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)	

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.

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[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 Intervenors 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. Kobelier 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 Determination*s, 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 Intervenors 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

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[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
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Margaret Cheney) COMMISSION
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Sarah Hofmann) OF VERMONT
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OFFICE OF THE CLERK

Filed: June 26, 2020

Attest: _____
Acting 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)

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