

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30)
and 209 into whether the petitioner initiated)
site preparation at Apple Hill in Bennington,) Case No. 20-1611-INV
Vermont, for electric generation in violation)
of 30 V.S.A. § 248(a)(2))

DEPARTMENT OF PUBLIC SERVICE INITIAL BRIEF

This case stems from site clearing conducted without a Certificate of Public Good (“CPG”) in violation of 30 V.S.A. § 248(a)(2) at a site proposed for the installation and operation of a solar facility in Bennington, Vermont (the “Apple Hill site”).¹ On June 26, 2020, the Public Utility Commission (“Commission”) issued a temporary restraining order (“TRO”) against Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC and PLH LLC and its affiliates, subsidiaries and contractors (collectively, “Developer”), effectively preventing the Developer from conducting site clearing until the Commission determines to either issue further injunctive relief or dissolve the TRO. The Department of Public Service (“Department”) submits this Initial Brief addressing the Commission’s question of whether further injunctive relief should be granted and the scope of that relief. For the foregoing reasons, the Department recommends the Commission issue a permanent injunction.

I. LEGAL STANDARD

An injunction is an extraordinary remedy and will not be granted routinely unless the right to relief is clear.² An injunction may be issued only in cases where it is “necessary to

¹ Petition of Apple Hill Solar LLC, Docket 8454.

² *In re Investigation Into General Order No. 45*, 2013 VT 24, ¶ 7, 193 Vt. 676, 677, 67 A.3d 285, 287 (2013).

prevent irreparable injury or a multiplicity of suits.”³ The Vermont Supreme Court has stated that the main prerequisite to obtaining injunctive relief is a finding that a party is being threatened by some injury for which it has no adequate legal remedy, and requires a showing that the party will suffer irreparable harm if the court of record does not intervene to prevent further injury.⁴

Commission Rule 2.406 defines a permanent injunction as “an injunctive remedy issued as final relief after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law.”⁵ The Commission has interpreted the rule to mean that injunctive relief “can be issued only if the petitioner demonstrates that the irreparable injury that it will [or has] suffer[ed] in the absence of the injunction is greater than the harm that the injunction will impose upon the respondent.”⁶

A four-factor test similar to that for a preliminary injunction must be satisfied in determining whether a permanent injunction should be issued. Specifically, a movant must show that: (1) it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.⁷ The Commission has historically found that these criteria taken comprehensively are meant to inform a tribunal, and that “a compelling showing upon

³ *Id.* (citing *Vt. Div. of State Bldgs. v. Town of Castleton Bd. of Adjustment*, 138 Vt. 250, 256, 415 A.2d 188, 193 (1980)) (citations omitted).

⁴ *Id.* (citing 11A C. Wright, et al., *Federal Practice and Procedure* § 2942, at 2944 (2d ed. 1995)).

⁵ Commission Rule 2.406(A)(3).

⁶ *In re Central Vermont Public Service Corp.*, Docket 5686, Order of 6/7/94 at 4.

⁷ *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 421 (2d Cir. 2013) (quoting *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 156 (2010)).

each single criterion is not an essential prerequisite to equitable relief.”⁸ Rather, “the criteria should be balanced so as to produce the “best result.””⁹

II. LEGAL ANALYSIS

A. *The standard for granting a permanent injunction has been met*

The factors the Commission discussed in its June 26, 2020 Order (“TRO Order”) as they apply to a TRO and a preliminary injunction continue to apply for purposes of granting a permanent injunction. Since the TRO was issued, additional evidence has also been presented that clearly satisfies the requirements for a permanent injunction.

First, irreparable injury has occurred. As made clear from the record, the Developer engaged in site clearing activity that has and continues to threaten very rare and rare plant species.¹⁰ Further, clear cutting of trees occurred,¹¹ and the Developer has given no indication that it will avoid any future clear cutting should the TRO be dissolved.

Second, this harm is not measurable entirely in monetary terms and therefore remedies available at law are inadequate to compensate for the injury. As the Commission has already explained, “the proposed tree clearing constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored.”¹² While it is true that trees can be replanted and grow back, the growth process takes years and is anything but immediate. Because

⁸ Docket 5686, Order of 6/7/94 at 5-4 (citing *Investigation of Vermont Electric Cooperative, Inc.'s request to increase its rates in the overall amount of 19.06%, to take effect February 18, 1993*, Docket 5360, Order of 9/10/93 at 4).

⁹ *Id.*

¹⁰ See generally Robert Popp, Agency of Natural Resources (“Popp”) supp. aff (11/25/20). The Department defers to the Agency of Natural Resources regarding the extent to which rare and very rare plants have been harmed.

¹¹ *Id.* at 10. See also Tr. 6/26/20 at 65-66 (Melone).

¹² *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)*, Case No. 20-1611-INV, Order of 6/26/20 at 6.

the damage has been done and the Developer has given no indication that it will refrain from additional tree clearing should the TRO be dissolved, there is no adequate legal remedy for the injury at issue.

Third, in considering the balance of hardships, it disfavors the Developer. The record continues to demonstrate that no real hardship to the Developer will manifest should the Commission issue a permanent injunction. As stated in the TRO Order, “the only possible harm to the [Developer] is a delay in his site-clearing activities if he is ultimately allowed to undertake those activities.”¹³ The Commission rightly acknowledged that the Developer “testified that he is unlikely to do any sheep farming or hemp growing in 2020,”¹⁴ and no evidence has been presented indicating otherwise. This strongly suggests that no hardship to the Developer will occur should it be permanently enjoined from site clearing while the Section 248 process continues.

Finally, the public interest favors a permanent injunction. Not only is there a “well-established public interest in preserving nature and avoiding irreparable environmental injury,”¹⁵ but notably, the Developer has demonstrated through its site clearing activities a blatant disregard for the Section 248 permitting process. The record supports the assertion that should the TRO be dissolved, there is great risk that the Developer will continue to engage in site clearing activities in disservice of the public interest.¹⁶

B. A permanent injunction must be issued in order to preserve the integrity of the Section 248 process

¹³ *Id.* at 5.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See Id.* at 6. *See also* exhs. PLH-TMM-3, PLH-TMM-4 and PLH-TMM-5. It is the understanding of the Department that these exhibits were filed after the December 4, 2020 evidentiary hearing took place and are related to the Commission’s request that the Developer correct its initial prefiled testimony and file the total number of rare plant populations inventories by Arrowwood Environmental. Tr. 12/4/20 at 10, 21-22, 211.

It is crucial to note that the public interest would be least served if the Commission were to refrain from issuing a permanent injunction. As the Department has made clear throughout this proceeding and consistent with the Commission's same assertions, the Developer's activities challenge the integrity of the Section 248 permitting process.¹⁷ Were the TRO to be dissolved, that would serve as a signal to developers that they will be permitted to thwart the regulatory process and commence site clearing without a CPG and without consequence.

In this case, the potential harm of dissolving the TRO would open the door to further site preparation without a CPG, which would effectively interfere with and completely abrogate the critically important component of the Section 248 process to (1) identify all potential adverse and unduly adverse impacts of a project; (2) give parties notice and an opportunity to be heard on those impacts; and (3) prevent or mitigate those impacts either by adopting appropriate conditions or, if merited, by denying a CPG. Simply put, in order for the Commission to maintain its Section 248 jurisdiction and to ensure preservation of the legislative intent behind the statute – which is to address the environmental, economic and social impacts associated with a particular project – it is in the public interest to issue a permanent injunction.

Moreover, the Developer has already shown its disregard for the permitting process. As the Commission stated in the TRO Order, the Developer proceeded with the very same “changes to the landscape” the Commission prohibited it from making when it denied the Developer's May 7, 2020 amended petition.¹⁸ There is nothing to suggest that the Developer would do

¹⁷ Tr. 12/4/20 at 37, 209 (Aceves). Case No. 20-1611-INV, Order of 6/26/20 at 5-6.

¹⁸ Case No. 20-1611-INV, Order of 6/26/20 at 6.

anything different here should the TRO be dissolved. Therefore, on balance,¹⁹ it is in the public interest to issue a permanent injunction.²⁰

C. The site clearing at issue is a direct violation of Section 248 warranting a permanent injunction

Even if the standard for issuing a permanent injunction had not been met (which it has), the Developer's site clearing without a CPG amounts to a direct violation of Section 248(a)(2) meriting a permanent injunction. Such conduct is consistent with precedent where a permanent injunction was found to be a proper remedy when a landowner's violation of a zoning ordinance was substantial and conscious.²¹ The same can be said here, especially given that the Developer commenced site clearing after the Commission explicitly denied it from doing so.²² This amounts to a "substantial and conscious" violation of Section 248 where a permanent injunction serves as the proper remedy.²³

D. Issuance of a permanent injunction is consistent with Commission Rules

The Department notes that the process for issuing a permanent injunction has been properly followed in this case. Pursuant to Commission Rule 2.406, a hearing was held on December 4, 2020, which was noticed on November 11, 2020. The proceedings up to this point allowed all parties adequate opportunity "to avail themselves of all procedures provided for" by

¹⁹ See *supra* Section I.

²⁰ It is for these same reasons the entire 27-acre parcel should be subject to a permanent injunction.

²¹ See *In re Wood NOV & Permit Applications*, 2013 VT 40, ¶ 53-55, 194 Vt. 190, 210, 75 A.3d 568, 581 (2013). See also *City of St. Albans v. Hayford*, 2008 VT 36, ¶ 14, 183 Vt. 596, 599, 949 A.2d 1058, 1063 (2008).

²² Case No. 20-1611-INV, Order of 6/26/20 at 6.

²³ Further, because Section 248 is effectively the equivalent to the zoning regulatory scheme for electric generation projects, it falls within the Commission's jurisdiction to enforce. See *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129, 582 A.2d 145, 148 (1990) (stating that where statute authorizes injunctive relief, municipality need not show irreparable harm but rather only violation of ordinance to obtain such relief).

Commission rules and therefore all administrative remedies have been exhausted as required for grant of a permanent injunction.²⁴

III. CONCLUSION

For the aforementioned reasons, the Department recommends a permanent injunction be issued.

Dated at Waterbury, Vermont, this 29th day of January, 2021.

Vermont Department of Public Service

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²⁴ See *Smith v. Highway Bd.*, 117 Vt. 343, 349, 91 A.2d 805, 810 (1952) (stating that as a general rule, a party must exhaust his or her administrative remedies before seeking equitable relief, and “[w]here an administrative agency has primary jurisdiction of the question in issue, the courts ordinarily will not grant injunctive relief prior to a decision by the agency”).