

**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))

PREFILED DIRECT TESTIMONY OF THOMAS MELONE

EXHIBITS

PLH-TM-1 Map

PLH-TM-2 Resume of Melissa Staebner

Q1. Please state your name, occupation and background.

A1. My name is Thomas Melone. I am the President and sole member of PLH Vineyard Sky LLC (“PLH”). I am also the President of Allco Renewable Energy Limited (“Allco”) and President of Vineyard Sky Farms Corp. I represent Apple Hill Solar LLC (“AHS”), Chelsea Solar LLC and PLH in the above-captioned matter. I am an attorney in good standing licensed to practice law in the states of New Jersey and New York for approximately thirty-six years. I am also an attorney in good standing licensed to practice law in the states of Massachusetts, Florida, Connecticut, Pennsylvania and Vermont. I have extensive experience as outside counsel in tax, energy and finance, including seven years practicing law with Cravath, Swaine & Moore in New York. I am currently a member of the litigation committee of the Board of Advisors of the Institute for Policy Integrity at New York University School of Law. I received my Juris Doctor with high honors from Rutgers Law School - Newark in 1983, my Master of Laws (LLM in taxation) from New York University School of Law in 1989 and my Certified Public Accountant certificate in 1980.

I also have extensive experience with the business side of finance, specifically, financing utility assets such as solar projects that sell the energy produced to utilities under power purchase agreements. For the past twenty years, as President of Allco and its affiliates, I personally have been involved in arranging and structuring the financing for billions of dollars of assets ranging from railcars, commercial aircraft, power plants, water and wastewater treatment systems, and air traffic control systems.

Q2. What is the purpose of your testimony?

A2. The purpose of my testimony is to establish that the temporary restraining order (“TRO”) issued in this case on June 26, 2020, should be dissolved and that no further injunction should be

1 issued restraining the lawful activities of PLH.

2
3 **Q3. Please explain the background of the current dispute?**

4 A3. PLH is the owner of a 27-acre parcel in Bennington, Vermont, located at the end of Willow
5 Road. There are two solar projects proposed for that parcel. The solar project proponents are
6 Chelsea Solar LLC (“CS”) and Apple Hill Solar LLC (“AHS”). Those entities are owned by Allco
7 Finance Limited, which is, in turn, indirectly wholly owned by Thomas Melone. That 27-acre
8 parcel, referred to herein as the “Solar Parcel,” is shown on Exhibit PLH-TMM-1 attached hereto.
9 PLH also owns an adjoining parcel that is currently the site of an apple orchard (the “Horticultural
10 Use Parcel”), which is also shown on **Exhibit PLH-TMM-1**. PLH has no financial interest in
11 either CS or AHS and is not the applicant for a certificate of public good (“CPG”) for either
12 proposed solar project. PLH’s financial interest vis-à-vis CS and AHS is a lessor of the land to CS
13 and AHS.

14 On January 6, 2020, the hearing officer in PUC Docket 8454 issued a proposed decision
15 recommending denial of a CPG for the AHS project. Recognizing the likelihood of potentially
16 more years of litigation surrounding the solar projects, in March of 2020, PLH decided that the
17 time had come to put both the Solar Parcel and the Horticultural Use Parcel to productive use.
18 The 2018 Farm Bill legalized the growing of hemp, which is a horticultural use for the extraction
19 of cannabidiol. In Vermont, the Agency of Agriculture Food and Markets (“AAF”) created a
20 registration system in order to license the growing of hemp. PLH applied for a license for the 2020
21 growing season paying a fee equal to \$1,000 in order to grow hemp on the Horticultural Use Parcel
22 and the Solar Parcel. The Horticultural Use Parcel is not the proposed site for the two solar

1 projects. PLH received its license from AAFM on June 29, 2020. As can be seen on **Exhibit**
2 **PLH-TM-1**, there was proposed a line of newly planted trees on the north end of the Horticultural
3 Use Parcel by AHS. Those trees were removed as part of the amendment to the AHS petition for
4 a CPG which is discussed below. If planted, however, those trees would not require clearing
5 because that area is already cleared. In fact, most of the Horticultural Use Parcel is clear of trees.

6 PLH also is planning to use the Solar Parcel for farming purposes, specifically, raising,
7 feeding, and management of sheep, and the on-site storage, preparation, and sale of hemp and
8 potentially the growing of hemp. The sheep operation would now be conducted through PLH's
9 wholly-owned corporation, Vineyard Sky Farms Corp., a Florida corporation ("VS Farms"),
10 formed in October 2020.



11
12 The livestock operations manager for VS Farms is Melissa Staebner, who is now a full-time
13 employee of VS Farms. See, **Exhibit PLH-TM-2**. VS Farms will operate a sheep farm in
14 Bennington, Vermont, and one in Plainfield, Connecticut, as part of its initial operations. Those
15 geographic locations are strategically located to maximize the opportunities for sheep grazing on
16 solar sites operated by Allco as well as third parties in Vermont, New York, Connecticut and

1 Massachusetts. In addition, to realizing revenue from grazing on land of solar projects, VS Farms
2 expects to derive income from the sale of market lambs, wool and milk. Eventually, VS Farms
3 plans to expand its operations to include making cheese. Those activities constitute farming
4 under 10 V.S.A. §6001(22). The onset of COVID-19 delayed the clearing activities for both
5 parcels. The clearing contractor engaged by PLH commenced on-site work on June 8, 2020.

6 On March 23, 2020, AHS filed an amendment (the “Amendment”) to its petition for a CPG,
7 see, Intervenor Exhibit 2, reflecting PLH’s farming activities. At that time, AHS’s petition for a
8 CPG was back at the PUC after remand from the Vermont Supreme Court (Docket 2018-358).
9 PUC Rule 2.204(G)(1) provides: “Proposed amendments may be filed at any time.” The
10 Amendment provided notice to all parties of PLH’s planned farming activities for both the Solar
11 Parcel and the Horticultural Use Parcel.

12 On June 24, 2020, the PUC opened an investigation on its own motion in response to a
13 complaint filed in Docket 8454 by anti-renewable energy activist Annette Smith, who has
14 spearheaded the opposition to the two Bennington solar projects. In its order opening the
15 investigation the PUC invited parties to ask for injunctive relief. On June 26, 2020, the PUC held
16 a hearing and issued the injunction (the “Injunction” or “TRO”) enjoining the clearing of trees on
17 both the Solar Parcel and the Horticultural Use Parcel.

18
19 **Q4. Is factual finding #5 in the Commission TRO correct?**

20 A4. No. Factual finding #5 is not correct as the transcript from the hearing shows.

21 Factual finding #5 states:

1 The sheep grazing is being done “primarily” to control vegetative growth at the
2 petitioner’s planned solar projects at the site. Melone Testimony of June 26, 2020.

3
4 That factual finding #5 is both incorrect and an inaccurate reflection of the testimony. The TRO
5 incorrectly states at 4: “The petitioner testified in this proceeding that, although the sheep may end
6 up being used for some farming purposes, he was putting the sheep in this location ‘primarily’ to
7 serve the proposed solar projects. This does not qualify as farming.”

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

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

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

25 Tr. 93-94.
26
27

28 As I clearly stated, while the impetus for getting into the farming business was to maintain solar
29 projects owned by Allco and third parties, the farming business will also engage in and realize
30 revenue from the more typical livestock farm revenue streams. The potential use of the sheep to
31 graze at the site in Bennington is an incidental benefit of the overall sheep business, it by no means
32 is the “primary” purpose as concluded by the PUC. Contrary to the TRO’s conclusion, PLH’s

1 proposed activities clearly constitute farming under Vermont law. The AAFM web page cited by
2 the TRO provides the following definition of farming, which definition follows 10 V.S.A. §
3 6001(22):

4 Section 2.16 of the Required Agricultural Practices (RAPs) states that “farming”
5 means:

6
7 (a) the cultivation or other use of land for growing food, fiber, Christmas trees,
8 maple sap, or horticultural, viticultural, and orchard crops; or

9
10 (b) the raising, feeding, or management of livestock, poultry, fish, or bees; or

11
12 (c) the operation of greenhouses; or

13
14 (d) the production of maple syrup; or

15
16 (e) the on-site storage, preparation, and sale of agricultural products principally
17 produced on the farm; or

18
19 (f) the on-site storage, preparation, production, and sale of fuel or power from
20 agricultural products or wastes principally produced on the farm; or

21
22 (g) the raising, feeding, or management of four or more equines owned or boarded
23 by the farmer, including training, showing, and providing instruction and lessons
24 in riding, training, and the management of equines.¹

25
26 There is no exception for a farm where sheep are being raised, fed and managed from not
27 being a farm or those activities not being farming simply because the sheep happen to be grazing
28 on a site that maintains a solar facility. Indeed, such a concept would be antithetical to the concept
29 of farming. I testified that the primary aspect of PLH *getting into the business of sheep farming*
30 was “to graze at solar projects” throughout the Northeast. At no time did I state (as Finding #5
31 claims) that “[t]he sheep grazing is being done ‘primarily’ to control vegetative growth at the

¹ <https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations>

1 petitioner's planned solar projects at the site." But even if the sheep grazing was being done
2 primarily to control vegetative growth of what is now a non-existent solar array, the activities on
3 the Parcels still include the raising, feeding, and management of sheep which is still farming.

4 Prior to the existence of any solar facility that may be approved for and placed on part of
5 the site, the sheep would be grazing because that is what sheep do—but only while they were on
6 the site and not at some other site. After any solar facility might be placed on part of the site, the
7 sheep would *be doing the same thing on a daily basis, again because that is what sheep do—*
8 *grazing—but only while they were on the site and not at some other site.* Contrary to the TRO's
9 inaccurate factual finding, the grazing at the Bennington site is not dependent at all on a solar
10 facility being on the site one day. The raising, feeding, and management of the sheep is a
11 completely separate business and farming activity, and would commence prior to any solar project
12 being on the site and would continue whether or not a solar project is ever built. PLH would be
13 operating a farming business that would not depend at all, much less primarily on the prospect of
14 a solar facility on the Bennington site. It would make no business sense to commence a farming
15 business that was dependent upon the existence of two solar projects that the PUC has denied
16 CPGs for.

17 PLH would be engaging in farming and the property would be considered a farm both
18 before and after any solar facility that might be placed in service. The hoped-for solar projects at
19 the site (which the Commission has denied CPGs for both) would be a small portion of the solar
20 projects that would be serviced by the sheep, which would include both Allco-related projects and
21 third-party projects (in New York, Vermont, Massachusetts and Connecticut).

1 PLH's proposed activities of raising, feeding and management of sheep fit squarely with
2 clause (b) above. PLH's proposed activities of selling lambs and wool fit squarely with clause (e)
3 above. PLH's proposed activities of growing, storing and processing hemp fit squarely with
4 clauses (a) and (e) above. PLH's proposed activities of raising, feeding and management of sheep
5 fit squarely within 10 V.S.A. § 6001(22)(b). PLH's proposed activities of selling lambs and wool
6 fit squarely within 10 V.S.A. § 6001(22)(e). PLH's proposed activities of growing, storing and
7 processing hemp fit squarely within 10 V.S.A. § 6001(22)(a) and (e).

8
9 **Q5. Is The Clearing That PLH Is Undertaking To Start Its Farming Use “site preparation**
10 **for or construction of an electric generation facility”?**

11 A5. No. PLH's clearing activities are site preparation for its farming activities. None of the site
12 work is being undertaken in preparation for an electric generation facility or the construction of an
13 electric generation facility. As I also explained at the TRO hearing, the site preparation for the
14 farming use is more expensive and more involved than clearing and site preparation for a solar
15 project. For example, in the case of a solar project, tree stumps do not need to be removed unless
16 they end up being in the way of a post for the support racking of the modules. Clearing for PLH's

1 farming use, however, requires that all the stumps be removed, which can more than double the
2 cost of clearing.

3
4 **Q6. Does the prohibition in 30 V.S.A. §248(a)(2)(A) against site preparation for an electric**
5 **generation facility provide a standard for you to understand what is permissible and what is**
6 **not?**

7 A6. No. The prohibition in 30 V.S.A. §248(a)(2)(A) against site preparation for an electric
8 generation facility provides no standard for me or ordinary people to understand what is
9 permissible. Moreover, I and persons of common intelligence must guess at its meaning and differ
10 as to its application.

11 30 V.S.A. §248(a)(2)(A) provides:

12 (A) no company, as defined in section 201 of this title, and no person, as defined in
13 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric
14 generation facility, energy storage facility, or electric transmission facility within
15 the State that is designed for immediate or eventual operation at any voltage.
16

17 The phrase “site preparation for ...an electric generation facility” is not defined. Nor does the
18 statute provide any standards as to the meaning or implementation of that phrase.

19 The prohibition against “site preparation for ...an electric generation facility” is not
20 accompanied by any standard that allows me or a landowner, such as PLH, to predict how it will
21 be interpreted or applied and thus it does not provide sufficient standards for landowners, such as
22 PLH, to develop proposed land uses accordingly.

23 Not only is the phrase “site preparation for ...an electric generation facility” not sufficient
24 for “ordinary people to understand,” even sophisticated developers and the PUC are left guessing

1 as to what it means. The PUC has no objective standard for determining what “site preparation
2 for ... an electric generation facility” means, and the statute reveals none.

3 The PUC has stated that “a petition filed under 30 V.S.A. § 248 does not terminate the
4 ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these
5 activities do not conflict with any requirements contained in a CPG issued by the Board.” *Georgia*
6 *Mountain*, Docket No 7508, Order of January 5, 2012. The PUC has also recognized that section
7 248 was not intended to cover farming related or otherwise lawful activities even though those
8 activities may overlap with activities related to electric generation. *Petition of Beaver Wood*
9 *Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011).

10 The PUC has also recognized the rule prohibiting site preparation for, or construction of, an electric
11 generating facility does not apply to activities or construction of facilities that *could be used for*
12 *other purposes*, and thus not solely related to the electric generating facility, even when those were
13 expressly incurred for federal and state tax purposes *as part of construction* of the electric
14 generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC
15 LEXIS 332 (October 22, 2010) at 6 (“the digester is but one component of the Project and not only
16 serves the purpose of generating electricity but also provides material for the farming operation
17 itself.”) The *Monument Farms* decision is particularly instructive because there the activities,
18 which included actual physical construction of part of an electric facility, were expressly incurred
19 for federal and state tax purposes related to construction of an electric generating facility. The part
20 of the facility that was being constructed just happened to be able to be used for other purposes so
21 the PUC held that the activities and construction did not constitute site preparation for or
22 construction of an electric generation facility.

1 Here, that precedent was ignored and the TRO concluded that PLH's farming activities are
2 site preparation for an electric generation facility merely because trees need to be cleared for the
3 farming activity on the Solar Parcel and trees would be needed to be cleared for a proposed solar
4 facility if the solar facility were built now.

5 Under such a view, there is no understandable limitation of what is now espoused as the
6 site preparation limitation. If there were an old house on the site that would need to be removed
7 for a farming use but also would be required to be removed for a solar use, that removal would
8 constitute site preparation. If there were a rock wall in the middle of an otherwise cleared parcel
9 that would need to be removed for a farming use but also would be required to be removed for a
10 solar use, that removal too would constitute site preparation. If one tree, ten trees, or a hundred
11 trees were in the middle of an otherwise cleared parcel that would need to be removed for a farming
12 use but also would be required to be removed for a solar use, that removal too would be considered
13 site preparation for an electric generating facility.

14 What the PUC has done is break away from its own precedent and effectively preclude any
15 use on a site where an electric generating facility is contemplated.

16 There is simply no standard for ordinary people to understand what is permissible and what
17 is not and persons of common intelligence must guess at its meaning and differ as to its application.
18 The end result is *ad hoc* decision-making leading to unbridled discrimination.

19
20 **Q7. Is PLH or are any of "Allco," "petitioner" or "Developer" as defined in the PUC's TRO**
21 **a "company" for purposes of either 30 V.S.A. §201 or §209?**

1 A7. No. None of PLH or the persons defined in the PUC's TRO as "Allco," "petitioner" or
2 "Developer" are a company for purposes of either 30 V.S.A. §201 or §209.

3 30 V.S.A. §201(1) defines "Company" or "companies" as "means and includes individuals,
4 partnerships, associations, corporations, and municipalities owning or conducting any public
5 service business or property used in connection therewith and covered by the provisions of this
6 chapter." None of PLH or the persons defined in the PUC's TRO as "Allco," "petitioner" or
7 "Developer" own or conduct any public service business or property.

8 Further confirming that none of PLH or the persons defined in the PUC's TRO as "Allco,"
9 "petitioner" or "Developer" are a "company" is section 248(b)(6) which provides: "With respect
10 to purchases, investments, or construction by a company, is consistent with the principles for
11 resource selection expressed in that company's approved least-cost integrated plan." To my
12 knowledge, every section 248 application submitted by an independent developer has not been
13 required to meet the criteria of section 248(b)(6) because such an applicant is not a company under
14 section 201 or 209. There is simply no support for the position that any of CS, AHS or PLH is "a
15 company." None file a least-cost integrated plan. None provide any product or service to the
16 public. None conduct a public service business. None own any property used in connection with
17 the conduct of a public service business.

18 The filing of a section 248 application is not the operation of a public service business.
19 The filing of a section 248 application does not constitute the owning of any property used in
20 connection with the conduct of a public service business. Indeed section 248 itself lays bare the
21 lack of merit in that position. Section 248(a)(2)(A) provides that "no company, as defined in
22 section 201 of this title, *and no person*, as defined in 10 V.S.A. § 6001(14), may begin site

1 preparation for or construction of an electric generation facility ... within the State that is designed
2 for immediate or eventual operation at any voltage.” (emphasis added.) The language that expands
3 the site preparation and construction prohibition to “persons” would be superfluous if the filing of
4 a CPG application turns the applicant and all “related” entities into section 201 and 209 regulated
5 companies because the first part of section 248(a)(2)(A) would do the job without the additional
6 language referencing “persons.”

7
8 **Q8. Has the TRO inflicted irreparable harm on PLH?**

9 A8. Unquestionably, yes. The Amendment was filed on March 23, 2020. At the time the
10 Amendment was filed the AAFM was not accepting new registrations for 2020 for hemp growing.
11 As a result, PLH assumed that the earliest it would be permitted to grow hemp would be 2021. As
12 I stated in my testimony of June 26, 2020 (Tr. at 87), PLH filed a registration with AAFM for
13 growing hemp to be effective when AAFM approved the registration, but we had no idea how long
14 it would take for AAFM to issue the registration. To our surprise, on June 29, 2020, AAFM
15 notified PLH that its registration was accepted, complete and effective for 2020. As a result, what
16 I considered unlikely as of June 26, 2020, became likely because of the issuance of the license.
17 During the week of June 29, 2020, I confirmed with Biosoil Farms Inc., that we would be able to
18 obtain sufficient plants to grow hemp on the Horticultural Use Parcel for growing and harvesting
19 in 2020. Because the Horticultural Use Parcel is mostly cleared in its current horticultural use, it
20 would not have taken very long to clear enough acres to commence growing hemp in July 2020.
21 That growing and clearing, however, was prevented by the TRO, which the PUC refused to vacate
22 even as to the Horticultural Use Parcel. In July 2020, I (through a single member limited liability

1 company) completed a convertible note investment in a hemp growing company, Biosoil Farms
2 Inc.

3 Now even though ANR, in Bob Popp's affidavit of November 25, 2020, has stated that
4 ANR does not seek any relief against the Horticultural Use Parcel, the damage has been done and
5 PLH is still subjected to the TRO, and even if it is dissolved, PLH is under a constant threat that
6 ANR or the PUC could change its mind yet again.

7 As far sheep are concerned, it was unlikely that PLH would be placing any sheep on the
8 site in 2020 because much preparation needs to be done in advance. The TRO has prevented PLH
9 for getting the site ready for sheep in 2021. By enjoining clearing, the TRO has likely prevented
10 PLH from getting the land suitable for sheep in 2021. Only with the immediate dissolution of the
11 TRO and PLH incurring increased costs to get the site ready for 2021 would it now be possible to
12 put sheep on the Parcels in 2021. The TRO has prevented the ability to have the site planted with
13 a proper seed mix in 2020 and have enough time to establish sufficient growth to both stabilize the
14 site and ultimately be suitable for grazing by 2021. As a result, to get the site ready by 2021 would
15 require increased costs of hydroseeding or similar techniques. The TRO has also prevented PLH
16 from clearing to install well water for the sheep. The TRO has also prevented PLH from planning
17 for and constructing the buildings needed for the sheep. Construction lead times have greatly
18 increased because of the pandemic. Now in order to get the buildings ready for 2021 for both the
19 hemp and the sheep, PLH would have to incur increased costs because the planning and
20 construction schedule would be far more compressed, if supply lines and construction personnel
21 are available. All in all, the TRO has created ongoing irreparable harm because sheep cannot
22 simply be placed on a site after it is cleared, nor can hemp be stored without necessary structures.

1
2 **Q9. Does the “natural environment” criterion in section 248(b)(5) provide a standard for**
3 **you to understand what is permissible and what is not?**

4 A9. No, not as applied by ANR and the PUC. One of the findings that is required for a solar
5 energy project to obtain a CPG under 30 V.S.A. § 248 is that the facility “will not have an undue
6 adverse effect on ... the natural environment ... with due consideration having been given to the
7 criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K) ... and
8 greenhouse gas impacts.”

9 The “due consideration” factors in 10 V.S.A. §§ 1424a(d) and 10 V.S.A. §§ 6086(a)(1)
10 through (8) and (9)(K) (Act 250 criteria) and greenhouse gas impacts are the only specific criteria
11 that are listed as being related to the “natural environment” and are not at issue here.² Those
12 specific cross-referenced criterion in section 248(b)(5) related to the natural environment do
13 provide some guidance for me to understand what is permissible and what is not, but even then,
14 there is no standard as to how they should be relevant.

² 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.

1 But those specific cross-referenced criteria are not at play here. Rather, what is being done
2 here is ANR attempting to expand what the Legislature enacted. ANR is seeking to use its coercive
3 power as a party to these proceeding to impose requirements related to unknown criteria—criteria
4 that is devised by ANR from time to time, outside the public or Legislature hearing process. As
5 such, the “natural environment” criterion is not sufficient for me or “ordinary people to
6 understand.” In practice, other than the specific sub-criteria in the statute, it means what ANR
7 says it means on an *ad hoc* basis.

8 The PUC and ANR (based upon ANR’s “guidance” and unscientific and unlawful rare
9 plant classification) conclude that there is more to the “natural environment” criterion than the
10 many specific due consideration factors enacted by the Legislature, some of which have detailed
11 rules and balancing requirements. It is those unknown and extra statutory sub-criteria that infect
12 the natural environment criterion and make it vague and standardless and result in me not being
13 able to understand what is permissible and what is not.

14 The natural environment criterion as it is applied by ANR and the PUC in respect of the
15 Plants and trees denies me and PLH the ability to develop proposed land uses. The meaning of
16 undue adverse effect on the natural environment is simply left to the *ad hoc* discretion of the then
17 current PUC commissioners, after considering the coercive effects of ANR’s *de facto* rules,
18 making it essentially arbitrary. Such abstract language has been held unconstitutionally vague in
19 the First Amendment context. *See, Epona v. Cty. of Ventura*, 876 F.3d 1214, 1223 (9th Cir. 2017)
20 (“*Epona*”) (holding as unconstitutional a law that has requirements that structures may not "have
21 a harmful effect upon the health or welfare of the general public" or be "detrimental to the welfare

1 of the general public . . . [or] to the aesthetic quality of the community or the surrounding land
2 uses").

3 I cannot determine how a decision will be made and neither I nor any reasonable applicant
4 can determine what is required to meet the "unduly interfere" standard. More specifically, no one
5 can determine how the PUC applies the individual elements in (b)(5) to find some undue
6 interference and thus to conclude that the applicant did not meet its burden of proof. The PUC's
7 decisions thus become pure *ad hoc* decision-making.

8 Here that is what is at issue and what formed the basis of the TRO is the invisible criteria—
9 those that are not in the statute—which under ANR's view can just be made up on an *ad hoc* basis.
10 While the statute sets out the ultimate finding the PUC must make regarding the natural
11 environment, nothing in section 248 provides any guidance to me or an applicant as to the meaning
12 of the term except for the specific due consideration Act 250 criteria. Likewise, the statute
13 provides no guidance on the ANR-created criteria and no explanation of how the ANR-created
14 criteria are to be taken into account.

15
16 **Q10. Even if the TRO's new legal approach as to what constitutes site preparation for an**
17 **electric generation facility is accepted. Is the TRO still overbroad?**

18
19 A10. Yes. The TRO is clearly overbroad in at least two respects. First, it covers the Horticultural
20 Use Parcel, which is not the proposed site of an electric generation facility. Second, the TRO
21 prevents clearing on the Solar Site which was already concluded would not have an adverse effect
22 on the natural environment. The CPG for the AHS project was issued on September 26, 2018.

1 Although that CPG was overturned by the Vermont Supreme Court's decision, nothing in the
2 decision altered the fact that AHS was authorized to fully clear the site for its proposed project
3 subject to the terms of the ANR MOU, as of September 26, 2018. Moreover, nothing in the PUC's
4 order on remand in docket 8454 changed the conclusions with respect to the natural environment.
5 Thus, the TRO is overbroad as to the Solar Parcel because it prevents what the PUC has already
6 concluded is acceptable. This change of heart by the PUC further shows precisely how PLH and
7 others live under constant threat that the undefined and invisible natural environment criteria
8 would be used by ANR or the PUC to prevent lawful activities and constrain land use planning
9 and development.

10 Thus, even if the TRO's new legal approach as to what constitutes site preparation for an
11 electric generation facility were accepted, the TRO should have only been narrowly focused on
12 whether and how the proposed clearing activities might conflict with the ANR MOU and the
13 PUC's conclusions based upon that MOU, and any injunction against site activities should have
14 been limited to those conflicts to the extent they might exist. Once those potential narrow areas
15 of conflicts, if any, were identified, then the proper course would have been to review those
16 conflicts individually or collectively to determine whether there would be an undue adverse effect
17 on the natural environment attributable solely to those conflicts (again of course assuming that the
18 new approach to site preparation applied and that the PUC had the jurisdiction to interfere with
19 and prevent lawful farming activities of a landowner.)
20

21 **Q11. In paragraph 25 of Bob Popp's supplemental affidavit dated November 25, 2020, he**
22 **states that "Clearing the trees at this time, without measures to protect the plants which have**

1 **already been documented to exist outside of the three RTE protection areas described at the**
2 **June 26 TRO hearing, and without updating the plant survey for the entire Apple Hill site,**
3 **would result in the destruction of a significant number of Arrow-leaved aster and the**
4 **Nimblewill. Because those plants will be destroyed, the harm will be irreparable.” What is**
5 **your response?**
6

7 A11. Mr. Popp has shown ANR’s true agenda which is to have the Plants treated as if they were
8 endangered species. Yet Mr. Popp seeks to treat them better than endangered species because if
9 the Plants were endangered species then there would need to be a determination under 10 V.S.A
10 6086(a)(8)(A) that the area to be cleared “will destroy or significantly imperil any endangered
11 species; **and** (i) the economic, social, cultural, recreational, or other benefit to the public from the
12 development ... will not outweigh the ... environmental ... loss to the public from the destruction
13 or imperilment of the habitat or species.” (emphasis added).

14 Mr. Popp does not provide any evidence on any of those factors. Rather, it is clearly his
15 belief, which translates into ANR’s position, that the destruction or harassment of any single Plant
16 is irreparable harm that should be enjoined. That view is what underpins all of ANR’s actions.
17 Mr. Popp’s statement also completely ignores ANR’s own unlawful de facto rules, styled as
18 “guidance” where certain percentage of “populations” can be taken without restriction. Mr.
19 Popp’s statement that the destruction or harassment of one or more Plants is irreparable simply
20 improperly defines the term “irreparable.” To be sure if a single Aster is removed and discarded,
21 there is no bringing back to life that particular Aster. That is what Mr. Popp defines as irreparable.
22 But that is not irreparable harm to the Asters or even undue adverse harm to the invisible undefined

1 natural environment criteria. Mr. Popp is simply trying to re-write what the Legislature wrote in
2 his own image, all outside of public view and the public rulemaking process.

3
4 **Q12. In paragraph 21 of Bob Popp’s supplemental affidavit dated November 25, 2020, he**
5 **states that “While normally, the Agency would be comfortable with site clearing being**
6 **completed before the fourth growing season – in this case, May 1 of 2021 - this approach will**
7 **not work here because the Nimblewill in Sites A and B needs to be flagged and this cannot**
8 **be accurately done before the next growing season.” What is your response?**

9
10 A.12. This is also another example of ANR trying to treat PLH and all its connected entities as a
11 class of one. ANR and the PUC have delayed the clearing for no justifiable basis and now ANR
12 says while it is usually comfortable with site clearing being completed before the fourth growing
13 season – in this case, May 1 of 2021, ANR will divert from that normal procedure to treat PLH
14 differently. In doing so, ANR outlines a position that creates a constant moving target. Knowing
15 that Asters can only be surveyed during a few weeks in the summer, ANR and the PUC
16 intentionally prohibited PLH’s clearing this past summer. Now ANR wants to prohibit clearing
17 through next summer as well so that more surveys can be done because of the Nimblewill, a plant
18 classified as a noxious weed by the USDA. If those surveys turn up more Asters and Nimblewill,
19 which is likely because the Plants thrive and not very rare or rare, then ANR will want surveys the
20 following year. ANR just keeps moving the target wanting survey after survey, year after year,
21 driving up costs and as a practical matter making it impossible for PLH to ever catch up to what
22 ANR wants.

1

2 **Q13. In paragraph 21 of Bob Popp’s supplemental affidavit dated November 25, 2020, he**
3 **states that “Because of this, and the obvious fact that new plants were discovered in prior**
4 **inventory updates, the Agency believes that it is necessary to update the inventory of the**
5 **entire Apple Hill site before any further clearing in [sic] performed in order to avoid**
6 **destruction of the plants which exists outside the conservation areas.” What is your**
7 **response?**

8

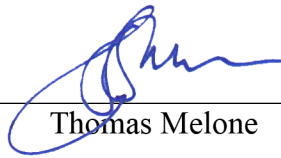
9 A.13. Mr. Popp’s and ANR’s position and request for more surveys is contrary to the MOU
10 executed with ANR. It was always the case that new Plants would have likely grown during the
11 time of the surveys on which the CPG for the AHS project was issued in 2018 and when clearing
12 started. The Aster and Nimblewill thrive and are plentiful. ANR’s unilateral attempt to impose
13 ongoing conditions not only is contrary to the terms of the MOU (and the PUC’s holding regarding
14 the natural environment in the AHS CPG orders), but lays bare the arbitrariness and lack of any
15 legal standards with ANR’s position.

16

17 **Q14. Does this conclude your testimony?**

18 A14. Yes.

I declare under penalties of perjury that the above testimony is true and accurate to the best of my knowledge and belief.



Thomas Melone