

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Otter Creek Solar LLC, pursuant to)
30 V.S.A. § 248, for a certificate of public good)
authorizing the installation and operation of the)
“Warner Solar Project,” a 2.2 MW solar electric)
generation facility located off Rice Lane in)
Bennington, Vermont

Case No. 19-0516-PET

**RESPONSES OF THE AGENCY OF NATURAL RESOURCES TO OTTER CREEK
SOLAR’S SECOND SET OF INFORMATION REQUESTS**

NOW COMES the Agency of Natural Resources (ANR or Agency) by and through its attorney, Donald J. Einhorn, and hereby responds to the March 11, 2020 request for information by Otter Creek Solar, LLC (“Petitioner” or “OCS”).

PROPOUNDING PARTY: Otter Creek Solar, LLC

RESPONDING PARTY: Vermont Agency of Natural Resources

SET NO: Second

GENERAL OBJECTIONS

The following General Objections are made in response to each interrogatory, request to admit, or request to produce (the “Requests”) as if the objections were fully set forth therein. Any response is given without waiver of any objection, whether or not an objection is stated. The Agency reserves the right to later raise any additional, available objections.

1. The Agency objects to the Requests on the grounds and to the extent they call for responses that exceed the scope of the Agency’s testimony and exhibits or are neither relevant to the subject matter of the pending action nor reasonably calculated to lead to the discovery of admissible evidence.
2. The Agency objects to the Requests on the grounds and to the extent that they seek responses that are subject to any or all of the following privileges: (a) the attorney-client privilege; (b) attorney work product and trial preparation privileges; (c) executive or deliberative process privilege, or that are otherwise privileged or protected from disclosure. The Agency construes each of the Requests so as not to seek any information or materials that falls within each of these privileges. To the extent any information or materials protected by these privileges is inadvertently produced, such production is not to be construed as a waiver of such privilege or protection.
3. The Agency objects to the Requests on the grounds and to the extent that they are overbroad, unduly burdensome or oppressive, unreasonably cumulative or duplicative, and not proportional to the needs of the case.
4. The Agency objects to the Requests on the grounds and to the extent that they are vague, unintelligible, contain undefined terms, require speculation, or are otherwise incapable of a reasonable response.
5. The Agency objects to the Requests on the grounds and to the extent that they purport to impose obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, request information and/or documents that require an unreasonable investigation on the part of the Agency, or purport to require the Agency to create documents or perform new analyses responsive to any such Requests.
6. The Agency objects to the Requests to the extent that they seek the production of documents and information already in the possession of, or publicly available to, or readily obtainable to the Petitioner and its counsel, on the ground that with respect to such production, the Requests are thereby rendered unduly burdensome.
7. The Agency objects to the Requests to the extent that they seek the production of documents and information not within the Agency’s possession, custody, or control.

8. The Agency objects to the Requests to the extent that they call for a legal conclusion.

The Agency expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses herein at any time. By making any response to the Requests, the Agency does not waive and hereby expressly reserves, the right to assert any and all objections as to the admissibility of such responses into evidence at the time of trial of this action, or in any other proceeding, on any and all grounds, including but not limited to competency, relevance, materiality, and privilege. The Agency also does not waive and hereby expressly reserves the right to object on any ground at any time to a demand for further responses to these requests or any other discovery procedures involving or relating to the subject matter of the Requests responded to herein. Further, the Agency provides the responses herein without in any manner, express or implied, admitting that the items in the Requests or in any response thereto are relevant or material to the subject matter of this proceeding.

Interrogatories, Requests to Produce, and Requests to Admit

Q.2-1. Please refer to your Answer A.1.1 in the ANR Response to Otter Creek Solar LLC's First Set of Information Requests, dated March 2, 2020 (the "ANR Responses"). On what date were the impact thresholds established (i.e. 10% for S1 and 20% for S2)? How often are those impact thresholds revisited? Please list all of the individuals that established those impact thresholds and whether these individuals are members of one or more of these groups: Agency staff, the Scientific Advisory Group on Flora or the Endangered Species Committee.

A.2-1. The 20% impact threshold for evaluating impacts to rare plants has been utilized by the Fish and Wildlife Department in Section 248 cases since at least 2013. Examples include the TDI-NE Project (Docket 8400) in 2015, Chelsea Solar (Docket 8302) and Barton Solar (Docket 8148) in 2014, and the Vermont Gas Addison Expansion Project (Docket 7970) in 2013. Leading up to the adoption of the guidance document, I determined that it was appropriate to utilize a 10% threshold for very rare plants to reflect the disparity in rarity and threat between S1 and S2 species. The thresholds of 10% and 20% were subsequently memorialized in the RTE plant guidance document (see my exhibit ANR-RP-3) which was signed by the Fish and Wildlife Department Commissioner on October 5, 2016. I have no set schedule for revisiting the impact thresholds. As the state botanist, I am responsible for establishing appropriate thresholds.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-2. What is your estimate of the number of individual plants in the Aster population located on and adjacent to the Project? What is your estimate of the percentage of the plants of this Aster population that are located within the Project footprint based on the most recent site plans filed in these proceedings?

A.2-2. Objection, the request imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency, and requires the Agency to create documents or perform new analyses. “Project footprint” is not defined. Without waiving the objection, I do not have an estimate of the number of individual plants in the Aster population located on and adjacent to the Project or the percentage within the Project footprint. The Agency has never received a precise count from the Petitioner identifying the total number of individuals in the Aster population. Based on the Petitioner’s September 12, 2019 Aster Distribution Report, the number totals approximately 208. However, this number does not appear to include Asters growing along the railroad ROW and which have not been counted by the Petitioner to my knowledge.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-3. Do you believe the construction of the Project will adversely impact the population of the Aster on and adjacent to the Project? If so, what is your estimate of the percentage of the plants of this Aster population that will be adversely impacted by the construction of the Project? Do you believe the construction of the Project will result in an undue adverse impact on the population of the Aster on and adjacent to the Project? If so, what is your estimate of the percentage of the plants of this Aster population that will be unduly adversely impacted by the construction of the Project?

A.2-3. Objection, the request imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency and requires the Agency to create documents or perform new analyses. Without waiving the objection, yes, the Project will adversely impact the Aster population at the site because, as proposed, the Project would impact most, if not all, of the 208 plants which have been identified by the Petitioner. Without implementation of appropriate measures to avoid, minimize and mitigate, the impact of the Project on these plants would be unduly adverse. I am not able to estimate the percentage of plants of this Aster population that will be impacted because the Petitioner has not provided a precise count of the number of Aster plants in the population.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-4. Would any of your answers to OCS.1.3 [sic] above change if it was determined that the Aster plants growing on and adjacent to the Battle Creek Solar Site (see Case No. 17-3727) were not adversely impacted by the construction of the Battle Creek solar project?

A.2-4. Objection, the request imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency and requires the Agency to create documents or perform new analyses. Without waiving the objection, no, because the Agency is unaware of any Aster plants growing on the Battle Creek Solar Site and the Petitioner has not provided any documentation related to the presence of the Aster at that site.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-5. Would any of your answers to OCS.1.3 [sic] above change if it was determined that the Aster plants growing on and adjacent to the railroad corridor (i.e., the corridor which runs between the Project site and the Battle Creek Solar Site (see Case No. 17-3727)) were not adversely impacted by the vegetation management performed by Vermont Railway in the railroad corridor (e.g., brush hogging).

A.2-5. Objection, the request imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency, requires the Agency to create documents or perform new analyses, and requires speculation. “Brush hogging” is not defined. Without waiving the objection, I cannot provide a substantive response because I cannot speculate as to how many Asters occur in the referenced corridor or how they are, or may be, impacted at this time based upon a lack of information.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-6. Please refer to your Answer A.1.2 in the ANR Responses. You state that the Section 248 review process provides for the protection of rare and very rare species. Can you please be more specific, what part of 30 V.S.A. §248 provides for ANR to protect rare and very rare species (as opposed to endangered species)?

A.2-6. Objection, the request calls for a legal conclusion. Without waiving the objection, please refer to the cases identified in my response to Q.2-1, and other cases where the Commission has dealt with impacts to rare and very rare plants.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-7. Please refer to your Answer A.1.4 in the ANR Responses. You state that the Section 248 Guidance includes a number of examples of what would constitute an impact. The 248 Guidance includes examples of mowing and shading as impacts, are there any other impacts? If so, please list other examples of impacts.

A.2-7. The guidance document speaks for itself. That said, additional examples of impacts include uprooting, transplanting, gathering seeds or fruit, cutting, injuring, harming, destroying habitat or killing the plant.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-8. Admit that the Aster plants can survive mowing.

A.2-8. Denied. The Aster cannot survive mowing in the absence of restrictions as to timing and methods, such as mowing during the dormant season or at other specific times with the mower set at an appropriate height above the ground.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-9. Admit that the Aster plants can survive shading.

A.2-9. Denied. According to Flora of North America, Volume 20, the Aster is primarily a sun plant although it can tolerate partial shade. The Aster is most abundant in the mid-west where its habitat is listed as open, dry or mesic, sandy or loamy, sometimes rocky soils, limestone pavements, glades, ravines, open oak, sassafras, aspen, or pine woods, edges of woods, moist or dry, rocky bluffs, savanna, wooded banks, stabilized dunes, fields, roadsides, hedgerows, and railroads. See **Attachment 2-9**.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.10. Please refer to your Answer A.1.7 in the ANR Responses, please list each “isolating barrier” within 1 kilometer of the Project site.

A.2-10. Objection, the request imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency, requires the Agency to create documents or perform new analyses. Without waiving the objection, I have not performed the requested analysis except as related to the only other known population in proximity to the Project. As I indicated in my response to 1-9 in the First Set of Information Requests, State Route 7 is the primary isolating barrier between the Project and that other known population of the Aster.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.11. Please refer to your Answer A.1.12 in the ANR Responses. Admit that the Aster is not “vulnerable to disturbance”.

A.2-11. Denied. The Aster is vulnerable to disturbance.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.12. Please refer to your Answer A.1.16 in the ANR Responses. Please provide some examples of circumstances that would lead the Aster to be downgraded from S1 to S2 on the Plant List (e.g., more than 5 populations are discovered, etc.).

A.2-12. Objection, the request requires speculation. In addition, it imposes obligations on the Agency that are beyond the scope of the Public Utility Commission Rules or the Vermont Rules of Civil Procedure or other applicable law, requests information that requires an unreasonable investigation on the part of the Agency, requires the Agency to create documents or perform new analyses. Without waiving the objection, it would require that there be no less than five documented viable populations within Vermont. For a population to be considered as viable there could be no imminent threats to that population that may result in its demise.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.13. Please refer to your Answer A.1.30 in the ANR Responses. You agree with the characterization of the Aster as a “disturbance adapted species”, please explain what you mean by the word “disturbance” and what you mean by “disturbance adapted species”.

A.2-13. By “disturbance” I refer to a natural process that typically results in setting succession back to an earlier state. Fire, flooding, storms, blowdowns would be examples. Disturbance adapted species generally require some form of disturbance to their habitat in order for the population to thrive for the long term.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.14. Please refer to your Answer A.1.30 in the ANR Responses and your use of the word “disturbance”. Would the construction of the Project be considered as a “disturbance” as you use the word in A.1.30. If not, please list some examples of a “disturbance” as you use the word in A.1.30.

A.2-14. No. The construction of the Project as proposed would constitute a destructive intrusion which would result in mortality to most of the Aster plants at the site due to vegetation clearing, grading, placement of panels, etc. Mowing every four years in the Conservation Area under the conditions described in my prefiled testimony is an example of a disturbance that would benefit the Aster. The Aster is also reported to benefit from occasional fires. This would be another form of disturbance that would benefit the Aster.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2.15. Do you agree that the biology of this Aster species is not well known?

A.2-15. Objection. “Well known” is vague and implies unspecified comparison. Without waiving the objection, no, there is a fair amount known about the habitat requirements for the Aster.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Q.2-16. Considering what we now know about the biology (and synapomorphic characteristics) of this specific Aster population, which suggest this species is spreading on its own, do you recommend measures to enhance its spread (distribution)?

A.2-16. Objection, “what we now know” is vague and implies unspecified comparison. Without waiving the objection, there is no direct evidence that the Aster is spreading in Vermont. As referenced in A.1.33. in the ANR Response, there are historical collections from the period 1899 to 1908 from Pownal, VT so the Aster has been present in the state for over 120 years.

The Agency does not recommend measures to enhance the spread of the Aster.

Person Responsible: Robert Popp
Title: Botanist, Vermont Fish and Wildlife Department

Requests to Produce

1. Please produce all documents requested in the preceding questions.

No documents were requested and none are provided.

2. Please produce any and all documents identified, referenced, relied upon, or referred to in responding to these information requests.

See documents produced as **Attachment 2-9**. Prefiled testimony and exhibits have already been provided via filing in ePUC.

3. Please produce any and all documents you expect to offer as exhibits at the technical hearings of these proceedings.

Objection to the extent that the request calls for attorney work product or documents prepared in anticipation of litigation. Without waiving the objection, please refer to testimony and exhibits which have been filed in ePUC. The Agency has not yet identified surrebuttal or cross-examination exhibits.

Dated at Waterbury, Vermont, this 1st day of April, 2020.

As to objections:

A handwritten signature in blue ink, consisting of a large, stylized 'D' followed by a horizontal line extending to the right.

By: _____

Donald Einhorn, Esq.
Litigation Attorney
Office of General Counsel
Enforcement and Litigation Section
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620-3901
Phone 802-249-1720
Email Donald.Einhorn@vermont.gov