)	OF VERMONT

OFFICE OF THE CLERK

Filed: June 26, 2020

Attest: 
Acting Clerk of the Commission

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