

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209	)	Case No. 20-1611-INV
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)	)	

VERMONT AGENCY OF NATURAL RESOURCES REPLY BRIEF

The Vermont Agency of Natural Resources (“Agency”) now provides the following reply to the Developer’s brief of January 29, 2021.¹

Discussion

The factual background.

The Developer’s version of the facts presented in its brief – a version which is premised on an attempt to disguise site preparation for solar facilities as “farming” – is not supported by the evidentiary record. The pertinent factual background was succinctly summarized by the Commission in its order issued August 26, 2020.

[T]he Developer is actively pursuing reconsideration and appeal of denials of its [Section 248] petitions, and clearing the trees from the 27-acre plot would serve to prepare the site for development of the proposed solar electric generation facilities.

The Developer admitted at the hearing that it intends to pursue these electric generation facilities and has not abandoned those proposals. The Developer acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility. The Developer also states that it plans to build solar facilities on the Apple Hill

¹ The Agency notes that many of the issues raised in the Developer’s brief have already been addressed and decided by the Commission and are therefore moot. Some are not relevant (or also moot) for the reasons stated at the hearing on December 4, 2020 or have already been briefed by the parties. For these reasons, the Agency’s reply addresses the Developer’s brief in a more summary fashion, taking each generally in the order it appears in the Developer’s brief.

site in order that it may sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts.²

The Commission's jurisdiction over the Developer and its activities.

The Developer, in Sections I, II and III of its brief argues that the Commission has no jurisdiction over the Developer, and no jurisdiction to restrain or enjoin the Developer from continuing to violate Section 248 by resuming its clearing of the Apple Hill site. The Developer's jurisdictional arguments fail as they have already been addressed and disposed of by the Commission.³ The true purpose of the site clearing has been established. It is not related to farming; it is for the purpose of developing solar electric generation facilities. As indicated above, the Developer admits that the trees must be cleared to build its solar facilities. Because the tree clearing is related to – and necessary to construct – the Developer's proposed solar projects, it is within the Commission's Section 248 jurisdiction. Stated another way, the Commission is not attempting to expand its Section 248 jurisdiction to regulate farming. Rather, the Commission is utilizing its Section 248 jurisdiction (which the Developer voluntarily submitted to) to address illegal site clearing which the Developer now attempts to disguise as "farming."

Ironically, the Developer includes in its brief a reference to Act 250 to buttress its position. The Developer argues that the Commission has no jurisdiction here, because farming is not solar development, and therefore not regulated by Section 248.⁴ However, the Developer fails to mention that similar efforts to skirt regulatory jurisdiction with

² 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 11.

³ *Id.* at 8-12.

⁴ See, Developer's brief, fn.3 at 11. Act 250 exempts from its definition of "development" the construction of improvements below 2,500 feet for, not only farming, but also for logging or forestry purposes. See, 10 V.S.A. § 6001(3)(D)(i).

“non-regulated” activities have been attempted and have failed in the Act 250 context. In

J.P. Carrara & Sons, Inc., and *Luce Hill Partnership*, the Environmental Board

determined that impacts from logging were appropriately considered when applications for regulated development activities were subsequently pursued.⁵ The Environmental Board reached its conclusions despite contentions of the Act 250 applicants that the site clearing was related to independent logging operations and not the proposed projects.

In *J.P. Carrara & Sons, Inc.*, the tree clearing was performed before the applicant applied for an Act 250 permit for a quarry. The Environmental Board determined that it had jurisdiction over the tree clearing. Tellingly, the Environmental Board concluded:

The Applicant’s intention for the use of the property in this case was clear from the beginning. Although the clearcutting was done by a professional lumber company that paid value for the timber, the primary usefulness of the logging to the Applicant was to clear the trees off that portion of the property that was going to be used for extraction of rock. Since that activity was undertaken in preparation for the quarry operation, it constituted commencement of construction for which an Act 250 permit should have been obtained.⁶

In *Luce Hill Partnership*, a forested area was cleared prior to the filing of an Act 250 application for a residential subdivision. The cleared area was consistent with the subdivision plans. The Environmental Board did not fall for the subterfuge and instead determined it would evaluate impacts associated with the subdivision plans based on the forested condition which existed prior to the clearing, not the condition which existed after the clearing, when the application was filed. The Board, citing *Re: Bernard and Suzanne Carrier*, #7R0639–EB, (Vt. Env’tl. Bd. Oct. 5, 1990), stated:

If the Board were to review this application for compliance with the site as it existed after it was cleared and terraced, some developers would be

⁵ See, *J.P. Carrara & Sons, Inc.*, #1R0589-EB (Vt. Env’tl. Bd. Order issued 2/17/1988), 1988 WL 220545; *Luce Hill Partnership*, #5L1055-EB (Vt. Env’tl. Bd. Order issued 7/7/1992), 1992 WL 186664.

⁶ *J.P. Carrara & Sons, Inc.*, at 10.

encouraged to commence development without filing an application for an Act 250 permit, thereby reaping an economic advantage by getting a head start on construction. We are therefore reviewing this application for compliance with the criteria based upon the site as it existed before construction commenced.⁷

The Developer's site clearing activities.

In Section IV of its brief the Developer persists in its argument that the site clearing is for farming and adds to this that the clearing, and farming, are part of “separate businesses of PLH” and that the solar facilities “may never be built but the sheep farm . . . will continue regardless.”⁸ This argument lacks merit. First, PLH has submitted the Apple Hill site to the Commission’s jurisdiction by virtue of the Section 248 petitions. Second, it is irrelevant who is conducting the clearing while the Apple Hill site is subject to the Commission’s jurisdiction; the solar projects are still being pursued, and the same area needs to be cleared to build the Section 248 projects.⁹ Finally, the Developer’s reliance on the same three cases it has previously argued (*Petition of Georgia Mountain Community Wind, LLC, Petition of Beaver Wood Energy Pownal, LLC, and Petition of Monument Farms Three Gen, LLC*), fails to recognize that all three cases are clearly distinguishable from the facts in this matter.

⁷ *Luce Hill Partnership*, at 5. This reasoning, and the need for integrity in the process and a level playing field so as not to disadvantage those applicants who do abide by the rules, applies equally to Section 248 and has already been discussed in the Agency’s initial brief.

⁸ This ignores the Commission’s findings and conclusions set forth in the orders previously issued in this matter which conclude that the site clearing is related to the solar proposals, which the Developer continues to actively pursue. That said, it is simply not credible that the Developer (whether through PLH, or any one of its other related entities) would spend \$850,000.00 to upgrade an interconnection line to the Apple Hill site for the purpose of grazing sheep. See, Case No. 20-1611-INV, Tr. 6/26/20 at 69-70 (Melone). It is common knowledge that large portions of Vermont’s forests were cleared for, and the land denuded by, sheep grazing more than a century ago – without the need for electric lines, let alone three-phase lines.

⁹ See, *Luce Hill Partnership*, at 5 (explaining that when forest clearing was performed in the same area as a subdivision was proposed, even by a prior owner, and then clearing continued once the future Act 250 applicant was under contract to purchase the property, the clearing was non-compliant).

In an attempt to anchor itself to these three decisions, the Developer rests on general propositions acknowledged by the Commission.¹⁰ The problem for the Developer is that none of these propositions are applicable to the activities which the Developer proposes to take – in fact has already undertaken – in this matter.

In *Georgia Mountain*, the Commission found that a property owner's independent logging activities did not violate the conditions of the wind farm's CPG because there was no evidence which demonstrated that the activities occurred where the wind farm project was proposed.¹¹ In sum, *Georgia Mountain* is inapplicable to this matter because the landowner's activities in that case were wholly unrelated to and located away from any planned electric generation construction. Here, the Developer's site clearing activities are in the same place as, and necessary for the construction of, its solar projects.

The *Beaver Wood* decision relied upon by the Developer simply stands for the basic proposition that the Commission has jurisdiction over activities related to the construction and operation of electric generation facilities but does not have jurisdiction over improvements which are not reasonably related to and considered to be a part of an

¹⁰ These are that Section 248: (1) Does not terminate the ability of a petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in an issued CPG; (2) Was not intended to cover farming related to or otherwise lawful activities even though those activities may overlap with activities related to electric generation; and (3) Does not apply to activities or construction of facilities that could be used for other purposes. See, Apple Hill Solar brief at 23-24.

¹¹ *Petition of Georgia Mountain Community Wind, LLC.*, Docket No. 7508, (Memorandum regarding Site Preparation and Construction issued Jan. 5, 2012). Notably, the lands upon which the complained of activities took place in *Georgia Mountain* consisted several hundred acres, on a separate parcel of land from the 700-acre parcel where the wind farm was proposed. In addition, pre-existing sugaring and logging activities had historically been conducted on the non-wind farm parcel. Also, the two adjoining parcels consisted of more than 1,000 acres, and the area required to be cleared for the actual wind farm project was substantially less than 100 acres. In contrast, here the Developer's site clearing activities encompass nearly the entirety of a much smaller 27-acre parcel, upon which the Developer's 4 MW's of proposed solar arrays projects also proposed to clear the majority of the very same parcel. Both clearing areas (the solar clearing and the alleged "farming" clearing) overlap almost entirely.

electric generation facility.¹² Contrast here, where the Developer's site clearing activities are not only related to the construction of its solar projects but, as acknowledged by the Developer, are *necessary* in order to build the solar.¹³ The instant matter is more analogous to the Commission's December 9, 2010 decision in *Beaver Wood*,¹⁴ issued in response to a request to commence site clearing prior to obtaining a CPG, where the Commission stated:

The Board cannot agree to forbear from exercising its enforcement powers as BWE requests. First, such an action by the Board would constitute tacit approval to commence construction prior to the issuance of a CPG, which is expressly prohibited by Section 248. Second, agreeing to abdicate the Board's responsibility to enforce a clear violation of the statute, regardless of the potential benefits associated with these projects, would violate basic principles of the rule of law and thereby undermine the integrity of the Board's process.¹⁵

Finally, the petitioner in *Monument Farms* already had a CPG, and was pursuing an amended CPG. Here the Developer has no CPG. In addition, the Developer has commenced clearing of a forested site (which contains very rare and rare plant species), in violation of Section 248(a)(2), where the Commission clearly has jurisdiction on the basis of the Developer's solar proposals and where the very same clearing is necessary to construct the Developer's solar projects.

The natural environment, the Agency, and the Section 248 process have been irreparably harmed by the Developer's actions.

¹² *Petition of Beaver Wood Energy*, Case Nos. 7678 and 7679, order of 4/1/11 at 9. That said, the Commission in *Beaver Wood*, still asserted jurisdiction over the project site.

¹³ *Id.*

¹⁴ *Petition of Beaver Wood Energy*, Case Nos. 7678 and 7679, order of 12/9/10.

¹⁵ *Id.* at 7.

In Section V of its brief the Developer argues that it is the only entity which is harmed here. This is incorrect. The Developer's claim that it has been irreparably harmed is not supported by the record. As indicated in the Agency's initial brief, any harm to the developer is temporary in a worst-case scenario and more likely, given the eleventh hour and dubious farming plan, wholly non-existent. An injunction only has the effect of prohibiting the Developer from engaging in activities which are violative of Section 248 while the Developer is pursuing its projects, having voluntarily submitted itself to that statute's requirements. Conversely, the harm to the natural environment, the Agency, and the Section 248 process is real and irreparable.

Here, the harm to the environment caused by the Developer's clearing activities (and the risk of additional harm should the clearing resume) has been well documented and already addressed in the Agency's initial brief. Very rare and rare plants have been destroyed. Mature trees have been cut. More plants will be destroyed as will more trees. The area the Developer plans to clear (and has now been enjoined from clearing) contains the entirety of the area proposed to be cleared for its solar projects, and then some. The "then some" area includes very rare plants which were not proposed to be disturbed by the solar projects. The Developer disputes none of this.

Such activities harm the Agency's ability to perform its legislatively mandated function in the Section 248 process.¹⁶ The Agency is not able to present evidence

¹⁶ See, 30 V.S.A. § 248(a)(4)(E), which provides that the Agency: "shall appear as a party in any proceedings held under [Section 248(a)], shall provide evidence and recommendations concerning any findings to be made [concerning the natural environment], and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding." Thus, the Agency, by statute, is charged with protecting Vermont's natural environment on behalf of the people of Vermont in all such energy siting proceedings before the Commission. It is also recognized that the Agency's work in connection with the conservation and protection of Vermont's natural environment extends far beyond Section 248. For example, the mission of the Agency's Department of Fish and

concerning something that has been destroyed; something which no longer exists to observe, document, and protect. At this time, it is unknown how many very rare and rare plants are in harm's way because the Apple Hill site was last inventoried in 2017.¹⁷ In addition, known locations of plants which had been identified with flagging to be avoided will no longer be avoided since the Developer had the flagging removed in 2020.¹⁸

Finally, the harm caused by the Developer's actions to the Section 248 process, and the Commission's statutory authority and its ability to regulate energy generation facilities in Vermont is, and will be, very real. This harm has been described in detail, and repeatedly, by both the Agency and the Department of Public Service from the inception of this matter in June 2020 through the filing of the initial briefs two weeks ago and does not require further illustration.¹⁹

Next, the Developer's reference to Vermont's Endangered Species Act is misplaced and is irrelevant. The two plant species at issue in this matter are not listed as threatened or endangered in Vermont. However, as demonstrated by the Agency, and admitted by the Developer, they are very rare and rare.²⁰ The Developer's reliance on the Section 248(b)(5) "undue adverse impact" standard of review is also misplaced. Simply put, this proceeding does not involve review of an application for a Section 248 project approval; rather, this matter involves activities which violate a statutory prohibition.²¹

Wildlife, established by Vermont statute (3 V.S.A. § 2871; 10 V.S.A. § 4041), is "the conservation of fish, wildlife and plants and their habitats for the people of Vermont."

¹⁷ See, Robert Popp, Agency of Natural Resources ("Popp") supp. aff. 11/25/20 ¶ 21; *see also*, Exhibits ANR-14; and ANR-15.

¹⁸ See, Tr. 6/26/20 at 115-117 (Kobelia).

¹⁹ As indicated in the Agency's initial brief, a clear violation of a statutory prohibition (such as has occurred here) does not require a showing of irreparable harm by a governmental entity.

²⁰ See, Popp, aff. 6/24/20 ¶ 6; *see also*, Exhibits ANR-9, ANR-11; ANR-12; ANR-13; ANR-14; and ANR-15.

²¹ The PUC case number assigned to the proceeding is illustrative. Were this proceeding about a petition seeking Section 248 approval, the case number (20-1611) would be followed by "PET" indicating this is a

Followed to its logical conclusion, the Developer's argument becomes: "If the illegal activity only results in an adverse impact, as opposed to an undue adverse impact, then all is well – there is no harm." Under this approach, the Section 248 prohibition on site clearing would become meaningless, allowing one to argue: "Yes, I admit I violated the statute, but I didn't cause any harm, or at least not too much harm..." Of course, if a site is cleared before the Agency or the Commission even learn about a project proposal there would be no way to determine the degree of harm attributed to the project because any trace of what existed, and therefore any evidence of harm, would not exist.²²

The Developer's reliance on what any prior MOU's may have contained is also misplaced. The projects were denied by the Commission and the MOU's are no longer in effect. That said, the clearing which has already taken place went beyond what was originally proposed in the solar project petitions, and which formed the basis for the terms of the MOU's.²³ In this sense, the Developer has violated the MOU's as well. The Developer cannot have it both ways as it seeks to do here.

The Developer next attempts to argue that the tree clearing does not present irreparable harm because the trees will be cleared no matter what. The Developer's brief, on page 37, contains a table intended to illustrate this fact. If anything, the table serves to illustrate that the clearing activities must be enjoined at this time. Beyond that, it also

petition for a CPG. Instead, the case number here ends in "INV" (20-1611-INV) indicating this is an investigation – further confirmed by the caption of the case: "*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).*"

²² See, PUC Rule 5.402(C)(1) (describing the contents which a 248 petition must contain, including, in subpart (c)(iii): "*existing significant natural and man-made features*"). The Commission, and the Agency, would not be able to evaluate a project's potential to impact natural features which no longer exist, thus rendering the 248(b)(5) criteria irrelevant.

²³ In this regard, the Developer's attempted amendment in March 2020, had it been filed earlier, would have required additional evaluation and process and likely resulted in the need to revise the MOU conditions in effect at that time.

recognizes that the Developer is not harmed by any injunction because at some future time the Developer will presumably be allowed to clear trees provided the clearing is performed in accordance with Vermont law (e.g., in accordance with a CPG issued by the Commission).

The Developer's reliance on the Agency's Guidance for Conducting Rare, Threatened, and Endangered Plant Inventories in Connection with Section 248 Projects, referenced on page 40 of its brief, is also misplaced. This was dealt with at the December 4, 2020 hearing. In sum, the Agency guidance document is for the purpose of evaluating a project's impacts in the context of a Section 248 petition – an entirely different process which recognizes that impacts are allowed, provided they are not undue. The guidance is not intended to be utilized to review illegal site clearing – the subject of this proceeding – because no level of impact on RTE species should be promoted or excused under such circumstances.²⁴ Nor is the guidance document a "Rule" as falsely claimed by the Developer.²⁵

The Developer's attempt, on pages 40-41 of its brief, to calculate its way out of its self-inflicted predicament caused by destruction of the very rare aster relies upon

²⁴ Even if it were applicable to this proceeding, the Developer would not benefit. One of the Developer's arguments is that, at the very least, the injunction should only be limited to those portions of the Apple Hill site that were depicted as to be cleared in connection with the solar proposals. Presumably, the Developer could then come back and clear the rest when, and if, it obtains its CPGs. The problem that this presents for the Developer is that the guidance discusses the Agency's approach to evaluating impacts when reviewing a Section 248 project proposal, which approach contemplates the need for measures to avoid, minimize and mitigate impacts. *See*, Exhibit PLH-6 at 4. Very rare and rare plants have already been documented (and destroyed) on the Apple Hill site outside of the solar array areas and the plant conservation areas, in other words in areas that were not to be cleared. *See*, Tr. 12/4/20 at 193-195 (Popp). By destroying those plants (and others which may have grown since the last inventory in 2017) the Developer would presumably not be able to demonstrate that it took measures to avoid, minimize and mitigate its impacts, thus jeopardizing a finding that its impacts were something less than undue resulting in failure to meet the Section 248(b)(5) standard and obtain a CPG.

²⁵ *See*, **Attachment A** to this brief discussed further below.

documents that are not part of the evidentiary record and misunderstands (or worse, misrepresents) the information contained in the Developer's own plant reports which are part of the record. It is not worth spending time explaining why the Developer's calculations are in error, because the issue of whether more or less than 10% of a plant population has been impacted is not relevant to this proceeding. As discussed above, the review standard to obtain a CPG is different than a proceeding to investigate and address illegal site clearing. However, a cursory review of one of the most recent plant reports provides sufficient insight.

ANR Exhibit 15 (2019 Chelsea Plant Report) contains, on page 2, a table which shows the aster plant counts in the south-western (Chelsea) plant conservation area at the Apple Hill site. The last column, which identifies the number of asters counted in the conservation area in 2019, depicts two numbers on each line. The inflated plant numbers presented in the Developer's brief (e.g., 321 asters in the Chelsea conservation area alone), and its claim that transplantation has been "incredibly successful" appears to be based on including both the numbers within, and without, parentheses. This flawed approach and conclusion, whether intentional or accidental, is belied by the narrative of the second paragraph which follows the table:

Germination of the aster seeds appears to be good within the transplant plots. There is often a flush of recently germinated plants which survive for a single season and then die. Since these recently germinated basal rosettes look very different from the mature plants, this was not recognized until 2019. In 2019 the number of these basal rosettes was counted and the numbers of these presented in the 2019 column in parenthesis. Since the majority of these plants will die, it is unlikely that these numbers will represent a spike in the population. However, this

information may be useful in understanding the local population dynamics in future years.²⁶

The Developer's next argument beginning on page 41, that Route 7 is not an isolating barrier between two distinct aster populations, is even more disingenuous. It warrants little discussion beyond pointing out that it references information which, again, is not part of the evidentiary record while also managing to egregiously misrepresent the testimony of the Agency's witness at the December 4, 2020 hearing.

The Developer refers to Mr. Popp's testimony at the December 4, 2020 hearing (Tr. at 180, lines 15-24) which explains why, in Mr. Popp's expert opinion, Route 7 is an isolating barrier. Then, a mere three lines later in the brief, the Developer suggests that according to Mr. Popp's reasoning "a mere sidewalk would be an isolating barrier." Had the brief author read the next page of the transcript (Tr. at 181, lines 2-12) he would have seen the following:

Mr. Melone: So would that mean that a regular paved street, a two-lane road, is an isolating barrier as well?

Mr. Popp: No. It's got to be of a certain size.

Mr. Melone: Okay. So, so that's my question. What standard is there for the size?

Mr. Popp: I mean, I guess we don't have a, a definition in writing. I mean, a four- or six-lane highway is pretty substantially different than a sidewalk or a logging road or even a regular road. Anybody would, would, I think anybody would, would agree to that.

Mr. Melone: Right, right. I would agree with that too.²⁷

²⁶ See, ANR Exhibit 15 (2019 Chelsea Plant Report) at 2. It is also worth noting that in the preceding paragraph, which appears just below the table, the author of the plant report (the Developer's plant expert) seems less enthusiastic than the brief writer, describing the "success rate" as merely "fairly good." *Id.*

²⁷ Tr. 12/4/20 at 181 (Popp). The point which the Developer appears to be trying to make is that the asters at the Apple Hill site may not be a separate population than the asters at the Warner Solar site located beyond Route 7 to the west. If true, that would result in only two, rather than three, known populations of the aster in Vermont. However, this is entirely irrelevant to this matter because it would not result in a

The Developer's argument suggesting that there will not be any irreparable harm to the nimblewill fares no better. First, the Developer admits that the nimblewill is rare in Vermont.²⁸ Second, as is the case with other arguments, the Developer again resorts to information which is not part of the evidentiary record. Third, the Developer's actions have already resulted in the destruction of an unknown number of nimblewill plants, and a significant percentage (close to 90%) of the nimblewill plants which have been identified at the Apple Hill site are in the area that the Developer intends to clear. As noted above, flagging which was installed to mark the boundaries of the nimblewill plant occurrences were removed by the Developer in March 2020.²⁹

Section 248 restriction on site preparation without a CPG is neither unconstitutionally vague nor unconstitutional as applied to the Developer and its illegal activities at the Apple Hill site.

As an initial matter, the Agency notes that in the context of the many hundreds of electric generation and transmission projects in which the Agency has participated as a party in proceedings before the Commission, this Developer is the only applicant that claims it does not understand the meaning of the clear prohibition contained in Section 248(a)(2) which provides that "no company . . . and no person . . . may begin site preparation for or construction of an electric generation facility" unless the Commission issues a certificate of public good.

change of the aster's status in Vermont. It would still be considered very rare – a fact which has been confirmed by the Developer's plant witness. See, Tr. 12/4/20 at 79-80 (McClammer). And it would still be destroyed by the developer's site clearing activities.

²⁸ See, Exhibits ANR-9, ANR-11; ANR-12; ANR-13; ANR-14; and ANR-15.

²⁹ See, Tr. 12/4/20 at 186, 194-195 (Popp); see also, Exhibit AH-RK-2, and ANR Exhibit-14.

Stated another way, the statute is not vague and it is not unconstitutional as applied to the Developer and its activities at the Apple Hill site. Section 248(b) identifies specific standards which must be met before the Commission can issue a certificate of public good. Among those are the criteria related to the natural environment and the requirement contained in Section 248(b)(5) that the project cannot have an undue adverse effect on the natural environment. Prior to filing its Section 248 petitions, the Developer hired several consultants. These consultants evaluated the Apple Hill site, the project's design, reviewed the statutory standards, and opined on the projects' effects on those standards. With regard to the natural environment, the Developer's consultants identified the presence of rare plants and proposed avoidance and mitigation measures designed to enable the project to meet the no undue adverse effect standard and obtain a CPG.

In fact, the Developer's consultants implemented their recommendations by actually transplanting rare plants in advance of the planned site preparation (i.e., site clearing activities). For the Developer to now argue that the site clearing prohibition is vague, or somehow applied to the Developer in a discriminatory manner defies logic. These claims are simply not credible. They have no merit.

Vermont's plant classification system is rational, is based on a system used by other states and governments throughout North and Central America, and is valid.

The aster is very rare and the nimblewill is rare. Facts that the Developer admits as discussed above.

On page 54, the Developer repeats the same mischaracterization of the record as it did in one of its earlier motions where it suggests, without any factual basis, that "replacement" plants could easily be purchased from Home Depot or many other sources.

The Developer attempts to support its contention by (mis)quoting the testimony of the Agency's witness, Bob Popp, at the June 26 TRO hearing. The problem is that the Developer omits the substantive portion of Mr. Popp's testimony which, obviously, undermines the Developer's newly adopted position that this plant is now common (i.e., not rare).³⁰

The entire question and response, which appears on page 47 of the June 26 transcript, is as follows:

Question by Attorney Dingledine: Mr. Popp, the questions that you got from Mr. Melone about the rarity of these species, apparently, Mr. Melone has claimed that you can just order these species from some nursery and they can bring them on in and you can plant, replant these species. Is that a correct statement for either the S1 or the S2 species that are a subject of this MOU and that are supposed to be protected?

Popp Response: I have not personally looked into that. I, I would not be surprised if you could get the American Aster plant through a nursery. Many of Vermont's rare and endangered plants are available through nurseries. We don't know the provenance of those. They're generally from big nurseries out in the Midwest or down south somewhere, so the genetics are completely different than our plants. So we don't encourage people to plant those out in the wild or introduce them into native populations. (emphasis added)

Simply stated, the very rare asters which exist at the Apple Hill parcel in Bennington, Vermont are not available for purchase at Home Depot or anywhere else.

It is also worth noting that Mr. Popp's above quoted response is consistent with his testimony filed one year ago on January 30, 2020, in the Warner Solar case (PUC Case No. 19-0516), testimony which the Developer moved into the evidentiary record in

³⁰ A position which is very much at odds with the testimony and reports filed by the Developer over the past half-dozen years in connection with its three separate Section 248 petitions related to the 27-acre Apple Hill parcel. See, various testimony of Dori Barton and Arrowwood Environmental natural resources and RTE plant reports in Docket 8302, Docket 8454, and Case 17-5024.

this matter. There, Mr. Popp explains the genetic differences of the Vermont plants and why this is important. The Developer is certainly familiar with the Warner Solar case.³¹ Mr. Popp, in that same Warner testimony, discusses in detail the classification system which the Agency uses to rank plants. The Developer's own plant consultant agreed that the classification system is widely utilized and not inappropriate.³²

The Developer did not challenge the classification of the plants in the underlying Section 248 matters. In fact, it presented evidence which confirmed the plants' status as very rare and rare. This issue is moot.

The plant classification system is not a rule and does not violate VAPA.

Here the Developer rehashes the same argument it presented in a suit against the Agency in superior court where the state's motion to dismiss the Developer's suit is pending.³³ The Developer's argument is addressed in Section I.A. of the state's brief which is included as **Attachment A** to this brief and incorporated into this brief as if fully set forth herein.

The Section 248(b)(5) natural environment standard is not unconstitutionally vague and is neither arbitrary nor discriminatory as applied to the Developer.

The Developer again rehashes an argument from the same superior court action. The Developer's argument is addressed in Sections II., III., and IV.B. of the state's brief which is included as **Attachment A** to this brief and incorporated into this brief as if fully set forth herein. In addition, as stated by the Agency at the December 4, 2020 hearing

³¹ The discussion concerning genetic traits, and the importance of protecting genetically distinct species, may be found on pages 14-16 (Answers 15-16) of Mr. Popp's January 30 testimony.

³² Tr. 12/4/20 at 80 and 85 (McClammer).

³³ *Otter Creek Solar LLC and PLH LLC v. Vermont Agency of Natural Resources et al*, Docket No. 169-2-20 Cncv.

and discussed above, the Section 248(b)(5) “natural environment” review standard is not relevant to this proceeding which is an investigation concerning illegal site clearing activities, not an application for a certificate of public good, where a degree of impact is allowed. This distinction is important.

Inherent in the Section 248(b)(5) standard of no undue adverse impact is the acknowledgement that a project may have an adverse impact and still obtain a CPG. This recognizes that every project will have some level of impact, and that some level of impact (provided that it is not undue) is acceptable to achieve the public benefits provided by a statewide energy infrastructure system. However, the same rationale does not apply to illegal activities which are violative of the regulatory structure which the Developer has voluntarily subjected itself to in exchange for the opportunity to profit from the generation and sale of electric. There is no public benefit which results from illegal site clearing activities such as those which have occurred here. There is only harm. Harm to the environment. Harm to the Agency and to the public, whose natural resources have been destroyed. And, no less important, harm to the Commission and its role in carrying out its legislatively mandated duties by regulating Vermont’s energy sector in a manner that levels the playing field for all participants.

The need for a permanent injunction.

For the reasons stated in the Agency’s initial brief, and those stated above, a permanent injunction is now necessary to prevent further irreparable harm from occurring. The scope of the injunction which the Agency seeks is for the entirety of the 27-acre Apple Hill site. The Developer’s alternative proposal for limiting the injunction

to only the area shown to be cleared in its solar project proposals, discussed on pages 65-66, misses the point.

First, the entire 27-acre parcel is under the Commission's jurisdiction. Second, the Developer itself proposed using portions of the parcel which were outside of the solar array clearing limits as conservation areas to offset the Developer's impacts to plants from clearing of the array areas. Third, rare plants were not moved out of the areas that were not proposed for clearing for the solar arrays (but now are being destroyed as those areas are cleared) *because* those areas were not proposed to be impacted by the solar projects. Fourth, leaving uncleared buffers on the remainder of the 27-acre parcel around the solar projects presumably served to minimize, or mitigate for, other project impacts beyond those related to the rare plants (e.g., aesthetics, noise, etc.). The Developer's attempts to now clear the entire area substantially changes the impacts associated with its solar proposals, and effectively terminates the potential utilization of the undisturbed areas to avoid, minimize or mitigate the projects' impacts, ultimately undermining its own ability for the solar projects to meet the standards contained in Section 248(b)(5).

Finally, the Developer's "partial injunction" proposition approach exposes the Developer's farming argument for the rouse that it is. Clearing some portions of the Apple Hill site, but not other portions of the Apple Hill site, based on where plants may or may not be (which, again is not known at this time since that last inventory was conducted in 2017), would appear to serve neither the solar development nor the farming.

Conclusion

For the reasons set forth above, the Agency respectfully requests that the Commission issue a permanent injunction prohibiting all clearing at the Apple Hill site.

Dated February 12, 2021, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



By:

Donald J. Einhorn, Esq.
Senior Environmental Litigation Attorney
Office of General Counsel
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
802-249-1720
Donald.Einhorn@vermont.gov