

**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 REPLY BRIEF

The Department of Public Service submits this Reply Brief addressing certain issues raised by the Developer in its January 29, 2021 Post-hearing Brief.

The Commission made clear at the December 4, 2020 evidentiary hearing that it wanted parties to address the question of whether further injunctive relief should be granted and the scope of that relief.¹ The majority of issues raised by the Developer in its Initial Brief do not address this question. While the Developer is free to raise those issues it deems relevant to the Commission’s decision, the majority of arguments raised by the Developer have already been addressed by the parties and ruled upon by the Commission. For the sake of clarity and in order to highlight for the Commission the matters upon which it has already ruled, the Department responds to the following:

**I. THE COMMISSION HAS ALREADY CONCLUDED THAT IT HAS
JURISDICTION OVER THE DEVELOPER AND ITS ASSOCIATED
ENTITIES**

The Developer continues to assert that the Commission lacks jurisdiction for several reasons. The Developer claims the Commission is without jurisdiction in this matter because (1) it is treating affiliated entities, including companies that are not a “company” as defined in

¹ Tr. 12/4/20 at 28-29 (Roisman).

Section 203, as one entity in violation of Title 30; (2) Developer's activities do not fall under the Commission's jurisdiction; (3) the Commission lacks authority to open the investigation at issue; (4) the Commission lacks jurisdiction to issue or maintain the temporary restraining order ("TRO"); (5) 30 V.S.A. § 30(h) provides the only avenue through which to pursue relief for site clearing in violation of 30 V.S.A. § 248; (6) that Commission Rule 2.406 does not give the Commission jurisdictional authority to issue injunctive relief; (7) that a Section 248 petition does not create Section 209 jurisdiction; and (8) that the Commission must be a court of equity to have the authority to stop the Developer's site clearing activities.

a. The Commission has jurisdiction over the Developer and its affiliates, all of which are companies subject to Title 30 authority

The Commission made clear in its August 26, 2020 Order denying the Developer's motion to vacate that its jurisdiction applies to the Developer and its affiliates PLH LLC, PLH Vineyard Sky, LLC, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC.³ There is no evidence in the record of the Commission treating these entities as the same for the simple reason that it has continued to identify each one individually.

Further, each of these entities is in fact a company. As stated in the Department's July 15, 2020 response to the Developer's motion to vacate the TRO, it is well established under 30 V.S.A. § 201(a) that "[T]he word 'company' or 'companies' means and includes individuals, partnerships, associations, corporations, and municipalities owning or conducting any public service business or property used in connection therewith and covered by the provisions of this

² The Department does not address this last point in detail because it is well known under the Vermont constitution that "courts of this state may exercise equity jurisdiction as well as law jurisdiction." Vermont Const. Ch. 2, § 31.

³ *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 8/26/20 at 8, n.30.

chapter.”⁴ The Commission has already established that the site clearing activities here fall under its Title 30 authority,⁵ which renders each of the above-listed entities – that have all, at one point or another, played a role in pursuing authorization to develop the Willow Road and Apple Hill solar electric generation sites – “companies” subject to the Commission’s jurisdiction.

b. A Section 248 petition creates Section 209 jurisdiction that renders any actions taken thereunder subject to the Commission’s regulatory authority

The Developer claims that (1) the Developer’s activities do not fall under the Commission’s jurisdiction; and (2) a Section 248 petition does not create Section 209 jurisdiction. The Developer is incorrect.

As stated in its August 26, 2020 Order denying the Developer’s motion to vacate, the Developer has two standard-offer contracts and is in “active pursuit” of authorization to develop two solar electric generation facilities on Apple Hill in Bennington, Vermont.⁶ The Commission rightly found that the Developer has been continuously engaged in seeking authorization to build the facilities since it acquired the standard-offer contracts in 2013 and 2014 and that by signing said standard-offer contracts, the Developer became subject to the Commission’s jurisdiction.⁷ The Commission went on to state that “[a]s long as the Developer does not relinquish the two standard-offer contracts at the Apple Hill site and abandon development of the facilities to be located there, the Developer is subject to the Commission’s jurisdiction pursuant to 30 V.S.A. § 209(a)(8).”⁸

⁴ 30 V.S.A. § 201(a).

⁵ Case No. 20-1611-INV, Order of 8/26/20.

⁶ *Id.* at 8.

⁷ *Id.* at 9.

⁸ *Id.*

The Developer's assertion that because no Certificate of Public Good ("CPG") has been issued, there are no regulatory requirements to conflict with is incorrect. The Commission made clear that

As long as the Developer's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, the Developer is subject to the Commission's jurisdiction. Such actions by the Developer include both the filing and amendment of any CPG petitions for the Apple Hill facilities, the clear-cutting activities that the Developer was engaging in here and that would have an impact on rare plants on the site, and any other acts in preparation of the site for electric generation."⁹

If the Commission had concluded otherwise, it would render the statute ineffective against the intent of the Legislature. The plain language of Section 248(a)(2) makes clear that site preparation shall not occur before a CPG is issued. The legislative intent of Section 248 is to address the environmental economic and social impacts associated with a proposed project. Therefore, despite Developer's assertions to the contrary, a petition for a CPG clearly falls under the purview of the Commission and to find otherwise would render the statute and the Commission's authority thereunder meaningless.

c. The Commission has the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction

The Developer also claims that (1) the Commission lacks authority to open the investigation at issue; (2) the Commission lacks jurisdiction to issue or maintain the TRO; (3) 30 V.S.A. § 30(h) provides the only avenue through which to pursue relief for site clearing in violation of 30 V.S.A. § 248; and (4) that Commission Rule 2.406 does not give the Commission jurisdictional authority to issue injunctive relief. These assertions are misplaced.

⁹ *Id.*

The Commission has already correctly recognized that Section 9 of Title 30 grants it the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction.¹⁰ The Vermont Legislature gave explicit oversight powers to the Commission regarding petitions for CPGs for electric generation facilities under Section 248, and it is the responsibility of the Commission to independently evaluate “what disposition of the matter is in the public interest.”¹¹ Here, the Developer has availed itself to the jurisdiction of the Commission with its Section 248 petitions, and therefore the Commission has the authority to determine whether its conduct thereunder, i.e. site clearing without a CPG, is in the public interest. Taken together with Section 9, this clearly permits the Commission to open the current investigation, issue and maintain a TRO and issue injunctive relief where it finds the requisite criteria to do so has been met.

The Developer is correct that Commission Rule 2.406 does not give the Commission jurisdictional authority to grant injunctive relief because as just explained, Section 9 of Title 30 serves that purpose. As stated in the Department’s July 15, 2020 response to the Developer’s motion to vacate preliminary injunction, courts of record have the authority to issue TROs and preliminary and permanent injunctions consistent with the process detailed in Vermont Rule of Civil Procedure 65. Commission Rule 2.406 is analogous to Rule 65 and is important not because it grants the Commission authority to grant injunctive relief, but because it promulgates the Commission’s Section 9 authority and the process for issuing TROs and preliminary and permanent injunctions; the process for which the Commission properly has followed as part of this investigation.

¹⁰ *Id.* at 6.

¹¹ *In re SolarCity Corp.*, 2019 VT 23, ¶ 14, 210 Vt. 51, 59–60, 210 A.3d 1255, 1261 (2019).

Finally, the Department has already highlighted the Commission's long history of relying on different statutory authority to provide injunctive relief¹² and the Commission has correctly highlighted that the Developer's reliance on Section 30(h) applies to the Department as it relates to administrative citations.¹³ It is worth noting that Section 30 applies in cases where monetary damages are deemed adequate. Because the conduct under investigation in this case is the subject of injunctive relief, which is merited where monetary damages are found to be inadequate, Section 30 is inapplicable to this case as a whole. It is for these reasons the Developer's assertion that 30 V.S.A. § 30(h) provides the only avenue through which to pursue relief for site clearing in violation of 30 V.S.A. § 248 fails.

II. THE COMMISSION HAS ALREADY CONCLUDED THAT THE DEVELOPER ENGAGED IN SITE CLEARING IN VIOLATION OF 30 V.S.A. § 248(a)(2)

The Developer asserts that its site work does not constitute site clearing activities in violation of 30 V.S.A. § 248(a)(2), which requires a CPG before site preparation for the construction of an electric generation facility. The Commission already resolved this issue in its June 26, 2020 Order granting a TRO, where it found that the Developer's activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The Developer's claim that its activities are solely for farming continue to be disingenuous and because the clearing activities were admitted by the Developer to be a prerequisite to building the solar projects that have yet to receive CPGs,¹⁴ it clearly constitutes site clearing in violation of 30 V.S.A. § 248(a)(2).

¹² See Case No. 20-1611-INV, Order of 8/26/20 at 6-7, n.23.

¹³ *Id.* at 11-12.

¹⁴ *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 4.

The Developer's continued reliance on *Beaverwood*, *Georgia Mountain* and *Monument Farms* to support its assertion that its activities are not site preparation in violation of the statute and that it is an "incidental overlap" is inapposite. As the Department has already explained, the cases are clearly distinguishable from this one and the Developer fails to recognize significant procedural differences that affected the respective outcomes of each.

As a reminder, the complaints at issue in *Georgia Mountain* had to do with activities that fell outside CPG requirements. The Commission concluded that the activities that were the subject of two complaints did not involve commencement of construction of a wind generation facility for which a CPG was issued.¹⁵ Although the Developer is correct in stating that "a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board,"¹⁶ it is important to note that no CPG has been issued in the present case. The Developer has not potentially violated a CPG because no CPG has been issued. But, because there is a still petition for a CPG before the Commission, the Developer remains subject to the authority of the Commission under 30 V.S.A. § 248(a)(2)(A). While sheep farming activities are presumably lawful, clearing a site that is the subject of a CPG petition without first being granted a CPG to conduct said clearing is not.

Beaver Wood addressed a request to commence construction activities prior to receipt of a CPG. Notably, the Commission recognized that while it "only has such powers that are expressly conferred upon it by the Legislature," it can "fully review the impacts of the construction and operation of the proposed generation facilities under the criteria of § 248

¹⁵ *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, Memorandum of 1/5/12 at 3.

¹⁶ *Id.*

without also exercising jurisdiction over the wood-pellet facilities.”¹⁷ The Commission explained that its “jurisdiction over the wood-pellet facilities is “necessary to the full exercise of” our authority over BWE’s proposed electric generation facilities.”¹⁸ The same conclusion applies here. The Commission has the authority to review the impacts of the site clearing under the criteria of § 248 without exercising jurisdiction over sheep farming. The immediate purpose of the clearing does not change the fact that it involves a parcel subject to the jurisdiction of the Commission and that clearing took place in violation of § 248(a)(2)(A). To do otherwise would cause the Commission to abdicate its responsibility to enforce a clear violation of the statute.

Finally, *Monument Farms* involved a request by a petitioner that already had a CPG to commence construction of a digester at a farm prior to obtaining approval of an amended CPG.¹⁹ Here, there is no CPG or request to commence activities prior to obtaining approval of a CPG. Instead, Developer commenced clearing activities on a site subject to the jurisdiction of the Commission without a CPG in violation of the plain language of the statute.

III. Irreparable harm has occurred to the natural environment

As the state representative for environmental protection issues, the Agency of Natural Resources (“ANR”) made clear that irreparable injury has occurred to two species of rare plants and mature trees.²⁰ Further, in issuing the TRO, the Commission recognized that there would be little harm to the Developer from being enjoined from its site clearing activities.²¹ The Commission noted that the only possible harm is a delay in the site-clearing activities,²² and that

¹⁷ *Petition of Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven, LLC*, Dockets 7678 and 7679, Order of 4/1/11 at 14.

¹⁸ *Id.*

¹⁹ *Petition of Monument Farms Three Gen LLC*, Docket 7592, Order of 10/22/10.

²⁰ ANR Brief at 3-4.

²¹ Case No. 20-1611-INV, Order of 6/26/20 at 5.

²² *Id.*

fact remains true despite the Developer's assertions that it will be harmed should it be permanently enjoined from site clearing. To date, the Developer has presented no evidence indicating that it would be irreparably harmed should the Commission issue a permanent injunction. It is for this reason and the valid reasons presented by ANR that any hardship on the Developer is minimal and outweighed by the harm to the natural environment.²³

IV. DEVELOPER'S CONSTITUTIONAL ARGUMENTS CONTINUE TO FAIL ON THE MERITS

The Developer continues to make the assertion that § 248(a)(2)(A) is unconstitutionally vague as it applies to site preparation. Generally, courts presume statutes to be constitutional, and "the proponent of a constitutional challenge has a very weighty burden to overcome."²⁴ Void-for-vagueness challenges are generally grounded in the Due Process Clause of the Fourteenth Amendment.²⁵ Statutes will be considered unconstitutionally vague and violate the Due Process Clause when they either: "(1) fail to provide sufficient notice of what conduct is prohibited, or (2) authorize or encourage arbitrary and discriminatory enforcement by failing to provide explicit standards."²⁶ Courts aim "to decide cases on nonconstitutional grounds if possible, and to adopt a construction of the statute that avoids constitutional deficiencies."²⁷

The Developer's arguments concerning the constitutionality of "site preparation" fail on their merits. The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for

²³ The Department defers to ANR regarding the Developer's claim that irreparable harm cannot be shown if there is no undue adverse effect on the natural environment.

²⁴ *In re LaBerge NOV*, 2016 VT 99, ¶ 18, 203 Vt. 98, 152 A.3d 1165.

²⁵ U.S. Const. amend XIV, § 1. *See also In re LaBerge NOV*, 2016 VT 99, ¶ 17.

²⁶ *State v. Green Mountain Future*, 2013 VT 87, 194 Vt. 625, 86 A.3d 981.

²⁷ *State v. Schenk*, 2018 VT 45, ¶ 10, 207 Vt. 423, 190 A.3d 820. *See also State v. Green Mountain Future*, 2013 VT 87, ¶ 48 ("State courts have wide latitude for assigning narrowing constructions to potentially unconstitutional statutes," and "may give [a statute] a narrowing construction to save it from nullification, where such construction does not establish a new or different policy basis and is consistent with legislative intent." (quotation omitted)).

adjudication.²⁸ Although § 248(a)(2)(A) does contain broad language, it is reasonable to conclude that “site preparation” includes clear-cutting for the purpose of siting a solar facility.²⁹ To decipher any ambiguity, the traditional tools of statutory construction must be examined to discern the intent of the Legislature.³⁰ Section 248 was enacted to address the environmental, economic and social impacts associated with a particular project. Here, it is logical to conclude that the Legislature intended for § 248(a)(2)(A) to include activities like clear-cutting trees – which have a direct impact on Vermont’s environment – as site preparation.

The Developer’s reliance on *Snyder*, which had to do with whether a zoning ordinance properly complied with and effectuated a statute, is misplaced. There is no question that the Commission, as an expert tribunal, has properly carried out its duty to interpret and enforce Section 248(A)(2). The fact remains that the Commission, in meeting its statutory mandate to ascertain whether a proposed solar facility will promote the general good of the state, will frequently address such proposals on a case-by-case basis.³¹ To do as the Developer suggests and apply an overly rigid 1:1 standard to what are almost always proposals with complicated, varying intricacies would ensure that those proposals are not properly vetted based on their specific traits and thus would effectively go against the public interest.

V. CONCLUSION

For the reasons herein and in the Department’s Initial Brief, the Department recommends a permanent injunction be issued.

²⁸ U.S. Const. amend. XIV, § 1. *See also State v. Green Mountain Future*, 2013 VT 87, ¶ 18.

²⁹ Indeed, the Department is unaware of any other Section 248 case where a petitioner has expressed such confusion over the fact that it is prohibited from conducting site clearing before issuance of a CPG.

³⁰ *Tarrant v. Dep’t of Taxes*, 169 Vt. at 197, 733 A.2d at 739 (1999).

³¹ *See, e.g., In Re: Review of the Standard-Offer Program.*, Case No. 17-5257-INV, Order of 1/15/19 at 3.

Dated at Waterbury, Vermont, this 12th day of February, 2021.

Vermont Department of Public Service

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