

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NUMBER 20-1611-INV

INVESTIGATION PURSUANT TO 30 V.S.A.
SECTIONS 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. SECTION 248(a)(2)

December 4, 2020
9:30 a.m.

Preliminary Injunction Hearing held before the
Vermont Public Utility Commission via GoToMeeting video
conference on December 4, 2020, beginning at 9:30 a.m.

P R E S E N T

Commissioners: Anthony Z. Roisman, Chairman
Margaret Cheney
Sarah Hofmann

Staff: Michael E. Tousley, Staff Attorney
Kyle Landis-Marinello, General Counsel
Ann Bishop, Operations Director

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1 CHAIRMAN ROISMAN: Good morning. This is an
2 Evidentiary Hearing in Case Number 20-1611-INV, which
3 is the investigation pursuant to 30 V.S.A. Sections 30
4 and 209 into whether the petitioner initiated site
5 preparation at Apple Hill in Bennington, Vermont, in
6 violation of 30 V.S.A. Section 248(a)(2). My name is
7 Anthony Roisman. I'm the Chair of the Vermont Public
8 Utility Commission, and with me for the moment is
9 fellow Commissioner Sarah Hofmann, and shortly we
10 should be joined either by phone or video or both by
11 Commissioner Margaret Cheney.

12 One of the little glitches in this kind of remote
13 situation is sometimes not everyone has connections.
14 Think of it as the equivalent of your getting caught in
15 a snowstorm on your way driving to Montpelier for a
16 live hearing. And I'm sure that Commissioner Cheney
17 will be joining us shortly. Also with me today are
18 Kyle Landis-Marinello, our general counsel, and Mike
19 Tousley, a staff attorney assigned to this particular
20 case. Ann Bishop, the Commissions's Operations
21 Director, is serving as the GoToMeeting platform
22 manager for this hearing.

23 Attending this hearing are also some other staff
24 people and members of the public, and, if you click on
25 your screen, the "view everyone", you will see the

1 names of all of those people. We don't normally
2 introduce people who are not parties or witnesses, and
3 so you can see them there on your screen if you're
4 interested to know who may be listening in to this
5 meeting.

6 This case is not about the proposed Willow Road or
7 Apple Hill solar facilities for which we have already
8 issued final orders, both of which are being challenged
9 by the petitioner. We're here because, on Friday, June
10 26th 2020 at about 1:30, the Commission announced that
11 it was issuing a temporary restraining order against
12 Allco Renewable Energy Limited; its affiliates, which
13 include Chelsea Solar, LLC; Apple Hill Solar, LLC; and
14 PLH, LLC, collectively being referred to here as the
15 developer and the developer's subsidiaries and
16 contractors.

17 The TRO prohibited any further tree clearing on
18 any of the property for the proposed projects on Apple
19 Hill in Bennington, Vermont, identified in any
20 certificate of public good applications and approved
21 amendments. This includes the sites of the proposed
22 Chelsea, Apple Hill, and Willow Road solar electric
23 generation facilities, including any property
24 identified in the applications for those facilities as
25 being part of the proposed project. A written order

1 issued that same day.

2 The TRO was issued based on our jurisdiction over
3 the preparation of sites proposed for the development
4 of an electric generation facility by the developer, in
5 this case, the two proposed solar projects that the
6 developer has, has testified it intends to seek
7 authority to construct and operate, despite our prior
8 denials of CPGs.

9 This Friday we need to determine whether the
10 Commission should issue further injunctive relief in
11 the form of a continued preliminary injunction or a
12 permanent injunction, and, if so, the scope of that
13 relief. The hearing will also address whether the
14 developer's site work to date constitutes site clearing
15 activities without a certificate of public good in
16 violation of 30 V.S.A. Section 248(a)(2).

17 And I see Commissioner Cheney has resolved, for
18 the moment at least, the technological problems.
19 Welcome, Commissioner Cheney.

20 We also need to otherwise determine if further
21 proceedings are appropriate in this investigation
22 pursuant to 30 V.S.A. Sections 30 and 209. If a party
23 or participant intends on recording the hearing via
24 video or audio, please indicate this when you provide
25 your name for the court reporter. We'll now take

1 appearances, starting with the Department.

2 ATTORNEY ACEVES: Good morning. Sarah Aceves
3 representing the Department of Public service.

4 CHAIRMAN ROISMAN: And the developer?

5 ATTORNEY MELONE: Good morning, Mr. Chairman
6 and Commissioners. Tom Melone for Allco Renewable
7 Energy, PLH, Chelsea Solar, and Apple Hill Solar.

8 CHAIRMAN ROISMAN: Okay. Mr. Melone, I see
9 that Michael Melone is also on the phone. Are you
10 intending to have him put you on the witness stand and,
11 and control the, the direction of cross-examination of
12 your testimony, or is he here merely as an observer?

13 ATTORNEY MELONE: He's here, he is here as an
14 observer.

15 CHAIRMAN ROISMAN: Okay, all right. Thank
16 you. The Agency of Natural Resources?

17 ATTORNEY EINHORN: Don Einhorn for the Agency
18 of Natural Resources.

19 CHAIRMAN ROISMAN: And for the Intervenors?

20 ATTORNEY DINGLEDINE: Brook Dingledine, Your
21 Honor, for Mount Anthony Country Club, Apple Hill
22 Homeowners Association, and Libby Harris.

23 CHAIRMAN ROISMAN: All right. I think what
24 we ought to do at this point before we get into the
25 procedures for a remote hearing that I'll run over, and

1 I know you all have discussed with Mr. Tousley
2 previously, is the question of exhibits. Have you all
3 reached a stipulation among yourselves as to the
4 admissibility of the various exhibits and testimony of
5 witnesses that have been proposed by all the parties?
6 We'll start with you, Ms. Aceves.

7 ATTORNEY ACEVES: It's my understanding the
8 parties haven't stipulated to the admittance of any
9 exhibits, but the Department does not oppose or object
10 to the admittance of anything that's been filed to
11 date.

12 CHAIRMAN ROISMAN: Okay. Mr. Melone?

13 ATTORNEY MELONE: We do not object to
14 anything that's been filed to date.

15 CHAIRMAN ROISMAN: Okay. Mr. Einhorn?

16 ATTORNEY EINHORN: With two very limited
17 exceptions, the Agency does not object to anything
18 that's been filed to date. Those exceptions are I saw
19 on my screen a, a in-box from ePUC that some additional
20 exhibits were filed this morning. I've not seen those.
21 I don't know who filed those. But, with regard to the
22 testimony that was filed by the developer yesterday
23 afternoon, our limited objection is to Mr. McClammer's
24 testimony, Footnotes 7 and 8 and all of his testimony
25 related to those two footnotes.

1 The reason for that is there's some sort of a
2 study or a report for which a link was supposedly
3 provided. The link does not work. We're not familiar
4 with that study or report. We haven't seen it, and,
5 and, therefore, we object to it being in the record.

6 CHAIRMAN ROISMAN: Mr. Einhorn, if, sometime
7 in the next 30 minutes, Mr. McClammer or Mr. Melone are
8 able to fix the link such that you can see the study,
9 will you still object, because you will not have had an
10 opportunity to study the study, or will that solve your
11 concern?

12 ATTORNEY EINHORN: I, I, we, we, I think that
13 will resolve our concern. That said, we will not
14 obviously have an opportunity to study the study, but,
15 you know, I think, in reality, it's not even relevant
16 to today's proceeding.

17 CHAIRMAN ROISMAN: Okay, all right. Mr.
18 Melone, are you and Mr. McClammer able to fix the
19 problem that Mr. Einhorn has identified with the link
20 to the study referenced in Mr. McClammer's testimony
21 that does not appear to be operational?

22 ATTORNEY MELONE: Yes, we can do that. And
23 I'd also say that what we filed this morning is Mr.
24 Popp's testimony that he gave in the Warner solar
25 proceeding, plus, plus exhibits. That was the other

1 item that, that Mr. Einhorn was, was referencing.

2 CHAIRMAN ROISMAN: All right. And, Mr.
3 Melone, are you intending to offer those in evidence
4 or, at this time, or are you intending to use them for
5 purposes of cross-examination of Mr. Popp or both?

6 ATTORNEY MELONE: Both. We would like them
7 to be admitted into evidence, and we intend to do so
8 when we cross-examine Mr. Popp.

9 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, I can
10 confirm, because I have looked at the exhibits, that
11 they are, in fact, documents all that were filed in
12 19-0516, and they are, as Mr. Melone described them,
13 related to Mr. Popp's testimony in that proceeding.
14 Assuming that that representation is correct, do you
15 still object to their admission?

16 ATTORNEY EINHORN: No, we do not object, and
17 we certainly would support admission of those into the
18 record. So the only outstanding objection is with
19 regard to the link.

20 CHAIRMAN ROISMAN: Great. Okay, thank you.
21 Ms. Dingleline?

22 ATTORNEY DINGLELINE: Yes, Your Honor. Thank
23 you. Intervenors would like to object to the add, to
24 the providing of evidence yesterday and today in
25 violation of the order of the PUC. We think it's not

1 only -- we think it's very disrespectful of the other
2 parties. I have not even looked at these documents
3 that were filed this morning. I tried to review what
4 happened yesterday. I want to make an objection to the
5 process that, that the petitioner is going through.
6 Now, in terms of the substance of those documents, I
7 haven't looked at them, but they seem to pertain to the
8 ANR rare species issues, which are not the issue that
9 my clients really have standing on, but we wanted to
10 make that point.

11 However, there is one objection to the materials
12 that were sent in yesterday that I wish to make, and I
13 can either, I guess, share the screen, or I can just
14 refer to it. It refers, it's regarding Mr. Melone's
15 prefiled testimony on Page 5, Lines 12 through 14. It
16 states, "On June 24th 2020, the PUC opened an
17 investigation on its own motion in response to a
18 complaint filed in Docket 8454 by anti-renewable energy
19 activist Annette Smith, who has spearheaded the
20 opposition to the two Bennington solar projects".

21 We would seek to have that statement stricken from
22 the record. We do not think it has any evidentiary
23 support, and we believe that it violates the cautionary
24 warning that the Chair had given Mr. Melone and the
25 other parties at the last hearing in terms of ad

1 hominem attacks on the character or motivations of
2 other parties or people, and we would like to have that
3 removed from the record, and that's Page 5, Lines 12.

4 CHAIRMAN ROISMAN: Mr. Melone, do you have a
5 response to what Ms. Dingleline has just stated?

6 ATTORNEY MELONE: Yes, Mr. Chairman. I don't
7 think it's a personal attack on anyone. It doesn't
8 impugn her character. It's just a, in my view, a
9 statement of fact. If they have facts that contradict
10 that, then they can bring them forward, but the facts
11 that we have, for example, is that, at least for the
12 better part of a couple of years, every, every filing
13 by opponents was posted in an envelope from Annette
14 Smith, and, you know, I, I think the, the facts speak
15 for themselves. If they want to put Annette Smith on
16 the stand to say that's not true, I'm fine with that.

17 I'm sorry, Mr. Chairman. I can't hear you.

18 CHAIRMAN ROISMAN: Is the statement that
19 appears in the testimony that Ms. Dingleline has
20 identified directly relevant -- I'm going to turn off
21 my camera. Can you hear me now?

22 ATTORNEY MELONE: Yes, I can hear you now.

23 CHAIRMAN ROISMAN: And can you hear me?

24 ATTORNEY MELONE: Yes, Mr. Chairman, I can
25 hear you.

1 CHAIRMAN ROISMAN: Okay, all right. I'm
2 going to keep my camera off. I think that will
3 facilitate your hearing me. You don't need to see me
4 anyway.

5 Mr. Melone, my question was, Is this testimony
6 that Ms. Dingledine has identified directly relevant to
7 any issue that you're making in this case at this
8 point?

9 ATTORNEY MELONE: It's not relevant to an
10 issue I'm going to raise today, but it certainly is
11 relevant to the origins of the investigation, which in
12 the briefs we filed with the Supreme Court already,
13 have identified that the investigation was not properly
14 according to the statute, and this, this provides the
15 background on why, why it was opened and how it was
16 opened.

17 CHAIRMAN ROISMAN: All right. And, but do I
18 understand correctly you've made that point already to
19 the Supreme Court in your filings with them?

20 ATTORNEY MELONE: That's correct. And this
21 statement is, is, or what's in this testimony, it's, if
22 it's not identical, it's fairly close to what's already
23 been before the court.

24 CHAIRMAN ROISMAN: So, if we granted Ms.
25 Dingledine's request that it be excluded from this

1 hearing, it would not in any way impede your ability to
2 make the arguments you wish to make to us on the issues
3 in front of us; is that correct?

4 ATTORNEY MELONE: Well, no. We're providing
5 the factual testimony here that this is -- so the
6 argument that we had made was, in fact, just that
7 argument. Now we are, we are putting this, what we
8 view as a fact, into the testimony to support the
9 argument.

10 CHAIRMAN ROISMAN: And, Ms. Dingleline, just
11 so we're clear, if the testimony remains in, are you
12 prepared to cross-examine Mr. Melone on the basis for
13 the statement that he made, or is it not the basis for
14 the statement that he made, but the tone or the
15 language used to make it that is objectionable?

16 ATTORNEY DINGLELINE: It is the substance of
17 the representations with regard to labeling Ms. Smith
18 in terms of being an anti-renewable individual, and the
19 tone, tone is irrelevant, but this is information that
20 unfortunately Mr. Melone wants to make facts by just
21 repeating the same thing over and over. And we have a
22 similar problem, and I'll get to another, to my second
23 objection in a minute, but, when you rule on this, but
24 this is duplicative, if, if you want to go with the
25 rules of evidence.

1 There is information in the record, the actual
2 complaint which was filed and put on the public comment
3 portion of the website. We know that's the facts, the
4 actual document. The best evidence rule should rule
5 here in terms of we don't need -- this is not evidence.
6 If Mr. Melone has some opinion about someone's
7 activities and he wants to call her names, well, that's
8 not, this isn't the forum for that. This is about
9 facts.

10 If he wants to testify and say there was a
11 complaint filed by Annette Smith on this date, we have
12 that in the record, but that would be fine, but to try
13 to continually use this fake news way of providing
14 information by just saying the same fake news over and
15 over, you just keep calling somebody by a name, and we
16 have that problem with Lot Number 1, and it should not
17 be allowed. There is no evidence to support this.

18 Now, in terms of cross-examining Mr. Melone on
19 this, I am not prepared to cross-examine him on this
20 today after this was filed yesterday afternoon. That
21 is unfair. It is inappropriate. So, if this is
22 allowed into evidence, then I would like an opportunity
23 to cross-examine him at another time.

24 CHAIRMAN ROISMAN: All right. The Commission
25 is going to consider this objection, but, Ms.

1 Dingledine, it will facilitate the process of the
2 hearing if you would make your other objections so that
3 we can rule on all the objections at one time, please.

4 ATTORNEY DINGLELINE: Certainly. Thank you,
5 Your Honor. So, at the status conference for the TRO
6 before the TRO hearing, I asked that Mr. Melone be,
7 stop calling Lot Number 1, which is the five-acre lot
8 that's north of the Von Nostrum's land, I asked that he
9 stop calling that the Orchard Lot. The reason why I
10 ask that he stop doing is that Libby Harris's lot is
11 actually named the Orchard Lot. That is in her deeds.
12 It is in all the permitting, Act 250, wastewater,
13 subdivision, everything. That is how that lot is
14 identified. And Mr. Melone kept calling it, quote,
15 "the orchard lot".

16 Yes, there was a remnant orchard on it that is
17 part of the landscaping plan, and additional trees will
18 be added to that lot. He refused to stop calling it
19 that, but then actually has since started calling it
20 "the horticultural lot", because he plans on building
21 that massive, unnecessary spite structure of, you know,
22 massive proportions, instead of planting his trees, and
23 he now seems that he doesn't even care that you've
24 denied his amendment to the petition.

25 So the reason, apparently, why he's now trying to

1 call it the horticultural lot and using this fake news
2 name over and over --

3 CHAIRMAN ROISMAN: Ms. Dingleline, I'm going
4 to ask you. I think "fake news" is the kind of
5 language that you were objecting to in Mr. Melone's
6 filing. It has taken on a character statement that is
7 considered fairly pejorative. I would appreciate it if
8 you would stop using that term. I understand you think
9 that what Mr. Melone is doing is not correct, but I
10 would appreciate it if you would speak to it more
11 directly. Thank you.

12 ATTORNEY DINGLELINE: Okay. So the use of
13 the term "horticultural lot" is as a result of the case
14 that Mr. Melone brought to seek permission in
15 Chittenden Superior Court to use Lot Number 1 as part
16 of the solar project, and he was told, You can't do
17 that. The covenants don't allow it. And the judge
18 dismissed him on the pleadings. So the reason why he's
19 now trying to call it the horticultural lot is he's
20 trying to claim that hemp is a horticultural activity,
21 and there is an exception, if you want to have a
22 greenhouse along your primary residence, you can have a
23 horticultural greenhouse, and so he's now trying to
24 characterize this as a horticultural lot. We would
25 like --

1 CHAIRMAN ROISMAN: Ms. Dingleline, can you
2 tell me, what is the objection to the admissibility of
3 his calling it whatever he chooses to call it that we
4 need to rule on? We don't need to get into why you
5 think it shouldn't be able to be used in the way he
6 wants to use it. What's the objection, and which part
7 of the objection --

8 ATTORNEY DINGLELINE: The objection is, the
9 objection is any time he uses the terminology
10 "horticultural lot", that should be stricken, and the
11 terminology "Lot Number 1", which is on his deeds for
12 PLH, LLC, that is the property they own. That is the
13 property where they, where they were supposed to put
14 the landscaping, and we would like the lot to be called
15 Lot Number 1 to avoid confusion. We believe this is an
16 intentional mechanism to try to confuse the record, and
17 we would like the actual name of the lot that is in Mr.
18 Melone's deeds that PLH, LLC took the property as
19 ownership, we want it called number lot, Lot Number 1,
20 which is the identifying name of it in the homeowners
21 association residential subdivision on all deeds and
22 permits.

23 CHAIRMAN ROISMAN: All right. What's your --
24 do you have any additional objections to admissibility
25 of any other exhibits or testimony?

1 ATTORNEY DINGLELINE: No, no. Thank you,
2 Your Honor.

3 CHAIRMAN ROISMAN: All right. At this point,
4 the Commissioners will mute their microphones, and we
5 will consult, and we'll come back shortly.

6 ATTORNEY DINGLELINE: Oh, Your Honor, but I
7 do want to point out, if I might, that it pertains, not
8 just to his prefiled testimony, but all the exhibits.
9 He has maps, et cetera, that also do not identify that
10 property correctly.

11 CHAIRMAN ROISMAN: I understand. Thank you.

12 ATTORNEY DINGLELINE: Thank you.

13 (A recess was taken from 9:57 a.m. to 9:58 a.m.)

14 CHAIRMAN ROISMAN: We are back. Are all the
15 representatives of the parties back? I see Mr. Melone,
16 Ms. Dingleline, Mr. Einhorn, Ms. Aceves. Okay. So
17 we've considered your objections, Ms. Dingleline. With
18 regard to the late-filed documents from the applicant,
19 as you pointed out, they relate to an issue that is not
20 directly relevant to your client, and Mr. Einhorn has
21 indicated, now that he knows what those documents were
22 that were filed this morning, that he did not object to
23 them being admitted.

24 Mr. Melone, I think, given that all those
25 documents were created months ago, I don't think it was

1 the best practice to file them the morning of the
2 hearing, and it would have been preferable if you had
3 filed them earlier, given that they relate directly to
4 an issue that obviously you knew was going to come up,
5 but we will allow them in the record.

6 With regard to Ms. Dingledine's concern about the
7 language that you've used in your prefiled direct
8 testimony related to Ms. Annette Smith, we think it's
9 very inappropriate. We have before admonished parties
10 that referring to other parties in any kind of an ad
11 hominem way is not acceptable practice in front of the
12 Commission. I understand that you have strong feelings
13 about this, but we feel that it is preferable that you
14 express them in a more, a more appropriate manner.

15 That said, it does not, in our opinion, have
16 anything directly to do with the decision we're going
17 to reach today. We're going to leave it in the record,
18 but, Mr. Melone, if you can control your passion in
19 future filings, that would be much appreciated.

20 ATTORNEY MELONE: Understood.

21 CHAIRMAN ROISMAN: And, finally, with regard
22 to Ms. Dingledine's objection to the characterization
23 of what is Lot 1 as the horticultural lot, the
24 Commission is not going to be misled. It understands
25 exactly what the lot is, and we don't think that the

1 characterization of it by you in your testimony is in
2 any way going to distort the record, and so that
3 objection is overruled. So all of the testimony and
4 exhibits that have been offered will be admitted with
5 the caveats that we will give them the weight that they
6 are entitled to when we reach our final decision. Ms.
7 Dingledine, I see your light is on.

8 ATTORNEY DINGLEDINE: Thank you, Mr. Roisman.
9 There's just one, one matter that I would just ask in
10 terms of -- well, I'll wait until the evidence is being
11 submitted, if there's different opportunities to
12 object. Never mind. Sorry.

13 CHAIRMAN ROISMAN: Okay, all right.

14 ATTORNEY EINHORN: Mr. Chairman, with regard
15 to the admission of all of the prefiled testimony and
16 exhibits, that's still being, coming into the record,
17 that's still with the caveat on fixing the link.

18 CHAIRMAN ROISMAN: Oh, okay. You have not
19 yet received from Mr. Melone or Mr. McClammer a
20 clarified version of that link?

21 ATTORNEY EINHORN: Let me see. I have -- I
22 have not. Oh, oh, I see. He's attached, he's emailed
23 me some tables, I guess, that is a, appears to be a
24 two-page document, "Summary of Vermont Organic Farms".
25 I'm assuming that's what that link was to.

1 CHAIRMAN ROISMAN: All right. Is that
2 correct, Mr. Melone? So he now actually has the
3 document that the link, if it had worked, would have
4 taken him to?

5 ATTORNEY MELONE: That's correct, Mr.
6 Chairman.

7 CHAIRMAN ROISMAN: Mr. Einhorn, does that
8 take care of your concern?

9 ATTORNEY EINHORN: It, it does. Thank you.

10 CHAIRMAN ROISMAN: Okay, all right. Thank
11 you. All right. Well, that was fun. We'll now move
12 on to discussing the procedure for a remote, web-based
13 hearing. I know you went over these with Mr. Tousley
14 before. As you know, we're limiting our personal
15 contact, essentially none, and you all have agreed to
16 this being a hearing conducted remotely. I want to
17 confirm that all the parties are agreeable to this
18 being a remote hearing and, if any party now objects to
19 this being done as a remote hearing, as we famously
20 say, speak now or forever hold your peace. Anybody?
21 Hearing no objection, we will proceed.

22 So, for the logistics of this hearing today, we'll
23 be using these special hearing procedures, and I'm
24 going to read them briefly, although I think you've
25 been over these, and, actually, I think all of you have

1 already been in at least one of our remote evidentiary
2 hearings.

3 You can raise objections to these procedures
4 either now or at any point during the hearing. In
5 addition to formal objections, you may also raise
6 concerns at any time if the platform is not performing
7 as expected for you or having difficulties. We expect
8 that this hearing will proceed more slowly, and we may
9 need to stop along the way to resolve technical issues,
10 as we have already done. We'll also recognize that,
11 because we're all in remote locations, there may be
12 unexpected interruptions at these locations. All cats,
13 dogs, and children are welcome to attend the hearing
14 until such time as they disrupt the process.

15 The representatives in this case should keep their
16 cameras on during the entire hearing. Witnesses should
17 leave their cameras off until they are testifying, at
18 which time they should turn them on. Even with your
19 camera turned off, you'll still be able to see
20 everyone, and you will be able to hear everyone.
21 Commission staff may choose whether to leave their
22 cameras on or off. My preference is that people who
23 are not actively participating in the proceeding leave
24 their cameras off so that the pictures of active
25 participants are larger.

1 Just for your benefit, at the top of your screen
2 where it says "view everyone", one of the options
3 that's available to you is to click the active cameras.
4 That will then turn the screen in front of you into
5 showing only those people who have their cameras on.
6 You can also pick who's talking, which will then create
7 the largest picture. You may wish to do that, for
8 instance, when a witness is being testified, is
9 testifying, and you can show everyone, or you can hide
10 everyone. Those options are available to you. We do
11 not control them, and I leave it up to you as to which
12 of those you want to do.

13 Commission staff will not mute anyone's
14 microphone, whether a party, a participant, or a member
15 of the public. This means that you should keep
16 yourself on mute unless you are speaking. That way, we
17 can minimize background noises, which can be very
18 disruptive. Each time you begin talking, please
19 identify yourself by name for the court reporter.

20 If your internet connection cuts out, please try
21 to rejoin the GoToMeeting or call in to the hearing
22 using the GoToMeeting telephone number that was
23 provided. If the audio or video from the hearing has
24 cut out, let me know when you're able to join, and I
25 will summarize what happened, and we will revisit any

1 questions on which an objection may have been allowed,
2 including any admission of an exhibit. If you're not
3 able to call in or rejoin, notify the platform manager
4 immediately via email or the clerk's office immediately
5 via email or phone, and we'll pause the hearing until
6 the issue is resolved. If we cannot resolve an issue
7 that prevents a party from participating in the
8 proceeding, we will reschedule the proceeding.

9 Similarly, if, at any point, any of you become
10 aware of another party, participant, or member of the
11 public having trouble accessing the video or the audio
12 feeds of this remote hearing, please let us know
13 immediately. We will pause the hearing until the issue
14 is resolved. If it cannot be resolved, we will
15 reschedule the hearing.

16 It's very important that we avoid talking over one
17 another. Of course, if you have an objection, then you
18 must raise it at the moment the objection arises. That
19 type of interruption is allowed and required. When
20 objections are issued or raised, I'll ask each
21 representative one by one whether they have a response.
22 We'll go in the following order: essentially, the
23 party who raises the objection and then, after that,
24 the parties in the order in which you entered your
25 appearances, the Department and Mr. Melone and Mr.

1 Einhorn and, finally, Ms. Dingleline.

2 When you are asking questions of witnesses, we
3 will make you the presenter in GoToMeeting. That will
4 allow you to put on your screen if you have any
5 exhibits that you want to ask the witness about so the
6 witness and all of us can see exactly where your
7 question is directed. You should share cross exhibits
8 on your screen by clicking the "share screen" icon.
9 Please verbally identify the cross exhibit you are
10 showing for the court reporter. For example, clearly
11 say, "I am showing Department Cross-1", If that is the
12 exhibit. When you're done with the exhibit, please
13 click "stop sharing screen". Whenever you are sharing
14 your screen, I advise you to close out any, out of any
15 unnecessary applications, such as email, to avoid
16 notifications being visible to others in the hearing.

17 Does anyone have any questions or concerns about
18 these procedures? All right. So the substantive
19 portion of the hearing, we'll begin by the parties each
20 making a brief, five-minute opening statement, and then
21 each party in order, starting with Mr. Melone, followed
22 by Mr. Einhorn, then Ms. Aceves. Does the Department
23 intend to offer any direct testimony in this
24 proceeding?

25 ATTORNEY ACEVES: No, we will not be offering

1 any direct testimony.

2 CHAIRMAN ROISMAN: Okay. And then Ms.
3 Dingledine, and each witness will then be followed by
4 cross-examination by the parties and the Commission
5 with redirect examination and then closing arguments,
6 and, although Mr. Tousley said five minutes, we're
7 going to be generous and give you each ten minutes to
8 do your, to do your closing arguments.

9 Mr. Melone, when you are the witness, if redirect
10 is needed, you should -- you've indicated that Mr.
11 Michael Melone will not be leading you through
12 redirect. So you will be basically speaking it as a,
13 as a soliloquy. We remind you that, when that happens,
14 as in all redirect, all of your statements must relate
15 directly to statements, issues that have been raised by
16 the cross-examination, and, in prior experience, I've
17 noticed that you're not inclined to speak extensively,
18 so we expect that you'll follow that practice when and
19 if you do redirect of your own testimony.

20 ATTORNEY MELONE: I will, Mr. Chairman.

21 CHAIRMAN ROISMAN: Thank you. At the time of
22 the closing arguments, we would like you to indicate
23 whether you believe any further process is needed
24 before the Commission decides to issue a permanent
25 injunction. As you know, technically, by operation of

1 the rules, we are already in a preliminary injunction.
2 The TRO, by statute, has expired, and it has been
3 converted, by statute, into a preliminary injunction.

4 So the question that will be in front of us is
5 whether to continue or to dissolve the preliminary
6 injunction but also whether or not to issue or deny a
7 permanent injunction. So one of the questions we'd
8 like you to answer during your ten minutes is whether
9 you believe we have enough record to decide the
10 permanent injunction question or whether you believe we
11 need more record before we can reach that decision.

12 Also, we'll want post-hearing briefs, and, at the
13 end of the hearing, we'll ask you all to indicate to us
14 a schedule. It may follow the usual practice. The
15 opening briefs will be simultaneous. The reply briefs
16 will be simultaneous. In those post-hearing briefs, we
17 would like you to address one question, along with
18 whatever else you wish to brief, which is, to the
19 extent that you wish to address it in detail, the
20 difference, if any, in the criteria that would be
21 applicable to a continuation of a preliminary
22 injunction, what criteria we would have to decide, and
23 what criteria we would have to decide if we were to
24 issue a permanent injunction. That one legal issue,
25 along with whatever issues you wish to address, would

1 be included in your post-hearing briefs.

2 And, unless there's any other preliminary matter,
3 I think we're ready to begin the evidentiary portion of
4 the hearing. Anybody have any preliminary matter
5 before we start with the --

6 COMMISSIONER HOFMANN: Mr. Chair, I would
7 just want to note to Mr. Einhorn, I don't think you're
8 aware that your microphone is not on mute.

9 ATTORNEY EINHORN: Oh, I'm sorry. Thank you.

10 CHAIRMAN ROISMAN: Although we should point
11 out you're in a very silent place, Mr. Einhorn, because
12 we never heard anything either.

13 We will take a break around 11:00 o'clock of about
14 ten minutes. If, for any reason during the course of
15 the hearing, any party believes they need a break,
16 please speak up, but our current plan is we'll break
17 for about ten minutes around 11:00 o'clock, and, if the
18 hearing is still going on, we would break at 12:30,
19 take an hour lunch break, and come back at 1:30. All
20 those times are flexible. We're not going to stop
21 someone's testimony at exactly 11:00 o'clock if it's
22 the middle of either direct or cross.

23 All right. Mr. Melone, you may call your first
24 witness.

25 ATTORNEY MELONE: Thank you, Mr. Chairman.

1 Bob Kobelia, are you on the line?

2 ATTORNEY EINHORN: Excuse me, Mr. Chairman.

3 Did, did we still want to do openings, or are we --

4 CHAIRMAN ROISMAN: Oh, I'm sorry. Yes. No,
5 no. Sorry, my fault. Thank you, Mr. Einhorn. Yes,
6 Mr. Melone, you have a five-minute opening. I'm sorry
7 for that.

8 ATTORNEY MELONE: Okay. Thank you, Mr.
9 Chairman. Good morning, Mr. Chairman and Commissioners
10 and other parties. Although this is a little bit off
11 topic, I first want to thank the Commission personally
12 for the organization yesterday in the Otter Creek Solar
13 1 case. I hope that that's in the past and eventually
14 we can resolve all the differences that are
15 outstanding.

16 Now, getting to this case, the basic issue here is
17 that we have begun a farm business. It's already
18 started in Connecticut. It's part of the operation
19 that's intended to include the Bennington land, and
20 our, our clearing activities are not for the purpose of
21 building or for site preparation or electric generation
22 facilities, they're there for farming purposes.

23 Now, the way I understand the posture of this case
24 now, the Agency has withdrawn any, any claim to wanting
25 some type of injunction on the, on the five-acre lot,

1 which, at one point, was going to be the site in our
2 plan for new trees. So the only thing that's left
3 here, again, as I understand the Agency's position, is
4 the, the fate of two plant species that have not been
5 transplanted already to conservation areas on the site,
6 because, as Mr. Kobelia's testimony shows, the clearing
7 plan that we, that we gave to him does not, does not do
8 anything to those conservation areas, and, as Mr.
9 Popp's testimony that he filed in this case shows and
10 attached, where he attached one of the plant reports
11 from Apple Hill, a very limited amount of aster plants
12 that are in the clearing area that were not
13 transplanted.

14 So, in our view, even if, even if the Agency had
15 or the Commission had some jurisdiction to stop the
16 clearing of those for farming purposes, we think, at
17 the end of the day, whatever final action, if there's a
18 continuation of an injunction of some sort, it really
19 needs to be limited just to those narrow areas and that
20 it would go away if, if those plants, or whatever the
21 threshold that the Agency ceases to object, if those
22 plants were transplanted as well. So we think the
23 injunction should not be continued. It should be
24 dissolved. Thank you, Mr. Chairman.

25 CHAIRMAN ROISMAN: Thank you, Mr. Melone.

1 Mr. Einhorn?

2 ATTORNEY EINHORN: Thank you, Mr. Chairman.
3 Today's proceeding really, when you boil it down, it's
4 a simple exercise. Has site clearing occurred, or is
5 it about to occur for an energy generation project?
6 Will there be irreparable harm as a result, or perhaps
7 has there already been irreparable harm? Yes, I think
8 there will certainly be irreparable harm as a result,
9 if not already, in that there are a significant number
10 of rare plants throughout this site, and including in
11 the areas to be cleared and perhaps even in the area
12 already cleared. This was established in June, for the
13 most part, and there's nothing new today.

14 There have been a number of filings by the
15 developer. I should say nothing new in the other
16 direction. What's been filing, what's been filed more
17 recently certainly supports those two issues that we
18 addressed in June in the fact that there is clearing
19 going on, that there is irreparable harm or certainly
20 the threat of irreparable harm.

21 Most of the filings yesterday offer paths that
22 lead to nowhere, and, and, quite frankly, would
23 distract from really the core purpose of today's
24 hearing. A lot of what I saw in these filings talked
25 about, you know, the 248 proceeding and the 248

1 standard of review.

2 That's not what we're engaged in here. This isn't
3 a 248 project review to determine if there's an undue
4 adverse impact. This is a hearing to determine if
5 there is irreparable harm. It's a totally different
6 standard. It's a totally different legal issue. This
7 is not about Agency guidance documents on RTE plants,
8 as again was set forth in some of these filings from
9 yesterday, because, as those documents clearly
10 indicate, those are for purposes of reviewing a
11 project's impact under Section 248, which, again, we're
12 not doing that today.

13 And this is also not about the Agency's plant
14 classifications. There's, there's a lot of effort, I
15 guess, on the developer's part, for lack of a better
16 term, to basically try to say that these plants really
17 aren't rare. That essentially is moot. I mean, the
18 underlying records in 8302, 8454, and 17-5024, Willow
19 Road, are replete with the developer's own expert
20 witnesses identifying these plants as very rare and
21 rare.

22 I think the argument, again, which really isn't
23 relevant, can be boiled down to the Agency should try,
24 should be required to prove a negative, that is, we
25 have to prove that these plants don't exist anywhere

1 else but the three known sites in the state, of which
2 this is one of those. So that, that type of an
3 argument just doesn't carry the day.

4 So, in the end, is there site clearing? Is there
5 the threat of irreparable harm? Yes, there is. Then a
6 preliminary injunction should issue. This was already
7 established, for the most part, in June. I think
8 today's exercise will just reinforce that and perhaps
9 put some, fill in some of the ambiguity that perhaps
10 existed after June's hearing with greater detail, which
11 demonstrates those facts. Thank you.

12 CHAIRMAN ROISMAN: Thank you, Mr. Einhorn.
13 Ms. Dingleline?

14 ATTORNEY DINGLELINE: Thank you, Mr. Roisman.
15 The interests of the Intervenor obviously have to do
16 with the screening that was proposed as part of the
17 project in order to get over the aesthetics analysis to
18 prove that the adverse impact would not be undue. That
19 is -- so the project has been proposed as for the Van
20 Nostrum lands, which are 26.8 acres, and also part of
21 the project site is 5.5 acres, which is Lot Number 1,
22 which is a residential lot in the Apple Hill Homeowners
23 Residential Subdivision.

24 So now we see with the latest filing of prefiled
25 testimony by Mr. Melone he is explicitly claiming that

1 Lot Number 1 is not part of the project site. It's a
2 rather, it is an unsupported position. There is not a
3 single case or any precedent provided that would
4 suggest that the landscaping portion of a project site
5 is not part of the project site.

6 It is an irrational position, but I suppose,
7 because Mr. Melone is making this argument, the PUC
8 will have to make a determination as to what
9 encompasses the project site or site or property that
10 is under the PUC's jurisdiction, because the applicant
11 has put it before you, submitted the lands to your
12 jurisdiction, and part and parcel of that project is
13 the screening that has been indicated would go in, in
14 addition to the orchard trees remaining on the lot.

15 So Mr. Melone wants to now plant hemp there and a
16 massive structure. You've said that he can't do that.
17 Now he's trying to claim it's not part of the project
18 site, because the court, Chittenden Superior's, told
19 him, You can't do this on this site, because it's part
20 of a residential subdivision that doesn't allow the
21 solar array project to be here. So, so now he's trying
22 to argue it's not part of the site.

23 So, I guess, part and parcel of the decision that
24 has to be made is to explicitly state that the 5.5
25 acres, which is Lot Number 1 which Mr. Melone is

1 calling the horticultural lot or parcel, is, in fact,
2 part of the project site and it, and it is part of the
3 lands that cannot be prepared before a CPG issues.

4 Now, the interesting part about Lot Number 1 is he
5 wants to go do something else, not the project. He
6 wants to cut the trees, which he's proposing for
7 screening, and plant something different. That is not
8 the application before you. You have denied him that
9 amendment to the application, and I guess that puts you
10 in a position of, we would suggest, that, if Mr. Melone
11 decides to cut the trees, then obviously he will fail
12 on the aesthetics analysis in terms of the screening
13 that was proposed. It will result in an undue adverse
14 impact if he's not going to do that.

15 So, whether you void his contract; whether you
16 say, You're denied, because you are not doing your
17 screening that you proposed, and that's part of the,
18 the project that you have put before us, you're not
19 going to get your permit, put him on notice, if he cuts
20 down those trees, he has stopped going forward with the
21 plan that he's submitted.

22 So we would ask that the injunction cover that
23 area and that he be given a warning that, if he
24 violates it, that he will fail on that criteria or the
25 contract will be void, because it will be a material

1 misrepresentation of fact in the project proposal that
2 they are incapable of doing if they cut the trees and
3 that a spite structure of massive proportions is not
4 allowed in place of the screening of 700-some-odd
5 trees. Thank you.

6 CHAIRMAN ROISMAN: Thank you, Ms. Dingledine.
7 Ms. Aceves?

8 ATTORNEY ACEVES: Thank you. Very briefly,
9 we would agree with the assertions made by Mr. Einhorn
10 and will be addressing more specifically whether the
11 criteria for injunctive relief has been met in this
12 case. That said, the Department, as we've said in our
13 previous filings, we remain very concerned about the
14 policy implications and potential abuse of the Section
15 248 process that this case has represented, and it's
16 possible that, should an injunction of some sort not
17 continue, that abuse may be realized, which could
18 potentially open the door for future petitioners to
19 thwart the requirements of Section 248 and, more
20 specifically, Section 248(A)(2)(a) which prohibits site
21 clearing without a certificate of public good. So
22 that's all we want to say at this point in time, and I
23 look forward to hearing more. Thank you.

24 CHAIRMAN ROISMAN: Thank you, Ms. Aceves.
25 And now, Mr. Melone, you may call your first witness.

1 ATTORNEY MELONE: Okay. Thank you, Mr.

2 Chairman. Bob Kobelia, are you on the line?

3 MR. KOBELIA: I am online, and I'll turn on
4 my camera.

5 COMMISSIONER CHENEY: Good morning, Mr.
6 Kobelia. I'll start by swearing you in.

7 ROBERT KOBELIA,
8 duly sworn to tell the truth, testifies as follows:

9 DIRECT EXAMINATION BY ATTORNEY MELONE

10 Q. So can you confirm that the testimony that's been
11 filed in this case under your name is still accurate?

12 A. It's perfectly accurate.

13 CHAIRMAN ROISMAN: Mr. Melone, does, have you
14 set an exhibit number? If so, would you refer to it
15 just at this point for the benefit of the court
16 reporter by the exhibit number?

17 ATTORNEY MELONE: Mr. Chairman, I apologize.
18 I don't know where we had left off on the exhibit
19 numbers from, from the last one, so we didn't assign it
20 a specific exhibit number.

21 CHAIRMAN ROISMAN: All right. Is he ready
22 for cross-examination, Mr. Melone?

23 ATTORNEY MELONE: Yes, he's ready for
24 cross-examination.

25 CHAIRMAN ROISMAN: All right. Mr. Einhorn,

1 do you have any questions for Mr. Kobelia?

2 ATTORNEY EINHORN: Thank you. I do not have
3 any questions.

4 CHAIRMAN ROISMAN: All right. Ms.
5 Dingledine, do you have any questions for Mr. Kobelia?

6 ATTORNEY DINGLELINE: Yes, Mr. Roisman, if I
7 could just ask a few questions, this is Brooke
8 Dingledine.

9 CROSS-EXAMINATION BY ATTORNEY DINGLELINE

10 Q. Mr. Kobelia, you attended and testified at the
11 temporary restraining order hearing prior in this
12 matter; is that right?

13 A. I did that on the Friday of the hearing. I was
14 remote at the time. This format's way better. I was
15 on a cell phone at the Albany, New York, airport, and
16 the service I had there was intermittent. We had some
17 issues, and I did lose my signal at the time the
18 hearing took a break. It was before any decisions were
19 rendered. I didn't hear anything after that. I tried
20 to connect again and lost it, so I drove back to
21 Vermont at that time.

22 Q. So you were aware that the Commission was making a
23 decision whether or not to stop any site preparation
24 work that you were performing, correct, when you were
25 present and testifying during that hearing?

1 A. There, at the time, I think a lot of the testimony
2 had taken place. Mine had. And a decision hadn't been
3 made as for what action was going to be taken.

4 Q. Right. But you knew that the hearing was about
5 issuing an order to tell you to stop work, correct?

6 A. That may not have been the only issue they would
7 have deliberated on, but I knew that could be one of
8 the decisions.

9 Q. Okay. Yet you undertook to engage in more work
10 the following day on Saturday without checking with Mr.
11 Melone in terms of what the outcome of the hearing was;
12 is that right?

13 A. I need to word this properly. As soon as a
14 decision was going to be made that would affect my
15 ability to work, I would work going forth. The weather
16 is, had prior been our biggest obstacle, and that next
17 day, the Saturday, was a very good day to be able to do
18 some activities, and so, unless I heard otherwise, I
19 was going to be on site carrying on with my work.

20 Q. Did you discuss -- well, let me ask you this. You
21 didn't answer my question. Could you answer my
22 question? Did you undertake to contact Mr. Melone
23 after you left the hearing before you started work the
24 next day to check in with him as to what decision the
25 PUC had made, yes or no? Did you check with him or

1 not?

2 A. I did not reach out.

3 Q. Did he reach out to you before you began work on
4 Saturday?

5 A. I did not hear any message from Tom Melone.

6 Q. Did you check your email?

7 A. I checked email, and I was looking for a written
8 decision. It's not my nature to know how long a
9 deliberation would take. So, being on the front line,
10 if I'm not notified, I'm not notified.

11 Q. And were you, did you have any discussions with
12 Mr. Melone on Friday in terms of getting in touch with
13 one another to know what the outcome of the hearing
14 was?

15 A. As I said, any information I had discussed with
16 Mr. Melone on the day of the hearing was just that, it
17 was preliminary. I met him, and then I lost my signal.

18 Q. So he never undertook to call you after you
19 dropped off of the hearing to tell you that a temporary
20 restraining order had issued and you were not to do any
21 work on the site before you began on Saturday; is that
22 correct?

23 A. I don't know if he wanted to. I can tell you that
24 I didn't --

25 Q. Did you hear from, Mr. Kobelia, did you hear from

1 Mr. Melone in any way, shape, or form between the time
2 when you left the hearing and when you began site work
3 on Saturday, yes or no? Did you hear from him?

4 A. The answer is, no, I did not. Nothing was --

5 Q. Thank you. And what time, what time did you start
6 your work on Saturday morning?

7 A. I'm an early riser. I think I left the house at
8 6:00 o'clock and was on site at about 7:00 in the
9 morning.

10 Q. And you began at that time?

11 A. Once the machine's warmed up, yes. You know,
12 there's a protocol when you run a machine.

13 Q. Yeah, okay, thank you. But what time was the
14 sheriff's service on you or notification that there was
15 an order prohibiting you from continuing work?

16 A. The sheriffs arrived while I was eating lunch. My
17 recollection is somewhere around 1:00 o'clock, and I
18 was eating my lunch. Two cars rolled up, and they
19 served me papers, at which time I stopped.

20 Q. Okay. When you say you stopped, did any more
21 construction work of any sort take place after you were
22 handed that paper by the police or sheriffs?

23 A. On the subject property, the only thing that would
24 have happened is I had a temporary plastic gate that I
25 would have pulled across to keep unwanted traffic off

1 the property, but, as far as machinery, I, I put the
2 machine in a good spot to move it away if I had to, and
3 that was the end of it.

4 Q. Did you have any contact with Tom Melone before
5 the sheriffs handed you that paper on Saturday?

6 A. To be honest with you, Ms. Dingledine, I have had
7 very little conversation with Tom Melone in my whole
8 life and certainly not that day. I, I've done work for
9 him and his company, but we're not in the chain of
10 command that I would normally be speaking to him.

11 Q. Who would you normally speak with, if not Mr.
12 Melone?

13 A. I would normally contact Chris Little, who is one
14 of his folks that work for the company.

15 Q. Did anyone with the company, Chris Little or any
16 other person, tell you between the time the hearing,
17 you left the hearing and the time that you commenced
18 work or got that order from the sheriffs, anybody, did
19 you have any conversations with anybody in any format
20 who, of your --

21 A. Yes. To help you out, yes.

22 Q. Who is that?

23 A. And I did have a conversation with Chris, and it
24 was to discuss the matter. At the time I spoke with
25 him, there had been no decision.

1 Q. What time was that?

2 A. It was after I left the meeting. I believe I was
3 in transit between Albany and Bennington, so --

4 Q. Okay.

5 A. I, at that time, we said, Well, I guess we'll wait
6 and see what transpires with the results of the
7 hearing. Knowing that it was a Friday night, I had no
8 idea how long, if the, if the group would be working
9 all night long or wait until Monday to make a decision.
10 It's not my decision to make.

11 Q. Were you advised by Mr. Little or anyone else that
12 there had been a verbal order that had issued from the
13 PUC and that they were going to follow it up with
14 something in writing?

15 A. The word "verbal", at the time of my discussions,
16 didn't come out. We were looking for a decision in any
17 way, shape, or form. At the time of my conversation,
18 that word was of a -- your cease and desist would not
19 have been given at that time.

20 ATTORNEY DINGLELINE: Okay. That's all I
21 have. Thank you, Your Honor.

22 CHAIRMAN ROISMAN: Ms. Aceves, do you have
23 any questions for Mr. Kobelia?

24 ATTORNEY ACEVES: I do not. Thank you.

25 CHAIRMAN ROISMAN: Commissioner Hofmann, any

1 questions for Mr. Kobelia?

2 COMMISSIONER HOFMANN: I just have one
3 clarifying question, Mr. Kobelia. I may have missed
4 kind of the timeframe. Did you talk to Mr. Little on
5 Friday afternoon or evening?

6 MR. KOBELIA: The time I -- the hearing was
7 in the morning when I was in Albany, New York, and I
8 was speaking to him as I went through Troy, Troy, New
9 York, back to Vermont. So it was at the time of a
10 recess had happened in that hearing, and he and I were
11 speaking as I was driving the car, which would have
12 been early midday. After the -- I, I had no direct
13 communication at night or in the, in the early morning
14 hours. I obviously went home, had dinner with my wife,
15 and went to bed.

16 COMMISSIONER HOFMANN: Okay. Then, after the
17 early morning hours then between the, when you got to
18 the site at 7:00 and you said the sheriff probably came
19 around 1:00, did you talk to Mr. Little or anyone from
20 the company during that time? I think you answered
21 this for Ms. Dingledine, but I'm not sure.

22 MR. KOBELIA: Yeah. When I was on site, you
23 understand I have a cell phone, and the bulldozer
24 shakes, and you don't hear it ringing. I had it on my
25 person in my Carhartt jacket, but I did not feel it

1 vibrate, and I was operating the machine. So after
2 7:00 in the morning when I got going, I didn't stop
3 except to have a, a lunch break. At the time I took
4 the lunch break, I didn't have any message on my phone.

5 I looked at my phone while I was eating my
6 sandwich and having a, my lunch, and there was an email
7 at that point saying that I should stop, that they had
8 been served papers and I should stop, and, almost on
9 cue, I looked up from my phone, and in front of me were
10 two sheriffs driving up, or Bennington's finest,
11 driving up Willow Road to my location.

12 So I asked them. I said -- I know these guys. I
13 know the police force here in my town, and they said
14 they had these papers and that I needed to stop, and I
15 said, "Well, that's fine". They said they'd been
16 outside at the end of the blacktop road of Willow. The
17 part I'm on was pretty low-maintenance, because nobody
18 lives there. So, apparently, they stopped where the
19 blacktop had, were awaiting legal counsel, as they
20 described to me, because there was questions on whether
21 it was valid papers, because they couldn't see a
22 signature. Now, I won't get into the technical reason
23 why the Bennington Police waited until then, but they
24 were waiting until they had legal counsel advise them
25 to serve me the papers.

1 COMMISSIONER HOFMANN: Okay. And, when you
2 indicated you got a message, was it a text or an email;
3 do you remember?

4 MR. KOBELIA: I believe that it was a text
5 message from Chris Little, and, at that time, as I just
6 said, I, I looked up from my text message while I was
7 eating my lunch, and I saw the cruisers come. You
8 could, you could see them a couple hundred yards out
9 before they got to my site. It's a dead end.

10 COMMISSIONER HOFMANN: What the did message
11 from Mr. Little say?

12 MR. KOBELIA: It was short. It said, "Bob,
13 we've been served the papers to cease and desist, so
14 cease and desist immediately". Well, that's what I
15 got. Albeit he did send me those papers or that
16 information, I didn't get it until just before the
17 police arrived. I have no idea when he got his
18 notification, but that's when I got the message. And
19 it's the same as the police didn't roll their cruisers
20 until they had legal authority to do that, and, as I
21 mentioned, it had something to do with the signature on
22 the papers that they couldn't statutorily serve it as
23 it was blocked out or here. They couldn't tell who
24 signed the papers, so they weren't sure if they were
25 fraudulent.

1 COMMISSIONER HOFMANN: Okay. Thank you, Mr.
2 Kobelia.

3 MR. KOBELIA: You're welcome.

4 CHAIRMAN ROISMAN: Commissioner Cheney, do
5 you have any questions for Mr. Kobelia?

6 COMMISSIONER CHENEY: Yes, I do. Thanks.
7 Between the, around 7:00 when you arrived and around
8 1:00 when you took your lunch break, can you describe
9 the nature of the work that you did?

10 MR. KOBELIA: Sure. The paper prefiling kind
11 of describes it, but do you have a copy of that in
12 front of you or the supplemental map?

13 CHAIRMAN ROISMAN: Yes, I did read that, and,
14 if that's the extent of it, then you don't need to go
15 further.

16 MR. KOBELIA: Well, I can be more -- I can
17 clarify things real well. If you look at the map and
18 where Willow Road intersects with this parcel of land,
19 that's, basically, the town road stops there, and the
20 rare and endangered section has a three- or four-foot
21 high orange protective fencing all the way around it
22 and right at that all four sides.

23 So where I was operating was west of that fence
24 line, and it's an area that I had used before. It's
25 fairly level. It's an ideal place to clear if you need

1 to park a vehicle, and, right now, most of this land
2 had been in a pioneer stage of reversion to forest. So
3 it had forest cover, lots of invasives, very, very
4 thick honeysuckle, autumn olive, and multiflora rose.
5 It's a jungle.

6 So, to be able to have a place to park, I had
7 initially made a small opening there when I first
8 started to install silt fence, and then my job on that
9 Saturday was the first day I had to not do silt fence
10 installation, but was to actually make a place to park
11 one or two vehicles if we were going to proceed with
12 the project.

13 So there's some ash right at the very beginning
14 that were maybe four- to eight-inch diameter trees that
15 were dead. Incidentally, a large component of the
16 trees are ash. Bennington was just notified that
17 emerald ash borer is found in Bennington, so those, all
18 those ash will be dead in three years if they're not
19 already on their way.

20 So that's, that's where I was clearing was that
21 roughly shaped like a football field, 100 feet by 250,
22 and it's still not cleared. I was going after the easy
23 to push out, honeysuckle and backblading a few bigger
24 trees, but anything real large still is standing,
25 because we were going to use the excavator to do the

1 proper clearing of those stumps.

2 CHAIRMAN ROISMAN: Mr. Melone, it will really
3 be helpful now if you will assign an exhibit number to
4 the document that Mr. Kobelia was just referring to,
5 which I believe is a document that has the title site,
6 "A Map of Site Work Performed", and it was filed a
7 couple of days ago. Can you just confirm, first of
8 all, with Mr. Kobelia that that's the map that he was
9 referring to and that the markings on there, sort of
10 the red hash line, show where clearing has taken place
11 and that what he is talking about, the clearing that he
12 had done in response to Commissioner Cheney's question,
13 his area that's identified is roughly 100 by 250 feet
14 and marked on the lower center of that map?

15 ATTORNEY MELONE: Yes, I can. So this is
16 Exhibit AH-RK-2 called "Map of Site Work Performed".
17 It's submitted with his testimony. So, Bob, can you
18 confirm that the map that was submitted with your
19 testimony and, well, the portion of the map that that
20 shows, that hatched area of 100 by 250 clearing, is the
21 specific area you were just talking about?

22 (Exhibit AH-RK-2 was shown to the Witness.)

23

24 <https://epsb.vermont.gov/?q=downloadfile/441501/150086>

25

1 MR. KOBELIA: I can confirm that that's the
2 correct map.

3 ATTORNEY MELONE: Thank you.

4 CHAIRMAN ROISMAN: Okay. Thanks. Thank you,
5 Mr. Melone.

6 COMMISSIONER CHENEY: You're muted.

7 MR. KOBELIA: I was speaking to the Chairman.

8 CHAIRMAN ROISMAN: Talking to me?

9 COMMISSIONER CHENEY: Sorry about that.

10 CHAIRMAN ROISMAN: I'm so rarely muted. If
11 you ask my friends and family, they'll tell you that.
12 Before we go back to you, Mr. Melone, for any redirect,
13 does any party have any follow-up questions for Mr.
14 Kobelia in response to the answers given to the
15 questions asked by Commissioners Hofmann or Cheney?

16 ATTORNEY EINHORN: I do, Mr. Chairman.

17 CHAIRMAN ROISMAN: Okay. Go ahead, Mr.
18 Einhorn.

19 CROSS-EXAMINATION BY ATTORNEY EINHORN

20 Q. Thank you. Mr. Kobelia, I just want to briefly
21 ask you about the area we just discussed that you
22 described as the 100-by-250-foot area that you worked
23 on on that Saturday in June after the TRO hearing. You
24 described clearing out brush, essentially, right,
25 multiflora rose, et cetera, and some trees and, and

1 backblading. Was it your understanding that there were
2 no rare plants in that area that you were to avoid?

3 A. To properly answer the question, my understanding
4 was is that the areas that had been identified for the
5 rare and endangered had been properly marked out on
6 site. It didn't mean that there couldn't have been a
7 plant on this, but the difference in forest type was
8 totally different. This was a full forest cover, and
9 my impression was is that these rare and endangered
10 need an open canopy and that's why they were in those
11 sections. The part of this lot that's on the easterly
12 side is a much younger forested stand, early
13 succession.

14 Q. I understand, Mr. Kobelia. I don't want to
15 interrupt you, but we spent a lot of time last time,
16 and we're hoping to spend not as much time today. As
17 you said in June, you're not a botanist, right?

18 A. I'm a professional consulting forester. I am not
19 a botanist.

20 Q. Thank you. And you would not recognize the plants
21 that are, that are at issue in this proceeding, the
22 rare plants?

23 A. I didn't say that I wouldn't. I, I have a, a -- I
24 pulled up the information on what they look like. I
25 did not see them. I did look for them, though.

1 Q. Okay. And so, again, you, your understanding here
2 is the three areas that are shown on your Exhibit RK-2,
3 which is the map of the clearing that has been
4 performed, those are the only three areas that you're
5 to avoid with regard to rare plants on this site?

6 A. That's correct. It doesn't mean I wouldn't have
7 worked around anything I found if I did see it ahead of
8 time, and I routinely do that. If it's a plant that I
9 know I'm looking for, I do my best to make sure. Even
10 if it's in my own yard here in Bennington, I would keep
11 an eye out for it.

12 Q. Yeah, I understand, but we're talking about this
13 site, not your own yard. You were not instructed to
14 look for any plants in the areas that you were charged
15 with clearing, were you?

16 A. I'm sorry, Mr. Einhorn. You, you cut out halfway
17 through.

18 Q. Oh, I'm sorry. The areas that you were hired to
19 clear, which is essentially the green area on your
20 exhibit, you were not instructed to look for or avoid
21 herbaceous plants or these rare plants in those areas
22 in the course of your work; that was not within your
23 scope, correct?

24 A. I wasn't, it wasn't worded that way, but I'll,
25 I'll accept what you said. It wasn't in my purview. I

1 was -- can I add one critical sentence, though, to your
2 comment? Is that it had been five years since the
3 issue of rare and endangered was raised and that some
4 examinations had been taken place to inspect the entire
5 property at the proper time of year. So it's not like
6 this was day one. It was, the way it was represented
7 to me is that there's been five years' worth of prior
8 opportunity to look for rare and endangered plants on
9 the entire tract. So that's why I still was looking on
10 my own, but I did not find any.

11 Q. But my question was, That was not within your
12 scope of work, your contract, correct?

13 A. I think I need to have you re, requestion, restate
14 the question. I've, I may have gotten off track.

15 Q. Yeah. You were hired to clear this property,
16 excluding what you've identified as three RTE areas,
17 correct?

18 A. That's correct.

19 Q. And, in your scope of work for clearing that
20 property, you were not told to look for or avoid rare
21 plants outside of those three areas, correct?

22 A. I wouldn't say it that way. I was, if I
23 personally know what it looks like, I would have
24 avoided it. I did not detect those. They did not put
25 that as my charge, but, as a fellow human being, I

1 don't like to run over anything that is a rare and
2 endangered plant.

3 Q. Okay, I understand. So you, you were not told to
4 look? If you did look, it was your own personal
5 interest or judgment or whatever we want to call it
6 that you were doing?

7 A. It's the right thing to do, sure.

8 ATTORNEY EINHORN: Yeah, I understand. Thank
9 you.

10 COMMISSIONER HOFMANN: Well, let me follow up
11 a little bit with Mr. Einhorn and Mr. Kobelia. So did
12 you get off your tractor, Mr. Kobelia, and then walk
13 those areas? Because you indicated you were, you were
14 vibrating, the vibration from the bulldozer made it so
15 you couldn't even feel that you had gotten a message
16 earlier. So did you get down and walk that land, based
17 on what you just told Mr. Einhorn?

18 MR. KOBELIA: That's the best way to do it is
19 to inspect the ground before you start doing any work.
20 You do the best you can to look around. Honeysuckle is
21 very thick. You could look and see, but I, there were
22 some openings. Every place I could go, I preflighted
23 it. You want to know where there's boulders and
24 dangerous things that could damage the machine, so I
25 basically crossed and traversed that area, 100 by 250

1 feet, before I started doing the work. That's one of
2 the things you do when the machine's warming up.

3 CHAIRMAN ROISMAN: Anybody else, Ms.
4 Dingledine, Ms. Aceves, before Mr. Melone has a chance
5 for redirect?

6 ATTORNEY DINGLELINE: Yes, Your Honor. I'd
7 like to ask some questions. It's Brooke Dingledine.

8 CHAIRMAN ROISMAN: All right, Ms. Dingledine.
9 I see we're at 11:08. We had hoped to take a break at
10 11:00. Will this -- if you think you're going to take
11 more than a couple of minutes, maybe we should take our
12 break now. If not, you can go ahead and finish asking
13 your questions.

14 ATTORNEY DINGLELINE: I'm, it's not going to
15 be terribly lengthy, but I would really appreciate a
16 break right now myself.

17 CHAIRMAN ROISMAN: Okay, all right. Good,
18 all right. So it's, it's 11:08, and we'll break until
19 11:20, and we'll come back then.

20 (A recess was taken from 11:08 a.m. to 11:20 a.m.)

21 CHAIRMAN ROISMAN: Okay. Everybody back?
22 Mr. Kobelia, I see you've hydrated. That's good.
23 Okay. Just before we go to you, Ms. Dingledine, we,
24 during the break, we talked a little bit about
25 scheduling, and it, it looks as like, as we thought,

1 that, because we're remote, it's going a little longer
2 than anybody had anticipated. Would anybody have a
3 problem, and I'm particularly directing this to the
4 court reporter, if we cut the lunch time down to 45
5 minutes instead of an hour? Please speak up if that's
6 a problem for anybody, including the court reporter.

7 THE REPORTER: This is the court reporter,
8 and that is certainly fine with me.

9 CHAIRMAN ROISMAN: Okay, all right. We don't
10 want to keep you from getting the break we know you
11 need, but if 45 minutes works, when we break for lunch
12 around 12:30, we will break for just 45 minutes. Ms.
13 Dingledine, it's your -- you're up.

14 RECROSS-EXAMINATION BY ATTORNEY DINGLEDINE

15 Q. Thank you, Your Honor. Mr. Kobelia, could you
16 look at your phone and tell us the time that the text
17 was sent to you by Mr. Little on June 27th?

18 A. It was right about the, within a few seconds of
19 the police, so it must have been 1:00-ish.

20 Q. That he actually sent the message to you?

21 A. I, I, as I said, I was eating lunch. I looked at
22 my phone, and it was roughly 1:00 o'clock that I was
23 eating and I looked at the phone. The text may have
24 come sooner than that. It's just that's when I read
25 it, so --

1 Q. All right. Could you please look at your phone
2 and tell us the time that the text message was sent to
3 you by Mr. Little?

4 A. I could do that, but we're going way back in time,
5 June. I've had lots of correspondence with him in the
6 meantime on multiple other topics, so I have no idea
7 how long it would take me to find that text message.

8 CHAIRMAN ROISMAN: Ms. Dingleline, would it
9 be acceptable if Mr. Kobelia provides that information
10 either through his testimony or provides it to Mr.
11 Melone and he shares it with us? Would the answer to
12 the question trigger some further questions from you,
13 or is it just that you're interested in knowing that
14 particular time?

15 ATTORNEY DINGLELINE: I'm interested in
16 knowing that particular time and the specific content
17 of what he was told, so I would appreciate production
18 of screenshots of the, of any texts or emails during
19 that time period between the 26th and the 27th in terms
20 of communication with Mr. Kobelia by his employers.

21 CHAIRMAN ROISMAN: Mr. Melone, are you
22 agreeable to providing what Ms. Dingleline has asked
23 for, which is a screenshot of any communications that
24 Mr. Kobelia received between the time that he stopped
25 being part of our TRO hearing and the time that he

1 stopped doing work at the site?

2 ATTORNEY MELONE: I have no objection.

3 CHAIRMAN ROISMAN: Okay. Do you think that's
4 something that you could provide either later today or
5 certainly by Monday morning?

6 MR. KOBELIA: Yes. Tomorrow is muzzleloader
7 opening day and a lot of sitting, so I can go through
8 my Smartphone while I'm on my deer watch.

9 CHAIRMAN ROISMAN: Okay, all right. That,
10 that sounds like a good plan. All right. Go ahead,
11 Ms. Dingleline, with any other questions for Mr.
12 Kobelia.

13 ATTORNEY DINGLELINE: Yes, and I wanted to be
14 able to share the Melone map of site work performed, so
15 can I get permission to share?

16 CHAIRMAN ROISMAN: Yes, we can make you the
17 presenter. You're now the presenter, Ms. Dingleline.
18 That was a nice picture.

19 ATTORNEY DINGLELINE: Picked the wrong one.
20 Sorry.

21 CHAIRMAN ROISMAN: I like the other picture
22 really well. All right. And, Ms. Dingleline, for the
23 record, please identify it by its exhibit number. I
24 believe it's RK-2. Is that correct, Mr. Melone?

25 ATTORNEY MELONE: Yes, that's correct, Mr.

1 Chairman.

2 BY ATTORNEY DINGLEDINE:

3 Q. Okay. RK-2 by the petitioner. Mr. Kobelia, I
4 wanted you to look at RK-2, if you would, and describe
5 for us, this perimeter area that's slashed, when was
6 that clearing done datewise, around this whole
7 perimeter area that you have marked out?

8 A. Yeah. You're looking at a couple-of-week
9 timeframe from when I was contracted to do that project
10 until all of the silt fence was installed, and imagine
11 that perimeter boundary as being a fire break, the
12 trail that I made. There's always been one on this
13 piece of agricultural land. It's just that the old
14 apple trees long since had overtopped with forest. So
15 that represents all of that perimeter, which would be
16 property benefiting by having silt fence installed
17 along the boundary line. It's the lowest points.

18 Q. So, in terms of this, you basically created a
19 corridor around the property by clearing how wide a
20 strip, exactly?

21 A. The bulldozer blade is a little more than eight
22 feet. I believe it's eight feet, eight inches. So
23 I've used a number called ten feet, and there's, to
24 access that for, as I indicated in my testimony, we had
25 an ATV with a little utility trailer in it, and we

1 towed the, the three-foot-high silt fence, which has
2 stakes. They weigh quite a bit. And the total
3 perimeter distance was 3,500 feet or thereabouts. So
4 it's a lot of rolls of that. So, by having it
5 short-hauled to the wherever we were installing it, it
6 was helpful. But the dozer was used to make a level
7 trail so you wouldn't flip the four-wheeler.

8 Q. Okay. So it's fair to say then that the clearing
9 activity that you were engaged in on the site preceded
10 the hearing by several weeks; is that right?

11 A. Oh, easily, yeah. All of that, including some of
12 the work in the hatched area that's the 100-by-250, all
13 of that had been completed long before the hearing,
14 and, and, in fact, it was a good week before, as I had
15 scheduled some planned maintenance on the bulldozer.
16 So the dozer wasn't even available until the repair
17 work was done.

18 Q. Have you also been hired to clear the property up
19 on Lot 1 that's north where the old apple orchard is?

20 A. Yes, ma'am.

21 ATTORNEY DINGLELINE: Okay. Thank you very
22 much. That's all I have. Thank you, Your Honor.

23 MR. KOBELIA: You're welcome.

24 CHAIRMAN ROISMAN: Mr. Landis-Marinello, did
25 you have a question or two?

1 MR. LANDIS-MARINELLO: I, I think that last
2 question might have clarified it. Mr. Kobelia, the,
3 the two exhibits, RK-1 has this 5.7 acre Lot 1 or
4 orchard lot or horticultural use area marked for
5 clearing, and RK-2 does not have that marked for
6 clearing, but it sounds like the plan is still to clear
7 the entirety of that 5.7 acres.

8 MR. KOBELIA: Is that a question of me?

9 MR. LANDIS-MARINELLO: Yes. Yeah. Can you
10 just clarify?

11 MR. KOBELIA: My understanding is that the
12 apples trees, and, upon inspection, I tried to pick
13 some apples at the beautiful time of harvest, and they
14 were a pathetic bunch of apples. They, there's -- the
15 deer would have had a hard time finding apples to eat.
16 So those trees are way past good use, filled full of
17 other brush because of lack of maintenance, so --

18 ATTORNEY DINGLELINE: Objection, Your Honor.
19 This is irrelevant testimony, nonresponsive to the
20 question.

21 CHAIRMAN ROISMAN: Mr. Kobelia, just, if you
22 would, just answer Mr. Landis-Marinello's question.

23 MR. KOBELIA: Yes, sir. My understanding is
24 is that that would be cleared.

25 MR. LANDIS-MARINELLO: All right. Thanks.

1 MR. KOBELIA: Sure.

2 CHAIRMAN ROISMAN: Okay. Unless anybody else
3 has a question based upon the answers given to the last
4 cross, we're ready, Mr. Melone, for any redirect
5 testimony you have for Mr. Kobelia.

6 ATTORNEY MELONE: Thank you, Mr. Chairman.

7 REDIRECT EXAMINATION BY ATTORNEY MELONE

8 Q. Bob, just two simple or two short questions. So
9 you just said that the 100-by-250 clearing area, which
10 we've identified on the exhibit, most of that was
11 cleared before the hearing on the 26th; is that
12 correct?

13 A. That is correct. I purposefully left those
14 six-inch dead ash until a day when I had the bulldozer
15 working perfectly, and that was the morning I was there
16 working on those.

17 Q. Okay. So that's the, those are the only things
18 that you actually cleared from the area on Saturday,
19 June 27th; is that correct?

20 A. That is, that is correct. And I wasn't looking to
21 excavate. That would be a further job. First, we took
22 the little stuff when I first started. Then we took a
23 few of these bigger trees. To get rid of all of the
24 stumps, it would require a further use of an excavator
25 that just would do it so quickly and then a final

1 back-grading to be able to use it for agricultural use.

2 So we were in step two.

3 Q. Okay, great. And you had said that you looked up
4 what the white arrowleaf aster looked like, correct, so
5 you'd be able to identify it if you saw it?

6 A. That is correct.

7 Q. And you also said that you did a what you called a
8 preflight, which is a walk-through or a walk inspection
9 of the entire 100-by-250-foot area; is that correct?

10 ATTORNEY DINGLELINE: Objection, Your Honor.
11 These are leading questions, and this is the
12 proponent's witness. They should not be suggesting the
13 answer to him on a yes-or-no basis.

14 CHAIRMAN ROISMAN: Ms. Dingleline, we've
15 usually been pretty generous about leading questions,
16 but, Mr. Melone, if you can do a little less leading,
17 that would be helpful.

18 BY ATTORNEY MELONE:

19 Q. Okay. So, Bob, did you do a, an inspection of the
20 100-to-250-foot area before you cleared it?

21 A. I did.

22 Q. And did you see any white arrowleaf asters when
23 you did that inspection?

24 A. I did not find any.

25 ATTORNEY MELONE: No further questions, Mr.

1 Chairman.

2 CHAIRMAN ROISMAN: I have just one question
3 to clarify. Mr. Kobelia, in your response just now to
4 Mr. Melone, you seemed to indicate that the only work
5 that you did on the 100-by-250-foot area starting
6 Saturday morning of the Saturday following the TRO
7 hearing was to take down some ash trees that were on
8 the property, not to do any other work. Is that
9 correct? Did I understand your answer correctly?

10 MR. KOBELIA: Not exactly. Let me clarify
11 what I did that morning. When I first started a couple
12 of weeks earlier, I had penetrated the area with the
13 bulldozer and just left the debris, say, for example, a
14 honeysuckle bush that might be ten feet high, big root
15 ball on the bottom. I just pushed those off out of my
16 way. So that material, according to my charge, would
17 have been perfect material to come back and chip and
18 use for biomass for these berms that were part of my
19 charge to build.

20 So that's material that I just pushed off to the
21 side, approximately 100 feet. At the end of that 100
22 feet, there's a natural drop-off, and that's where I
23 pushed all of that biomass. So the big stuff standing,
24 yes, they were the smaller ash and trees of that
25 nature, but the brush, the honeysuckle and autumn

1 olive, those invasives, I had also pushed, and I needed
2 to get those out of the way too.

3 CHAIRMAN ROISMAN: All right. I'm sorry, Mr.
4 Kobelia, but I'm not sure that I got an answer to my
5 question, and I'm interested here now in a time period.

6 MR. KOBELIA: Yes.

7 CHAIRMAN ROISMAN: What, what work did you
8 actually do on Saturday morning before you got the stop
9 order from the sheriff and the message from Mr. Little?

10 MR. KOBELIA: I didn't want to give the
11 impression that, when I arrived in the morning, this
12 100-by-250 was only 6-inch trees. I had already moved
13 out the brush into, just, just pushed them out. I
14 hadn't pushed it back. So that's what my purpose was
15 was to clear the site so you could pull in there with a
16 pickup truck and turn around. So, until that time that
17 Saturday morning, you could not do that. So I pushed
18 the debris that had been exhumed a couple of weeks
19 earlier out of the way, plus the new 6-inch trees.

20 CHAIRMAN ROISMAN: Okay, all right. That, I
21 just wanted to make sure I understood that. And when
22 did you do this site examination? Did you do it on
23 Saturday morning, or had you done it several weeks
24 before, before you did the major bulldozing activity on
25 the 100-to-250-foot square, rectangle?

1 MR. KOBELIA: Well, that's a very good
2 question. I actually did it a couple of times.
3 Sometimes, when the, when I first got on site, I
4 intentionally looked, as I was the one that took charge
5 and put the flagging up heavily before we did the silt
6 fence. So I had plenty of field time on this property
7 to examine the entirety. I traversed most of the land
8 in my activities. So that would have been -- some of
9 it even happened the day that I was there. I just
10 quick looked around, because there had been some
11 disturbance, and perhaps you might see something better
12 after some of the honeysuckle was gone, but I didn't, I
13 didn't detect any. So it was more than one time that I
14 actually looked at the area.

15 CHAIRMAN ROISMAN: All right. Thank you. If
16 no one else has any questions in light of any of the
17 last questions and answers that were given by Mr.
18 Kobelia, we can discharge Mr. Kobelia as a witness.
19 Anybody else have any questions? Mr. Kobelia, thank
20 you very much.

21 MR. KOBELIA: Thank you very much. You folks
22 have a nice day.

23 CHAIRMAN ROISMAN: Thank you. Mr. Melone?

24 ATTORNEY MELONE: Thank you, Mr. Chairman.
25 Jim McClammer, are you there? I see you, Jim.

1 MR. MCCLAMMER: I'm here, and I guess I can
2 see myself and hear myself, so hopefully you can hear
3 me and see me as well.

4 ATTORNEY MELONE: We can. Yes, we can.

5 COMMISSIONER CHENEY: We can. Good morning,
6 Mr. McClammer. I'm going to swear you in.

7 JIM MCCLAMMER,
8 duly sworn to tell the truth, testifies as follows:

9 DIRECT EXAMINATION BY ATTORNEY MELONE

10 Q. Thank you, Jim. Can you affirm that the testimony
11 that was submitted under your name yesterday with three
12 exhibits, Exhibit AH-JM-1, 2, and 3, is true and
13 accurate?

14 A. Yes. That was prepared by me, and it is accurate.

15 ATTORNEY MELONE: Thank you. Mr. Chairman,
16 the Witness is available for cross-examination.

17 CHAIRMAN ROISMAN: Okay. Mr. Einhorn?

18 CROSS-EXAMINATION BY ATTORNEY EINHORN

19 Q. Thank you. Hello, Mr. McClammer. It's been a
20 while. Nice to see you again.

21 A. Yeah, thank you. Good to see you.

22 Q. Did you, were you present and, and listening and
23 able to hear Mr. Kobelia's testimony just a few minutes
24 ago?

25 A. Yes, I had. I've been following the proceedings

1 since they opened.

2 Q. You're familiar with the white arrowleaf aster,
3 correct?

4 A. Very much so.

5 Q. Yeah. Would you agree with me that the white
6 arrowleaf aster, as it occurs in Vermont, is not easily
7 identifiable at the species level until it flowers?

8 A. That's an accurate statement.

9 Q. And when does that species flower in Vermont,
10 typically?

11 A. Later in September.

12 Q. And that's what you experienced at your visits to
13 the Warner solar project, which is not very far from
14 the site that we're talking about today, correct?

15 A. That's absolutely correct, and that's only about
16 3,000 feet away, and I would also add I've seen it on
17 the Apple Hill project site and the Stark project site
18 as well.

19 Q. And okay, thank you. Your March 22nd visit to the
20 Apple Hill site which occurred this year, was that
21 visit before or after the flagging was removed from the
22 nimblewill along the old logging road otherwise
23 referred to by apple, by Arrowwood as the Nimblewill
24 Sites A and B?

25 A. I, I'm going to be rather frank about my purpose

1 of my visit was actually to identify whether or not
2 there were any wetlands on or in the vicinity of the
3 project, but I did, out of curiosity, walk across the
4 site, and I observed the conservation areas that have
5 been referred to in the previous testimony that were
6 surrounded by orange silt fence. I also noticed a
7 couple of areas on the site that had flagging around
8 it, but I didn't pay particular attention to what may
9 have been there.

10 ATTORNEY EINHORN: Okay, thank you. Let me
11 see. Would I be able to share my screen, please?

12 CHAIRMAN ROISMAN: Yes, you can be made the
13 presenter. You're now presenter, Mr. Einhorn.

14 ATTORNEY EINHORN: Okay, thank you. Let's
15 see if I get it right. Can everyone see my screen
16 there?

17 CHAIRMAN ROISMAN: Yes.

18 MR. McCLAMMER: I can.

19 (The prefiled testimony of Mr. McClammer was
20 shown to the Witness.)

21

22 <https://epsb.vermont.gov/?q=downloadfile/441570/150086>

23

24

25

1 BY ATTORNEY EINHORN:

2 Q. Okay, great. Thank you. So, in, in the testimony
3 that you filed in this matter yesterday, you make
4 reference to an MOU between the Agency and the Apple
5 Hill project developer; do you remember that?

6 A. Yes.

7 Q. And I think it's on Page 4 on Line 12. You
8 identify it as the June 29, 2015 MOU, and then you talk
9 about, further down on Line 16, that the conditions
10 have been complied with. Do you see that?

11 A. Yes.

12 Q. Are, are you aware that the 2015 MOU that you
13 reference has been superseded?

14 A. No.

15 Q. Okay. Let me see. Okay. Can you see my screen
16 now?

17 A. Yes.

18 Q. Okay. For the record, what I'm showing Mr.
19 McClammer is a Memorandum of Understanding dated
20 February 22, 2018 from the Apple Hill project Case
21 8454. We can call that, I guess, for purposes here is
22 as ANR-Cross-1.

23 (Exhibit ANR-Cross-1 was shown to the Witness.)

24

25

1 A. Okay.

2 Q. If we scroll down, Mr. McClammer, I have Page 2,
3 Paragraph 2. Do you see that?

4 A. Yes.

5 Q. Could you read that into the record for me,
6 please, the entire Paragraph 2? It's only four lines

7 A. Sure. "The parties agree that the 2015 MOU, which
8 was entered as Exhibit AHS-MOU-ANR on August 18, 2015
9 in this docket, is hereby withdrawn. The terms and
10 conditions of the 2015 MOU are superseded by the terms
11 and conditions of this MOU. The parties agree that the
12 2015 MOU is no further, is of no further force or
13 effect and the Commission should not consider or rely
14 on it."

15 Q. Okay, thank you. Now, in your testimony that we
16 just talked about, you had that line, I think it was,
17 16 that said that all MOU conditions have been complied
18 with. I take it you were referring to the 2015 MOU
19 when, in that statement, correct?

20 A. I believe that's correct, yes.

21 Q. Okay. I'd like to show you a different paragraph
22 in ANR-Cross-1, which is the 2018 MOU. Okay. This is
23 Paragraph Number 15 on Page 10 of ANR-Cross-1, and
24 could you read that paragraph into the record for me,
25 please?

1 A. Paragraph 15?

2 Q. Yes. Thank you.

3 A. It says, "Petitioner shall perform an updated RTE
4 plant survey if project site preparation or
5 construction does not commence by April 30th 2019. In
6 that case, site preparation or construction shall not
7 take place until the Vermont Fish and Wildlife
8 Department has reviewed the updated RTE plant survey
9 and determined that there are no undue adverse impacts
10 to RTE plants or approved appropriate avoidance or
11 mitigation measures."

12 Q. Okay. Thank you. Now, you said, when you were at
13 the Apple Hill site in March, the purpose was more to
14 look for wetlands, not to do an RTE plant survey,
15 correct?

16 A. That's correct.

17 Q. And --

18 A. Not a good time of the year to find RTE plants.

19 Q. Yeah. I'm sorry, and I interrupted you. I was
20 just going to ask you, You wouldn't look for them at
21 that time of the year, anyway?

22 A. We're on the same page, yes.

23 Q. Okay. And, in between March and the time Mr.
24 Kobelia started clearing the site in June, did you
25 revisit the site to look for RTE plants?

1 A. I did not.

2 Q. To your knowledge, did anyone?

3 A. Not to my knowledge.

4 Q. Okay. I'll take you back to your testimony, and
5 we're, now we're on Page 4 still, and on Line 18 and 19
6 you say that all of the aster plants -- and you're
7 referring to the white arrowleaf aster here, correct --

8 A. Correct.

9 Q. -- within the area of the proposed solar facility
10 were transplanted.

11 CHAIRMAN ROISMAN: Excuse me, Mr. Einhorn.

12 ATTORNEY EINHORN: Yes.

13 CHAIRMAN ROISMAN: That appears to be Page 3
14 of Mr. McClammer's testimony. I just want to make sure
15 that we're looking at the same thing. It may be the
16 way my computer printed it.

17 ATTORNEY EINHORN: No. I'm, I'm sorry. My
18 fault. It's, it's Page 3, but it's .pdf Page 4.

19 CHAIRMAN ROISMAN: Okay, all right.

20 ATTORNEY EINHORN: My apologies.

21 CHAIRMAN ROISMAN: All right. Go ahead. I'm
22 sorry.

23 BY ATTORNEY EINHORN:

24 Q. That's okay. And, and, and so, just so I
25 understand, Mr. McClammer is saying that all of the

1 aster plants within the proposed solar facility were
2 transplanted to the conservation areas by the end of
3 2018. Would you agree with me, Mr. McClammer, that
4 not, that other asters existed after the end of 2018 on
5 the Apple Hill site, the 27-acre site, in areas other
6 than the area of the proposed solar facility footprint
7 or the three RTE plant areas?

8 A. Could you repeat that, Mr. Einhorn, the last part
9 of that question?

10 Q. Sure. I'm sorry. Maybe I can approach it from
11 another angle that might make more sense. If we accept
12 what you have said here as true, would you agree with
13 me that asters existed in other areas within that
14 27-acre Apple Hill parcel, excluding the RTE
15 conservation areas, that were not transplanted?

16 A. I think I, I'd agree with that statement and to
17 paraphrase it or rephrase it, I would say there were
18 asters outside the proposed solar project area and that
19 were not within the conservation areas, not
20 transplanted, that were still there.

21 Q. Okay. Yeah, great. And we were, just a little
22 while ago with Mr. Kobelia, looking at his Exhibit RK-2
23 that showed the areas where he has cleared so far, and
24 now I have that on the screen, and, just to orient you,
25 the area in the southeast corner of the Apple Hill

1 parcel is one of the rare plant conservation areas,
2 correct?

3 (Exhibit AH-RK-2 was shown to the Witness.)

4

5 <https://epsb.vermont.gov/?q=downloadfile/441501/150086>

6

7 A. Correct.

8 Q. And just contiguous with that and to the west of
9 it is the area that he was talking about as the
10 100-foot-by-250-foot area that he cleared, which sounds
11 like to me both prior to, and then he did some work
12 after the hearing in, in June. Is that your
13 understanding of what that is there?

14 A. That's correct.

15 Q. Yeah. So that area has been cleared. I'm going
16 to show you. This is ANR Exhibit 14 to Mr. Popp's
17 testimony, and this is a report from Arrowwood
18 Environmental. It is the 2019 monitoring report for
19 the Apple Hill site, and I'm showing you Figure 1 on
20 Page 3 of that report. Do you see that?

21 (Exhibit ANR-14 was shown to the Witness.)

22

23 <https://epsb.vermont.gov/?q=downloadfile/440866/150086>

24

25

1 A. Yes, sir.

2 Q. And do you see the red outline, RTE conservation
3 area?

4 A. Yes.

5 Q. And just contiguous to that area and to the west
6 of it are three polygons. Do you see those blue
7 polygons?

8 A. Yes.

9 Q. And I'll scroll down a little bit more. Those
10 signify the presence of white arrowleaf asters,
11 correct?

12 A. That's correct.

13 Q. And those were not transplanted, correct?

14 A. That's correct.

15 Q. And those are in the area that was, that was
16 described by Mr. Kobelia and is shown on his Exhibit
17 RK-2 as an area that has been cleared at this time,
18 correct?

19 A. That's accurate. That's correct.

20 Q. Let me take you back to your testimony, and we'll
21 go, and I'm going to try to get the page numbering
22 right this time, which should put us on, I think, Page
23 5. Okay, yes. Page 5, Question and Answer 7, it talks
24 about the --

25 CHAIRMAN ROISMAN: Mr. Einhorn, I believe

1 that's Page 6.

2 ATTORNEY EINHORN: I'm sorry. Yes. See, I
3 went -- yeah. Struggling with the .pdf versus
4 pagination. Thank you for correcting me.

5 BY ATTORNEY EINHORN:

6 Q. So Question and Answer 7 on Lines 15 through 17,
7 you make a statement that, "The aster is not very rare
8 on or near the Warner project site, nor in the
9 Bennington area, where it is known from three
10 localities". Do you see that statement?

11 A. Yes.

12 Q. You, you would agree with me that the
13 classification and ranking of plants as to their rarity
14 in Vermont is based on the number of known populations
15 in the state, not the number of plants at a particular
16 population, correct?

17 A. Generally correct. I, you know, it becomes then
18 -- I literally have to parse the words as, What do you
19 mean by population? And, if you look closely at my
20 testimony, these are occurrences, and, in my mind and
21 based upon sort of the biological interpretations of
22 populations, the plants that are here on the Apple Hill
23 site are part of the same population that occur, occurs
24 on the Warner and, you know, Stark projects --

25 Q. So --

1 A. -- on the fact of, you know, it's the known
2 occurrences as opposed to populations.

3 Q. Okay. Let's explore that a little bit. I don't
4 want to speak for Mr. Popp, but I believe his position
5 and the Agency's position are these are two different
6 populations, and there's one other known, two
7 different, meaning the Warner site and the Apple Hill
8 site, and there's another known population, I think,
9 just near Bennington in Pownal, which gives us three
10 known in the state.

11 If we agree with you and say the Warner and Apple
12 Hill occurrences are, in fact, one population or
13 occurrence, if we want to use the word, that would
14 effectively mean that there are only two known
15 occurrences or populations in Vermont, would it not?

16 A. I think that would be accurate, yes.

17 Q. And, again, the state ranking is --

18 A. Just a caveat there. I'm sorry, Mr. Einhorn, but
19 I just want to say that I don't honestly know the
20 Pownal population or occurrence, whether or not there
21 actually have been identified accurately as the white
22 arrowleaf aster.

23 Q. Okay. And I appreciate that, and let's just, for
24 hypothetical, let's say that they are and they have
25 been.

1 A. Sure.

2 Q. That would leave us with two populations or
3 occurrences in, in the state that we know of, and that
4 is, in fact --

5 A. Two populations, yes.

6 Q. -- and that is, in fact, what the ranking is based
7 on, not the number of individuals at a given occurrence
8 per population, correct?

9 A. That's correct.

10 Q. Okay. Let's scroll down a little bit more. I'm
11 going to really try hard to get this one right. So
12 Page 7, Question and Answer 8, this is kind of what we
13 just talked about, the known populations or
14 occurrences. You say the use of five or fewer
15 locations is arbitrary.

16 Do you agree that this methodology that the Agency
17 uses for classifying the plants is based on the
18 Heritage methodology?

19 A. I would say that that's generally correct, yes.

20 Q. And, and the Heritage methodology, which is
21 coordinated throughout the US as well as, I believe,
22 parts of Canada and Central America, by, by nature,
23 sir, is used by Heritage programs throughout the
24 country; is that correct?

25 A. That's correct.

1 Q. Would you also agree with me that the white
2 arrowleaf aster is considered by Flora Conservanda as
3 being rare in the New England states?

4 A. I can't specifically state that I know that.

5 Q. Are you aware of any occurrences or populations of
6 white arrowleaf aster anywhere in New England other
7 than Vermont?

8 A. I am not, with the caveat that I really haven't
9 searched for them either.

10 Q. I understand. I appreciate that. Would you agree
11 with me that the white arrowleaf aster is part of
12 Vermont's natural environment?

13 A. That is a question I have to be clear in
14 answering. It's, in my mind, it's part of the natural
15 environment, but it is probably not as part of the
16 natural environment as the 248 section classifies the
17 natural environment. I mean, in my mind the natural
18 environment would include the coronavirus, but I don't
19 think that under 248 you want to include coronavirus
20 under 248 criteria.

21 Q. Yeah. No. I understand. I appreciate that, and
22 I wasn't asking you in the sense of is it, is it a
23 legal definition or does it meet a definition of the
24 statute, but more that it's a, it's a species that is
25 occurring naturally in Vermont?

1 A. Yeah. I mean, you, doing NEPA work -- that's
2 Environmental Policy Act stuff -- it's certainly a
3 component of the natural environment and not so much a
4 component of the human environment.

5 Q. Right. Like some introduced horticultural species
6 perhaps would be? Did I -- I'm sorry. I didn't hear
7 your response.

8 A. Pardon?

9 Q. I'm sorry. I didn't hear your response.

10 A. Oh, my response? Yeah, maybe I wasn't clear on
11 what your question was.

12 Q. Oh, I'm sorry.

13 A. Can you repeat it?

14 Q. Yeah. I said, as you said, that it would be --
15 you referred to your NEPA work and it would be
16 considered as part of the natural environment, and I
17 said I guess my question would be, you know, as opposed
18 to, say, some exotic horticulturally introduced species
19 would not be considered a part of the natural
20 environment?

21 A. My own opinion, I think horticultural varieties or
22 whatever else are also part of our natural environment
23 and how I conceive the definition of the natural
24 environment outside of the Section 248.

25 Q. Okay. Would the nimblewill plant that exists at

1 the Apple Hill site also be considered part of the
2 natural environment of Vermont?

3 A. Again, in a broad sense, I consider the nimblewill
4 plant to be part of the natural environment in Vermont
5 and elsewhere.

6 ATTORNEY EINHORN: Thank you, Mr. McClammer.
7 I don't have any further questions.

8 CHAIRMAN ROISMAN: Mr. Einhorn, do you want
9 to introduce Cross-1 as an exhibit in the case or not?

10 ATTORNEY EINHORN: I, I don't need to. I
11 mean, Mr. McClammer read, read that into the record,
12 but, you know, let's, let's why not? Let's, let's do
13 it. I mean, it came out of one of the proceedings. So
14 let's move it in, sure.

15 CHAIRMAN ROISMAN: Okay. Just identify it
16 for the record and by name, and then it will be Cross
17 Exhibit 1, and then we'll see if anyone objects to it.

18 ATTORNEY EINHORN: Okay. I need to find it.
19 Here it is. It is the, it is the First Amended
20 Memorandum of Understanding between Apple Hill Solar
21 and the Agency dated February 22nd 2018 from Case 8454.

22 CHAIRMAN ROISMAN: Okay, all right. Does
23 anyone object to the admission of this exhibit? Mr.
24 Melone?

25 ATTORNEY MELONE: No objection, Mr. Chairman.

1 CHAIRMAN ROISMAN: Ms. Dingleline?
2 ATTORNEY DINGLELINE: No objection.
3 CHAIRMAN ROISMAN: Ms. Aceves?
4 ATTORNEY ACEVES: No objection.
5 CHAIRMAN ROISMAN: Very well, it will be
6 admitted. Thank you, Mr. Einhorn.
7 ATTORNEY EINHORN: Thank you. I guess I
8 don't need to share anymore. I think I know how to do
9 this. Okay.
10 CHAIRMAN ROISMAN: Good. All right. Ms.
11 Dingleline, do you have any questions for Mr.
12 McClammer?
13 ATTORNEY DINGLELINE: No, thank you, Your
14 Honor.
15 CHAIRMAN ROISMAN: Okay. Ms. Aceves, do you
16 have any questions for Mr. McClammer?
17 ATTORNEY ACEVES: I do not. Thank you.
18 CHAIRMAN ROISMAN: Okay. Commissioner
19 Hofmann, did you have any questions for Mr. McClammer?
20 COMMISSIONER HOFMANN: I don't. Thank you.
21 CHAIRMAN ROISMAN: Commissioner Cheney, do
22 you have any questions for Mr. McClammer?
23 COMMISSIONER CHENEY: No, I don't. Thank
24 you.
25 CHAIRMAN ROISMAN: Mr. Landis-Marinello, did

1 you have any questions for Mr. McClammer?

2 MR. LANDIS-MARINELLO: I just had one, and I
3 think Attorney Einhorn asked similar questions, but, in
4 terms of ANR's classification of RTE, do you view that
5 system as rational?

6 MR. McCLAMMER: Could you, Mr. Landis, could
7 you repeat that, please, so I can make sure I
8 understand it?

9 MR. LANDIS-MARINELLO: Do you think that
10 ANR's classification system for RTE is rational?

11 MR. McCLAMMER: I pause on the word
12 "rational". It's pragmatic. It serves some purpose.
13 But is it definitive in determining whether or not a
14 species may have very limited distribution? That, I
15 wouldn't agree with. So I'm not sure if that answers
16 your question or not. You could maybe ask it in a
17 different manner. Yeah.

18 MR. LANDIS-MARINELLO: Yeah. I'll ask the
19 reverse. Would you call that system irrational?

20 MR. McCLAMMER: No, I wouldn't call it
21 irrational. It certainly is, it's a technique that's
22 been applied to try to get a handle on distribution of
23 certain species or taxa. It's not always just species.

24 MR. LANDIS-MARINELLO: Okay, thanks.

25 CHAIRMAN ROISMAN: Okay. Anybody have any

1 questions based on the answer that Mr. Landis-Marinello
2 just heard from Mr. McClammer? Okay. Mr. Melone, do
3 you have any redirect for Mr. McClammer?

4 ATTORNEY MELONE: Yes, Mr. Chairman, just a
5 couple of questions.

6 REDIRECT EXAMINATION BY ATTORNEY MELONE

7 Q. So, Mr. McClammer, Attorney Einhorn asked you
8 about the identification or the ability to identify the
9 aster at the species level, say, outside of the
10 flowering period. So, to an ordinary observer, not a
11 botanist, who would have familiarized themselves with
12 what asters look like, before it flowered would it just
13 potentially look like another aster, they just couldn't
14 identify what type of aster it is?

15 A. Mr. Melone, you're breaking up a little bit, and
16 so I would ask you to repeat it so I can give you an
17 accurate response.

18 Q. Okay. So, when someone tries to identify the
19 aster, we know that the exact type of aster cannot be
20 identified until it flowers, correct?

21 A. Yes, that's an accurate statement.

22 Q. So what would -- before it flowers, would it look
23 like some other type asters?

24 A. Yes, it could be confused with several other aster
25 species.

1 Q. So, if someone like Mr. Kobelia familiarized
2 himself with what asters look like, he would still be
3 able to identify what an aster is, he just couldn't
4 tell whether it was this particular aster; is that
5 correct?

6 ATTORNEY EINHORN: Object to the form.

7 ATTORNEY DINGLEDINE: Objection, objection.

8 ATTORNEY EINHORN: I mean, it's so
9 hypothetical. Mr. Kobelia testified in June that he
10 knows what trees look like, but he doesn't know what
11 herbaceous plants look like, and, just because he
12 looked at a photo of an aster, which probably was in
13 flower, I, I just don't -- he's not a person that's
14 qualified to be looking for this species on any site
15 for that matter, let alone the one he's clearing, and I
16 don't think we need to spend much time exploring this,
17 because I don't -- you know, I could get into a whole
18 bunch of recross and stuff, and I don't think we need
19 to go there.

20 CHAIRMAN ROISMAN: Ms. Dingleline?

21 ATTORNEY DINGLEDINE: Yeah, I would also
22 object. I don't think that the Witness is competent to
23 testify as to the matters that he's been asked about.
24 He does not have any factual basis, and there has been
25 no establishment of any basis to admit this kind of

1 evidence from this particular witness about another
2 witness.

3 CHAIRMAN ROISMAN: Mr. Melone, what's your
4 response?

5 ATTORNEY MELONE: Well, Attorney Einhorn had
6 raised the issue, because we just heard Bob Kobelia say
7 that he familiarized himself with the asters, that he
8 went out and looked around the entire site, actually,
9 not only in the cleared area, for asters outside the
10 conservation area and didn't hear any, and, but
11 Attorney Einhorn then asked Mr. McClammer here to
12 confirm that you couldn't identify it at the species
13 level until it flowers which, which is, to me, a
14 lead-in to say that, well, no one -- when Bob Kobelia
15 did his inspection, it wasn't in September. But my
16 point is is that these asters, while you can't identify
17 a white arrowleaf aster before it flowers, you can
18 identify asters in general, and --

19 CHAIRMAN ROISMAN: All right. And, and, Mr.
20 Melone, I think, I don't think that the objection would
21 go to your asking that question of Mr. McClammer. I
22 think the focus of the objection was asking Mr.
23 McClammer to offer an opinion as to Mr. Kobelia's
24 capability. If you want to reframe the question to ask
25 Mr. McClammer what you just said, which is, Would a

1 person be able to identify an aster plant, if not this
2 particular species, during a period when they weren't
3 flowering, I don't think that Mr. Einhorn or Ms.
4 Dingledine would object to your asking him that
5 question.

6 ATTORNEY MELONE: Sure, I can rephrase it
7 that way.

8 BY ATTORNEY MELONE:

9 Q. So, Mr. McClammer, would it be possible for an
10 ordinary person, nonbotanist, who familiarized
11 themselves with what asters look like to identify an
12 aster before the flowering period?

13 A. Well, I'd give sort of a technical answer to that
14 question. When we use the word "aster", it's a
15 vernacular term for what can be applied to several
16 different genera of aster, you know, aster-like, like
17 plants, and so there are several genera that look very
18 similar and are very difficult to even distinguish one
19 genus from another without having flowering material.

20 But, once you have the flowering material and you
21 become acquainted with those genera and species in a
22 certain area, you could probably, you know, distinguish
23 them based upon morphological characteristics of the
24 leaves, particularly, but it's not easy, unless you
25 have some prior experience in being able to look at the

1 technical characters so you know whether or not that
2 particular genus and species may be in that area. It
3 sounds like an oblique answer, but I wanted to be as
4 precise as I can.

5 Q. Thank you for that.

6 A. If it goes to Mr. Kobelia, I might add I was
7 impressed by his testimony and his knowledge of plants
8 and biology out there, but --

9 ATTORNEY DINGLEDINE: Objection, Your Honor.
10 This is nonresponsive. The Witness has not been asked
11 such a question, and I move to strike the testimony.

12 CHAIRMAN ROISMAN: Mr. McClammer, just wait
13 for Mr. Melone to ask you a particular question.

14 MR. McCLAMMER: Yes, Mr. Chairman.

15 CHAIRMAN ROISMAN: All right, thank you. Mr.
16 Melone.

17 BY ATTORNEY MELONE:

18 Q. So, Mr. McClammer, before the white arrowleaf
19 aster plant would flower in September, what would it
20 look like in, in June?

21 A. Based upon my experience with that species, it
22 would be still rather diminutive. It may well be
23 obscured by foliage of other plants, such as the
24 buckthorn or the honeysuckle on a site, and it would be
25 hard to even find it, as, not only my previous

1 testimony has alluded to, but from my experience of
2 trying to find this species on these other solar sites
3 that I've actually looked at, and it's also Arrowwood's
4 experience that, indeed, in their reports they assert
5 that, you know, hey, once the leaves fall on things
6 such a honeysuckle, they're able to see it. So the
7 bottom line is it's difficult to find and identify this
8 species.

9 Q. Okay. Next question, you went over with Attorney
10 Einhorn the 2015 MOU and 2018 MOU. If the provisions
11 of the 2018 MOU relating to conservation of the RTE
12 plants on the site are identical to those in the 2015
13 MOU, would your testimony still stand that the
14 conditions of the MOU have been satisfied?

15 A. The problem is I don't know what the conditions in
16 the amended or super, or the most recent MOU are, but
17 that's, I guess, is my answer to that. If I was more
18 familiar with the more recent MOU, I could answer it
19 more accurately.

20 Q. Right. Well, I'd like to save everybody the
21 trouble of you reading the 2018 MOU to discover only
22 that the provisions are, in fact, identical. So my
23 question is, If the 2018 provisions on conservation of
24 the RTE are identical to those in the 2015 MOU, would
25 your testimony still stand that, that those provisions

1 were satisfied?

2 A. Absolutely.

3 Q. Okay. And Attorney Einhorn directed your
4 attention to one section in the 2018 MOU that related
5 to a resurvey for RTE that states, if clearing or if
6 site preparation hasn't started by April 30th 2019,
7 then a resurvey would need to be done, but, in fact, if
8 site preparation, if, for example, Mr. Kobelia had,
9 when Apple Hill Solar did have a CPG, started clearing
10 before that date, then is it your opinion that no
11 resurvey would be needed?

12 A. That's an accurate interpretation of the 2018 MOU.

13 ATTORNEY MELONE: No further questions, Mr.
14 Chairman.

15 CHAIRMAN ROISMAN: Anybody have any
16 additional cross in response to the answers to the
17 redirect? Ms. Dingleline?

18 ATTORNEY DINGLELINE: Mr. Roisman, I could
19 not make out the last question and answer. There was
20 some disruption that I was hearing with Mr. Melone. So
21 I'm not quite sure that I understood the last question
22 and answer.

23 CHAIRMAN ROISMAN: All right. Can the court
24 reporter read back the last question and answer,
25 please?

1 (Question and answer read by the reporter.)

2 CHAIRMAN ROISMAN: Thank you. Ms.
3 Dingledine? Okay, all right. Well, Mr. McClammer, I
4 think you can be excused at this point. Thank you for
5 your testimony.

6 MR. McCLAMMER: Thank you, Mr. Chairman.

7 CHAIRMAN ROISMAN: Mr. Melone, who is next?

8 ATTORNEY MELONE: I guess it's me. I'm next.

9 COMMISSIONER CHENEY: All right. Then I'll
10 start by swearing you in as a witness, Mr. Melone.

11 THOMAS MELONE,
12 duly sworn to tell the truth, testifies as follows:

13 CHAIRMAN ROISMAN: All right. And, Mr.
14 Melone, you are going -- you could find it an awkward
15 position that's, technically, you are not only the
16 witness, but the lawyer questioning the witness. We'll
17 see how that works out if the problem arises. For the
18 moment, we'll just simply let you verify if your
19 prefiled direct testimony is still true and accurate to
20 the best of your personal knowledge, if that is true.

21 ATTORNEY MELONE: Yes, the, the testimony I
22 submitted on December 3rd in this docket, plus the two
23 exhibits, is true and correct and accurate as of today.

24 CHAIRMAN ROISMAN: All right, okay. Mr.
25 Einhorn, do you have any questions for Mr. Melone?

1 ATTORNEY EINHORN: I do not. Thank you.

2 CHAIRMAN ROISMAN: Okay. Ms. Dingledine, do
3 you have questions for Mr. Melone?

4 ATTORNEY DINGLELINE: Thank you.

5 CHAIRMAN ROISMAN: Ms. Dingledine, before I
6 start, we're almost at when we were going take a lunch
7 break, and the question is, Do you think that it would
8 take more than ten minutes to examine Mr. Melone? If
9 so, we might decide to take our lunch break now, rather
10 than break up your cross.

11 ATTORNEY DINGLELINE: Yes, I think I am going
12 to be more than ten minutes.

13 CHAIRMAN ROISMAN: Okay. Well, let's adjourn
14 now at 12:21, and we will reconvene again at 1:06,
15 unless I screwed up my math. Okay. See everybody at
16 1:06. Have a good lunch.

17 (A recess was taken from 12:21 p.m. to 1:06 p.m.)

18 CHAIRMAN ROISMAN: Okay. I think we're all
19 back. Ms. Dingledine, I believe we were ready for you
20 to cross-examine Mr. Melone. Mr. Melone, remember
21 you're still under oath.

22 ATTORNEY MELONE: Thank you, Mr. Chairman.

23 CROSS-EXAMINATION BY ATTORNEY DINGLELINE

24 Q. Thank you, Your Honor. Good morning, Mr. Melone,
25 or I guess it's afternoon, Mr. Melone.

1 A. Good afternoon.

2 Q. Who is the petitioner in the Chelsea Solar project
3 proposal?

4 A. The petitioner in Docket 8302 and 17-5024 is
5 Chelsea Solar, LLC.

6 Q. Is that the only party in interest, from your
7 perspective, that has any rights or obligations under
8 that proposed application for a petition?

9 A. I'm sorry. Can you --

10 Q. Is Chelsea Solar the only entity that has any
11 interest, position, or standing with regard to the
12 petition for the present Chelsea Solar project
13 proposal?

14 A. It's the only party in those dockets that's made
15 an appearance, as I recall.

16 Q. What's, well, what about the landowner?

17 A. The landowner, I don't think the landowner has
18 made an appearance in that docket.

19 Q. Okay. So in the, in the, either of the Chelsea
20 Solar dockets, is there any party in interest other
21 than Chelsea Solar, LLC, from your perspective as the
22 petitioner or related to the petitioner?

23 A. Can you define "party in interest"?

24 Q. They have standing to be involved.

25 A. Again, what do you mean by standing?

1 Q. Okay. You know what? Let's move on. Does
2 Chelsea Solar, LLC have a certificate of public good at
3 this moment in time?

4 A. No, it does not.

5 Q. Have they ever had a certificate of public good in
6 either of the dockets related to the Chelsea Solar
7 petitions or applications?

8 A. No, they have not.

9 Q. Does Apple Hill Solar, LLC have, is that the other
10 proposal that you have for the Bennington property that
11 is at issue, the Apple Hill Solar project?

12 A. That's correct.

13 Q. And is the petitioner in that case Apple Hill
14 Solar, LLC?

15 A. That's correct.

16 Q. And does Apple Hill Solar, LLC have a certificate
17 of public good right now?

18 A. No, it does not.

19 Q. Okay. During any of the time that Mr. Kobelia did
20 any work for you prior to the temporary restraining
21 order hearing at the end of June, did you, did Apple
22 Hill Solar or Chelsea Solar, LLCs, either of them, have
23 a certificate of public good while any of the work done
24 by Mr. Kobelia was performed?

25 A. Yes. Mr. Kobelia performed work in April 2019 in

1 Apple Hill Solar or for the Apple Hill Solar project
2 and, and commenced site preparation there by, by
3 removing some trees.

4 Q. In April of 2019?

5 A. April 2019. He actually started, I believe, on
6 April 16th 2019.

7 Q. And that was on which project site?

8 A. Apple, Apple Hill Solar.

9 Q. So he did not testify, either in his prefiled
10 testimony or on cross-examination, about any activities
11 prior to a few weeks before the TRO hearing. So is it
12 your under-oath testimony that you did engage him the
13 prior year in April of 2019 to do site preparation?

14 A. Yes, I did, yes. At the time, Apple Hill Solar
15 had a CPG.

16 ATTORNEY DINGLELINE: May I share my screen,
17 Mr. Roisman? Oops, I got it.

18 CHAIRMAN ROISMAN: Yes. You'll be made the
19 presenter, and then you can share your screen. You're
20 now the presenter, Ms. Dingleline.

21 ATTORNEY DINGLELINE: Great, thank you so
22 much.

23 BY ATTORNEY DINGLELINE:

24 Q. Mr. Melone, I'm showing the site clearing map that
25 Mr. Kobelia testified to. I believe it's TR-2 as the

1 exhibit number.

2 A. That's correct, yeah.

3 Q. Could you describe for us what portion of the site
4 was cleared in April of 2019 by Mr. Kobelia?

5 A. I don't know exactly where he commenced clearing,
6 but we certainly could get that information from him.

7 Q. Okay. But is it your testimony that the majority
8 or at least the area here, the 100-by-200-foot section,
9 that definitely was done in 2020; is that right?

10 A. That's my understanding, yes.

11 Q. Okay. Thank you very much. Now, Mr. Melone, who
12 owns Chelsea Solar, LLC?

13 A. Chelsea Solar, LLC is owned by Allco Finance
14 Limited.

15 Q. And who owns Allco Finance Limited?

16 A. Allco Finance Limited is owned by Allco Finance
17 Limited, LLC, which is, in turn, owned by me.

18 Q. I'm sorry. I couldn't hear you. Say it again?

19 A. Allco Finance Limited is owned by Allco Finance
20 Limited, LLC, which, in turn, is owned by me.

21 Q. So you own and control, you're the only owner,
22 ultimately, or person in control of Chelsea Solar, LLC,
23 fair to say?

24 A. Yes.

25 Q. Who is Apple Hill Solar, LLC owned by?

- 1 A. The same parties, Apple Hill Finance Limited.
- 2 Q. So Apple Hill Solar, LLC is owned by Allco Finance
- 3 Limited?
- 4 A. Correct.
- 5 Q. Okay. And Allco Finance Limited is owned by Allco
- 6 Finance --
- 7 A. Limited, LLC.
- 8 Q. -- Limited, LLC?
- 9 A. Correct.
- 10 Q. And you are the owner of Allco Finance Limited,
- 11 LLC?
- 12 A. Correct.
- 13 Q. So you are the sole owner and person in control of
- 14 Apple Hill Solar, LLC, correct?
- 15 A. Indirectly.
- 16 Q. You own and control it, correct?
- 17 A. I own the entity that ultimately controls it.
- 18 Q. Is there any other party who controls or owns any
- 19 portion of Chelsea Solar, LLC?
- 20 A. No.
- 21 Q. What about Apple Hill Solar, LLC; anyone else
- 22 other than Thomas Melone who ultimately is the owner?
- 23 A. No.
- 24 Q. Okay. What about PLH, LLC?
- 25 A. I'm the sole member and owner of that company.

1 Q. So you, you are the sole owner in control of that
2 entity as well?

3 A. Correct.

4 Q. And PLH Vineyard Sky, LLC, same question, who is
5 the owner?

6 A. Oh, well, actually, PLH, LLC is PLH Vineyard Sky,
7 LLC. The name was changed, and it was, the state of
8 organization was transferred from Indiana to Florida.

9 Q. Oh, okay. So, so it's the same -- it's a name
10 change, same entity?

11 A. Same entity, just different, just, yeah, different
12 name, different state of incorporation or organization.

13 Q. Okay. And then Allco Renewable Energy Limited is
14 owned by?

15 A. Allco Finance Limited, LLC, which I'm the sole
16 owner of.

17 Q. Okay. And, lastly, Ecos Energy, LLC, who is the
18 owner of that?

19 A. Allco --

20 Q. Beg your pardon?

21 A. Allco Renewable Energy Limited.

22 Q. And Allco Renewable Energy Limited is owned by?

23 A. Allco Finance Limited, LLC.

24 Q. LLC? And then so you are the owner of every
25 single one of those entities, correct?

1 A. Indirectly, that's correct.

2 Q. But, but the sole owner, however indirectly it
3 might be, correct?

4 A. That's correct.

5 Q. Okay. Thank you very much for going through that.
6 I appreciate it. Another document that I just wanted
7 to very, oh, so briefly, ask you about if I may be the
8 presenter just for a moment, please.

9 MS. BISHOP: Ms. Dingledine, you're still the
10 presenter. So, to share your screen, you can, if you
11 move your mouse, you'll see some circles on the bottom
12 of your screen, and one is for your microphone, and one
13 is for the camera, and the one right next to it is
14 screen. If you click on that, you will share your
15 screen.

16 ATTORNEY DINGLELINE: Oh, thank you very
17 much.

18 CHAIRMAN ROISMAN: Just for the benefit of
19 the reporter, that was Ann Bishop, who is our Director
20 of Operations and is also acting as the manager of this
21 remote proceeding.

22 (Intervenors Exhibit 4 was shown to the Witness.)

23

24 <https://epsb.vermont.gov/?q=downloadfile/416534/150086>

25

1 BY ATTORNEY DINGLEDINE:

2 Q. Mr. Melone, what I'm showing you is -- I'm sorry.

3 Let me go back to the top -- is Intervenor's Exhibit
4 Number 4, which could you identify this document for
5 us, please?

6 A. It looks like a settlement agreement that was
7 signed with the Town of Bennington.

8 Q. Okay. And I'm going to skip all the way down to
9 the bottom of it and just ask you, do you recognize the
10 signatures on this document?

11 A. Yes.

12 Q. It's Michael Melone, Esquire, for Chelsea and for
13 Apple Hill Solar?

14 A. Correct.

15 Q. And also for PLH and all of the other entities
16 here, it's Michael Melone who signed it?

17 A. Correct.

18 Q. Okay. Was Michael Melone authorized on behalf of
19 all of these entities to enter into this settlement
20 agreement and undertake the responsibility for
21 obligations under it on behalf of each of these
22 entities?

23 A. Yes.

24 Q. And so am I correct then in assuming that
25 Paragraph 7, which indicates that the following, quote,

1 "PLH agrees not to develop 557 Apple Hill Road,
2 Bennington, Vermont (the "Apple Orchard"), in
3 parentheses in quotes, into any other use other than
4 its existing use for the life of the Apple Hill and
5 Chelsea projects. For the avoidance of doubt, neither
6 PLH nor the Developer shall have any obligation to
7 maintain the current condition of the Apple Orchard.
8 This provision is not intended to and does not waive
9 any legal obligations that may exist or the rights of
10 any non-parties to this agreement".

11 Do you agree that the document in Paragraph 7 says
12 as I read it?

13 A. I agree that those are the words that are there.

14 Q. Okay. And was Michael Melone, Esquire, authorized
15 to bind all of the entities, the solar array entities
16 and all of these other LLCs, et cetera, was he
17 authorized to bind them to that provision, yes or no?

18 A. I think that's been asked and answered.

19 Q. Could you please answer?

20 ATTORNEY MELONE: I object to reanswering the
21 same question.

22 CHAIRMAN ROISMAN: Mr. Melone, it will move
23 it along if you just tell her yes or no.

24 ATTORNEY MELONE: Yes, he was.

25

1 BY ATTORNEY DINGLEDINE:

2 Q. Okay. And you would agree with me, would you not,
3 that now altering these proposed sites to engage in a
4 different use, i.e. in agriculture or horticulture,
5 would, in fact, be a change of use?

6 ATTORNEY MELONE: I have to object to this
7 line of questioning, because I think -- I don't see how
8 this is relevant to the issue before the Commission
9 that deals with the aster plants, and the Agency has
10 already stated that it has no interest in this other
11 five-acre parcel for purposes of this injunction.

12 CHAIRMAN ROISMAN: Ms. Dingleline, your
13 response?

14 ATTORNEY DINGLEDINE: My response is that
15 this is a document that was actually submitted,
16 promises that were made, and representations that were
17 submitted to the Public Utility Commission and
18 precipitated the withdrawal of the Town of Bennington.
19 There was a representation made that the area under
20 consideration here, the Apple Hill Road location, would
21 not be developed into any other use, and that is
22 exactly what is proposed, and so the question becomes,
23 Is this or is this not a misrepresentation in terms of
24 what is now happening on the site?

25 CHAIRMAN ROISMAN: Ms. Dingleline, within the

1 scope of the jurisdiction of the Commission, which I
2 think is what Mr. Melone is raising, what is it that
3 you think we can or should be doing if what you just
4 said is correct, that there is a violation or a
5 proposed violation of an agreement that was entered
6 into between Mr. Melone's companies and the Town of
7 Bennington?

8 ATTORNEY DINGLELINE: It goes to two things,
9 Your Honor. It goes to the, to the material
10 representations that were made with regard to the
11 actual pending applications, but it also goes to a more
12 important matter, and that is to the credibility of the
13 Witness in terms of how they are proceeding, what
14 promises that they're making, and I think that that's a
15 very important issue in terms of assessing the
16 credibility of the testimony that you're hearing from
17 Mr. Melone.

18 This is more information that was presented to the
19 Public Utility Commission, and while it's a private
20 agreement with the Town, it certainly bears on and
21 relates to the use of this property and what promises
22 have been made with regard to actual, actually whether
23 the Town was or was not involved in this. They chose
24 to withdraw based on a series of promises. This is one
25 of them. And now that party is no longer a part of

1 this because of this agreement, and that is significant
2 in terms of the process and the procedure that's going
3 on right now. We need to know what is the, what is the
4 representation for these projects, what promises were
5 made, what representations exist? This is one of them
6 that's relevant to what they're doing on the site.

7 CHAIRMAN ROISMAN: All right. We're going to
8 --

9 ATTORNEY MELONE: Mr. Chairman, could I just
10 say one other thing?

11 CHAIRMAN ROISMAN: Yes.

12 ATTORNEY MELONE: The, the agreement is with
13 the Town of Bennington. Bennington has been well aware
14 of our proposed agricultural uses since we proposed
15 them. They have been copied on ePUC. Their attorneys
16 have been copied on all filings in the Supreme Court.
17 They have not come to us and said they have any issue.
18 So I think, aside from this being irrelevant to this
19 proceeding, Ms. Dingledine has no right to speak for
20 the Town in this proceeding either.

21 CHAIRMAN ROISMAN: All right. We're going to
22 temporarily step away, and Commissioners Cheney and
23 Hofmann and I will discuss this offline, and then we
24 will come back and let you know our response. So, if
25 everybody will just hold on, we're --

1 (A recess was taken from 1:24 p.m. to 1:34 p.m.)

2 CHAIRMAN ROISMAN: Okay. We're back. If
3 those of you who are parties, would activate your
4 cameras. Ms. Dingleline?

5 ATTORNEY DINGLELINE: Sorry, Your Honor. I
6 was trying to find the right button.

7 CHAIRMAN ROISMAN: All right. Well, welcome
8 to the new age, Ms. Dingleline. Okay. We're going to
9 overrule the objection, but, Ms. Dingleline, we're
10 going to give you a very short leash. We are not
11 convinced that this is a significant issue that needs a
12 lot of development. The document that you're referring
13 to has been received in evidence, so we have it in
14 front of us. We'll let you explore this for just a
15 little tiny bit, okay?

16 ATTORNEY DINGLELINE: Actually, Mr. Roisman,
17 I didn't have much else to ask on it. I just wanted
18 Mr. Melone to answer my pending question.

19 CHAIRMAN ROISMAN: Okay. Will the court
20 reporter read back the pending question, please?

21 (Question read by the reporter:

22 "Q. Okay. And you would agree with me,
23 would you not, that now altering these proposed
24 sites to engage in a different use, i.e. in
25 agriculture or horticulture, would, in fact, be a

1 change of use?")

2 CHAIRMAN ROISMAN: Mr. Melone?

3 ATTORNEY MELONE: Yeah. My answer is "no".

4 BY ATTORNEY DINGLEDINE:

5 Q. Mr. Melone, how is it that using property for
6 agricultural or horticultural purposes would not be a
7 different or change in use from a solar array project?

8 A. Oh, I thought you were talking about the five
9 point, the five-acre parcel, because I believe that's
10 all that provision addresses. The 27-acre parcel is
11 not covered by that provision that you referenced. So
12 I guess I'm not clear on what you're actually asking
13 then.

14 Q. I'm sorry, Mr. Melone. I'm having trouble hearing
15 you a little bit, but I'm not clear. Could you repeat?
16 I didn't understand.

17 A. Well, you asked about a solar use. So I, I
18 thought you were talking about the 5-acre parcel, not
19 the 27-acre parcel.

20 Q. Well, why don't we talk about that then, and we'll
21 come back to this issue? You are taking the position
22 in your latest prefiled testimony that the, that Lot
23 Number 1 of the Apple Hill Homeowners Residential
24 Development, which you call the horticultural use
25 parcel, you are taking the position that is not, that

1 it is not part of the proposed site of an electric
2 generation facility; is that correct?

3 A. That's correct.

4 Q. Okay. And you also take the position in that
5 testimony that the horticultural use parcel, Lot Number
6 1, is not the proposed site for the two solar projects.
7 Do you have any legal authority in Vermont or from any
8 jurisdiction whatsoever that suggests that landscaping
9 planning that screens a solar array project is not
10 considered part of the project or reasonably related to
11 the project?

12 A. I, I testified as to the facts, that there is no
13 solar electric generation facility planned for that
14 parcel.

15 Q. You would agree with me that the landscaping plan
16 that is provided in the exhibits that are already in
17 evidence from your aesthetics experts indicate that the
18 landscaping plan is for the purposes of satisfying the
19 mitigation prong of the Quechee Analysis with regard to
20 aesthetics in terms of buffering or screening the
21 project from the northern residential properties,
22 correct?

23 A. I don't agree with the statement as to Quechee. I
24 do agree that the trees that were once proposed there
25 at the northern end of that parcel, which, in fact, is

1 already cleared -- there's nothing that would need to
2 be cleared to put in those trees -- was there to
3 further mitigate the potential view of, of the, at
4 least one of the projects.

5 Q. Well, you're saying that you don't think it's part
6 of the Quechee Analysis. Then why did your expert put
7 it in the laundry list of items that should be
8 considered with regard to whether there was reasonable
9 mitigation or not on that prong of the Quechee
10 Analysis?

11 A. My understanding is that the expert reviews the
12 facts. What we, what we asked them to do was to, to
13 create a project that would be invisible, and those
14 trees would certainly make at least the Chelsea Solar
15 project invisible. The Apple Hill solar project has
16 been invisible from that viewpoint anyway, just because
17 of the slope of the land.

18 Q. So are you suggesting that that's not part of any
19 mitigation plan in terms of the Quechee Analysis in
20 that the PUC should disregard your landscaping plan in
21 terms of whether or not reasonable mitigation has been
22 employed in this matter?

23 A. I don't follow the question, because it was
24 submitted. The CPG was denied. It's not back at the
25 PUC for any determination.

1 Q. Mr. Melone, should the PUC consider the
2 landscaping plan as part of your project proposals, or
3 is that no longer going to happen? That row of trees
4 in front of Libby Harris's house up in the northern
5 boundary area of Lot Number 1 that you call the
6 horticultural lot, is that, are those trees going in
7 there or not?

8 A. No. We made that clear in March of 2020.

9 Q. And you're aware that the PUC denied your
10 amendment or request for amendment to your petitions
11 that said you were going to not plant those trees and
12 put up a massive barn, hemp-drying structure, correct?

13 A. I agree that that was what was stated by the PUC.
14 We have a different legal view of what the rule says,
15 and I think the PUC is in the process of trying to
16 amend that rule to have it more align with the
17 interpretation that was in the Apple Hill order.

18 Q. So, Mr. Melone, as you sit here today, your
19 current proposal is not to put all those trees in for
20 the screening for the northern properties and to build
21 a massive hemp-drying barn instead; is that what you
22 are planning on doing as you sit here today? Tell us
23 under oath, yes or no.

24 A. The amendment is, is clear that we deleted the,
25 the trees, and I don't necessarily agree with the

1 characterization that you're giving to the structures
2 that would be on the property.

3 Q. How long is the hemp-drying barn?

4 A. What?

5 Q. What are the dimensions of the hemp-drying barn
6 that you plan on erecting in the location where those
7 buffer trees were supposed to be planted?

8 A. Oh, I don't recall that. I believe that would be
9 in the amendment.

10 Q. So 160 feet long, does that sound wrong to you or
11 right?

12 A. Again, I'd have to look at the amendment.

13 Q. Okay. Well, I would say my characterization of a
14 160-foot-long barn, 30 feet height and 16 feet deep, is
15 a massive structure. If you disagree with that
16 characterization, I'm sorry, but that's what I'm going
17 to call it.

18 So are you going to put that hemp barn with
19 whatever your dimensions are that you have provided
20 with your amendment, not even a motion to amend, you're
21 just going to go do that, right? You're not going to
22 plant the trees, and you're going to put up this barn
23 instead, correct?

24 A. We're going to -- the plan is to do what is in the
25 amendment, not the trees, and to put up whatever

1 structure is shown in the amendment.

2 CHAIRMAN ROISMAN: Let me ask a question here
3 just so I'm clear. Mr. Melone, is it, am I
4 understanding correctly that the initial plan before
5 you filed the amendment was to add some trees on the
6 north side of the Lot 1 that would further screen the
7 view from homes that were north of there if a solar
8 project was built; is that correct? Do I understand
9 that correct?

10 ATTORNEY MELONE: That's correct.

11 CHAIRMAN ROISMAN: And did that plan include,
12 as part of the screening effect, keeping what trees
13 were already on Lot 1 on Lot 1?

14 ATTORNEY MELONE: I don't, I don't know. I
15 don't, I don't recall if that was the case, but I don't
16 know what the, what the expert determined.

17 CHAIRMAN ROISMAN: And are any of the trees
18 that were there, say, two years ago that nature hasn't
19 caused to fall down, are any of the trees that were on
20 Lot 1 now no longer on Lot 1 because of work that Mr.
21 Kobelia did?

22 ATTORNEY MELONE: No. My understanding is,
23 no, that Mr. Kobelia hadn't gotten to Lot 1 yet.

24 CHAIRMAN ROISMAN: Okay. So, except for your
25 intent not to put trees, new trees, on Lot 1 and except

1 for whatever nature may have done, Lot 1 is as it was
2 two years ago or three years ago, correct?

3 ATTORNEY MELONE: That's my understanding. I
4 haven't visited it, but that's my understanding.

5 CHAIRMAN ROISMAN: Okay, all right. Thank
6 you. Thank you, Ms. Dingledine. Sorry to interrupt.

7 BY ATTORNEY DINGLEDINE:

8 Q. All right. So now we know that you are taking the
9 position that Lot 1 is not part of the project site,
10 correct?

11 A. That no electric generation facility is part
12 that's planned to go on.

13 Q. Are you familiar, are you familiar with the
14 reasonably related doctrine?

15 A. I think you'd have to explain it to me.

16 Q. Well, then, obviously, the answer is, No, you're
17 not familiar with it. Thank you.

18 So do you have any legal precedent whatsoever that
19 suggests that, if you are, if you are building,
20 planting a buffer for a landscape screening for a
21 project, that that is not part of the site, project
22 site, or it is not reasonably related to the project
23 site, do you have any legal precedent whatsoever to
24 establish that?

25 A. The only precedent that I have is the statute

1 itself at this time.

2 CHAIRMAN ROISMAN: Excuse me. Ms.
3 Dingledine, I had just a question of clarification for
4 you. The questions that you're asking Mr. Melone, now
5 that he's a witness and under oath that are asking for
6 legal opinion, are you acknowledging that Mr. Melone is
7 an expert witness on legal issues and that we should
8 treat his opinions as the opinions of a legal expert?

9 ATTORNEY DINGLEDINE: No. I'm simply looking
10 for some basis to take the -- I don't think this is a
11 factual position. I think this is some opinion of
12 someone. I don't think he's a legal expert, nor is
13 this, this is an ultimate issue, nor would an expert be
14 able to opine and provide you with this. I'm trying to
15 understand where this witness, in terms of presenting
16 this application, ignoring your orders that they're not
17 allowed to amend it, where is he coming from? That's
18 what I'm trying to understand.

19 And it's about credibility. It's about you're
20 taking a position here based on what? That's what I'm
21 trying to get at. No, he's not an expert. He's the
22 petitioner, and I think that we're entitled to look
23 into what, what the petitioner is doing right now. I
24 don't understand it.

25 CHAIRMAN ROISMAN: What I'm having problems

1 with, Ms. Dingleline, is Mr. Melone is going to have to
2 submit a legal brief. You'll submit a legal brief. We
3 will decide the legal questions based upon what's in
4 the legal brief. If Mr. Melone's statements today on
5 what he might include or not include in his legal brief
6 are not expert opinion, I'm not sure what their
7 probative value is or what we gain by having you ask
8 him and him answering that question, outside of the
9 fact that there will be briefs filed on this. If
10 there's something that I'm missing, please let me know.
11 Otherwise, I'm not sure that I see the relevance of
12 asking him what legal standard or what legal precedent
13 he has to support a position. We'll find that out soon
14 enough.

15 ATTORNEY DINGLELINE: Mr. Roisman, this is
16 the problem. I don't even know what we're here
17 discussing. I have no idea what this petition is, nor
18 do you, because the gentleman has indicated that the
19 amendment that you denied to him is, is what we're
20 sitting here talking about, and I don't know what to do
21 with that, because it's not.

22 Just because he says Lot Number 1 isn't part of
23 the project site is preposterous. So I'm trying to
24 determine, What kind of credibility does this guy have
25 that he's saying this kind of information? I've never

1 heard of such a thing in my 25 years practicing, and
2 this goes back to 1971. The Attorney General in the
3 State of Vermont has issued an opinion about project
4 sites and reasonably related doctrine, and there is a
5 2019 case on it in Section 248. So I just don't
6 understand what we're doing, and it puts us at a
7 disadvantage to try to present evidence when we don't
8 even know what the project is.

9 CHAIRMAN ROISMAN: Ms. Dingleline, the
10 problem I'm having, you're referring to evidence, but
11 we're really talking about legal precedent, and legal
12 precedent is usually presented in briefs and oral
13 argument, of course.

14 ATTORNEY DINGLELINE: I do appreciate that,
15 Your Honor, I really do, but I'm really at a loss to
16 understand what it is that is going on here, because,
17 without knowing what the actual project that's proposed
18 is, he's telling you it's something different than what
19 is in front of you and what you have accepted. So I
20 honestly am looking for some guidance.

21 I get what you're saying, this is all going to
22 come out in legal arguments, but I think that you're
23 entitled to know why somebody comes in here and says,
24 The thing I gave you isn't what I'm doing. You told me
25 I couldn't do -- you know, I don't want to do "X". You

1 told me I couldn't do "Y", but I'm still not going to
2 do "X". So I think it's incumbent on Mr. Melone right
3 now to say if he's proceeding under his petition that
4 was submitted that has been accepted without this
5 latest amendment or not. Because, if he's not going to
6 prosecute that application, then I don't know what
7 we're doing here.

8 CHAIRMAN ROISMAN: Why don't you ask him that
9 question, Ms. Dingleline?

10 BY ATTORNEY DINGLELINE:

11 Q. Very good, I will. Mr. Melone, what project are
12 we here to discuss? What is your plan, and what you
13 are asking for permission from the PUC to give you a
14 CPG for? Does it include or does it not include
15 landscape plantings on Lot Number 1, as has been
16 depicted by your experts, their testimony, and the
17 exhibits?

18 A. All I can say is that in this proceeding, like
19 Attorney Einhorn said in the beginning, we're not
20 talking about the 248 approval process. We're talking
21 about alleged irreparable harm to rare plants that
22 would occur from the clearing we intend to do.

23 Now, we've made it clear in the amendment, whether
24 it's accepted now or not, as to what is going to occur
25 or what our plan is to occur for the farming

1 activities. Obviously, those have some impact on the,
2 on the petition that is now at the Supreme Court.

3 Q. Could you answer my question, please? What is the
4 petition pending before the PUC? What are you asking
5 permission for? Does it or does it not include
6 landscaping planting that has been specified for Lot
7 Number 1 and the preservation of the apple orchard
8 trees that reside on that lot?

9 A. Okay. First of all, there's nothing pending
10 before the PUC in terms of the Apple Hill project.
11 That's at the Supreme Court. Second of all, the, the
12 plan, like we said before the amendment, did include
13 the row of trees. You asked that, and I answered it.
14 It's shown on the plan. The amendment eliminates that.
15 The PUC didn't want to accept the amendment, but that
16 doesn't mean -- well, I don't know what that means, you
17 know, at this point in terms of the, the petition.

18 Obviously, if we go ahead with the farming
19 activities, which we think we're entitled to do, then,
20 if the petition, you know, comes back to the PUC, then,
21 at that point in time, the record will be corrected to
22 reflect the real facts on the ground as they exist at
23 that time.

24 ATTORNEY DINGLELINE: Mr. Roisman, could you
25 ask the Witness to answer the question, please?

1 CHAIRMAN ROISMAN: Ms. Dingleline, I think he
2 did answer the question. He indicated that there is an
3 application pending with the Commission that includes
4 the trees, that he believes that he's entitled to alter
5 the site irrespective of that application existing in
6 order to put in the agricultural purposes that he
7 wishes to put in.

8 He acknowledges that we've not allowed him to
9 amend his application to include that, and he's
10 indicated that, if we were to allow him to go ahead and
11 pursue the agricultural purposes, in other words, lift
12 the injunction and not make it a permanent injunction,
13 that, if and when the Supreme Court were to return the
14 Apple Hill case to us, that is, overturn our
15 determination denying the CPG, that the project would
16 then have to be changed to reflect the real world,
17 which would be a world in which there was a sheep farm
18 and a hemp farm and a hemp building.

19 I think he answered all of that. I mean, I don't
20 know what more he could have answered to your question
21 other than what he did, but if, if there's something
22 you thought he should have answered that wasn't
23 included in that, please pursue it.

24 BY ATTORNEY DINGLELINE:

25 Q. Thank you. I'll move on, Your Honor. Mr. Melone,

1 you have brought up and wrote all sorts of briefs to
2 the Public Utility Commission about site control, and,
3 in fact, you took issue with the awarding of certain
4 contracts to NextEra, for example, claiming that they
5 didn't have site control over different projects.

6 So my question to you is, Do you have site control
7 on Lot Number 1 such that you have the rights to
8 incorporate Lot Number 1 for the purposes of planting
9 screening for the solar array projects?

10 A. Yes.

11 Q. So do you acknowledge that Judge Helen Toor has
12 already made a, a decision on summary judgment in your
13 case that you, where you sued Libby Harris and the
14 Homeowners Association? Are you, do you remember that
15 she has granted summary judgment against you and said
16 that you don't have any right to maintain any kind of
17 solar facility or plantings for a solar facility on Lot
18 Number 1?

19 A. I would have to go back and look at the opinion.
20 I know that some of the rulings went against us and
21 went against the defendants.

22 Q. Well, I can read it to you, but let's cut to the
23 chase here. How is it that, if the Superior Court, on
24 a declaratory ruling, has made a determination which is
25 likely to be upheld when you appeal that to the Supreme

1 Court, how is it that you think that you have the right
2 to do plantings for this solar array or, for example,
3 to have your access way through that area, which was
4 another count that you brought, in light of the fact
5 that the court has said, no, you don't have the right,
6 doesn't that go to the issue of site control?

7 A. I don't think it goes to the issue of site
8 control. PLH owns the property, but I think what
9 you're really saying is that the Commission should have
10 accepted the amendment, because the Superior Court, you
11 were saying, said that those trees can't be there,
12 right? I mean, isn't that --

13 Q. The Superior Court said you're not -- the Superior
14 Court said you didn't have, Russet Drive doesn't exist.
15 They said that you couldn't use Lot Number 1 to access
16 the solar array and that you couldn't plant any of the
17 screening or use that lot for any what they deemed to
18 be a commercial purpose, which was the solar array.

19 So how is it that you think you can come to the
20 PUC now after having a court decision against you that
21 says you don't have site control, meaning you don't
22 have the right to incorporate this lot into anything to
23 do with this commercial project? We have a Superior
24 Court judge who said its commercial, and you can't do
25 it. How is it that you can present this now to the PUC

1 after getting your declaratory ruling, yet somehow you
2 think you have site control?

3 A. Well, again, site control is different, but, you
4 know, I think what you're saying is that, well, we
5 removed those trees. So I'm not sure what the
6 complaint is. You're saying that the, the Superior
7 Court said we couldn't put the trees there. We filed
8 an amendment to remove the trees. So I just don't
9 understand what the point is.

10 Q. The point is you don't have site control, because
11 you don't have the right to do anything on that
12 property related to the solar array, right?

13 A. No. Again, you know, I, you know, I disagree with
14 what the meaning of site control is. We own the
15 property, or PLH owns the property.

16 Q. Yeah, but you can't do what you want to do on the
17 property because of the restrictive covenants. That is
18 what the court looked at and said they run with the
19 land and you can't do what you want to do, correct?

20 A. Well, what we want to do with the property is not
21 have the trees there.

22 Q. What you wanted to do with the property was to use
23 it for screening and buffering purposes so that the
24 properties that were residential to the north would not
25 see the solar array, correct? That was the purpose of

1 it. That's what your, all of the documents say from
2 your experts --

3 A. But, again --

4 Q. -- mitigation under Quechee, right?

5 A. But, again, we have --

6 Q. Yes or no? Please answer yes or no.

7 A. To what? What was the question?

8 ATTORNEY DINGLELINE: Could the reporter read
9 the question back, please?

10 (Question read by the reporter:

11 "Q. What you wanted to do with the property
12 was to use it for screening and buffering purposes
13 so that the properties that were residential to
14 the north would not see the solar array, correct?
15 That was the purpose of it. That's what your, all
16 the documents say from your experts.")

17 ATTORNEY MELONE: All right. So I will say,
18 again, that, like I said in the petition, the row of
19 trees that was planted or proposed to be planted on the
20 north end was to block the view of the home, the single
21 home that's to the north of it, and but we have now
22 filed the amendment to remove that, so --

23 BY ATTORNEY DINGLELINE:

24 Q. Mr. Melone, let me just clarify. I think you're
25 incorrect in what you just testified to. You said the

1 single home north, which you're referring to the Harris
2 property. That is incorrect. I would draw your
3 attention to all of your experts' information about
4 this screening and buffering. It's for, primarily for
5 Ms. Harris, but there are other residential properties
6 to the north, correct?

7 A. There are other residential properties to the
8 north beyond that one particular house, but I don't
9 think they can see over the trees.

10 Q. And but, regardless of that, your experts
11 testified that this screening was for the benefit of
12 the residential properties, plural, to the north of the
13 site, yes or no?

14 A. I'd have to go back and look to see specifically
15 what these trees were planted for. I don't think that
16 those trees do anything --

17 ATTORNEY DINGLELINE: Objection. Move to
18 strike as unresponsive.

19 CHAIRMAN ROISMAN: All right. We're going to
20 adjourn this for a few moments and talk among
21 ourselves. This seems to be getting far removed from
22 the narrow question we're having to ask, which is,
23 Should we stop site clearing at this project? So I'm
24 going to, we're going to consult among ourselves, and
25 we will get back to you after we have finished

1 consulting.

2 ATTORNEY DINGLELINE: Mr. Roisman?

3 CHAIRMAN ROISMAN: Yes.

4 ATTORNEY DINGLELINE: I'm almost done. I
5 have one other exhibit with a very quick question, and
6 then I'll be done, just so that you know.

7 CHAIRMAN ROISMAN: All right. Well, why
8 don't you proceed with that one question?

9 BY ATTORNEY DINGLELINE:

10 Q. Thank you. Mr. Melone, we put in Intervenor
11 Exhibit Number 10, the hemp registration document that
12 you got late summer, and my question is, When was that
13 applied for? What was the date?

14 A. I'm pretty sure that was June 26th. I think
15 that's what I testified to.

16 COMMISSIONER HOFMANN: I'm sorry. I didn't
17 hear that, Mr. Melone. Did you say you applied for it
18 on June 26th?

19 ATTORNEY MELONE: I think so, right.

20 BY ATTORNEY DINGLELINE:

21 Q. Thank you. That actually is consistent with what
22 the Ag. Department told me. It got approved in three
23 days, because it's merely a registration system where
24 the boxes have to be checked. Is that your
25 understanding as well?

1 A. Well, actually, we, on this registration system,
2 we had no idea how long they would take to approve it,
3 particularly given, given the pandemic.

4 ATTORNEY DINGLELINE: Yeah, but it turned
5 right around. Okay, great. That's all I have. Thank
6 you.

7 CHAIRMAN ROISMAN: All right. Just to
8 clarify on that last question, on Page 14 of Mr.
9 Melone's direct testimony at Lines 12 to 15, he states
10 that the application was filed on June the 26th and
11 that it was issued on June 29th. So that's the
12 specific reference.

13 Okay. Mr. Einhorn, I can't remember now. Did we
14 offer you the opportunity to cross-examine Mr. Melone,
15 and, if not, would you like to do so? Mr. Einhorn?

16 ATTORNEY EINHORN: Oh, I'm sorry. I clicked
17 the wrong --

18 CHAIRMAN ROISMAN: I thought maybe my
19 question had done something that caused you to want to
20 leave.

21 ATTORNEY EINHORN: No, but something else
22 may. But I, I was asked, thank you, and I do not need
23 to. I said I did not have any cross-examination, and
24 that's still my position. I would reserve perhaps some
25 follow-up after the Commission asks questions, but I do

1 not have any cross.

2 CHAIRMAN ROISMAN: Okay. And, Ms. Aceves,
3 did you have any questions for Mr. Melone?

4 ATTORNEY ACEVES: The Department has no cross
5 at this time.

6 CHAIRMAN ROISMAN: And, Commissioner Hofmann,
7 do you have any questions for Mr. Melone?

8 COMMISSIONER HOFMANN: I don't have any
9 questions. Thank you.

10 CHAIRMAN ROISMAN: And, Commissioner Cheney,
11 do you have any questions for Mr. Melone?

12 COMMISSIONER CHENEY: Just to complete the
13 circle on the hemp registration, which was received on,
14 if it was three days later, on June 29th, when does
15 that provision expire? I believe there's also an
16 expiration date.

17 ATTORNEY MELONE: My understanding it's only
18 for the calendar year. So that would be 2020, and we
19 have to reregister, which we plan to do for 2021.

20 COMMISSIONER CHENEY: Thank you.

21 CHAIRMAN ROISMAN: Okay. Does, Mr.
22 Landis-Marinello, do you have any questions for Mr.
23 Melone?

24 MR. LANDIS-MARINELLO: I do have just a
25 couple. Mr. Melone, I'm just trying to figure out on

1 Page 6 of your testimony, your most recent testimony,
2 you quote the testimony from the previous hearing, and
3 then you go on to say that this was not, the sheep
4 farming is not primarily for solar projects, but I'm
5 just struggling a little with reconciling that.
6 Because the, the previous testimony the Chair had
7 asked, quote, "It sounds like the sheep that you're
8 proposing here is primarily sheep to be used to graze
9 at solar projects", end quote, and it goes on from
10 there and ends with, "Is that a fair characterization?"
11 And your first sentence was, "Yeah, I think that's,
12 that's the primary aspect", end quote.

13 And then you did go on to explain there were other
14 things that you planned to do with the sheep, but I'm
15 just trying to get clarity. Are you saying that you
16 misspoke when you gave that response before?

17 ATTORNEY MELONE: No, I'm not saying that I
18 misspoke before. I don't think that that's what this,
19 this says. I mean, somehow, that, that question and
20 answer got turned around to something else, because the
21 actual factual finding says sheep grazing is being done
22 primarily approved at the petitioner planned solar
23 projects at the site, i.e. the Bennington site. That
24 was the factual finding.

25 MR. LANDIS-MARINELLO: So your dispute is

1 with where the sheep are controlling the vegetative
2 growth? Was that part of the factual finding? Is that
3 what you're saying, because they're going to be used at
4 other solar sites as well?

5 ATTORNEY MELONE: Yes, that's right. Right,
6 they will be used at other solar sites as well, and,
7 while I said there they, the primary motivation for
8 getting into the business was the fact that we
9 basically have this captive, you know, I guess, a
10 captive revenue stream, because we have to maintain all
11 these sites anyway, throughout Vermont, Connecticut,
12 and Massachusetts.

13 So, from a business standpoint, we're going to
14 start a farming business, but you know that at least
15 part of the revenue stream is, is, in a way, fixed.
16 You know that you're going to get the revenue from
17 certain aspects of the business, which is grazing, at
18 least at your own solar project sites, and likely other
19 solar project sites, in addition to the management and
20 selling of sheep and wool and things like that.

21 MR. LANDIS-MARINELLO: Okay. I think I, I
22 think I understand the clarification now, and I just
23 have one other question. This is on Page 12 of your
24 most recent testimony. At the very end of your, the
25 bottom of that page, the end of Question 6, you have a

1 statement about there. It says, quote, "There is
2 simply no standard for ordinary people to understand
3 what is permissible and what is not", and then it goes
4 on from there, and I just wanted to ask you if you're
5 aware of our process for a declaratory judgment that we
6 have at the Commission and if that was considered in
7 this as you were trying to determine whether you could
8 do this tree clearing or not.

9 ATTORNEY MELONE: I am, you know, so I, I am
10 aware that there is the possibility to seek that, but,
11 you know, at least my position is that, you know, there
12 should be clearer standards that landowners can look up
13 and say, All right, this is what the rules say. This
14 is what we can or can't do. And I think it's, it's
15 particularly applicable here, because the, the facts
16 that I had discussed prior to that immediate testimony
17 in that same question, I mean, the, the one case that
18 the PUC ruled on, there actually was construction of
19 part of an electric generation facility, specifically
20 for some tax treatment, as I recall, to take advantage
21 of a grant program that, that was the 1603 Grant
22 Program under the Internal Revenue Code.

23 So but there, you know, the, the Commission held
24 that, even though the actual construction of part of
25 the facility was specifically intended as part of an

1 electric generation facility to qualify for tax
2 purposes, that that still didn't make it site
3 preparation or construction without a CPG, because it
4 could be used for something else.

5 MR. LANDIS-MARINELLO: I'm sorry. I'm doing
6 the lawyer thing. I just had one more question, and
7 then I realized I had one more. The Apple Hill project
8 that's at the Supreme Court, is the relief you're
9 seeking there to get approval of the Apple Hill project
10 as proposed?

11 ATTORNEY MELONE: Well, I guess you have to
12 clarify what you mean, as proposed.

13 MR. LANDIS-MARINELLO: So with, with, as you
14 know, we rejected the proposed amendment in March, and
15 so the actual proposal on the table, if you will, for
16 the Apple Hill site is the unamended project, and I, I
17 haven't seen -- I don't know if the briefing has
18 happened yet at the Supreme Court in Apple Hill, but is
19 the request you're making of the Supreme Court that
20 that project be approved, meaning the unamended
21 project?

22 ATTORNEY MELONE: Well, no. Well, I haven't
23 written a brief yet, but I imagine the very first point
24 is going to be that the amendment should have been
25 considered based on the plain language of the rule. It

1 says amendments can be filed at any time. And then the
2 Supreme Court will be able to address that and decide
3 whether they, what the scope of their remand was.

4 So what we're asking the Supreme Court in the
5 first instance is to rule that the scope of the remand
6 was consistent with what's called the Rule of Mandate
7 and that, once we filed the amendment, that the
8 amendment should have been considered. If they rule
9 against us on that, then, obviously, we'll have the
10 alternative arguments.

11 MR. LANDIS-MARINELLO: And one of the
12 alternative arguments would be that it should have been
13 approved unamended, right?

14 ATTORNEY MELONE: Probably, yeah. I mean,
15 another one will be that, that all the stuff related to
16 aesthetics is irrelevant, because the, you know, town
17 plan is not a clear community standard and that, even
18 if you took out these, these trees, it still should
19 have been approved.

20 MR. LANDIS-MARINELLO: Okay, thanks.

21 CHAIRMAN ROISMAN: Mr. Tousley, did you have
22 any questions for Mr. Melone?

23 MR. TOUSLEY: Yes, I did, also related to his
24 most recent statement, but, but I'm on Page 8, and I
25 know you had just testified about how you, how you got

1 into the sheep business and the agriculture business,
2 and, and it, it is in your testimony that your
3 agricultural activity is always a follow-on or a
4 partner to or, or an additional revenue stream
5 associated with a solar project.

6 You know, are you going to farm and do -- are you
7 going to raise sheep and grow hemp in non, in sites
8 that have no linkage whatsoever to solar activity?

9 ATTORNEY MELONE: It's possible. I mean,
10 the, we certainly are going to graze sheep and
11 essentially grow hemp, you know, in places like
12 Connecticut as well where the land on which the sheep
13 generally would be doesn't have a solar array, but that
14 there would be a solar array connected to it. So, for
15 example, like the Plainfield, Connecticut, site that,
16 that we, that I had mentioned in my testimony, that
17 site is about 110 acres overall. Currently, there are
18 three 1-megawatt solar projects on it that, that, I
19 guess, take up probably about 15 to 20 acres.

20 So the sheep will have access to the entire
21 property, but they're there, you know, because, one,
22 you know, the solar arrays. We have a fence around the
23 property. We have security cameras. So it just makes
24 more sense to do it that way now.

25 You know, we have looked at buying a farm

1 independently in Massachusetts with, with a cheese
2 operation as well where sheep would be, wouldn't
3 necessarily have the solar farm, but, right now, the
4 plan is to kind of colocate, even if the sheep, you
5 know, graze on, not only the area of the solar array,
6 but on the remainder of the property as well.

7 MR. TOUSLEY: Okay, okay. Looking again at
8 Page 8 in the center of the page, Line 10, it says,
9 "The raising, feeding, and management of the sheep is a
10 completely separate business and farming activity", and
11 I'll read the sentence, "and would commence prior to
12 any solar project", but there is a solar project.

13 Is it your testimony that your interest in
14 developing, in getting into the, the sheep-raising and,
15 and hemp-growing business is, arose from your work in
16 the solar industry and that you have no contemplation
17 of -- well, you said it. Is, did it arise from your
18 role as a solar developer?

19 ATTORNEY MELONE: Yeah, it, yeah, it arose,
20 because, you know, because of the solar projects which
21 we've been developing.

22 MR. TOUSLEY: So it's, farming and solar is
23 the nature of the business plan?

24 ATTORNEY MELONE: Well, you know, I know that
25 there's some disagreement as to who can, who, what

1 companies, you know, control what, but the PLH is
2 separate from the development part of, you know, the
3 business that I own. PLH owns a lot of real property
4 throughout the United States, including on solar farms
5 that we don't own, didn't build, don't operate. So it
6 not only invests in real estate where we own or where
7 the developer would own the project, property of the
8 project, but it invests in real property for any solar
9 developer.

10 And PLH would, well, owns Vineyard Sky Farm. So
11 the farming business is separate from the solar
12 development business, even though the reason why it
13 made sense to start up the farming business was because
14 we knew the farming business would at least have a
15 guaranteed income stream to some extent. So, if you've
16 got sheep, they don't have to just sit there. They'll
17 realize income over the year from bringing them from
18 point A to point B to point C.

19 MR. TOUSLEY: I'm also looking at the, the
20 branding of the Vineyard Sky Farms logo on Page 4, and,
21 when I first looked at it, I thought for sure I saw a
22 solar array in the background, and that's because I
23 haven't -- you know, from what your testimony is
24 telling us, I believe, is that, that sheep and solar go
25 together and that's the business plan.

1 ATTORNEY MELONE: Well, there's -- yeah,
2 again, sheep and solar go together, one, because it's
3 more, better for the environment if you bring sheep to
4 maintain a, you know, vegetative growth on a solar farm
5 compared to using mechanical equipment that's powered
6 by gas, usually. From me as from the perspective of
7 investing in different businesses, it makes sense that
8 this one business, Vineyard Sky Farm, because we can
9 always in the future -- I mean, if a solar company came
10 along and said, you know, Tom, we want to buy the solar
11 projects, solar business, we might sell that, yet we
12 would still keep the farming business.

13 So it's not part of the same entity. Yeah, from
14 an investment perspective, it makes sense to invest in
15 activities where you can have some, some coordination
16 or where they, you know, potentially benefit each
17 other. I mean, that's one reason why in testimony I
18 described I invested in a hemp company, so because
19 investing in the hemp company gives us access to the
20 technology to plant the hemp, to grow the hemp, to buy
21 the seeds, and to do what we intend to do in Vermont,
22 as well as other places. So, I mean, it's not part of
23 one entity's business plan, yeah. It's part of my
24 investment plan, but it's --

25 MR. TOUSLEY: Okay. I got it. Thank you. I

1 don't have any more questions.

2 CHAIRMAN ROISMAN: Does anybody who has asked
3 questions before have any questions to ask now based
4 upon responses to the questions that were asked by the
5 Commission or its staff? Okay. Mr. Melone, you're
6 excused as a witness but not as a representative of a
7 party.

8 ATTORNEY MELONE: Thank you, Mr. Chairman. I
9 did, I forgot to mention one thing to Mr. Tousley's
10 question. There is no solar module in the background
11 of the logo. This is completely independent.

12 MR. TOUSLEY: I was suggesting a correction.

13 ATTORNEY MELONE: Well, my hope is that,
14 eventually, it can be more milk- and cheese-oriented as
15 well. So this, the primary reason for this logo the
16 way it looks is because I think that will, well, we
17 think it will look good on cheese.

18 CHAIRMAN ROISMAN: All right. Mr. Melone, do
19 you have any other witnesses?

20 ATTORNEY MELONE: No, Mr. Chairman.

21 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, I
22 believe you have one witness, Mr. Popp?

23 ATTORNEY EINHORN: That is correct.

24 CHAIRMAN ROISMAN: Okay. Is he online?

25 ATTORNEY EINHORN: I do believe he is. I

1 thought I saw him.

2 CHAIRMAN ROISMAN: Yes, I assume not active
3 cameras yet. He may be just looking in.

4 ATTORNEY EINHORN: Right.

5 MR. POPP: Yeah, I'm here. This is Bob Popp.

6 CHAIRMAN ROISMAN: Okay. Mr. Popp, can you
7 turn on your camera?

8 MR. POPP: Sure. One second, please.

9 CHAIRMAN ROISMAN: Okay, all right. Mr.
10 Einhorn.

11 COMMISSIONER CHENEY: I will start by
12 swearing him in.

13 CHAIRMAN ROISMAN: Okay.

14 ROBERT POPP,
15 duly sworn to tell the truth, testifies as follows:

16 DIRECT EXAMINATION BY ATTORNEY EINHORN

17 Q. Mr. Popp, the testimony that you filed on November
18 25th, is that, along with the exhibits attached to it,
19 true and accurate to the best of your knowledge and
20 belief today?

21 A. It does.

22 Q. Okay. Just for the record, Mr. Popp had
23 previously filed testimony and three exhibits in June.
24 His testimony was ANR Exhibit 6. His exhibits then
25 were ANR 7, 8, and 9. In keeping in that order,

1 logically, his testimony here would be ANR Exhibit 10,
2 it's an affidavit, and then Exhibits 11 through 15,
3 which are various plant reports from 2017 through 2019
4 for both the Chelsea and Apple Hill project sites.

5 CHAIRMAN ROISMAN: Okay, all right.

6 ATTORNEY EINHORN: And I understand they've
7 been admitted into evidence. So Mr. Popp is available
8 for cross-examination.

9 CHAIRMAN ROISMAN: All right. Mr. Melone, do
10 you have any cross-examination for Mr. Popp?

11 ATTORNEY MELONE: Yes, I do. Thank you, Mr.
12 Chairman.

13 CROSS-EXAMINATION BY ATTORNEY MELONE

14 Q. Good afternoon, Mr. Popp.

15 A. Good afternoon.

16 Q. So I'd like to start with the facts related to
17 what the Agency's position is in, in this particular
18 case. I don't know if you recall in June you testified
19 that, if the asters were all transplanted in the
20 conservation area, then there would be no, no alleged
21 irreparable harm to the asters. Is that, is that still
22 your position?

23 A. That is correct. If they've all been moved,
24 there's no, no undue harm to the asters.

25 Q. Okay. Now, you have reviewed the Chelsea and

1 Apple Hill annual reports, correct?

2 A. I have.

3 Q. Okay. So I don't know if you recall or you can
4 bring it up. The 2019 annual report for the Chelsea
5 project shows certain locations in figure one of rare
6 plants, and it indicates that they've all been
7 transplanted; is that correct?

8 A. I don't have access to that figure right at the
9 moment, so I can't say. If you give me a moment, I can
10 try to find it, or you can share your screen and show
11 me.

12 Q. I don't have that on the computer I'm using for
13 this hearing.

14 A. What year was that?

15 Q. 2019. It's an exhibit to your affidavit filed --

16 A. Yeah.

17 Q. -- November 25th.

18 A. But it's the 2019 Arrowwood report?

19 Q. That's correct.

20 A. Okay. I think I have that. What figure are you
21 referring to now?

22 Q. I'm referring to Figure 1.

23 ATTORNEY DINGLELINE: Mr. Roisman, I'm going
24 to object that the Witness is looking at a document
25 that nobody else can verify, and I'm not even sure that

1 the questioner and the Witness are even looking at the
2 same document.

3 CHAIRMAN ROISMAN: We can solve that problem.
4 Mr. Popp, we can make you the presenter, and, if you
5 have that document available to you electronically, you
6 can show us the cover page of the document to verify
7 that it is a document that we've just received in
8 evidence.

9 MR. POPP: Okay. Can you see that?

10 CHAIRMAN ROISMAN: Yes.

11 MR. POPP: Okay, excellent.

12 ATTORNEY EINHORN: If I may interrupt --

13 ATTORNEY MELONE: Well, we can start with
14 that one. I was going to get to that one.

15 ATTORNEY EINHORN: And I believe that's the
16 2019 Apple Hill one, right?

17 ATTORNEY MELONE: Correct, that's right.

18 ATTORNEY EINHORN: Yeah, I mean, if it makes
19 -- I'm certainly happy, because I have the ANR exhibits
20 that we filed, you know, readily available to me. If
21 it helps move things along, I'm happy to use my screen
22 for sharing purposes.

23 CHAIRMAN ROISMAN: Okay. Ms. Dingleline,
24 does this deal with your objection?

25 ATTORNEY DINGLELINE: I would prefer if Don

1 were able to use the actual exhibits as opposed to this
2 email. I think I would, that's more correct.

3 CHAIRMAN ROISMAN: All right. Mr. Einhorn,
4 are you comfortable with doing that?

5 ATTORNEY EINHORN: Yes.

6 CHAIRMAN ROISMAN: Okay. So, Mr. Melone,
7 which of the exhibits that we already have in the
8 record is the one that you wish to ask Mr. Popp about?
9 And then Mr. Einhorn, who will now be the presenter,
10 will put that up on the screen for us.

11 ATTORNEY MELONE: Okay. So we might as well
12 start, if we can, with the Chelsea one, since that's
13 the one I started with. That was -- let's see. That's
14 attached to Mr. Popp's 20, or November 25, 2020
15 affidavit. It is --

16 ATTORNEY EINHORN: It's ANR Exhibit 15.

17 ATTORNEY MELONE: Okay. ANR Exhibit 15? All
18 right. So, if you can go to Figure 1 in that document
19 --

20 CHAIRMAN ROISMAN: Wait just a second. Ms.
21 Dingledine, does this satisfy your concerns?

22 ATTORNEY DINGLEDINE: Yes. Thank you very
23 much.

24 CHAIRMAN ROISMAN: Go ahead, Mr. Melone.

25

1 (Exhibit ANR-15 was shown to the Witness.)

2

3 <https://epsb.vermont.gov/?q=downloadfile/440867/150086>

4

5 BY ATTORNEY MELONE:

6 Q. Okay, okay. Thank you, Mr. Chairman. Mr. Popp,
7 so you see those circles there? Those, according to
8 the way I read the legend in the Arrowwood report,
9 indicate locations for the asters, and they all
10 indicate that they were transplanted, correct? Is that
11 your assessment of that report --

12 A. Yes.

13 Q. -- or that figure?

14 A. That's correct. All of the plants that were known
15 at that time were moved.

16 Q. Right. So, based on this information, there would
17 be, if that area were cleared that is outlined in
18 green, there would be no adverse effect to any asters;
19 is that correct?

20 ATTORNEY EINHORN: I'm going to object to the
21 form of the question, adverse effect. I think Mr. Popp
22 testified in his recently filed affidavit that his
23 concern is with the destruction of the plants. Adverse
24 effect implies the 248 standard for reviewing a CPG
25 application, and that is not what we're doing today.

1 CHAIRMAN ROISMAN: Okay. Mr. Melone, are you
2 comfortable with that correction to the question?

3 ATTORNEY MELONE: Yeah, I can reask the
4 question.

5 CHAIRMAN ROISMAN: Okay, please. Thank you.
6 BY ATTORNEY MELONE:

7 Q. So, Mr. Popp, based on this figure, is it correct
8 to say that all the asters that are located or located
9 on that figure are no longer in those locations?

10 A. Yes.

11 Q. And is it correct to say that, since that has been
12 done, there are no asters remaining in that area that
13 would be affected by clearing that area?

14 A. I cannot say that unequivocally, because there may
15 be additional asters that have either germinated or
16 moved into that site or were overlooked by Arrowwood.
17 The Agency gives three years on any planting incurred.
18 So, if work were done within that three-year period,
19 we're willing to accept some minimal damage, if you
20 will. If it's done beyond that three years, we want to
21 know the inventory done for the very reasons that I
22 stated.

23 So, in answer to your question, I cannot say that
24 no plants were harmed, but I will say that the Agency
25 would be, would overlook the few plants that could have

1 been taken that may have moved in after that inventory
2 had been done and, therefore, were not moved.

3 Q. Okay. So let me put this another way then. Based
4 on the inventory that's represented in this Figure 1,
5 there's, there would be -- well, the Agency is not
6 claiming that there would be any irreparable harm by
7 clearing that area; is that correct?

8 A. Correct, to the asters, and, if it were done, I
9 think, by on or before May, May 1st of 2021.

10 Q. Correct. So, just to be clear, follow up on that,
11 if the Commission lifted the injunction to allow us to
12 clear by May 1st 2021, the Agency is not claiming that
13 there would be any adverse, any impact to or any
14 irreparable harm to asters; is that correct?

15 A. That would be correct.

16 Q. Okay. So, Don, if you wouldn't mind bringing up
17 the Apple Hill 2019 report. Go to Figure 1 as well.
18 Okay. Now, the same questions as to the asters here.
19 Is it correct to say that all those circles that have
20 some, some version of pink outline represent asters
21 that have been transplanted and are no longer there?

22 (Exhibit ANR-14 was shown to the Witness.)

23

24 <https://epsb.vermont.gov/?q=downloadfile/440866/150086>

25

1 A. Yes, that's my understanding.

2 Q. So, to get right to the heart of the Agency's
3 position, is, is it limited then to these circles on
4 Figure 1 that haven't been transplanted? Is that the
5 area, or are those the specific plants which the Agency
6 has taken a position would create an irreparable harm
7 if those areas were cleared?

8 A. Correct. It would be all the blue polygons or
9 blue circles that are not outlined in pink or red.
10 Plus, we didn't talk about the nimblewill yet, but also
11 the nimblewill would be a concern.

12 Q. Right. But at least -- yeah, I'm going to get to
13 the nimblewill, but, at least as to the asters, the
14 Agency's concern, or is it correct to say that the
15 Agency's concern is just for those blue asters that
16 have blue dots that have not been, where asters have
17 not been transplanted?

18 A. Yes, with the caveat that clearing occur before
19 May 1st.

20 Q. Correct, right, right. Now, have you visited the
21 Apple Hill site?

22 A. I have not personally been there.

23 Q. Okay. Has anybody from ANR visited the Apple Hill
24 site and seen the flowering asters?

25 A. The enforcement person, I know, was there. I, I

1 really can't answer that other than him. There may
2 have been other people.

3 Q. Okay. Now, in terms of the nimblewill, is it
4 correct that the nimblewill is located, based on this
5 figure, in the areas shown in yellow or the, the line
6 or the blobs shown in yellow?

7 A. Correct. We use the term "polygon".

8 Q. Polygon? Okay. Yeah, I got confused with the
9 polygon reference, because I thought a polygon had to
10 have at least one straight side.

11 A. No.

12 Q. But okay. So the way I read this is the
13 nimblewill from Site B and Site C and part of Site A
14 have been transplanted; is that correct?

15 A. Let me -- I need to refresh my memory on that.
16 Site C was indeed transplanted. My understanding was A
17 and B, and I -- let me look at the reports here. Okay.
18 From the Arrowwood 2017 report, they state, "Site B
19 contained many hundreds of plants. Since it was not
20 feasible to transplant all of these plants, only a
21 portion, approximately 10 percent of the population,
22 was transplanted". So 10 percent of many hundreds,
23 they didn't put a total value on there. I don't know
24 offhand about A. I would need to go back and look if
25 that was entirely moved or not.

1 Q. Okay, all right. But so the, the specific areas,
2 you know, again, where ANR is looking to stop clearing
3 are the areas of the nontransplanted asters and
4 nimblewill shown on this figure; is that correct?

5 A. That's correct.

6 Q. Okay. Now, there's been some, some testimony here
7 on, on the definition of a population. Have, so, based
8 on ANR's general guidance, there's a certain threshold,
9 right, I think 10 percent in the case of S1 plants,
10 where those plants can be removed or destroyed without
11 creating any undue adverse effect; is that correct?

12 ATTORNEY EINHORN: I'm objecting to this
13 question, this line of questioning, if it continues.
14 The document that Mr. Melone is referring is the
15 Agency's Section 248 guidance related to rare,
16 threatened and endangered plants, and, again, we're not
17 reviewing a Section 248 CPG application today. What
18 we're reviewing today is whether or not an injunction
19 should be continued due to the fact that there is a
20 threat of irreparable harm presented for clearing that
21 is, at this time, unauthorized by the Public Utility
22 Commission under Section 248.

23 ATTORNEY MELONE: Yeah. So this is part of
24 the confusion, the, the part where I get confused,
25 because I'm not sure how you can claim there's

1 irreparable harm when the Agency itself has some
2 guidelines that, you know, removal of 10 percent of
3 plants of a population don't create undue adverse
4 effect. So I don't see how you can claim that an
5 action that has no undue adverse effect can then cause
6 irreparable harm.

7 ATTORNEY EINHORN: I mean, that's getting
8 into a legal discussion, but that approach,
9 acknowledging that a CPG applicant can have an adverse
10 impact but cannot have an undue adverse impact, is
11 essentially the legal standard for Section 248, and so
12 that is the difference between what would be considered
13 adverse and acceptable for purposes of a 248 approval,
14 recognizing that any project will have some level of
15 impact. The question is, Will that project have an
16 undue level of impact? That is the purpose of that.

17 What we're looking at today -- and that is in the
18 context of a project that meets the Section 248
19 standard and has been approved by the Commission. What
20 we're dealing with today are proposed projects that
21 have not been approved by the Commission, and, in that
22 respect, that standard doesn't apply, and then, in
23 addition to that, because they have not been approved
24 and that site clearing is taking place, they are
25 violative of the 248 prohibition on site preparation.

1 And so it's a different standard. The standard
2 becomes, Should an injunction issue? And the standard
3 for that is, Is there irreparable harm? And
4 destruction of a plant is by nature irreparable,
5 because that plant is destroyed, and it cannot be put
6 back.

7 BY ATTORNEY MELONE:

8 Q. Okay. So that clarifies the Agency's position,
9 Mr. Popp, if you could just confirm that, the Agency's
10 position here is that, even if a single plant is
11 harmed, that that constitutes irreparable harm; is that
12 correct?

13 A. Well, I, I'm certainly no lawyer.

14 ATTORNEY DINGLEEDINE: Objection. Outside the
15 scope of the direct testimony of this witness, and it's
16 asking for a position of an agency of the State of
17 Vermont. This is a fact witness and an expert in his
18 area, not on the position of ANR with regard to policy.

19 ATTORNEY EINHORN: I will add to that an
20 objection. We can brief that issue. Mr. Popp can
21 speak to the issue of whether or not the activities
22 that have taken place or the activities that are
23 proposed will result in the destruction of plants.

24 ATTORNEY MELONE: Well, the last page of Mr.
25 Popp's affidavit, he testifies that, you know, as to

1 what is in his view is irreparable harm. So I think
2 it's fair for me to ask him what his view is as to what
3 constitutes irreparable harm, since he's testified as
4 to it.

5 CHAIRMAN ROISMAN: Yeah. I think, Mr.
6 Melone, I think the controversy is the inclusion in
7 your questioning of him as to what the position of the
8 Agency was, and I think the nature of the objection
9 that Ms. Dingledine raised was that Mr. Popp is not
10 qualified or appropriate to ask him what the position
11 of the Agency is. He has stated in his testimony what
12 his position is, and he says, because those plants will
13 be destroyed, the harm will be irreparable. I think
14 it's fair game for you to ask him what constitutes
15 irreparable harm and whether he believes destroying one
16 plant, but confining it to what he believes, because
17 that's what his testimony says.

18 BY ATTORNEY MELONE:

19 Q. Okay. Fair enough, Mr. Chairman. So, Mr. Popp,
20 do you believe that destroying one arrowleaf aster
21 plant is irreparable harm?

22 A. From a biological standpoint, no. From a legal
23 standpoint, again, I'm not a lawyer, and I'm not
24 qualified to answer that.

25 Q. Okay. And so why, why do you conclude that it's

1 not irreparable harm from a biological standpoint?

2 A. Why do I not?

3 Q. Why do you conclude, yes, that it's not
4 irreparable harm from a biological standpoint?

5 A. Because it's under the 10 -- one plant would
6 presumably be well below the 10 percent threshold that
7 we allow.

8 Q. Okay, thank you. Now, based on your review of the
9 reports, have you totaled any of the numbers of, of,
10 say, the blue circles that have not been transplanted
11 and compared those to what you consider to be the
12 population?

13 A. I actually have, to the best extent that I can.
14 There's only one, one of Arrowwood's reports that
15 actually provide numbers, and it does not provide
16 numbers of plants at all of the polygons. So we still
17 have not had a complete count on the number of asters.

18 Q. So would, would you be more informed if, if
19 Arrowwood provided the specific number of plants at
20 each of these blue circles that represent plants that
21 were not transplanted?

22 A. I'm, could you repeat the beginning of your
23 question? There was an outside noise that I didn't
24 quite get. Sorry.

25 Q. All right. So what I'm asking is, Do you need

1 more information from Arrowwood as to the exact total
2 number that each of these blue circles represents --

3 A. Yes.

4 Q. -- to make such a determination?

5 A. Yes, absolutely.

6 Q. And so, if Arrowwood did provide that information
7 to you, then you could at least make some assessment as
8 to whether or not it exceeded the 10 percent threshold
9 you just made, you just mentioned; is that correct?

10 A. Probably. If we had numbers for all the other
11 polygons and the numbers that were moved, we could
12 conceivably do that.

13 Q. Okay, all right. So I guess then my question is,
14 Isn't it correct to say that we don't yet, yet have all
15 the information you need to determine whether there's
16 irreparable harm from a biological perspective?

17 A. We don't have the information that we need to
18 determine if the 10 percent threshold has been reached
19 and gone over, and, until we have that information,
20 yes, I guess we can't make a final decision on, on the
21 amount of irreparable harm. As far, you know, from,
22 again, this is all couched in the terms of ecological
23 damage, and I defer to the legal staff as far as what
24 constitutes damage in the, you know, as far as the
25 legal sense goes. So I just want to make clear that's

1 what my, my comments are directed completely in that,
2 you know, restricted to that narrow sense.

3 Q. I understand. All right. So the 10 percent
4 threshold is based on what's called a population; is
5 that correct?

6 A. That is correct.

7 Q. And I think we did go over what the, what the
8 Agency's or what you view as the definition of
9 population is, but why do you believe that the, the
10 population at the Chelsea and Apple Hill solar site is
11 not part of the same population as the Warner, Stark,
12 and Battle Creek site, which is right across Route 7?

13 A. We, we being the Heritage Program, have a
14 convention of what constitutes a population, and we try
15 -- we use that consistently, unless there's, you know,
16 a clear exception, and I'll get into that in a second.
17 And our convention is plants that are more than one
18 kilometer apart or are separated by a major fragmenting
19 feature, such as an interstate highway or a completely
20 different habitat, are considered to be distinct
21 populations.

22 One exception I can think of off the top of my
23 head would be riparian systems where you have, we have
24 some rare plants that occur up and down river shores,
25 and there may be a mile or two between populations, but

1 when floods come, when ice scour comes, those plants
2 move up and down. Well, they don't move up quite as
3 much. They usually move downstream. But so there's
4 some high potential for interbreeding, and that's
5 pretty much where we're going with this.

6 These are plants -- I'm not saying that no
7 interbreeding occurs between populations, but most of
8 it occurs within the population, and, you know, things
9 can interbreed long distances, but it's, it's not, not
10 that common. I mean, most of the cross-pollination is
11 occurring right on site. I could go on, probably.

12 Q. Okay. Well, on this point, back in June, you
13 know, and I guess you testified to this now. You said
14 plants move around; is that correct?

15 A. Yeah, that's reasonable. Some more than others.

16 Q. So how would the aster move around?

17 A. It can move vegetatively. You know, the roots, it
18 has, like, short, short underground rhizomes. So it
19 can send up new shoots. So it can spread on site. It
20 can also spread via seed. Those would be the two
21 primary means. Obviously, people moving them, we've
22 moved a bunch, or Arrowwood moved a bunch to the
23 conservation area.

24 Q. Right. So, when, when they -- I'd like to ask
25 about moving by seed. So, when the asters flower, is

1 that when seeds would be dispersed?

2 A. Well, no. After the, the seeds are mature, which
3 comes after the flowering.

4 Q. Okay. And so --

5 A. They flower in September. The seeds wouldn't be
6 ripe until October, probably, but, yeah, you're in the
7 ball park.

8 Q. So could the seeds travel by air?

9 A. Potentially.

10 Q. Now, we've already been told by the Intervenors
11 that there's very windy conditions there on that site.
12 So wouldn't it be reasonable to conclude that it's
13 possible that the seeds --

14 ATTORNEY DINGLELINE: Objection, Your Honor,
15 facts not in evidence.

16 BY ATTORNEY MELONE:

17 Q. Well, I'm getting to the question. Isn't it
18 reasonable to conclude that the seeds from either the
19 Apple Hill solar site could have traveled to the Warner
20 and Stark site or vice versa?

21 ATTORNEY DINGLELINE: Objection, still to the
22 foundational factual premise provided to the applicant.
23 It could be rephrased, but in this proceeding there is
24 no such evidence.

25 CHAIRMAN ROISMAN: Mr. Melone?

1 ATTORNEY MELONE: Well, the Witness has
2 testified to the fact that the, the seeds can travel by
3 air. So that's what I'm asking about.

4 CHAIRMAN ROISMAN: Do you want to ask him if
5 he is aware of whether there is any wind in Bennington
6 that might cause the seeds to move and, if so, what the
7 direction is of it?

8 ATTORNEY MELONE: I think it's enough that I
9 ask him, Isn't it reasonable to, or isn't it possible
10 that the seeds could have traveled across Route 7 in
11 either direction?

12 CHAIRMAN ROISMAN: Ms. Dingleline, if he
13 leaves it that way and leaves out any reference to wind
14 or anybody saying there's wind, does that take care of
15 your objection?

16 ATTORNEY DINGLELINE: Certainly, Your Honor.
17 Thank you.

18 CHAIRMAN ROISMAN: Okay. Mr. Melone, just
19 reask the question so Mr. Popp has it fresh in his
20 mind, please. Thank you.

21 BY ATTORNEY MELONE:

22 Q. Okay. So, Mr. Popp, is it a reasonable
23 possibility that the seeds would, the aster seeds,
24 could travel by air across Route 7, either in the
25 direction from Chelsea/Apple Hill westward or from

1 Warner/Battle Creek eastward?

2 A. Absolutely, and I think I stated that when I
3 defined what a population was. I said most of the
4 breeding occurs within the population. Occasionally,
5 there can be, there can be gene flow among populations,
6 and I can just give you a quick example. We found a
7 grape fern down in Manchester on Mount Equinox, and the
8 nearest population of it is in Michigan. I mean, how
9 did it get there? You know, a spore must have gotten
10 up in the wind column.

11 So where I'm going with this is anything's
12 possible, and, of course, there can be some gene
13 transfer or interbreeding, but the vast majority of it
14 is within that population, and that's how we define it.
15 I mean, to say, to completely exclude any inbreeding,
16 we'd have to say there's only one population of the
17 aster in the whole country, because, you know, seeds
18 could blow from Kansas. I don't know. You see where
19 I'm going with this? I mean, it gets ridiculous after
20 a while. You've got to draw some boundaries.

21 Q. Right. So my next question, just from a factual
22 perspective with the, the asters that exist on the
23 Chelsea/Apple Hill site and the asters that exist
24 across the road on the Warner, et al., sites, have you
25 done any analysis of, that compares the plants to each

1 site to see whether they are exactly the same?

2 A. Of course not. I mean, I do not have -- we don't
3 have the capability or the resources to do genetic
4 analysis. That's very, very expensive, and it's only
5 done with very high-profile plants like federally
6 endangered species, and even then not much is known
7 about endangered plants, genetically speaking.

8 Q. Okay. So then you can't tell for sure whether or
9 not the Chelsea/Apple Hill population is, in fact,
10 different from the Warner/Battle Creek population; is
11 that correct?

12 ATTORNEY EINHORN: Objection. It's been
13 asked and answered. Mr. Popp has testified as to why
14 they're considered distinct populations and the fact
15 that you could not rule out interbreeding, but the
16 breeding typically takes place or the pollination
17 within the separate populations.

18 ATTORNEY MELONE: Yeah, I think Mr. Popp has
19 testified as to general rules. I'm asking about the
20 specific facts applicable to this case and whether or
21 not there's -- he said there's been no analysis to
22 compare the two. So what I'm asking is or trying to
23 confirm that there's really no evidence that these are
24 not, these being Apple Hill asters and Warner asters,
25 are not part of the same population.

1 MR. POPP: Should I answer that? I mean,
2 it's -- okay. I didn't know if the objection --

3 ATTORNEY EINHORN: I'm sorry. I, I was
4 continuing my objection in that you're asking him to
5 prove a negative, and he said essentially that anything
6 is possible with regard to interbreeding, but it is not
7 likely.

8 ATTORNEY MELONE: Well, no.

9 CHAIRMAN ROISMAN: Mr. Melone, given that our
10 standard is more probable than not, maybe you want to
11 frame your question to him in terms of that, is it more
12 probable than not can he say that these asters that are
13 at the Apple Hill site are not the offspring of the
14 asters at Warner?

15 ATTORNEY DINGLELINE: Your Honor, may I make
16 an objection? This is Brooke Dingleline. I would like
17 to ask that the Public Utility Commission does not
18 suggest to Mr. Melone, the petitioner or the
19 cross-examiner, how to rephrase his questions. I don't
20 think it's appropriate to help one side versus the
21 other, and that's how it is feeling to the Intervenor
22 when you suggest how he should rephrase. I don't mean
23 to be inappropriate in making that objection, but I do
24 want it on the record, because my clients are concerned
25 about it.

1 CHAIRMAN ROISMAN: Okay. Ms. Dingledine,
2 just to be clear, our purpose here is to make sure we
3 get a clear and complete record. I'm sorry that it may
4 appear that we're giving assistance to Mr. Melone in
5 framing the question. I think what we were doing was
6 helping the question get framed in a way that would
7 avoid the objections and get the information in the
8 record, but I take your point. Mr. Melone, please
9 proceed.

10 BY ATTORNEY MELONE:

11 Q. Thank you, Mr. Chairman. Okay. Mr. Popp, do you
12 think it's more likely than not that the aster
13 populations on the Chelsea/Apple Hill site are part of
14 or related to the population on the Warner/Battle Creek
15 site?

16 A. I really have no basis to provide an answer to
17 that. I don't know anything about the genetics of this
18 aster. I don't know that any work has been done on it.
19 The best I can do, as I said, we've done very little
20 genetic work. One of the species we actually got some
21 funding to work on was pitch pine up in Colchester, and
22 we found clusters of pitch pine that were, you know, a
23 kilometer apart, like very close, had distinct genetic
24 differences, and that was quite surprising to us. We
25 thought it was going to be genetically uniform, and it

1 was not. So I can't even speculate how that would
2 apply to the asters, but the potential is there for
3 them to be genetically different.

4 Q. Okay. Thank you. All right. So I have a
5 question on the, the ranking of the aster. What is the
6 goal or the purpose of the ranking?

7 A. We use the ranking as part of a national,
8 international network of designating which members of
9 our flora and fauna, I would add, and natural
10 communities are considered rare and worthy of
11 protection. So, just like we have an S1 plant, we have
12 S1 animals, we have S1 natural communities. A natural
13 community being like an old-growth forest or a bog.
14 I'm not saying they're an S1, but I'm just giving you
15 an example.

16 It, it allows us to prioritize. It allows -- it's
17 used by the federal government to prioritize. I mean,
18 this is a nationwide network. There's 80 different
19 Heritage Programs across the US, Canada, Latin America,
20 and we've all agreed to use this method. So it's been
21 worked on and evolved over years by -- you know, the
22 Heritage Program started in 1984. So you do the math,
23 and that's how long this S-ranking system has been in
24 existence. It's not something that we just made up.

25 Q. Okay. So, in order to be ranked very rare or S1

1 in Vermont, is it correct that there needs to be five
2 or fewer known populations in the state?

3 A. Correct. That's, that's the standard for S1.

4 Q. Okay. And you said, as a general rule, you would,
5 you know, general rule absent some kind of barriers,
6 that you would treat as one population any plants
7 within a one-kilometer radius; is that correct?

8 A. That is correct.

9 Q. So, if you had an open field, a very big open
10 field that was just chock full of asters and that was
11 one kilometer in diameter, how many aster plants could
12 be on that, a million or more?

13 A. I'm not sure I follow the question. I mean, that,
14 if it's a contiguous population, it, it, contiguous
15 plants, it would be one population, regardless of the
16 area it occupied. We're talking about distances
17 between populations, not within populations. Maybe I
18 don't understand the question.

19 Q. No. That's right, one contiguous area. Suppose
20 there's one massive field one kilometer wide.

21 A. That would be one population.

22 Q. All right. So, if that one-kilometer area was
23 just filled every square inch with asters, wouldn't
24 there be more than, say, a million asters on that site?

25 A. I have no idea. It's unlikely. You don't get

1 pure stands of native plants in natural settings. You,
2 that sounds like a cornfield.

3 ATTORNEY DINGLELINE: I'd like to object on
4 relevance grounds.

5 BY ATTORNEY MELONE:

6 Q. Well, I'm getting to that. But you'd be able to
7 have tens of thousands, at least, right? I mean,
8 because --

9 A. No. I mean that --

10 ATTORNEY DINGLELINE: Objection, relevance.

11 MR. POPP: I mean, I mean -- no, I don't
12 think you could get that many, because there's
13 competition. There would be other plants there. I
14 mean, if you went out and plowed a field and planted
15 asters in a row like an agricultural field, maybe you'd
16 get thousands of them, but not in a natural situation,
17 even in old fields like that. Yeah, I, that sounds
18 completely unrealistic to me.

19 CHAIRMAN ROISMAN: Mr. Melone, is there some
20 relevance to where all this is going? And, if so,
21 maybe we ought to get there.

22 ATTORNEY MELONE: Okay. So, yeah, I'll
23 explain relevance. It's, the way the ranking system
24 works, there could be one aster plant in six different
25 localities in the, in the state, and, that way, the

1 plant would be no longer very rare the way I understand
2 these rules, but yet you could have tens of thousands
3 of plants in one location, but yet the plant is
4 considered very rare. That's all I'm trying to get on
5 the factual record.

6 ATTORNEY EINHORN: I'm going to object to
7 this line of questioning. First of all, Mr. Melone
8 obviously doesn't know the biology of asters or any
9 plants, apparently, based on these questions and what
10 he's just explained.

11 That aside, to the extent, and I think where he's
12 going with this is to attempt to show that this
13 particular species of aster is not a very rare plant in
14 Vermont. That's a moot point as we sit here today,
15 because all of these reports that we're looking at
16 right now, we've been looking at, have been prepared by
17 Arrowwood Environmental working on behalf of the solar
18 facility developers, and those reports clearly say that
19 these plants are S1 in the case of the aster and S2 in
20 the case of the nimblewill. So to debate whether or
21 not that's appropriate is, for our purposes, moot.
22 These report, these, the testimony that preceded these
23 reports from Arrowwood is essentially acknowledging the
24 classification and ranking of these plants.

25 CHAIRMAN ROISMAN: Mr. Melone?

1 ATTORNEY MELONE: Yeah, and I disagree, Mr.
2 Chairman. It's not a moot point, because, yeah, it's
3 true those reports just are based on what the Agency
4 has said is an S1. They don't get into whether there's
5 a justifiable basis for it, whether the system makes
6 sense, whether the system has any relation to
7 irreparable harm to either the plants or the natural
8 environment, and the Agency, in fact, has argued that
9 this is the kind of issue that we need to address at
10 the Commission first, because we have asked the
11 Superior Court to rule on this type of issue, and the
12 Agency has objected, saying that we need to go to the
13 Commission for this type of what they consider an as
14 applied challenge.

15 Now, if the Agency doesn't want us to develop a
16 record on that, then I guess they'll end up needing to
17 withdraw their argument in the Superior Court.

18 ATTORNEY EINHORN: The reference made in
19 Superior Court was because this was being challenged in
20 the context of an active Section 248 application, the
21 Warner Solar project, Case 19-0516. In these
22 particular projects which form the basis of why we're
23 here today, Apple Hill, Chelsea, and Willow Road, the
24 petitioner in those projects has essentially agreed and
25 admitted that the classifications of these plants as S1

1 and S2 are effectively appropriate. That's what they
2 are. So that makes this a moot point for the purposes
3 of this proceeding.

4 ATTORNEY MELONE: No, we haven't acknowledged
5 that just by the fact that we were agreeing to play
6 along by ANR's rules, because now, now we're in a
7 different circumstance. Now we're in a circumstance
8 where ANR is trying to take the whole bundle of sticks
9 related to plants and say that, well, we have to accept
10 the S1 characterization and, based on that, we have to
11 accept the 10 percent threshold and we have to accept
12 the population definition, and the end result is that,
13 oh, well, there's going to be an injunction to stop
14 your farming activities, so --

15 ATTORNEY EINHORN: The, the identification as
16 the plants, of the plants as S1 and S2 was made and
17 offered by the petitioner's consultants. The proposal
18 to relocate plants to the conservation areas was made
19 by the petitioner's consultants. So I don't see how we
20 go back and we revisit that.

21 CHAIRMAN ROISMAN: And, Mr. Melone,
22 notwithstanding what you represent was done in the
23 Superior Court, it sounds like what you're asking us to
24 do is to rule on a rule that was adopted by ANR as to
25 whether or not we think they made a rational decision

1 in developing a rule. I don't think we have any
2 jurisdiction to be ruling on ANR's rule.

3 There are mechanisms by which you can challenge
4 the way in which ANR classifies plants as endangered,
5 S1, S2, rare, very rare, but I don't, I don't see how
6 that's relevant here, and, even if it were, it sounds
7 like we're having a legal argument, and, of course,
8 that's not the purpose of this hearing. You'll have a
9 chance to brief that, but I don't think we need to
10 explore it any further.

11 BY ATTORNEY MELONE:

12 Q. Okay. That, that's fine then. So, Mr. Popp, to,
13 to your knowledge, has the Agency sought to enjoin any
14 other persons from removing asters or nimblewill from
15 their land?

16 A. I'm sorry. Have we prevented anyone from moving
17 them, removing them?

18 Q. Have you sought to prevent them?

19 A. Not to my knowledge.

20 Q. Okay. Now, the 10 percent threshold that you
21 mentioned before, were you involved in the, the
22 creation of that 10 percent threshold?

23 A. I was.

24 Q. And, and when was that, that decided?

25 A. Oh, in, I don't have the date off the top of my

1 head, but just prior to the guidelines for inventories
2 being completed for 248 process, and if, I think that
3 document is there somewhere, but there's a date on it.
4 Yeah.

5 Q. Right. Okay, yeah. So --

6 A. Go ahead.

7 ATTORNEY MELONE: Yeah, yeah. So I think
8 that document is, is ANR-RT-3, and I don't know if you
9 can bring this up, Don, on your screen, but the date on
10 that document, according to the copy filed, is October
11 5th 2016.

12 ATTORNEY EINHORN: I, I, if, if you're
13 referring -- that's not a document that we've offered,
14 so I don't know if I even have it, and, again, I'm
15 going to object to questioning, any line of questioning
16 on the Agency's Section 248 guidance document, because
17 that is a document that the Agency uses in reviewing
18 248 petitions. It's a document that the Agency has
19 made available to applicants so that they understand
20 what the Agency's thought process is.

21 If Mr. Melone wants to ask Mr. Popp questions
22 independently as to what his biological opinion is on
23 the topic of population impact, I think we could allow
24 that, but I also think that's already been done. I
25 don't think it's appropriate in this proceeding to be

1 discussing a guidance document that is used in the
2 context of 248 project review to determine if something
3 is unduly adverse or simply adverse. And but I don't
4 have that document handy. I could possibly dig it up
5 but with the caveat that I'm objecting to questioning
6 along the lines of that document.

7 CHAIRMAN ROISMAN: Mr. Melone, you do or
8 don't have that document?

9 ATTORNEY MELONE: I do have that document. I
10 thought it was in this, in this proceeding. If not, I
11 would certainly like to introduce it. It is marked,
12 the copy that I have is Exhibit ANR-RP-3.

13 CHAIRMAN ROISMAN: ANR, did you say P, like
14 Paul, 3?

15 ATTORNEY MELONE: Yes, P, like Paul, 3.

16 CHAIRMAN ROISMAN: Mr. Einhorn, did you have
17 a document like that?

18 ATTORNEY EINHORN: Well, I think, and, again,
19 in this proceeding, no. I think that was filed this
20 morning, which is why I don't have it. My
21 understanding is that was filed as an entire packet of
22 Mr. Popp's testimony and exhibits in the Warner solar
23 project. Is that what you're talking about, Mr.
24 Melone?

25 ATTORNEY MELONE: Yes, it must be in the

1 Warner solar project testimony that we filed in the
2 record today.

3 ATTORNEY EINHORN: You filed that today,
4 right? And now I can look for that.

5 ATTORNEY MELONE: Yeah, I mean, so all I'm
6 trying to get at it is Mr. Popp mentioned the 10
7 percent threshold that he mentioned earlier was
8 developed in connection with this guidance, and so I
9 was just trying to determine the date, and the date was
10 October 5th 2016.

11 ATTORNEY EINHORN: As I recall his testimony,
12 it was based on a biological perspective. I don't
13 think he was talking specifically about the guidance
14 document itself and, and how that document was
15 developed, which, again, I'm going to object to
16 questioning about that document. If you want to ask
17 him about his own opinions --

18 ATTORNEY MELONE: Well, I'm trying to refresh
19 his recollection as to the date when the 10 percent was
20 developed.

21 ATTORNEY EINHORN: In the document or --

22 ATTORNEY MELONE: He's the one who referred
23 to the fact that the 10 percent threshold was developed
24 at the time that they came up with and issued the
25 guidance, but he couldn't remember the date. He said

1 it was years ago. So I'm trying to get, refresh his
2 recollection as to the date, and the best way to do
3 that is to show him the guidance document.

4 ATTORNEY EINHORN: I can pull the guidance.
5 I think I found it. RP-3?

6 ATTORNEY MELONE: Yes.

7 MR. POPP: Yes. It's, October 5th 2016 is
8 when it was signed by the Commission official.

9 ATTORNEY DINGLELINE: May I enter an
10 objection, Mr. Roisman, on relevance? I don't
11 understand why we're looking at all these kinds of
12 documents when the petitioner signed MOUs and now they
13 don't like the provision of the MOUs, so they're trying
14 to go after something that's completely moot about
15 methodologies and all of this other jazz about the rare
16 species and how they're calculated and all this. I
17 simply do not understand why this inquiry is even
18 happening. It is completely irrelevant. They are in
19 violation of their promises under an MOU, and that is
20 what is relevant here.

21 CHAIRMAN ROISMAN: All right. Mr. Melone, we
22 do seem to be getting very, very far afield. As to
23 this simple question, I think we now have been told
24 what the date of this document was, and you heard Mr.
25 Einhorn's objection that, since this document described

1 at the very beginning the guidance with regard to
2 petitions under 30 V.S.A. Section 248, why should we be
3 concerned, other than that you wanted to know the date,
4 with any further questioning of Mr. Popp about what's
5 contained in the document that's relevant to issues
6 that are not in front of us?

7 ATTORNEY MELONE: Well, yeah, Mr. Chairman, I
8 first wanted to have him confirm that the timeframe
9 when he developed the 10 percent threshold was this
10 date or around this date. Second --

11 CHAIRMAN ROISMAN: And you have that now,
12 correct?

13 ATTORNEY MELONE: Correct. Second, the, so
14 I'm having a difficult time understanding how this
15 proceeding that ANR is claiming that we're engaging in
16 site preparation for an electric generation facility
17 under Section 248 but yet, at the same time, saying
18 anything related to Section 248 is not relevant to
19 hear. It just seems inconsistent to me. I mean, I
20 understand why they don't want to have to address their
21 guidance document here from a substance perspective,
22 but I think the argument's inconsistent, because,
23 otherwise, where is the jurisdiction if it's not --

24 CHAIRMAN ROISMAN: Well, it sounds like a
25 good legal argument that you will be making in your

1 brief, Mr. Melone. What I'm trying to figure out is
2 why we're spending a lot of time talking about this.
3 Ms. Dingleline?

4 ATTORNEY DINGLELINE: I just wanted to add.
5 The time for Mr. Melone to have asked these questions
6 and to challenge the methodology was before he signed
7 the MOU. There is a contract. He had obligations. He
8 has breached them. That's what this should be about,
9 not whether ANR, any of this methodology stuff. This
10 has no bearing on it. It is irrelevant. Did they or
11 did they not engage in site activities that violated
12 their MOU?

13 ATTORNEY MELONE: All right. So I would just
14 like to briefly address that. We've heard testimony
15 earlier today from Jim McClammer that we did not
16 violate the MOU, even by this proposed clearing, and,
17 secondly, the fact that we were willing to sign MOUs
18 with ANR to get their support does not mean that, well,
19 in this proceeding, which is totally different, we
20 can't challenge that.

21 I mean, clearly, the argument we made to the
22 Superior Court and the United States Supreme Court has
23 acknowledged in its almost identical circumstances that
24 the Agency has a coercive effect. They basically say,
25 Unless you play ball with us and abide by these rules,

1 whether or not they're valid or not, we're going to
2 give you a hard time. So the fact that we did it,
3 okay, that's, that's fine, but now we're having gone
4 way beyond that in trying to, to stop valid activities
5 that are unconnected to 248. That's the difference.

6 CHAIRMAN ROISMAN: That still doesn't
7 explain, Mr. Melone, why we're going into all these
8 questions about whether or not a guidance document
9 related to 248 is supportable or not supportable by
10 ANR. We're not here -- this case is not about whether
11 or not ANR is doing its job. This case is about
12 whether or not construction has taken place on a site
13 for which a CPG application has been filed in violation
14 of the provisions of the statute and the regulations of
15 the Public Utility Commission. That's the issue. I'd
16 like you to stay focused on that. I mean, it's getting
17 late. We want to finish this today. I'm just not sure
18 where you're headed with this that it's going to
19 advance the record that we need to have made in order
20 to decide the question in front of us.

21 ATTORNEY MELONE: Well, so you're right
22 there, but there are two separate legal determinations.
23 One is whether or not there's been site preparation for
24 an electric generation facility. The second one,
25 though, is the criteria for an injunction. That, that

1 goes beyond just whether you conclude that site
2 preparation for an electric generation facility has
3 occurred. There has to be irreparable harm. And what
4 I'm trying to get at by questioning Mr. Popp about the
5 10 percent threshold, that's what he says is the
6 threshold for irreparable harm. So I would like to at
7 least ask him, apart from the guidance document, where
8 that 10 percent came from. Is it based on any
9 scientific evidence?

10 CHAIRMAN ROISMAN: And I, I'm not -- I
11 thought he had answered that, but ask him that
12 question, and let's see what his answer is.

13 BY ATTORNEY MELONE:

14 Q. Okay. Mr. Popp, how did you develop the 10
15 percent threshold and on what scientific basis was that
16 developed?

17 A. It was done collectively by members of the Flora
18 Advisory Group, and then it was discussed within the
19 Agency Planning Department Division, and they accepted
20 it and then, ultimately, with our Commissioner, but the
21 groundwork was done by the Flora Advisory Group, which
22 is a scientific subcommittee of the Endangered Species
23 Committee, and I queried a number of people there. We
24 discussed it at a meeting, and we decided on 10
25 percent. You know, it's, I think -- yeah, that's, the

1 Commissioner and the Agency accepted that as
2 reasonable.

3 Q. All right. So my question was, What was the
4 scientific evidence that supports the 10 percent? Were
5 there any studies of any kind that it was based on?

6 A. We looked into, you know, some population studies
7 of plants declining, like how much, especially with,
8 like, seed removal, but also, you know, removal of
9 plants, and, you know, not a lot has been done, as you
10 can imagine, with removing individuals of endangered
11 species, just because of the very nature that, you
12 know, they're rare species, and you don't kind of mess
13 with them. So there's really nothing absolutely
14 relevant. You know, it's, most of the removal studies
15 have been done with more common species.

16 But, yeah, we did look into some literature, and,
17 and we actually looked at what other states do, and,
18 yeah, it was -- and I just want to add it was done more
19 than four years ago. That's when it finally got
20 accepted and approved by our Commissioner, and those of
21 you who work in the State know that there's a bit of
22 bureaucracy and until things get up to the higher
23 levels and get looked at and get approved takes a
24 while. So this was actually discussed two or three
25 years prior to that date. More than discussed, it was

1 determined that, you know, those were going to be the
2 thresholds we would use.

3 CHAIRMAN ROISMAN: All right. Mr. Melone,
4 unless you have only one or two more questions, I think
5 we should take a break now. Do you have one or two
6 more questions, or is it more than that?

7 ATTORNEY MELONE: I can't say it would only
8 be one or two. So I'm fine taking a break right now.

9 CHAIRMAN ROISMAN: All right. Let's take a
10 break, and we'll get back together again at 3:45.

11 (A recess was taken from 3:33 p.m. to 3:45 p.m.)

12 CHAIRMAN ROISMAN: All right. Are we all
13 back? Mr. Melone?

14 ATTORNEY MELONE: Thank you, Mr. Chairman.

15 BY ATTORNEY MELONE:

16 Q. Mr. Popp, do you consider Route 7 to be an
17 isolating barrier between the Apple Hill and Chelsea
18 population on the one hand and the Warner and Battle
19 Creek populations on the other?

20 ATTORNEY DINGLELINE: Objection, relevance.

21 ATTORNEY EINHORN: It's been asked and
22 answered.

23 CHAIRMAN ROISMAN: I think they're right, Mr.
24 Melone.

25 ATTORNEY MELONE: I don't think he actually

1 answered that question.

2 CHAIRMAN ROISMAN: Mr. Popp, is it a barrier
3 or not?

4 MR. POPP: It is.

5 CHAIRMAN ROISMAN: All right, Mr. Melone.

6 BY ATTORNEY MELONE:

7 Q. Okay. So then on what basis do you conclude that
8 it's a barrier?

9 A. It's a completely different habitat. Our
10 guidelines are one kilometer or a barrier that's -- in
11 other words, if there was similar habitat that was
12 continuous, then it wouldn't constitute a barrier. I
13 think an interstate highway is a very different habitat
14 than a regenerating old field.

15 Q. Okay, that's fine. So, just so I understand, you
16 look at the, the roadway itself not being consistent
17 with the land on each side? Is that how you're looking
18 at it?

19 A. There is no potential whatsoever for any kind of
20 colonization by the aster in that intervening area,
21 because it's concrete, and there, and the road sides
22 are mowed. So there's no possibility of plants, a
23 population starting in between the two existing
24 populations. That's what we mean by a barrier. If
25 the, if the habitat was contiguous, there might be some

1 potential, in which case -- I'll stop there.

2 Q. So would that mean that a regular paved street, a
3 two-lane road, is an isolating barrier as well?

4 A. No. It's got to be of a certain size.

5 Q. Okay. So, so that's my question. What standard
6 is there for the size?

7 A. I mean, I guess we don't have a, a definition in
8 writing. I mean, a four- or six-lane highway is pretty
9 substantially different than a sidewalk or a logging
10 road or even a regular road. Anybody would, would, I
11 think anybody would, would agree to that.

12 Q. Right, right. I would agree with that too. I'm
13 just saying, how do you determine where the line is?

14 A. An interstate's a barrier. A single town road is
15 not or, yeah, wouldn't likely be.

16 Q. And that's because of the width?

17 A. The width and also the use, but, yeah, mostly the
18 width. Interstates are, you know, not only are they
19 wide, but the, the medians are mowed constantly or
20 regularly. So it's unlikely that any rare plant would
21 get established in the median. So it's not just the
22 concrete, it's the whole cleared area that's the
23 barrier.

24 Q. Okay. But, but it's correct to say that there's
25 no specific standard anywhere that you're basing this

1 on?

2 A. There may be, but I don't, I'm not aware of any
3 off the top of my head.

4 ATTORNEY MELONE: Okay, all right. Thank
5 you, Mr. Popp. Mr. Chairman, that concludes my
6 questions.

7 CHAIRMAN ROISMAN: Okay. Ms. Aceves, do you
8 have any questions for Mr. Popp?

9 ATTORNEY ACEVES: I do not.

10 CHAIRMAN ROISMAN: Okay. Ms. Dingleline?

11 ATTORNEY DINGLELINE: No, thank you, Your
12 Honor.

13 CHAIRMAN ROISMAN: Did you say "yes" or "no"?
14 I'm sorry.

15 ATTORNEY DINGLELINE: I beg your pardon. I
16 didn't mean to interrupt. I don't have any questions.
17 Thank you.

18 CHAIRMAN ROISMAN: Okay. Thank you.
19 Commissioner Hofmann, any questions for Mr. Popp?

20 COMMISSIONER HOFMANN: No, I don't. Thank
21 you, Mr. Chairman.

22 CHAIRMAN ROISMAN: Commissioner Cheney?

23 COMMISSIONER CHENEY: Neither do I. Thank
24 you.

25 CHAIRMAN ROISMAN: Mr. Landis-Marinello, any

1 questions for Mr. Popp?

2 MR. LANDIS-MARINELLO: No, I do not. Thanks.

3 CHAIRMAN ROISMAN: Mr. Tousley, any questions
4 for Mr. Popp?

5 MR. TOUSLEY: I do not. Thank you.

6 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, do you
7 have any redirect questions for your witness?

8 ATTORNEY EINHORN: I do, Mr. Chairman, very
9 limited.

10 REDIRECT EXAMINATION BY ATTORNEY EINHORN

11 Q. Mr. Popp, Mr. Melone asked you a number of
12 questions focused around the percentage of plants
13 impacted for, as you explained it, understanding damage
14 to plants from a biological perspective, whether the
15 percent, if you would, of impact is 10 percent or 20
16 percent or some other percentage. Do you remember
17 that?

18 A. Yes, I do.

19 Q. And, when you were talking about the damage from a
20 biological perspective based on the percent of plants
21 impacted, you were, were you talking about damage to
22 the population, or were you talking about damage to the
23 individual plant which has been harmed or damaged?

24 A. It was certainly intended to be damage towards the
25 population. Our thought is the population could

1 withstand that limit of, of impact. Obviously, if, if
2 you impact an individual plant, that plant is, is, you
3 know, is then, is done for if it's destroyed.

4 Q. Okay. Or, if it's a number of plants, it's that
5 number of plants, whether --

6 A. Correct.

7 Q. -- it's above or below 10 percent of the
8 population?

9 A. Right.

10 Q. And Mr. Melone, I shared my screen, if you
11 remember. He discussed the Apple Hill monitoring
12 report with you that showed some asters that were not
13 transplanted. Do you recall that?

14 A. I do.

15 Q. And, again, that was kind of within the
16 questioning of percent of the overall population, and I
17 think there was some discussion about, well, we really
18 don't know. We would need additional information from
19 Arrowwood Environmental to determine how many asters
20 are out there entirely, how many have been moved, how
21 many are still where they originally were and, in
22 effect, in harm's way. Do you remember that?

23 A. I do.

24 Q. Okay. So the plants that those blue polygons that
25 we've talked about that weren't surrounded by the

1 little pink circles, those plants that you said would
2 be destroyed, you don't know the exact number, as we
3 sit here today, of those plants, do you?

4 A. That's correct. We know it's more than 110.

5 Q. Okay.

6 A. Because Arrowwood provided some numbers, but not
7 all of the numbers.

8 Q. Okay.

9 A. There's some numbers that were unlabeled.

10 Q. Okay. So more than 110 based on the information
11 provided from Arrowwood, but it could be more?

12 A. Yes, it would be more, because there's some, as I
13 said, unlabeled polygons that would be destroyed.

14 Q. I understand. And, and a polygon here, it could
15 be --

16 A. Yeah.

17 Q. -- it could be 1 plant, it could be 10 plants, it
18 could be 50 plants in a, in a single polygon that we
19 see here?

20 A. Correct. We have no way of knowing.

21 Q. Okay. Are the asters the only plants that are
22 considered rare or very rare on this site that are also
23 in harm's way as we sit here today?

24 A. Well, no. The nimbwill is considered rare also.

25 Q. And do we know -- again, he, Mr. Melone, made

1 reference to the polygons in yellow of the nimblewill,
2 and he suggested he was going to ask you about that,
3 but I don't recall him coming back to that, but he did
4 bring it up, and I just want to understand from you.

5 Do we have any idea, based on the Arrowwood
6 reports, or do you have any idea about how many plants
7 are, are still in locations where Arrowwood observed
8 them and those same locations are locations that are
9 proposed to be cleared?

10 A. The best estimate we have is what I told Mr.
11 Melone, that Arrowwood's report said Site A and Site B
12 have many hundreds of plants, and their guess or
13 estimate was about 10 percent of those got moved. So,
14 I, I mean, we have to interpret what many hundreds
15 means, but you can all do the math as well as I can.
16 So it's, it's vague, but there's a lot of plants left
17 on site. I guess that's the bottom line.

18 Q. So the equation would be X representing the number
19 of plants left on site right now in harm's way of
20 clearing, times Y, which is .9, equals how many plants?

21 A. Right. Yeah. So 90 percent of the plants in A
22 and B are still there, and I guess all of D is still
23 there as well.

24 ATTORNEY EINHORN: But D, I believe -- okay,
25 yeah. That's, that's all that I have. Thank you.

1 CHAIRMAN ROISMAN: Okay. Anybody who has
2 asked questions previously have any follow-up questions
3 now after the redirect? Mr. Melone?

4 ATTORNEY MELONE: Thank you, Mr. Chairman.

5 RECROSS-EXAMINATION BY ATTORNEY MELONE

6 Q. Mr. Popp, you just testified that you think that
7 there are a minimum of 110 --

8 CHAIRMAN ROISMAN: Mr. Melone, put your
9 microphone up close to your mouth, please.

10 BY ATTORNEY MELONE:

11 Q. I apologize for that. Mr. Popp, you just
12 testified that you believe that there is at least 110
13 plants in the area or represented by the blue, blue
14 circles that don't have any pink. One of your
15 exhibits, ANR-11, it's the 2017 Apple Hill plant
16 report, and Page 33 actually does give a specific
17 number and, and just a quick calculation doesn't make
18 it seem anywhere near 110. So I'm just wondering where
19 you got the 110 number from.

20 A. Can you put that up? I'm not familiar with that
21 number that you just put out there. And then I'll
22 answer your question.

23 ATTORNEY MELONE: Don, do you have that?
24 It's Exhibit ANR-11.

25 CHAIRMAN ROISMAN: Mr. Einhorn, you're on

1 mute.

2 ATTORNEY EINHORN: I'm sorry. Thank you.
3 Mr. Melone, you're looking for Exhibit Number 11 that
4 we filed last week?

5 ATTORNEY MELONE: That's correct.

6 ATTORNEY EINHORN: Yes, I, I have it up on my
7 screen. If I can share my screen, then we will have
8 it.

9 MS. BISHOP: Mr. Einhorn, you're still the
10 presenter. So, if you just move your mouse on the
11 bottom when you see the circles, the second from the
12 right will be screen, and, if you just click on that,
13 you'll share your screen again.

14 ATTORNEY EINHORN: Okay. And I think we have
15 it now. And what page was that?

16 ATTORNEY MELONE: We can go to Page 32. It's
17 actually on both Page 32 and 33. I think it's --

18 ATTORNEY EINHORN: Let's try that. 32, 33.
19 I got it.

20 ATTORNEY MELONE: Okay. So you might have to
21 zoom in a little bit to actually see the numbers and
22 not, that are depicted in those circles.

23 CHAIRMAN ROISMAN: Mr. Melone, which circles
24 are you asking the Witness to focus on, the pink ones
25 or the yellow?

1 ATTORNEY MELONE: The pink ones that are at
2 the southern end of the property that are outside the
3 that green border.

4 CHAIRMAN ROISMAN: Oh, okay.

5 (Exhibit ANR-11 was shown to the Witness.)

6

7 <https://epsb.vermont.gov/?q=downloadfile/440863/150086>

8

9 BY ATTORNEY MELONE:

10 Q. So, kind of looking left to right, there's one
11 that has the number 7. Another one has the number 35.
12 Another one has 9. Another one's 6. So it was my
13 intention to ask for some further information from
14 Arrowwood just to confirm that these numbers represent
15 numbers of plants, but that's the way I read these.

16 So, Mr. Popp, I'm wondering where you get the 110
17 number from.

18 A. I added up all those numbers, and that's what I
19 came up with. I believe there were -- just give me one
20 moment here. Okay. I found a total of 14 polygons
21 outside of the array where plants were not moved. 12
22 of them had numbers. There were 2 additional polygons
23 that were added in the 2019 report without numbers. I
24 added the numbers up in those 12 polygons and came to
25 110, plus the 2 polygons that were unlabeled, and

1 that's why I said 110-plus. So one, two, three, four,
2 five, six, seven, eight, nine, ten, eleven. I still
3 count twelve polygons there. Somebody can check my
4 math if they would like.

5 Q. And you're saying that those are all in the, in
6 the clearing area? I'll get that plan.

7 A. Yeah. So it's, it's -- yeah, you have to overlay
8 them. It's approximate, but it's the best we can do.

9 CHAIRMAN ROISMAN: And, just so we're clear,
10 Mr. Popp, the ones you counted are the ones that are
11 not inside any of the green borders; is that correct,
12 not inside the red border?

13 MR. POPP: That is correct. Oh, you can't
14 see my cursor. I could show you the 12 that I counted,
15 but you could probably figure that out.

16 CHAIRMAN ROISMAN: Yes, I can see them.

17 BY ATTORNEY MELONE:

18 Q. Now, so the, the, at least the way when I -- so
19 are you counting the 10 and the 20 at the very bottom
20 of the screen?

21 A. I did.

22 Q. But, if you pick up the clearing plan that was
23 attached to Kobelia's testimony, the clearing plan goes
24 straight across from the southern border of the, of the
25 conservation, which would exclude the 10 and the 20,

1 because I think that that's not, that's not on the
2 landowner's property.

3 CHAIRMAN ROISMAN: Mr. Melone, are you asking
4 a question, or are you making a statement?

5 MR. POPP: I can respond to that.

6 CHAIRMAN ROISMAN: Let him answer. Go ahead,
7 Mr. Popp.

8 MR. POPP: I was going to say or ask Mr.
9 Melone, Are those plants flagged? We know from Mr.
10 Kobelia he's bringing heavy equipment in, bulldozers.
11 It looks like Polygon 20 is right adjacent to the road,
12 and you're bringing in heavy equipment on a, on an old
13 logging road. I've had numerous, a lot of experience
14 where roadside plants get totally crushed by heavy
15 equipment. So, unless those plants are flagged and
16 fenced, and fenced, not just flagged, they're not,
17 they're in jeopardy. We've had plants on construction
18 sites that were flagged and fenced with construction
19 fencing, and they were still bulldozed. So, yeah,
20 they're in jeopardy.

21 BY ATTORNEY MELONE:

22 Q. Okay. So you would think, since the clearing plan
23 doesn't contemplate clearing the 10 and the 20, that,
24 that all that would need to be done is to fence them
25 off; is that correct?

1 A. Well, fence off those two or all of them, are you
2 proposing?

3 Q. Well, yeah. I was just talking about the two that
4 are not on --

5 A. Well, if you can fence those, that would protect
6 those two, and then, remember, there's two others that
7 are not shown on this plan, because they were only
8 discovered in 2019. If you go to the 2019 plan and
9 compare it with this one, you'll see two additional
10 circles.

11 Q. Two additional circles? Well, yeah, I see one,
12 but I don't see a second one.

13 A. There's one on the west side of Willow Road just
14 up to the uncleared area, and then there's one at the
15 southwest corner of the array, just outside the green
16 line, that are not depicted on the earlier plan.

17 Q. All right. Yeah. So, so you don't have those,
18 those numbers?

19 A. That is correct.

20 Q. So, again, you couldn't tell, until you get that
21 number, whether, where things sat with the 10 percent
22 threshold; is that correct?

23 A. That would be correct.

24 ATTORNEY MELONE: Okay. That, that ends my
25 questioning, Mr. Chairman.

1 CHAIRMAN ROISMAN: Okay. Any additional
2 questions based upon responses to Mr. Melone's recross?

3 ATTORNEY EINHORN: Yes, I do.

4 REDIRECT EXAMINATION BY ATTORNEY EINHORN

5 Q. While we're looking at this ANR Exhibit 14, which
6 is the 2019 plant report for Apple Hill on which the
7 two new polygons appeared, Mr. Popp, I want to direct
8 your attention to the three polygons directly to the
9 west of the conservation area and sort of in the lower
10 part of that triangle between the Willow Road
11 extension, the conservation area, and the solar array.
12 Do you see those?

13 A. I do.

14 Q. I'm going to bring up the Exhibit RK-2, which was
15 filed yesterday, depicting the site work that Mr.
16 Kobelia has performed, and did you hear him testify
17 earlier today?

18 (Exhibit AH-RK-2 was shown to the Witness.)

19
20 <https://epsb.vermont.gov/?q=downloadfile/441501/150086>

21

22 A. I did.

23 Q. And I want to ask you if you've had an opportunity
24 to review what he has done according to this plan and
25 what he described in his testimony today and compare

1 that to the 2019 plan we were just talking about, and,
2 if, if you have had that opportunity, do you have any
3 conclusion with regard to the status of those three
4 polygons?

5 A. The plants in those three polygons are destroyed
6 as depicted on the, the site-clearing plan. They're,
7 they're certainly within that, that rectangle, and it's
8 possible the two, there's two other polygons to the
9 north that may be -- they're kind of on the edge --
10 that might be included in the clearing area.

11 Q. And, just adjacent to and to the north of that
12 conservation area, there's the cleared area that
13 continues, it kind of runs along it from east to west
14 or west to east, and Mr. Kobelia described that, I
15 believe, this morning as approximately ten feet wide.
16 Do you see that?

17 A. I'm sorry. You're talking about the, along the
18 northern boundary of the conservation area?

19 Q. Yes.

20 A. Yeah, I do.

21 Q. And are there any nimblewill in that area as
22 depicted by --

23 A. Yeah. Well, it cuts right across a swath of
24 nimblewill that Arrowwood left in place, because it was
25 outside the proposed solar array.

1 Q. What's your conclusion with regard to the plants
2 that were in that swath of clearing?

3 A. They'd be destroyed as well.

4 ATTORNEY EINHORN: Okay, thank you. I don't
5 have any further questions.

6 CHAIRMAN ROISMAN: Any additional questions
7 from anyone? Mr. Popp, thank you very much.

8 MR. POPP: You're welcome. Thank you.

9 CHAIRMAN ROISMAN: Mr. Einhorn, do you have
10 any additional witnesses?

11 ATTORNEY EINHORN: I do not.

12 CHAIRMAN ROISMAN: Ms. Aceves, I believe you
13 previously said you had no witnesses. Has anything
14 changed?

15 ATTORNEY ACEVES: No, we have no witnesses.

16 CHAIRMAN ROISMAN: Okay. Unless I'm having a
17 senior moment here, it looks like the evidentiary
18 portion of the hearing is concluded and we can go to
19 ten-minute closing statements. Does anybody have
20 anything that we need to address at this point with
21 regard to the evidentiary portion of the hearing that's
22 not going to be covered in your ten minutes?

23 ATTORNEY DINGLEDINE: Mr. Roisman, this is
24 Brooke Dingledine. In terms of any emails or text
25 messages between the Melone entities and Mr. Kobelia,

1 we'd like to try to get those before the briefs are
2 due.

3 CHAIRMAN ROISMAN: Okay. I think, Mr.
4 Melone, you had indicated that, or maybe Mr. Kobelia
5 had indicated that we could probably get those by
6 Monday, and, unless I'm very mistaken, I doubt that
7 anybody is going to propose briefing by Monday.

8 ATTORNEY MELONE: That's correct.

9 CHAIRMAN ROISMAN: Okay. And, by the way,
10 once they're produced, can we get any agreement at this
11 point that they will be admitted into evidence, or is
12 that something that everyone wants to reserve on? We
13 can always do it by emails if people want to look at
14 them before they say, yes, put them in or don't put
15 them in, but any, any thoughts on that from anybody?

16 ATTORNEY MELONE: We would like to reserve.

17 CHAIRMAN ROISMAN: Okay, all right. So
18 they'll get produced. If anybody, after they're
19 produced, wants to have them made as an exhibit, file
20 something in ePUC that requests that they be made an
21 exhibit. We'll use a quick, 24-hour turnaround time
22 for anybody who has an objection, and then we'll either
23 admit them or not admit them as the case may be.

24 ATTORNEY DINGLELINE: Mr. Roisman, may I ask
25 that the production be pursuant to an interrogatory and

1 request to produce that has to be responded to under
2 oath so that there's a very clear written record as to
3 what is being requested to be produced so there is no
4 misunderstanding of that end and Mr. Melone answer
5 under oath that those are the only materials that, once
6 he produces them, in response to that?

7 CHAIRMAN ROISMAN: If, Ms. Dingledine, if
8 you'll file before the end of the day today in ePUC
9 that request, then, Mr. Melone, when you respond, you
10 can respond to the request including, if you so choose,
11 any objection you have to whatever Ms. Dingledine has
12 asked for, and we'll receive it in that format, and
13 we'll take both the questions and the answers as being
14 filed in ePUC. I know it's been our practice that
15 often in hearings responses to the requests are not
16 themselves filed in ePUC, but, in this case, we will
17 have it filed in ePUC. Okay? And, Mr. Melone, please,
18 if you are not going to be able to produce by noon on
19 Monday, will you just send a note around to everyone,
20 again, through ePUC indicating when you're going to
21 produce?

22 ATTORNEY MELONE: Yes, I will, Mr. Chairman.

23 CHAIRMAN ROISMAN: Great, thank you. All
24 right. So, Mr. Melone, you have ten minutes.

25 ATTORNEY MELONE: Thank you, Mr. Chairman.

1 Thank you to you and the other Commissioners for
2 spending the time today. So you asked as part of
3 closing, I think, whether we think any further process
4 is needed. I think the answer to that is "yes", to a
5 small extent. That is that I think we need to produce
6 the actual numbers of the unknown polygons, because,
7 without that, I don't see how there is an evidentiary
8 basis to calculate whether there's irreparable harm or
9 not, even under ANR's purview.

10 We also have served discovery on ANR, which we
11 would like to be responded to, and Mr. Popp earlier
12 today in determining, or referenced studies on which
13 his, his 10 percent threshold is based. We would like
14 ANR to produce those studies.

15 So the, the two issues here are whether site
16 preparation for construction of an electric generation
17 facility is taking place or would take place based on,
18 on the proposed clearing for the farm use, and our view
19 is we've sent our, and our view is that this is site
20 preparation for the farming activities. It is not site
21 preparation for an electric generation facility. To
22 conclude otherwise requires the Commission to do a
23 180-degree turn from every other one of its rulings on
24 what constitutes site preparation for an electric
25 generation facility, and we cite those, those decisions

1 in our, in our memo or my testimony as well.

2 And, even if it, if there were site preparation
3 for an electric generation facility, that still doesn't
4 mean, from a legal perspective, that an injunction is
5 appropriate. There has to be irreparable harm from the
6 site-clearing activities, and we don't believe there's
7 any irreparable harm. Mr. Popp has testified that
8 there's no irreparable harm if the 10 percent threshold
9 is not reached, and we think the evidence will support
10 that the 10 percent threshold is not reached, so that
11 there's no basis for the temporary or the injunction of
12 any kind.

13 We, we continue to sufferer irreparable harm by
14 not being able to engage in those activities, and, even
15 if the Commission continues some type of injunction,
16 what we've heard from Mr. Popp today, it should be
17 limited to just the southern end of the Apple Hill or
18 the southern end of the 27-acre parcel, because that's
19 the only area where there are plants that have not been
20 transplanted. There's no, there's no basis to expand
21 it beyond where, where there are no plants that have
22 not been transplanted.

23 So that's all I have to say. Thank you again for
24 the time today.

25 CHAIRMAN ROISMAN: Okay. Thank you, Mr.

1 Melone. Mr. Einhorn?

2 ATTORNEY EINHORN: Thank you, Mr. Chairman.

3 At the outset, I said this is really a simple exercise
4 today, or I thought it would be, anyway, despite the
5 fact that we've spent a fair number of hours on it, and
6 that is, Is site clearing which is prohibited by
7 Section 248 occurring, or has it even occurred? It
8 appears that it has, and it appears that it will
9 continue to occur if there is no injunction. And will
10 that result in irreparable harm?

11 So, to test the factors as we know, is there
12 exists a threat of irreparable harm? Yes, there
13 clearly is. Percentages aside, which really are
14 dealing with the total plant population, as Mr. Popp
15 testified, there are rare plants, and a significant
16 number of those at that, that are at risk of being
17 destroyed by the clearing. In fact, it appears as
18 though there have been plants of both species that have
19 been destroyed. In that regard, discussing, even if we
20 were to use a 10 percent number, Mr. Popp said that 90
21 percent of the nimblewill population, which amounts to
22 hundreds of plants, are, in fact, in harm's way.

23 So another thing that hasn't been discussed here
24 is, even if there were no rare plants on this site,
25 it's a forested site. Those trees would be cleared,

1 and those trees would be effectively destroyed. Trees
2 do grow back, but they don't grow back when they are
3 cut down for purposes of land conversion, which is what
4 we're dealing with here, and, essentially, those are
5 the types of projects that the Commission reviews and
6 approves in Section 248, land conversion projects to
7 convert a parcel to a generation facility or a
8 transmission facility.

9 That's what's being proposed here. So the
10 clearing of the trees is for land conversion. It's not
11 for silviculture or forestry activities, and, in that
12 respect, those trees will also be gone, and they can't
13 be put back immediately when they're gone, and these
14 activities would be occurring without a permit to do
15 it, because the parcel is still under the Commission's
16 jurisdiction, because we still have solar facilities
17 being pursued there under Section 248.

18 Does the irreparable harm outweigh the potential
19 harm to the developer? I believe it does. The threat
20 is certainly definite if the clearing proceeds. We
21 know it. It's probably started to occur already. The
22 developer's harm is, seems like the potential for harm
23 there is still somewhat speculative. This
24 horticultural plan, it was hatched recently. I think
25 these projects go back to 2014, at least, when we talk

1 about the standard offer contract. So the developer
2 still has the ability to go through the approval
3 process for these projects. That's in front of the
4 Supreme Court now. Who knows where that will go? It
5 hasn't been exhausted.

6 The likelihood of success on the merits, I think
7 there's a very high likelihood of success on the
8 merits, because Section 248 is very clear in that site
9 clearing is prohibited without a certificate of public
10 good. It's also very clear that there are natural
11 resources that will be destroyed as a result of site
12 clearing, and the injunctive relief is certainly in the
13 public's interest.

14 The public has a very, very high interest in the
15 integrity of the 248 process, and that is what is, not
16 to belittle the natural resources that exist at this
17 site, but I think the integrity of the 248 process is
18 probably foremost in this instance here, especially
19 given the history of, of these projects and how we've
20 gotten to the point where we've gotten now. Obviously,
21 preventing harm to natural resources is also in the
22 public's interest.

23 I, I also will raise the issue, because I think,
24 Chairman Roisman, you, you, if you didn't mention it
25 today, I think I may have seen it in the order, is that

1 permanent injunction or temporary injunction, and then,
2 I guess, that also overlaps with, Is further process
3 needed? Clearly, further process is not needed at this
4 time for a temporary injunction, and I would say that
5 it really doesn't matter whether it's called a
6 temporary or a permanent, although I don't see any need
7 to call it permanent, because the duration of either,
8 it runs with the underlying proposals to develop energy
9 generation at this property.

10 Once those projects are either approved by the
11 Commission, then there's no need for an injunction, and
12 it dissolves by itself. If those projects are denied,
13 if the appeals are denied and they're over and they're
14 done and there's no longer a project being proposed,
15 then the injunction goes away as well, because,
16 effectively, the Commission's jurisdiction will go away
17 at that point.

18 If CPGs are granted, the Commission will retain
19 jurisdiction to enforce conditions of those CPGs, but
20 that's a different matter. So I think, you know, as to
21 preliminary or permanent, I think the duration ends up
22 being the same in this case. I think a preliminary is
23 fine at this point. I think we meet the standard for a
24 preliminary injunction, and, for that reason, I don't
25 think there's the need for any further process.

1 I, we got discovery served on us on the eve of
2 Thanksgiving, I think, at 6:30 at night, expecting
3 answers by the following Wednesday, far beyond the pale
4 of the civil rules, but, also, most of them, as my
5 quick review of the questions, are really irrelevant to
6 the issues at hand today, and I think we, we dealt with
7 those, that those are in the, several times in the
8 course of the, of the proceeding today. To the extent
9 that that discovery is out there, I think most of it is
10 irrelevant. If we were to have to respond to it, we
11 would obviously need 30 days to deal with that. Thank
12 you.

13 CHAIRMAN ROISMAN: Okay. Ms. Dingleline?

14 ATTORNEY DINGLELINE: Thank you, Your Honor.
15 Let me just follow up, first of all, by, on the
16 discovery issue, that, supposedly, a party in this
17 proceeding has served discovery on ANR. Such is not
18 the case. Apparently, Michael Melone took a set of
19 discovery requests from another case, changed the
20 caption, and forgot to change who was asking the
21 questions. So Otter Creek Solar, LLC has asked some
22 discovery questions of ANR with this case's caption on
23 it. They're not a party in interest, so I don't
24 believe there are any discovery requests pending right
25 now that have been served on ANR, at least by any

1 entity that has any relationship to this, to either of
2 these cases or this investigation.

3 We also would like to point out we think it was a
4 terribly abusive use of discovery. We would like to
5 mention to the Court and remind everybody about the
6 timeline here. We had a June 26 TRO hearing. The next
7 day a written, or that evening a written order issued.
8 Mr. Melone doesn't follow written orders. He was told
9 verbally and then received the written order that he
10 was to make sure all of his contractors and anyone
11 associated with his companies were notified and that
12 they would respond and follow any TRO that was issued
13 by the PUC.

14 That didn't happen. Mr. Melone did not contact,
15 to the best that we can tell so far, the contractor,
16 Mr. Kobelia. Obviously, it was expected. Mr. Melone
17 was told verbally during the daytime that there would
18 be a TRO issuing. So the, the concern that the
19 Intervenors have besides the next issue I'll get to in
20 just a moment, but that we seem to be in a situation
21 where all of the rules continue to be flouted, not
22 followed.

23 There are agreements that are entered into, for
24 example, the MOU. Now we're hearing, even though
25 someone was authorized to enter into that agreement,

1 that somehow they were coerced into signing it now.
2 There was a settlement agreement with the Town. Now we
3 -- I don't understand why it was even signed if they're
4 not going to abide by it. To suggest that now changing
5 the use of this property to agricultural or
6 horticultural instead of a solar array, how can that
7 not violate that, that rule?

8 The credibility of the petitioner is, the
9 positions that are being taken here just strain
10 credulity. You are now facing a, a petitioner who
11 flouts your denial of his amendment and has testified
12 that he plans to go forward, regardless of what you
13 said about his screening. He says that that Lot 1 is
14 not part of the solar array project. Well, I know he
15 has drawn his little, you know, perimeters around the
16 Van Nostrum lands only, and he continually talks about
17 how the project site is only 27 or 28 acres, but, in
18 fact, that isn't true, and just because Mr. Melone says
19 the same thing over and over and writes the same thing
20 over and over does not make it true.

21 Now, in terms of the, the Lot Number 1 not being a
22 part of the project site, we would submit it's a
23 preposterous, unsupportable suggestion, which we think
24 violates Rule 11, and had, if we had the proper timing
25 to be able to serve Mr. Melone a motion under Rule 11

1 to advise him to withdraw his unsupportable legal
2 positions, there isn't enough time to do that, but I
3 think that it is still incumbent upon the PUC to ensure
4 that our rule, Vermont Civil Rules of Procedure, is
5 abided by, that lawyers are held to a standard to do
6 their due diligence, not put in evidence that is
7 incorrect, to, to not make frivolous claims and
8 arguments that cannot be supported through the law.

9 Unfortunately, we don't have the timing to be able
10 to give him the opportunity to revise or to remove
11 those offending positions, but I would ask the PUC to
12 be very cognizant of the pattern and practice here we
13 have of making agreements and breaking them, making,
14 entering into MOUs and then claiming they were coerced,
15 asking for amendments or just declaring that amendments
16 are going to happen and not caring whether the PUC
17 approves or denies them.

18 This is an abuse of this process, and we have been
19 dragged through this situation for years and years. It
20 is time for the PUC to stand up to this gentleman and
21 say, What you're doing is wrong, and the mantra, "It's
22 easier to ask for forgiveness than to ask for
23 permission", is not the way that the PUC does business.
24 Please institute an injunction that stops any site
25 preparation, including any cutting of the orchard

1 trees. Whether they produce great apples or not,
2 that's not the point. They are part and parcel and
3 proposed as part of the screening that has been
4 represented as being part of the reasonable mitigation.

5 And, as I said in the beginning, one of two things
6 needs to happen here from our perspective. That is, if
7 Mr. Melone isn't going to follow through with his
8 proposed project without the amendment that was denied,
9 then he ought to be on notice that he no longer has a
10 project pending and it's akin to withdrawal.

11 On the other hand, the other approach is the
12 standard offer contract and the petition that was
13 provided under it, if there were material
14 misrepresentations of fact between that proposal and
15 what is on the ground or intended to be on the ground,
16 then, in our opinion, that would be a, a situation
17 where incorrect information formed the basis of the
18 reason why the contract and the permitting would have
19 been allowed, and you can't change tracks now and play
20 a bait and switch.

21 If you asked for "X", you get an answer on whether
22 you get to do "X" or not. You don't get to do "Y"
23 instead. And, if they're going to do that, the
24 underlying contract that allows them to go forward with
25 this, these sites ought to be voided, because the

1 material misrepresentations of fact no longer suffice
2 to be able to allow them to go forward with the altered
3 project that was denied. Thank you very much.

4 CHAIRMAN ROISMAN: Thank you. Ms. Aceves?

5 ATTORNEY ACEVES: Thank you. I just have a
6 few brief comments to add. We believe continuing a
7 preliminary injunction is appropriate here. I agree
8 with the Agency of Natural Resources's assertions
9 regarding the specific criteria that must be met for an
10 injunction, and I just want to add that the main
11 prerequisite to obtaining injunctive relief is a
12 finding that a party is being threatened by some injury
13 for which it has no adequate legal remedy, and we
14 believe the site clearing that has already taken place
15 here has no adequate legal remedy, thus making
16 injunctive relief appropriate.

17 And, as I alluded to further, I would posit that
18 there are larger policy implications at play here.
19 Should the Commission refrain from issuing an
20 injunction and dissolve the TRO, it could create the
21 potential to both undermine the Commission's authority
22 over the solar siting process generally, as well as
23 open the door for abuse of the Section 248 process, and
24 this is because doing so would allow this petitioner
25 and other petitioners to thwart what is a clear

1 requirement under the statute, no site preparation
2 without a CPG, which they could potentially do without
3 repercussions should an injunction not stand. And that
4 is all I have. Thank you.

5 CHAIRMAN ROISMAN: Thank you all very much.
6 A couple of matters that have come up that I think I
7 need to get, we need to get some clarification on. Mr.
8 Melone, you indicated that you feel that we don't, the
9 record's not yet ready for a resolution, because we
10 need the polygon count. If I understand correctly,
11 that is a matter within the, the, the knowledge of your
12 consultant. Is it your intent to have Arrowhead -- or
13 is it Arrowwood? I'm sorry.

14 ATTORNEY MELONE: Arrowwood.

15 CHAIRMAN ROISMAN: Arrowwood file a, a, some
16 kind of a supplemental document that indicates what the
17 count is in the, in the 2019 uncounted polygons? Is
18 That how you figure that could be done?

19 ATTORNEY MELONE: Yes.

20 CHAIRMAN ROISMAN: All right. And when do
21 you expect that to happen?

22 ATTORNEY MELONE: I think we could have it
23 done early next week, depending on what their schedule
24 is.

25 CHAIRMAN ROISMAN: Okay. You also indicated

1 that there were some studies that were referenced by
2 Mr. Popp, I believe, that form the basis, oh, or one of
3 the bases for the development of the 10 percent number.

4 ATTORNEY MELONE: Yes.

5 CHAIRMAN ROISMAN: I think, if you wish to
6 have ANR respond to that, as we've done already on
7 other matters, you should file, ideally before the end
8 of the day today, although, candidly, the day is pretty
9 much done, a request for copies of those. If something
10 more informal will work for you, you might just talk
11 with Mr. Einhorn. If it's just a matter of sending a
12 couple of links that you can have access to and that
13 works for you, I think that's fine.

14 You also indicated you wanted discovery, answers
15 to the discovery. Mr. Einhorn has expressed his belief
16 that the discovery is inappropriate, and I believe Ms.
17 Dingledine has also indicated she thinks it's
18 inappropriate. Mr. Einhorn, I would suggest that, at
19 your earliest convenience just so we don't drag our
20 feet here, you file any objections that you have to the
21 discovery and, at that time, indicate, to the extent
22 that any of the discovery requests are going to be
23 answered, when, when they'll be answered.

24 But, that said, I heard, I think it was, from you,
25 Ms. Dingledine, that the questions that were asked are

1 actually a replica of discovery that was filed in 0516.
2 If that's -- the Warner case. If that's true, then I
3 believe that we already received from, I think it was
4 you, Mr. Melone, this morning, Mr. Popp's responses to
5 discovery that took place in 0516. If all the
6 questions that have been asked in this proceeding have
7 already been answered in 0516, can't we just file those
8 answers? And, if somebody objects to them being
9 included in the record, to the extent they're different
10 than the ones we've already accepted in the record,
11 they can speak up when they're filed.

12 Am I correct, Ms. Dingleline, that, the, the
13 document that was filed here by Mr. Melone or by
14 Michael Melone is an actual replica of the very
15 discovery that was filed in 19-0516; is that correct?

16 ATTORNEY DINGLELINE: Well, Your Honor, I'm
17 not involved in that other docket, so I haven't seen
18 the discovery requests in there, but what I have seen
19 served in this case is the caption of this case, and
20 then it's, you know, it says, Otter Creek Solar, LLC
21 asks the following discovery questions of ANR, and then
22 it is signed by Michael Melone as the lawyer for Otter
23 Creek Solar, LLC. So I assume it's the same.

24 CHAIRMAN ROISMAN: All right. Mr. Melone and
25 Mr. Einhorn, if you could speak to each other on Monday

1 and ascertain whether or not that discovery request has
2 effectively already been answered and can reach some
3 resolution, that would be great. If you can't reach a
4 resolution, file the papers you need to file to bring
5 the issue up for us to decide, and we will decide it.
6 Is that acceptable to both of you, Mr. Einhorn?

7 ATTORNEY EINHORN: That's fine. I'm happy to
8 talk with Mr. Melone on Monday. I don't know if what
9 we were sent on Thanksgiving eve are the same questions
10 that were propounded on us in the Warner project. We
11 did answer two rounds of discovery questions in the
12 Warner project. They're really covering a lot of the
13 topics that Mr. Melone was asking about and that I was
14 objecting to today. And, you know, I can talk with him
15 about that. We may be able to just make this really
16 easy and just move in the responses from the Warner
17 discovery. That said, I would still be objecting to
18 the relevancy.

19 CHAIRMAN ROISMAN: I understand.

20 ATTORNEY EINHORN: But I will discuss that
21 with Mr. Melone if that works for him.

22 CHAIRMAN ROISMAN: Okay. If you guys can
23 work that out, that would be great. The second thing
24 is that on this issue of the standards for the
25 preliminary versus the permanent injunction, I would

1 just ask all the parties, when you file briefs with us,
2 to please look at two cases, City of St. Albans, 2008
3 Vermont 36, and in re: Wood, then a whole lot of other
4 stuff, 2013 Vermont 40, and address what those cases in
5 your filing with regard to the standards applicable to
6 a permanent injunction versus the standards applicable
7 to a preliminary injunction.

8 Now, briefing, have you all had a chance to think
9 about when you think top-side briefs should be due?
10 And I would suggest, in light of Mr. Melone's feeling
11 that the record needs to be completed and we are going
12 to at least wait on the email information coming on
13 Monday, that we set a time "X" days from when all
14 discovery is completed, whatever that may be, rather
15 than try to pick a date certain. Are you all
16 comfortable with doing it that way? If so, does
17 anybody want to start by proposing a first briefing
18 date?

19 ATTORNEY MELONE: I'm comfortable with that
20 approach. We would prefer a shorter timeframe as
21 opposed to a longer one. So we would be prepared to do
22 our brief within two weeks.

23 CHAIRMAN ROISMAN: Two weeks after any
24 outstanding discovery responses have been filed or
25 objections to discovery has been resolved?

1 ATTORNEY MELONE: That's correct.

2 CHAIRMAN ROISMAN: Okay. Mr. Einhorn, how
3 does that work for you, keeping in mind, everyone, that
4 we're at that time of year when two weeks might end up
5 on Christmas Eve.

6 ATTORNEY EINHORN: Right.

7 CHAIRMAN ROISMAN: Putting that aside for the
8 moment.

9 ATTORNEY EINHORN: Yeah. Simply put, it does
10 not work for me. Despite my persistence today by
11 repeatedly saying this is not a 248 application we're
12 reviewing and a CPG proceeding that we're engaged in,
13 my request would be to use the briefing schedule that
14 we normally use in 248 cases, which is 30 days or, I'm
15 sorry, 2 weeks, 4 weeks for initial briefs and 2 weeks
16 for replies.

17 CHAIRMAN ROISMAN: Okay. Before I circle
18 back around to you, Mr. Melone, Ms. Dingledine, what's
19 your thinking on, on a briefing schedule?

20 ATTORNEY DINGLEDINE: My only issue is what
21 date it starts so that I can see where we're at for
22 when it's actually due, but I would tend to agree with
23 Mr. Einhorn. Like, right now, if we had four weeks, we
24 could get the discovery, and that would make me feel a
25 little more comfortable timing-wise if we also say,

1 well, four weeks from today, at least.

2 CHAIRMAN ROISMAN: Well, yeah, that's right.
3 We're proposing, for the moment, and I thought you all
4 were in agreement, that we'll start the days for
5 briefing once we've completed the discovery process.
6 If it ends on Monday, it ends on Monday. If it ends
7 two weeks from Monday, it starts then. Are you all
8 right with that approach, Ms. Dingledine?

9 ATTORNEY DINGLEDINE: Yes, that would be
10 fine. If something comes up, for example, right now,
11 four weeks from now is January. So I think that's
12 fine. It gets us over the holidays. So I wouldn't
13 have any objection.

14 CHAIRMAN ROISMAN: All right. And has Ms.
15 Aceves views on now some competing proposed scheduling?

16 ATTORNEY ACEVES: I think we would prefer
17 four weeks for initial briefs. You know, that would
18 give time for discovery. It would also give time for
19 the transcript to be part of the record, and, just, as
20 state agencies, there's a lot more red tape that we
21 have to deal with, and so more time in that respect
22 would be useful.

23 CHAIRMAN ROISMAN: Okay. Well, thank you for
24 mentioning the transcript. The court reporter is
25 obviously still on. What looks reasonable for you in

1 terms of when a transcript would be available?

2 THE REPORTER: I think the earliest would be
3 the end of next week if that is agreeable for everyone.

4 CHAIRMAN ROISMAN: All right. So let's,
5 let's take that as a given, that there will be no
6 transcript available, realistically, until Monday, a
7 week from this coming Monday. So that's the first time
8 we'd have a transcript available. All right. Mr.
9 Melone, you asked for two weeks. Mr. Einhorn, Ms.
10 Aceves, and Ms. Dingledine asked for four. What do you
11 have to say?

12 ATTORNEY MELONE: I would be fine with four
13 if it ran from today, since I suspect we'll be able to
14 resolve the discovery questions within the next two
15 weeks. So it would put it to January 4th. But, if
16 it's going to be based off when discovery is, is
17 totally resolved, then I think two is appropriate,
18 because everyone knows what the issues are, what the
19 briefing is. So maybe it's two weeks from when the
20 transcript is issued. I think that that would be a
21 reasonable position.

22 CHAIRMAN ROISMAN: All right, okay. Back to
23 you, Mr. Einhorn. Four weeks from today or two weeks
24 from when the transcript is going to be due, which is
25 probably not until a week from today?

1 ATTORNEY EINHORN: It doesn't work. Based on
2 what we've experienced so far in this proceeding, the
3 Agency, assuming for a moment that we may not, Mr.
4 Melone and myself, reach an agreement resolving
5 discovery quickly by filing something that's already
6 been done, the Agency is not interested and frankly not
7 equipped to both engage in what will be a pretty heavy
8 lift responding to discovery or objecting and then
9 resolving all those issues while at the same time
10 briefing this case.

11 CHAIRMAN ROISMAN: All right. Ms.
12 Dingleline, what do you say to Mr. Melone's suggestion,
13 four weeks from today or two weeks from a week from
14 next Monday, basically?

15 ATTORNEY DINGLELINE: Well, I have to say I
16 do have concerns, as ANR does, in terms of this
17 discovery, and I do want to just mention that, you
18 know, discovery was asked for back in the summer
19 instead of having our preliminary injunction hearing,
20 and then, instead of serving discovery, the case was
21 appealed. Under the rules that was improper, and no
22 permission was asked for. So, at this point, you're
23 bending over backwards to give the applicant time for
24 discovery, even though now he's served it under some
25 other entity's name.

1 So I don't want to be in the situation where we're
2 waiting on this discovery stuff and then, all of a
3 sudden, we're jammed up in time because they can't get
4 an agreement about what's going on. So but let me
5 finish by saying, as long as it's in January after the
6 first couple days, I'm okay.

7 CHAIRMAN ROISMAN: Okay. Ms. Aceves?

8 ATTORNEY DINGLEDINE: I beg your pardon. So
9 long as there's sufficient time between when we get
10 everything resolved and when it's due for briefing.

11 CHAIRMAN ROISMAN: Okay. Ms. Aceves?

12 ATTORNEY ACEVES: I guess I would agree with
13 Ms. Dingledine as far as, you know, if it's in January,
14 that we would be amenable to that.

15 CHAIRMAN ROISMAN: Okay. Commissioners
16 Cheney and Hofmann, do you want to talk about this
17 between us and make a decision right now?

18 COMMISSIONER HOFMANN: I think we should. I
19 think we should get on our separate line and talk about
20 it for a minute.

21 CHAIRMAN ROISMAN: Okay. So we're going to
22 put you guys -- we're going to mute.

23 (A recess was taken from 4:52 p.m. to 4:59 p.m.)

24 CHAIRMAN ROISMAN: Okay. I think we've got
25 everybody. Yes? Looks like it. Good. Okay. So

1 we're back on the record. We're going to accept Mr.
2 Melone's suggestion with a tiny variation. Four weeks
3 from today would be the 4th of January. That's the
4 first Monday after New Year's. We don't think it's
5 realistic to think that any of you are going to be
6 working on New Year's Day, New Year's Eve, and the
7 weekend immediately following.

8 So we're going to set the deadline for the
9 briefing at the 8th of January for the upside brief,
10 subject to if you all cannot work out the discovery
11 problems such that you really have most of that time
12 and that ANR does not find itself in the bind of
13 simultaneously trying to write a brief and respond to
14 an extremely complex and prolix discovery request,
15 you'll come back to us.

16 I will note that, as Ms. Dingleline has pointed
17 out, the particular discovery request that we're
18 talking about appears not to have been validly filed in
19 this case at all and that we, in our order at the time
20 that we granted the TRO last summer, urged the parties
21 to do their discovery back then. You all have, to some
22 extent, been a little lax in getting your discovery
23 done. We've been a little generous in letting you do
24 it, and, and it, except for Ms. Aceves, it actually
25 applies to all of you. Everybody has put in a

1 discovery request well after what we thought would be
2 the, the discovery request time.

3 That said, if you all can work it out, make sure
4 you've got a record that everyone's comfortable with
5 that allows you to make the case you want to make, we
6 aren't going to get hypertechnical with you. So, for
7 now, your initial briefs will be due on the 8th of
8 January, and we will allow ten days for reply briefs.
9 If that works for everybody and you really need two
10 weeks, raise your hand now on reply briefs. These are,
11 these would then be due on the 18th of January if we
12 did it that way.

13 Okay, all right. So this, this hearing is closed
14 for now, but the record is not yet closed, and there
15 will be, when and if you either file something that has
16 shown up in discovery that you want to have or conclude
17 that you have nothing more to add. The record is not
18 open for new witnesses, new exhibits, new testimony,
19 other than whatever responses you get from these
20 discovery exchanges. Any questions?

21 ATTORNEY DINGLEDINE: Mr. Roisman, this is
22 Brooke Dingledine. Given the late hour, I have plans
23 this evening, and getting out a discovery request would
24 be burdensome on me this evening, because I'm going to
25 be running late. So I was wondering if I could get

1 that to Mr. Melone tomorrow.

2 CHAIRMAN ROISMAN: If it's okay with him. I
3 think he knows exactly what you want. I think you
4 wanted to make sure there was a formal document that he
5 responded to. So I would assume that, Mr. Melone, if
6 you got it on Saturday, when you were ready to file
7 your response, you would simply have the piece of paper
8 that you would respond to in your hand. Will that work
9 for you?

10 ATTORNEY MELONE: Yes, that would be fine,
11 Mr. Chairman, because I don't think that we can get
12 our, our discovery requests out to ANR by tonight
13 either, but we certainly can by the end of the weekend.

14 ATTORNEY EINHORN: Mr. Chairman, just for the
15 record, back in September the Agency had indicated that
16 it saw that no further process was needed, and that
17 meant that we never intended to do discovery at that
18 time, and we still don't see the need to do discovery.
19 So we're not asking to do discovery.

20 CHAIRMAN ROISMAN: I understand that, yes.
21 Thank you for that clarification, Mr. Einhorn. Okay.
22 Well, it's been a full day, everybody. Thank you for a
23 most interesting hearing, and we are going to take
24 everything under advisement, obviously, and we look
25 forward to your next filings. Have a good and safe

1 weekend.

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3 (Whereupon at 5:05 p.m. the hearing was adjourned.)

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