

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO. 169-2-20 Cncv

OTTER CREEK SOLAR LLC
and PLH LLC,
Plaintiffs,

v.

VERMONT AGENCY OF NATURAL
RESOURCES, VERMONT PUBLIC
UTILITY COMMISSION, and
THE STATE OF VERMONT,
Defendants.

**THE STATE OF VERMONT, THE VERMONT AGENCY OF NATURAL
RESOURCES, AND THE VERMONT PUBLIC UTILITY COMMISSION'S
MOTION TO DISMISS**

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The State of Vermont, the Vermont Agency of Natural Resources, and the Vermont Public Utility Commission move to dismiss all counts in the Complaint. Rather than be subject to environmentally protective statutory criteria in their efforts to build solar facilities in Vermont, Plaintiffs ask this Court to declare those criteria and related agency policy documents unconstitutional.

Plaintiffs have failed to state a claim because, despite their legal conclusions otherwise, the agency documents are not reviewable in this proceeding and the natural environment criterion in 30 V.S.A. § 248(b)(5) is constitutional. The criterion provides sufficient guidelines and standards and this Court should decline to hear Plaintiffs' as-applied claim. Regarding Plaintiffs' climate claim, they have not alleged a climate-related injury to establish standing but, even if they had, the natural environment criterion does not violate stable climate or public trust principles. Instead, the natural environment criterion embodies these very interests.

As a legal matter, Plaintiffs' claims cannot survive.

MEMORANDUM OF LAW

Background

In Vermont, electric generation facilities must obtain construction and siting approval from the Vermont Public Utility Commission (PUC). 30 V.S.A. § 248(a)(2) (with some exceptions not applicable here). This approval is known as a "certificate of public good" (CPG). *Id.* § 248. Before the PUC may issue a CPG, it must make

findings under various statutory criteria supporting that the proposed project is in the public good—the “section 248” criteria. *See id.* § 248(b).

The PUC may hold hearings to take evidence on the criteria. *Id.* § 248(a)(4); *see also id.* § 9 (“The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.”). One of the criteria provides that there can be no “undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety.” *Id.* § 248(b)(5). The Agency of Natural Resources (ANR) is a statutory party in such hearings, directed to provide evidence and recommendations on section 248(b)(5). *Id.* § 248(a)(4)(E).

Plaintiffs allege they are the owners and developers of solar projects, including the Warner solar project. Compl. ¶ 14. They allege that three ANR policy documents regarding rare and threatened species are unlawful. *Id.* ¶¶ 37 (guidance document), 38 (guidance document), 39 (classification methodology), 45-64. They further allege the natural environment criterion in § 248(b)(5) is unconstitutional. *Id.* ¶¶ 65-88. Plaintiffs claim the agency documents and natural environment criterion harm their “ability to develop, build, operate and maintain solar electric energy facilities in Vermont” and “limit the amount of solar facilities that they can build, and increase the costs of operation and of seeking and obtaining approval to build solar facilities.” *Id.* ¶¶ 5, 17. Plaintiffs claim they “have a constitutional right

and a right under the public trust doctrine to use their land to build solar facilities, and only an overwhelmingly compelling contrary state interest is allowed to curtail that right.” *Id.* ¶ 87.

Standard of Review

I. Motion to Dismiss

On a motion to dismiss for failure to state a claim, the question is whether, assuming all “facts pleaded in the complaint are true” and making “all reasonable inferences in the plaintiffs’ favor,” there exists a basis for relief. *See Montague v. Hundred Acre Homestead, LLC*, 2019 VT 16, ¶ 10, -- Vt. --, 208 A.3d 609. A motion to dismiss only should be granted when “there exist no facts or circumstances that would entitle the plaintiff to relief.” *Id.* (citation omitted).

However, a court is “not required to accept as true ‘[c]onclusory allegations or legal conclusions masquerading as factual conclusions.’” *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 10, 184 Vt. 1, 955 A.2d 1082 (citation omitted); *accord* 61A Am. Jur. 2d Pleadings § 530 (“plaintiff’s bare statements of opinions [and] conclusory allegations . . . are not accepted as true”). Accordingly, where the law does not support the Plaintiffs’ claims, the claims should be dismissed. *See Montague*, 2019 VT 16, ¶ 10 (“The purpose of a dismissal motion ‘is to test the law of the claim, not the facts which support it.’”) (citation omitted); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989) (“Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of a dispositive issue of law.”).

Similarly, in a motion to dismiss for lack of subject matter jurisdiction, the court accepts uncontroverted factual allegations as true. *See Rheaume v. Pallito*, 2011 VT 72, ¶ 2, 190 Vt. 245, 30 A.3d 1263. Where there is no case or controversy, there is no subject matter jurisdiction. *See Brod v. ANR*, 2007 VT 87, ¶ 8, 182 Vt. 234, 936 A.2d 1286.

II. Constitutionality of Statutes

Statutes are presumed constitutional. *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367, 10 A.3d 469; *In re Montpelier & Barre R.R. Corp.*, 135 Vt. 102, 103 (1977), 369 A.2d 1379, 1380 (“In testing statutes for their compliance with constitutional standards, every presumption is to be made in favor of constitutionality.”). As such, a person challenging a statute’s constitutionality bears a “heavy burden.” *Barre R.R. Corp.*, 135 Vt. at 103, 369 A.2d at 1380.

Argument

I. The Agency of Natural Resources’ policy documents are not reviewable in this proceeding.

Counts I, II, III, and the “de facto rules” portion of Count VI should be dismissed because ANR’s policy documents cannot be challenged in this proceeding. They are not rules. The proper forum for Plaintiffs to raise concerns about ANR’s use of these documents—whether for constitutional reasons or otherwise—is in underlying proceedings before the PUC and appeal to the Supreme Court. Additionally, for the guidance documents, Plaintiffs could petition ANR to amend or repeal them. But the documents cannot be challenged as rules, “de facto” or otherwise.

A. The Agency of Natural Resources’ policy documents cannot be challenged as rules.

Plaintiffs allege ANR’s policy documents are “de facto” rules in excess of statutory authorization, in violation of the Vermont Administrative Procedure Act (VAPA) rulemaking requirements, unlawful subdelegations, and in violation of due process and the public trust. Compl. ¶¶ 55, 60, 63, 88. But, they are not rules and cannot be challenged as such.

First, by statute, ANR’s policy documents are not rules. A “rule” is an “agency statement of general applicability that implements, interprets, or prescribes law or policy and that has been adopted in the manner provided by sections 836-844 of this title.” 3 V.S.A. § 801(b)(9) (referencing VAPA rulemaking procedures); *see also id.* § 801(b)(14) (specifically defining “guidance document” as one that has “not been adopted” in accordance with VAPA rulemaking procedures). As Plaintiffs allege, the ANR documents at issue have not been adopted under the VAPA’s procedures for the adoption of rules (3 V.S.A. §§ 836-844). *See* Compl. ¶ 60. Therefore, by definition, the documents are not rules. Further, the legislature specifically created a mechanism for the public to petition an agency to “adopt a guidance document as a rule”—further illustrating that the guidance documents at issue here are not already rules. *See* 3 V.S.A. § 806(b).

Second, contrary to Plaintiffs’ legal assertions and even if Vermont recognized “de facto” rules, ANR’s policy documents do not have the force of law and could not be de facto rules. *See* 3 V.S.A. § 835(b) (“A procedure or guidance

document shall not have the force of law.”).¹ For section 248 proceedings specifically, ANR does not have the authority to issue, deny, make findings, or impose conditions in CPGs. That authority rests with the PUC. *See* 30 V.S.A. § 248. Though ANR is a party, nothing obligates the PUC to adopt ANR’s recommendations (and thus the positions espoused in ANR’s policy documents) when making findings under section 248(b)(5). *See id.* § 248(a)(4)(E) (authorizing ANR to provide evidence and recommendations concerning § 248(b)(5) but not mandating particular outcome), (b)(5) (providing only that PUC “shall find” project meets natural environment criterion before issuing certificate of public good).

In a recent proceeding, the PUC recognized ANR policy documents are not law. In that proceeding, ANR sought a discovery response about a solar project’s location in relation to specific geographic areas identified in an ANR policy document. The applicant objected the request was irrelevant and ANR’s policy document was “not legally enforceable under 3 V.S.A. § 835.” *Petition of Golden Solar, LLC*, No. 18-4163-PET, Order Granting in Part & Den. in Part Mot. to Compel Disc., 2019 WL 1732071, at *14 (Vt. Pub. Util. Comm’n Apr. 10, 2019). The hearing officer ruled the discovery request was proper even though the agency document did not have the “force of law.” *Id.* Because the PUC could consider the

¹ A procedure—not a guidance—may have the force of law if a specific statute so provides. *See* 3 V.S.A. § 835(b). Thus, when the legislature intends for a procedure to have the force of law, it says so. *See* 31 V.S.A. § 652(a)(2)(C) (providing that duly adopted procedure related to multijurisdictional lottery games “shall have the force of law”). Even if the VAPA authorized guidance documents—versus procedures—to have the force of law upon separate, specific statutory authority (which it does not), there is no such statutory provision for the ANR guidance documents complained of here.

document, the request was relevant: “[N]othing in the statute cited by [the company] prohibits the Commission from considering the [agency document] in assessing impacts from the proposed project under relevant Section 248 criteria.”

Id.

In sum, ANR’s policy documents are not rules and there is no basis for judicial review in this proceeding.²

B. Plaintiffs may seek relief through underlying Public Utility Commission proceedings or petition to the Agency of Natural Resources.

Plaintiffs’ proper mode of redress is in underlying PUC proceedings and, from there, appeal to the Supreme Court. *See* 30 V.S.A. § 12 (providing for appeal of PUC order to Supreme Court). There, Plaintiffs are free to argue that ANR’s policy documents and recommendations should not be given weight and are not entitled to deference, pursuant to established principles of administrative law. *See, e.g., In re Morrisville Hydroelectric Project Water Quality*, 2019 VT 84, ¶¶ 35-45, -- Vt. --, 224 A.3d 473 (applying principles of agency deference); *see also Golden Solar*, 2019 WL 1732071, at *14 (noting that applicant’s “argument about the accuracy” of an agency document was “better aimed at what weight the Commission should give” it). The VAPA itself contemplates that agency guidance documents properly are assessed by the tribunal before which the agency appears. *See* 3 V.S.A. § 835(b) (providing that guidance’s failure to have force of law “is not intended to affect whether a court or

² Even if the documents were rules, a VAPA challenge would need to be brought in Washington Superior Court and generally within one year of the rules’ issuance. *See* 3 V.S.A. §§ 807, 846(e).

quasi-judicial body gives deference to a procedure or guidance document issued by an agency whose action is before the court or body”).

Similarly, if the PUC adopts ANR’s recommendations based on the policy documents, Plaintiffs may argue the PUC’s implementation of section 248(b)(5)—using the agency documents—is unconstitutional as applied. But, as described below, *infra* Part II.C at 15-17, an as-applied challenge must be brought in the context of the PUC proceeding itself.

Separately, Plaintiffs also are free to petition ANR to “amend or repeal the guidance document[s]” at issue. *See* 3 V.S.A. § 806(b). If ANR denies the petition, it must give reasons in writing. *See id.* Though that decision may be subject to judicial review, Plaintiffs in this case do not allege or challenge any ANR decision regarding any such petition. Thus, even if an ANR decision regarding the guidance documents might be reviewable outside the underlying PUC proceedings, Plaintiffs have failed to exhaust the administrative remedies in 3 V.S.A. § 806(b) and there is no ANR decision to challenge.

Plaintiffs’ legal conclusions that ANR’s policy documents are de facto rules reviewable in this proceeding are incorrect as a matter of law. Plaintiffs have failed to state a claim and Counts I, II, III, and the “de facto rules” portion of Count VI should be dismissed.

II. The section 248(b)(5) natural environment criterion is not unconstitutionally vague or standardless and does not violate due process or equal protection.

Count IV of the Complaint should be dismissed because the natural environment criterion in 30 V.S.A. § 248(b)(5) is not unconstitutionally vague or standardless. It provides sufficient guidance for applicants and decisionmakers, especially because it is civil rather than criminal and Plaintiffs have recourse through the administrative permitting process.

A permitting requirement only is unconstitutionally vague if it fails to provide “sufficient conditions and safeguards to guide applicants and decisionmakers.” *In re Snyder Grp., Inc.*, 2020 VT 15, ¶ 28, -- Vt. --, -- A.3d -- (citation omitted). Courts employ a similar, overlapping analysis when assessing whether a statute is standardless so as to violate equal protection.³ *See In re Pierce Subdivision Application*, 2008 VT 100, ¶ 19, 184 Vt. 365, 965 A.2d 468 (“In the context of land-use regulation, our approach to complaints of standardless, arbitrary discretion focuses on the criteria for due process and equal protection.”). Put generally, “a permit statute which ‘provides absolutely no standard or guidance’ for the exercise of discretion is unconstitutional.” *Richards v. Nowicki*, 172 Vt. 142, 151 (2001), 772 A.2d 510, 518 (citation omitted).

³ Plaintiffs’ void-for-vagueness claim implicates due process. *See In re 1650 Cases of Seized Liquor*, 168 Vt. 314, 324 (1998), 721 A.2d 100, 107 (explaining that void for vagueness is due process principle). Plaintiffs’ standardless claim implicates equal protection. *See In re Handy*, 171 Vt. 336, 345 (2000), 764 A.2d 1226, 1235-36 (“the power to grant or refuse zoning permits without standards denies applicants equal protection of the laws”).

In void-for-vagueness challenges, the courts apply “greater tolerance” when reviewing civil rather than criminal laws because “the consequences of imprecision are qualitatively less severe.” *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489, 498-99 (1982), *quoted in ANR v. Persons*, 2013 VT 46, ¶ 17, 194 Vt. 87, 75 A.3d 582; *see also Winters v. New York*, 333 U.S. 507, 515 (1948) (“The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement.”). The test also is less strict where the plaintiff can “resort to administrative processes.” *Rogers v. Watson*, 156 Vt. 483, 491 (1991), 594 A.2d 409, 414.

A. The natural environment criterion provides sufficient guidance to applicants and decisionmakers.

In a void-for-vagueness inquiry, the question is whether there are “sufficient overall standards,” and courts may look to the entire law, “not just the challenged subsection.” *Snyder Grp.*, 2020 VT 15, ¶¶ 25, 27 (citations omitted). Relatedly, in an equal protection inquiry, the question is whether there is an “absence of standards” or “excessive discretion” granted to decisionmakers. *See In re Handy*, 171 Vt. 336, 347 (2000), 764 A.2d 1226, 1236. In this context, courts likewise may look to the entire law. *See Pierce Subdivision*, 2008 VT 100, ¶¶ 18-20 (evaluating due process and equal protection claim and noting “we . . . look to the entire ordinance, not just the challenged subsection”). In general, the issue is whether a standard “fail[s] to provide adequate guidance” leading to “unbridled discrimination.” *See id.* ¶ 20 (citation omitted).

Additionally, a court will “uphold standards even if they are general.” *Id.* ¶ 20 (due process and equal protection context); accord *Snyder Grp.*, 2020 VT 15, ¶ 25 (void for vagueness context). Imprecise terms are permissible. See *Sessions v. Dimaya*, 138 S. Ct. 1204, 1214 (2018) (“[m]any perfectly constitutional statutes use imprecise terms like ‘serious’ . . . or ‘substantial’”). This is particularly true where a statute provides specific factors to be assessed in determining compliance with the general standard. See *In re LaBerge NOV*, 2016 VT 99, ¶¶ 20, 23, 25, 203 Vt. 98, 152 A.3d 1165 (upholding local noise ordinance where it “ identify[d] key factors in assessing reasonableness: intensity, duration, and frequency—guidance that further focuses the reasonableness inquiry, guards against arbitrary enforcement, and puts individuals on notice of the law’s requirements”).

The section 248(b)(5) natural environment criterion satisfies these precedents and is constitutional because it contains a permissible general standard, accompanies related criteria that must be met to qualify for a CPG, and sets forth factors that must be considered in assessing whether the criteria (including the natural environment criterion) are met.

To begin, being qualitative and general does not make the “undue adverse effect” standard unconstitutional. See *LaBerge*, 2016 VT 99, ¶ 25 (“[t]he fact that there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is not a sufficient reason to hold the language too ambiguous to define a penal offense”) (citation omitted). Where, as here, the qualitative standard is being applied in a real-world situation (actual

project applications in actual CPG proceedings), its constitutionality is even less in doubt: “we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” *Dimaya*, 138 S. Ct. at 1210, 1214-16 (citation omitted) (holding “crime of violence” standard in Immigration and Nationality Act unconstitutionally vague because it required applying qualitative risk standard to hypothetical “ordinary case” versus real-world conduct).

Next, section 248(b)(5) establishes conditions that the “undue adverse effect” standard must be met in six specific areas: “aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, and the public health and safety.” 30 V.S.A. § 248(b)(5). Then, in assessing whether a project creates such an undue adverse effect, including specifically for the natural environment criterion, the PUC must consider: (i) fourteen separate cross-referenced criteria relating to outstanding natural resource waters including, among other things, water quality, habitat, recreation, and archeological sites; (ii) more than thirty separate considerations incorporated from Act 250; (iii) impacts on primary agricultural soils as specifically defined in Act 250; and (iv) greenhouse gas impacts. *Id.* (cross-referencing 10 V.S.A. § 1424a(d) (outstanding resource waters); 10 V.S.A. § 6086(a)(1)-(8), (9)(K) (Act 250); 10 V.S.A. § 6001 (primary agricultural soils)).

The six “undue adverse effect” criteria and the numerous factors the PUC must consider in assessing them provide sufficient guidance. *See Snyder Grp.*, 2020 VT 15, ¶¶ 24-28 (upholding zoning bylaw against unconstitutionally vague

challenge where bylaw established “multiple conditions” for local authorities to consider when deciding whether to approve certain planned unit development applications); *contrast with In re Handy*, 171 Vt. at 345-46, 348-49, 764 A.2d at 1235-36, 1238 (holding that statute offends equal protection and due process principles where it “provides absolutely no standard or guidance” and provides “unlimited discretion” to local land use authority). The natural environment criterion in section 248(b)(5) is not unconstitutionally vague or standardless.

B. Additionally, Plaintiffs have recourse through the administrative permitting process.

Sufficient guidance defeats Plaintiffs’ claim in and of itself. However, the natural environment criterion is constitutional on the further grounds that Plaintiffs have the opportunity to seek recourse through administrative processes. As explained by the Supreme Court: “Although we have applied the constitutional vagueness standard in regulatory circumstances, we have noted that we are ‘dealing with an area where some imprecision and generality is necessary and inevitable’ and ‘[o]ur void-for-vagueness test is less strict where the regulation is economic and the landowner can seek clarification of its meaning or resort to administrative processes.’” *In re Ferrara & Finn Gravel Pit*, 2013 VT 97, ¶ 16, 195 Vt. 138, 87 A.3d 483 (citation omitted) (upholding qualitative noise standard against void-for-vagueness challenge).

Here, Plaintiffs do not dispute that they may seek their desired outcomes through CPG proceedings, or that they are able to obtain additional clarification regarding section 248(b)(5). Plaintiffs have familiarity with ANR’s policy

documents. *See* Compl. ¶¶ 37-38 (referencing ANR documents on, among other things, precise thresholds for determining when an impact to sensitive plant species qualifies as “unduly adverse,” mitigation of such impacts, and best management practices regarding non-native invasive species). Further, Plaintiffs have the benefit of the PUC’s Rules which, among other things, require applicants to file natural resources and aesthetics information with their applications. *See* 18-1-20 Vt. Code R. § 5.402(C). In addition, if the PUC determines an application is not complete or is insufficient to support positive findings, the PUC must notify the applicant with a statement of deficiencies. *Id.* § 5.402(C)(4). Then, the applicant has the opportunity to remedy the deficiencies. *Id.*

Rather, Plaintiffs allege the natural environment criterion would decrease their profits. More specifically, they allege that ANR’s position on the Warner solar project requires them to “alter the proposed solar project, increasing the costs of construction and operation, and reducing the revenue [they] would receive from the project by forcing a reduction in the number of solar modules.” Compl. ¶ 17.⁴ Instead of supporting a void-for-vagueness challenge—which again already fails because the natural environment criterion in section 248(b)(5) already provides sufficient guidance to applicants and decisionmakers—Plaintiffs’ allegations suggest they know precisely what is required to support a positive 248(b)(5) finding from ANR’s perspective. Plaintiffs just disagree. However, as explained above, the

⁴ Plaintiffs’ CPG application for the Warner solar project currently is pending before the PUC. *See Petition of Otter Creek Solar LLC*, Case No. 19-0516-PET (at Case Details, Vt. Pub. Util. Comm’n, <https://epuc.vermont.gov/?q=node/64/138555>).

recourse for that is for Plaintiffs to make their case before the PUC and, if necessary, the Supreme Court. It is not a basis to declare the natural environment criterion unconstitutionally vague. *See Richards*, 172 Vt. at 144, 150-51, 772 A.2d at 513, 517-18 (not void for vagueness where, as part of permitting process for town sewage permit, Town explained degree of public health and safety protection necessary to satisfy permitting standard).

Plaintiffs have failed to state a claim because, despite their legal conclusions to the contrary, the natural environment criterion is not unconstitutionally vague or standardless as a matter of law. The Court should dismiss Count IV.

C. Plaintiffs' as-applied claim is not properly before the Court.

Plaintiffs assert both as-applied and facial challenges under Count IV. Compl. ¶ 68. Plaintiffs as-applied claim also should be dismissed. Any as-applied challenge must be made in the context of an actual CPG proceeding, not in a collateral Superior Court proceeding. *See generally Travelers Indem. Co. v. Wallis*, 2003 VT 103, 176 Vt. 167, 845 A.2d 316; *accord Otter Creek Solar LLC v. State of Vermont*, No. 299-4-18 Cncv, Ruling on Mots. for Summ. J., at 4 (Vt. Super. Ct. Mar. 4, 2019) (holding as-applied claims barred by res judicata where plaintiffs could have litigated them before PUC) (Toor, J.) (attached).

In *Travelers Indemnity*, the Supreme Court dismissed Travelers' as-applied constitutional claims under the doctrine of primary jurisdiction. 2003 VT 103, ¶¶ 10-18. Travelers sued the Department of Labor in Superior Court seeking a declaratory judgment that the Department had violated Travelers' constitutional

rights in workers compensation cases at various stages of proceedings before the Department. In dismissing the as-applied claims, the Court reasoned that the tribunal with expertise (the Department) would need to construe the statute in the first instance, in the individual proceedings Travelers complained about. *Id.* ¶ 17. The Court noted “[t]he validity of the application of a statute . . . usually involves factual issues which have been committed to the expertise of administrative agencies by the legislature and in many instances the constitutional issue may never arise if the administrative remedy is exhausted.” *Id.* ¶ 18 (citation omitted). The Court also relied on the rule that, “[i]n general, use of a declaratory judgment action to attack the application of the statute in particular cases is not appropriate.” *Id.*

Similarly here, Plaintiffs must make their arguments before the PUC. The PUC will make findings, construe the statute, and grant or deny CPGs. *See* 30 V.S.A. § 248(a)(2), (b). If Plaintiffs are aggrieved by the PUC decisions, their recourse is not to this Court in a collateral proceeding, but to the Supreme Court. *See* 30 V.S.A. § 12. Even if this Court could hear an as-applied challenge to the natural environment criterion, Plaintiffs have not alleged anything for this Court to review. They have not alleged constitutional violations from any final PUC orders, instead alleging their ability to “develop, build, operate and maintain solar electric energy facilities” has been harmed because section 248(b)(5) “inhibit[s] solar energy development.” Compl. ¶ 5; *see Travelers*, 2003 VT 103, ¶¶ 8, 19 (allegations regarding agency’s “general practices” insufficient to support as-applied claims).

For these reasons, Plaintiffs’ as-applied claim under Count IV should be dismissed. And Plaintiffs’ facial challenge fails because, as explained above, the natural environment criterion provides sufficient guidance and standards, along with the opportunity to utilize administrative processes. *See Snyder Grp.*, 2020 VT 15, ¶ 27 (facial challenge fails where law has “sufficient overall standards”) (citation omitted).⁵

III. The section 248(b)(5) natural environment criterion is not an unconstitutional delegation and does not violate due process or equal protection.

For the same reasons the natural environment criterion is not unconstitutionally vague or standardless, it is not an unconstitutional delegation of power to the PUC.⁶ Count V should be dismissed.

⁵ There is some doubt that even a facial void-for-vagueness challenge can be raised outside the context of a particular case. *See State v. Purvis*, 146 Vt. 441, 443 (1985), 505 A.2d 1205, 1207 (“Since ‘[v]agueness challenges to statutes not involving First Amendment freedoms must be examined in light of the facts’ presented . . . we need not decide whether this statute passes constitutional muster under all possible applications.”) (citation omitted); *Snyder Grp.*, 2020 VT 15, ¶ 27 (holding, in context of zoning appeal itself, that statute was not void for vagueness on its face). However, the Supreme Court also generally has held that facial challenges for declaratory judgment may be heard separately. *See Travelers*, 2003 VT 103, ¶¶ 18-19. Therefore, and because Plaintiffs also raise a “standardless” equal protection claim, the State addresses the facial challenge in Part II.A-B at 10-15, *supra*.

⁶ The nondelegation standard overlaps with that for vague and standardless claims. *See In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 17 n.3, 203 Vt. 274, 155 A.3d 1207 (noting that analysis upholding statute as constitutional under nondelegation doctrine applied equally to vague and standardless claims: “[O]ur above analysis—and the cases we rely on—answer these questions, insofar as we are holding that the statute contains sufficient specific criteria and precise standards to render it constitutional.”); *In re Handy*, 171 Vt. at 345-46, 764 A.2d at 1235-36 (noting “three overlapping theories” for standardless delegation claims); *Dimaya*, 138 S. Ct. at 1212 (noting that void for vagueness doctrine is “corollary of the separation of powers”).

Under the nondelegation doctrine, a legislature generally may not delegate its legislative power to another branch. Vt. Const. ch. 2, § 5 (“The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”); *Vill. of Waterbury v. Melendy*, 109 Vt. 441, 448 (1938), 199 A. 236, 239 (“functions of the Legislature, which are purely and strictly legislative, cannot be delegated, but must be exercised by it alone”).

However, a legislature may delegate power to implement legislative policy if the delegation is not “devoid of any conceivable standard to guide and constrain discretion.” See *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 12, 203 Vt. 274, 155 A.3d 1207. The basic inquiry is whether the legislature has provided standards or policy guidance to the delegated body. *Id.* ¶ 17 (“there is no delegation if the legislation in question ‘provides a general statement of policy, together with a right to judicial review, of any administrative action taken’”) (citation omitted); *Melendy*, 109 Vt. at 453, 199 A. at 242 (whether legislature has provided any “policy or plan” or “rule or standard”); *In re B&M Realty LLC*, 2016 VT 114, ¶ 28, 203 Vt. 438, 158 A.3d 754 (“there can be no claim of ‘unconstitutional delegation of legislative power’ where a statute ‘establish[es] reasonable standards to govern the achievement of its purpose and the execution of the power which it confers’”) (citation omitted).

The natural environment criterion in section 248(b)(5) contains many standards to guide the PUC’s discretion. See *supra* Part II.A at 10-13 (describing criterion’s permissible qualitative standard, accompanying criteria that must be

met, and more than forty factors that must be considered). These standards reflect legislative policy to help ensure the siting of electric generation facilities will “promote the general good of the State.” *See* 30 V.S.A. § 248(a)(2)(B). They provide even more guidance than the statute upheld in *MVP Health*, which delegated authority to the Green Mountain Care Board and provided for “considerations of affordability, the promotion of quality care and access to care, insurer solvency, and fairness,” and consideration of another agency’s opinion. *See* 2016 VT 111, ¶ 16.

As in *MVP Health* and as previously noted, if Plaintiffs disagree with how the standards are applied, their recourse is to make their substantive case to the underlying tribunal (the PUC) regarding compliance with the natural environment criterion, and then appeal to the Supreme Court if they feel the PUC’s decision is not justified. *See id.* ¶18 (reversing and remanding decision for Board “to make specific findings, based on the statutory factors, to support its conclusions”).

Plaintiffs have failed to state a claim because, despite their legal conclusions to the contrary, as a matter of law the natural environment criterion is not an unconstitutional delegation of power. The Court should dismiss Count V.

IV. Plaintiffs lack standing for Count VI because they have not alleged an injury caused by climate change and, even if they had, the section 248(b)(5) natural environment criterion is constitutional under due process and does not violate the public trust.

Count VI should be dismissed because, rather than allege injuries caused by climate change, Plaintiffs allege injuries caused by the CPG permitting process. Further, even if Plaintiffs adequately had alleged standing, and even if Plaintiffs have a fundamental right to a stable climate and the State of Vermont has a public

trust obligation to protect a stable climate, the natural environment criterion does not violate these principles.⁷ Instead, section 248(b)(5) and the natural environment criterion *incorporate* these principles by prohibiting undue harm to air purity and requiring consideration of greenhouse gas (GHG) impacts.

Plaintiffs would have this Court declare any undesired prerequisite to building renewable energy facilities (such as applying for a CPG and complying with the natural environment criterion by “alter[ing]” a project, *see* Compl. ¶ 17) unconstitutional. The State would lose its ability to place conditions on projects to ensure environmental protection or to deny projects based on undue impacts caused by improper siting, insufficient mitigation, or the like.⁸ Again, if Plaintiffs believe the PUC improperly considers air pollution and GHG impacts in any particular proceeding, Plaintiffs’ remedy is to appeal that ruling to the Supreme Court—not to void Vermont’s natural environment criterion as facially unconstitutional.⁹

A. Plaintiffs lack standing because they have not alleged an injury caused by climate change.

Plaintiffs have not alleged an injury caused by the alleged violation of their

⁷ The State evaluates Count VI under due process and the public trust. The State does not separately address Article I because Article I is not self-executing. *Shields v. Gerhart*, 163 Vt. 219, 223-26 (1995), 658 A.2d 924, 928-29. Also, the State does not separately address Article 7 because Plaintiffs have not alleged a violation of the Common Benefits Clause. Compl. Count VI, at 17, & ¶ 88. Rather, Plaintiffs cite Article 1 and Article 7 to support their claim that the Vermont Constitution creates a right to a stable climate, *id.* ¶ 88, presumably in lieu of the liberty and property interests that typically underlie a due process claim, *see Mellin v. Flood Brook Union School Dist.*, 173 Vt. 202, 215 (2001), 790 A.2d 408, 420.

⁸ Solar generating facilities are exempt from local zoning regulations. 24 V.S.A. § 4413(b). Solar generating facilities also are generally exempt from needing an Act 250 permit. *See* 10 V.S.A. § 6001(3)(D)(ii).

⁹ The State reads Count VI as a facial challenge. Any as-applied challenge would be improper. *See supra* Part II.C at 15-17.

right to a stable climate under the Vermont Constitution and public trust doctrine.

Plaintiffs must have standing for each claim. *DaimlerChrysler Corp. v. Duno*, 547 U.S. 332, 352 (2006) (“our standing cases confirm that a plaintiff must demonstrate standing for each claim he [or she] seeks to press”). Standing requires (i) injury in fact that is (ii) fairly traceable to defendants and (iii) redressable by the court. *See Parker v. Town of Milton*, 169 Vt. 74, 77 (1998), 726 A.2d 477, 480. The injury must be “particularized” to the plaintiff. *Id.* at 78, 726 A.2d at 481. Further, the injury complained of must fall within the “zone of interests to be protected or regulated by the statute or constitutional guarantee in question.” *Hinesburg Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 342 (1997), 693 A.2d 1045, 1048 (citation omitted).

Thus, where the claimed “interest to be protected” is that of a stable climate, Plaintiffs must have a particularized injury-in-fact flowing from harm to that interest. *See* Compl. ¶ 20 (alleging interest in stable climate as fundamental right and as beneficiary of public trust). Instead of alleging harm from an unstable climate, however, Plaintiffs have alleged harm from the CPG permitting process. *See* Compl. ¶¶ 17 (§ 248(b)(5) causes financial harm), 18 (§ 248(b)(5) increases costs), 19 (§ 248(b)(5) limits ability to generate renewable electricity), 87 (§ 248(b)(5) criteria restrict use of land for solar facilities). Their barebones, non-particularized allegation regarding harm from climate change is that the State is “contributing to the dangerous risks of harm to human life, liberty, and property, including that of Plaintiffs.” *Id.* § 19.

This is very different from the injury that was sufficient for standing in the *Juliana* cases Plaintiffs cite. See Compl. ¶¶ 78-79 nn.3-5. There, the Ninth Circuit assumed for purposes of analysis that a “broad constitutional right” to a “climate system capable of sustaining human life” existed. *Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020). Though it ordered dismissal on redressability grounds, the Ninth Circuit agreed with the lower court that plaintiffs had met the injury requirement. *Id.* at 1168, 1175. For example, some plaintiffs were forced to leave their homes because of water scarcity or flooding. *Id.* at 1168. They showed “that *climate change is affecting them now in concrete ways* and will continue to do so unless checked.” *Id.* (emphasis added).

In contrast here, Plaintiffs have not alleged an injury to their interests caused by climate change: they have not alleged that “climate change is affecting them now in concrete ways.” To the contrary, Plaintiffs have alleged financial loss due to the CPG permitting process. Count VI should be dismissed for lack of subject matter jurisdiction. See *Brod*, 2007 VT 87, ¶ 8 (“To have a case or controversy subject to the jurisdiction of the court, the plaintiffs must have standing.”).

However, even if Plaintiffs properly had alleged injury, their due process and public trust claims would fail.

B. The natural environment criterion does not violate due process.

A statute burdening a fundamental right is constitutional under due process if it is narrowly tailored to promote a compelling state interest. See *State v. Barlow*, 160 Vt. 527, 528 (1993), 630 A.2d 1299, 1300; *State v. Blackmer*, 160 Vt. 451, 464-65

(1993), 631 A.2d 1134, 1142-43 (Johnson, J., dissenting) (describing test).¹⁰ This is known as “strict scrutiny.” See *Brigham v. State*, 166 Vt. 246, 251, 256 (1997), 692 A.2d 384, 387, 390.

Fundamental liberties typically are thought of as those protected by the Bill of Rights or “central to individual dignity and autonomy.” See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015). Here, though Plaintiffs invoke climate as a fundamental *right*, their allegations of harm to fundamental liberty *interests* are skeletal. See Compl. ¶ 19 (alleging Defendants are “contributing to the dangerous risks of harm to human life [and] liberty”). Rather, as noted above, Plaintiffs assert harm to their economic property interests. See Compl. ¶¶ 17 (financial harm), 18 (increased costs), 19 (generating electricity), 87 (using land for solar facilities).

These types of interests are not fundamental and laws affecting them are not entitled to strict scrutiny. See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 576 n.142, 578, 609-11, 625 (1997) (noting rational basis review for zoning laws and advocating for certain other property interests—such as bodily integrity and reputation—to be deemed “fundamental”); *Vill. of Euclid, Oh. v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance invalid if “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528,

¹⁰ The State reads Count VI of the Complaint as alleging a substantive due process violation. Plaintiffs do not appear to challenge the CPG process itself, but rather the substantive rules underlying the process. See *Parker v. Gorczyk*, 170 Vt. 263, 276 (1999), 744 A.2d 410, 418-19 (describing difference between procedural and substantive due process).

542, 548 (2005) (private property “regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause”); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995) (interest in government permit subject only to “arbitrary or irrational” review); *Galanes v. Town of Brattleboro*, 136 Vt. 235, 240 (1978), 388 A.2d 406, 410 (zoning ordinance constitutional where “reasonably related to public health, safety, morals or general welfare”).

Nevertheless, assuming for the sake of argument that Plaintiffs have alleged a burden to the claimed fundamental right sufficient to invoke strict scrutiny, the natural environment criterion meets the test.¹¹

1. The natural environment criterion promotes compelling state interests.

Despite Plaintiffs’ claim that “[s]tandardless natural environment criteria . . . do not rise to the level of a sufficient state interest,” the environmental interests protected in section 248(b)(5) are precisely the types of interests that courts have upheld. *See Maine v. Taylor*, 477 U.S. 131, 144, 151-52 (1986) (in dormant commerce clause strict scrutiny context, upholding Maine’s ban on import of live baitfish and noting that state “retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources”); *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104, 115 (2d Cir. 2001) (in First Amendment disclosure context, holding “Vermont’s interest in protecting human health and the

¹¹ As such, the natural environment criterion also necessarily survives any rational basis review implicated by Plaintiffs’ economic and property interests in use of their land.

environment from mercury poisoning is a legitimate and significant public goal”); *Grocery Mfrs. Ass’n v. Sorrell*, 102 F. Supp. 3d 583, 634 (D. Vt. 2015) (“the protection of the environment” is a “quintessential governmental interest[]”).

Further, Plaintiffs do not dispute the State has an interest in protecting its public trust resources. *See* Compl. ¶¶ 20, 86. Section 248(b)(5)—including the natural environment component—embodies that interest, which is deeply rooted in Vermont law. *See* 30 V.S.A. § 248(b)(5) (applying to air, water, natural environment, natural resources); *e.g.*, Vt. Const. ch. 2, § 67 (public trust in surface waters, wildlife); 10 V.S.A. § 1390(5) (public trust in groundwater); 10 V.S.A. § 6615d(a)(8) (“‘Natural resources’ means fish, wildlife, biota, air, surface water, groundwater, wetlands, drinking water supplies, or State-held public lands.”); *State v. Cent. Vt. Ry., Inc.*, 153 Vt. 337, 342 (1989), 571 A.2d 1128, 1130 (referencing “critical importance of public trust concerns”). The natural environment criterion reflects a compelling state interest.

Relatedly, any burden the natural environment criterion places on Plaintiffs’ alleged right to a stable climate is slight. The question is whether, balanced against the state interest, a burden is so egregious as to be unconstitutional:

We have made it plain, of course, that not every law that incidentally makes it somewhat harder to exercise a fundamental liberty must be justified by a compelling counterinterest. . . . But a state law that creates a “substantial obstacle” . . . for the exercise of a fundamental liberty interest requires a commensurably substantial justification in order to place the legislation within the realm of the reasonable.

Washington v. Glucksberg, 521 U.S. 702, 767 n.8 (1997) (Souter, J., concurring) (citations omitted); *see also State v. DeLaBruere*, 154 Vt. 237, 273 (1990), 577 A.2d

254, 274 (upholding truancy statute against substantive due process challenge where parents’ liberty interest in directing education of children was subject to “reasonable state regulation”); *Barlow*, 160 Vt. at 528-29, 630 A.2d at 1300 (upholding statutory rape statute against substantive due process challenge because “any infringement on the minor’s privacy interest under the state constitution is limited in duration and is outweighed by a compelling state interest”).

Here, section 248(b)(5) requires in-state electric facilities to avoid undue adverse environmental impacts. *See* 30 V.S.A. § 248(b)(5). It does not establish a moratorium on non-fossil fuel facilities. It does not impose unreasonable requirements for approval of non-fossil fuel facilities. Plaintiffs are free to build their facilities if they meet the criteria and other applicable legal requirements.

Indeed, by its terms, section 248(b)(5) *promotes* the very interest Plaintiffs claim it *burdens*—a stable climate. A CPG cannot be granted if a project has an undue adverse effect on the natural environment or air purity, and the PUC must consider “greenhouse gas impacts.” *Id.* *See also, e.g., In re ER Jericho Gravel Solar LLC*, No. 19-3257-PET, Final Order Granting Certificate of Public Good, 2020 WL 1692998, at *9, 17 (Vt. Pub. Util. Comm’n Apr. 1, 2020) (granting CPG for solar facility and finding no undue GHG emissions where, other than during construction, project would not generate GHGs); *In re Petition of Rutland Renewable Energy LLC*, No. 8188, 2015 WL 1227471, at *17-18, 70 (Vt. Pub. Serv. Bd. Mar. 11, 2015) (granting CPG for solar facility and finding no undue GHG

emissions where project “will produce significantly lower GHG emissions per kWh than conventional electric generation”); *In re Petition of Georgia Mtn. Cmty. Wind LLC*, No. 7508, Findings & Order, 2010 WL 2468224, at *25, 63 (Vt. Pub. Serv. Bd. June 11, 2010) (granting CPG for wind facility and finding no undue air pollution where project “will offset [GHG] emissions, including approximately twenty million pounds of carbon dioxide”).

2. The natural environment criterion is narrowly tailored.

The natural environment criterion is narrowly tailored to promote the precise interests it identifies. It prohibits only “undue” adverse impacts, not all adverse impacts. *See* 30 V.S.A. § 248(b)(5). It applies to specific types of facilities—those seeking approval to generate, store, or transmit electricity or natural gas in Vermont. *Id.* § 248(a)(2)-(3). It is listed within the context of specific related criteria (e.g., air and water purity) that must be considered. *Id.* § 248(b)(5). And, it provides substantial guidance to the PUC on specific factors to consider when assessing these impacts. *See id.*; Part II.A at 10-13, *supra*. It does not go “beyond what [i]s reasonably necessary” to accomplish its purpose. *See Shaw v. Reno*, 509 U.S. 630, 655 (1993) (noting test in context of reapportionment plan challenge). Like Act 250, it is “narrowly tailored to serve the State’s interest in protecting the lands and environment of Vermont.” *See In re Downing Act 250 Application*, No. 225-11-09 Vtec, Decision & Order on Cross-Mots. for Partial Summ. J., slip op. at 9, 2010 WL 4998270 (Vt. Super. Ct. Envtl. Div. Nov. 29, 2010) (Wright, J.).

In sum, the natural environment criterion in section 248(b)(5) embodies a compelling state interest, including the very interest Plaintiffs claim it burdens—a stable climate system. Any burden on that interest is mild, and the criterion is narrowly tailored to achieve its purposes.

C. The natural environment criterion does not violate the public trust.

Though the Complaint is unclear, the State assumes for purposes of this motion that Plaintiffs intend to allege an independent violation of the public trust, versus using alleged beneficiary status to support a fundamental right to a stable climate, which is addressed above.¹² Plaintiffs’ public trust claim fails for many of the same reasons.

Simply put, the natural environment criterion does not abdicate “the state’s authority as sovereign to exercise a continuous supervision and control” over public trust resources. *See Cent. Vt. Ry.*, 153 Vt. at 345, 571 A.2d at 1132 (citation omitted). In *Central Vermont Railway*, the State and the City of Burlington brought an action challenging the railway’s title to certain lands along Burlington’s waterfront on public trust grounds. The railway argued that it held title pursuant to two nineteenth-century statutes. The Supreme Court held the legislature never intended to convey title free of the trust. *Id.* at 347, 571 A.2d at 1133. The Court reasoned that any statutory attempt to abandon the public trust must be “clearly expressed or necessarily implied” and that “if reasonably possible,” statutes must be read to “preserve the public’s rights in the trust property.” *Id.* at 347, 350, 571

¹² The State also assumes without conceding that private citizens (Plaintiffs) may bring an independent public trust claim against the State.

A.2d at 1133, 1134 (citation omitted). Ultimately, the Court ruled the railway held title to the lands subject to the public trust. *Id.* at 351-52, 571 A.2d at 1135-36.

Here, unlike the legislation at issue in *Central Vermont Railway*, the natural environment criterion does not convey title to anything. Instead, it is one of the means through which the State of Vermont may protect public trust resources—by prohibiting undue adverse effects on the environment in conjunction with considering greenhouse gases and protecting air purity. *See supra* Part IV.B.1 at 24-27. It does not abandon the public trust.

CONCLUSION

Plaintiffs have failed to state a claim for Counts I, II, III, and the “de facto rules” portion of Count VI because ANR’s policy documents are not rules and are not reviewable in this proceeding. They have failed to state a claim for Counts IV and V because the natural environment criterion in section 248(b)(5) is not standardless. Additionally, the Court should not exercise jurisdiction over Plaintiffs’ as-applied claim in Count IV. Finally, Plaintiffs have failed to state a claim regarding a stable climate system in Count VI. They have failed to allege a climate-related injury and, even if they had, the natural environment criterion is consistent with the public trust and does not violate the Vermont Constitution. It promotes compelling environmental protection interests and is narrowly tailored to achieve them. The Court should dismiss this case.

Dated at Montpelier, Vermont, this 8th day of May, 2020.

Respectfully submitted,

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