

**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, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	)))))	Case No. 20-1611-INV
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RESPONDENTS' REPLY BRIEF

"If the facts are against you, argue the law. If the law is against you, argue the facts. If the law and the facts are against you, pound the table and yell like hell."

~ Carl Sandburg

"When you have no basis for an argument, abuse the plaintiff."

~ Cicero, Roman politician and lawyer.

Introduction

The other parties' arguments are a mix of Sandburg and Cicero. The Agency of Natural Resources' ("ANR's") and Attorney Dingleline's response of primarily ad hominem attacks merely clutters the discussion rather than engaging in a precise pronouncement of the facts and the issues. But once all of their mud-slinging is set aside, the simple fact remains that the evidence establishes that:

- (1) The landowner's clearing activities are for the purpose of farming, which need no approval from the Public Utility Commission ("Commission" or "PUC");
- (2) Amendments to petitions for a certificate of public good ("CPG") require no approval from the PUC under PUC Rule 2.204(G)(1);

(3) Robert Kobelia’s activities on Saturday morning, June 27, 2020, were removing brush from the already cleared area¹;

(4) Neither the landowner nor any of the other parties referenced in the TRO are a company, thus the PUC has no jurisdiction to issue an injunction.

The other parties’ briefs are also striking for what they do not say. None of the briefs provide a statutory basis for the Commission’s jurisdiction. The closest the Department comes to a basis for jurisdiction is an assertion the “site clearing without a CPG amounts to a direct violation of Section 248(a)(2).” DPS Brief (as defined below) at 6. But the Department’s faint attempt at supporting jurisdiction (i) ignores the uncontroverted fact that the landowner is engaging in farming, not building an electric facility, and (ii) ignores the fact that neither the landowner nor any other party referenced in the TRO is a “company,” and the statute only gives the PUC jurisdiction to issue injunctive relief against a “company.” If the Department believes there is a basis for a statutory violation the statute requires that it follow the process in 30 V.S.A. §30. If the Department wishes to seek injunctive relief, it needs to do so in Superior Court. Those are the Department’s remedies at law.

ANR’s explanation for PUC jurisdiction, while more verbose, similarly fails to address the statutory basis for Commission jurisdiction. ANR’s attempt to draw parallels between certain zoning cases and here, simply ignores the foundational issues. In ANR’s cited cases, two things were clear—(1) the Superior Court had jurisdiction to issue an injunction, and (2) the actions of the landowner “convert[ing] a former conforming nursery school into a sixth residential unit without the necessary permit, in violation of the town’s zoning ordinance,” ANR Brief (as defined below) at 8, and “construct[ing] a retaining wall which did not meet design specifications or

¹ Hearing Transcript, Page 66, Lines 10-19.

comply with a permit issued by the town,” were in fact prohibited by the zoning ordinance. Here, neither is true. First, as argued in Respondents’ opening brief, the PUC does not have the jurisdiction to issue an injunction against the Respondents’. *Second*, also as the evidence shows, the landowner’s activities are for farming purposes, and are not site preparation for the construction of an electric generation facility.

ANR’s argument for PUC jurisdiction is simply that jurisdiction is implied because section 248(a)(2)(A) provides that “no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.”

The evidence on which ANR relies to establish that the landowner’s activities constitute “site preparation for or construction of an electric generation facility,” is the fact that there is partial overlap to the site work required for the landowner’s farming activities and the site work that would be required if solar facilities were eventually built. ANR’s evidence is simply insufficient to establish that the landowner’s site work to enable its farming activities are for the construction of an electric facility. As argued in the Respondents’ opening brief the Commission has held on numerous occasions that ANR’s view of the law is clearly wrong.

Attorney Dingleline’s brief is, well, a re-warmed version of the intervenors’ usual rant, filled with conspiracy theories. One of her more recent, well-known and often-repeated conspiracy theories involves the mailing of the CPG Amendment to Libby Harris. Intervenor Br. at paras. 15-18. *See*, Dingleline Br. at 6-7:

Unbeknownst to any other party or to the PUC, on March 24th, 2020, Thomas Melone, Esq. and/or Michael Melone, Esq. mailed or caused to be mailed, paper copies of the 80+ pages of the Proposed Amendment filing directly to Libby Harris, a represented party, from the ALLCO offices in New York City, the epicenter of

the Covid-19 Pandemic. The Melones did not mail paper copies of the Proposed Amendment filing to any other party or attorney of record. ... Then, on March 27, 2020, Libby Harris received a large surprise mailing at her home in Bennington, Vermont, where she was isolating and sheltering in place due to her vulnerability to the Covid-19 virus because of her age and health issues, both of which are known to the Melones. The mailing contained paper copies of the 80+ pages of documents comprising the Proposed Amendment filing which the Melones had electronically filed with the PUC on March 23rd and which had been emailed only, to all the parties' counsel of record, including to Libby Harris' attorney. ...The Melones intentional direct mailing of paper copies of the Proposed Amendment documents to Libby Harris, under the Covid-19 Pandemic circumstances referenced above, containing shocking, outrageous and unlawful threats to harm Ms. Harris' property value, her rights under the Covenants, deed restrictions and Common law, and her quiet enjoyment of her property, were all for the improper purpose of bullying, intimidating and scaring Ms. Harris into withdrawing her opposition to the solar energy projects.

The truth is quite different. Rule 5.407 required that hard copies of the Amendment be sent to the ten (10) statutory parties and twenty-seven (27) adjoining landowners in the same manner that hard copies of the original 248 petitions in Docket No. 8454 and No. 8302 were distributed. And that was what was done. One of the recipients included the Apple Hill Homeowners Association, Attorney Dingleline's own client. Attorney Dingleline was not sent a hard copy because her notice of appearance in Case No. 8454 was limited to the technical hearing. Attorney's Dingleline's other conspiracy theories have been debunked by the Respondents on multiple occasions and are in any event irrelevant to this proceeding.

Reply

Pursuant to the Order Granting Parties' Motion to Alter Post-Hearing Schedule issued by the Public Utility Commission ("Commission" or "PUC") on December 18, 2020, Respondents hereby submit this reply brief in response to (i) the brief of the Department of Public Service ("DPS" or the "Department") (the "DPS Brief"), (ii) the brief of the Vermont Agency of Natural Resources ("ANR") (the "ANR Brief") and (iii) the brief of Apple Hill Homeowners Association,

Mount Anthony Country Club and Libby Harris (collectively, the “Intervenors”) (the “Intervenor Brief”), each filed on January 29, 2021.

I. The Landowner’s Activities Are Clearly Not Site Preparation For An Electric Generation Facility.

While this case can be disposed of and the injunction vacated on multiple grounds, the clearest legal basis is that the landowner’s activities and structures are simply not site preparation for the construction of an electric generation facility. The Vermont Supreme Court recently observed that the actual construction of a structure that does not produce electricity does not fall within the ambit of section 248. *See, In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20 at P19:

We also find it helpful to be mindful of the history of §§ 246 and 248. Section 248, originally enacted in 1969, establishes requirements for CPG approval for in-state electric transmission and generation projects. *Id.* § 248(b)(1)-(11); 1969, No. 69, § 1. These criteria are generally applicable to public service companies preparing to construct an electricity-generating project or facility within the state. *See id.* § 201 (defining “companies”); *see also id.* § 248(a)(2)(A) (directing that “no company, as defined in section 201 of [Title 30] ... may begin site preparation for or construction of an electric generation facility ... within the State” without first obtaining CPG). The criteria are extensive and were not geared toward temporary meteorological towers, which, unlike other projects governed by § 248, are temporary constructions that do not produce electricity. Section 246 was adopted in 2008, almost forty years after § 248. It was clearly written to account for temporary meteorological towers, as distinct from the electricity-generating facilities governed by § 248.

Here the result is even clearer. Like meteorological station, the landowner’s farming activities and structures will not generate electricity, and thus do not need a CPG. Thus, there is no basis to continue the injunction. The landowner’s activities are in the Commission’s own words “*lawful activities on its land, [] that [] do not conflict with any requirements contained in a CPG issued by the Board.*” *Georgia Mountain*, Docket No 7508, Order of January 5, 2012.

II. The Commission Lacks Jurisdiction to Issue an Injunction.

As the caption of this case states and as ANR argues in the ANR Brief, the Commission is relying on 30 V.S.A. §30 and 30 V.S.A. §209 to assert jurisdiction in these proceedings. However, as argued in the Respondents’ opening brief, section 209 simply has no applicability to the Respondents² as none of them are a “company.” It is therefore no surprise that no proponent of the injunction has made any attempt to argue that any of the Respondents can be considered a “company” under 30 V.S.A. §209(a)(6). Also as argued in Respondents’ opening brief, the fact that the solar project CPG applicants are parties to standard offer contracts similarly does not provide a basis for jurisdiction.

As argued in the Respondents’ opening brief, to the extent that there is an alleged violation of section 248 by a “person” as alleged here, the Legislature provided for the path that must be followed and that is laid out in 30 V.S.A. § 30(h). Under section 30, the investigation must proceed under section 30(h), and to the extent injunctive relief is sought, it must be done so in Superior Court.

Moreover, as argued in Respondents’ opening brief, the PUC’s claim of jurisdiction over the landowner rests solely on treating the landowner and the solar project companies as a collective “person” under 10 V.S.A. §6001(14) in direct contravention of the Vermont Supreme Court’s holding in *In re Mt. Top Inn & Resort, JO 1-391*, 2020 VT 57. Here, the landowner’s only role is leasing part of the land to the solar companies. The landowner has no other financial interest in the solar companies or the solar projects, and is not the applicant for a CPG.

As a result, the injunction must be vacated and this case closed. If the Department decides to pursue the matter it certainly may do so by following the proper procedures.

III. None of the Four Factors Required for an Injunction are Satisfied.

² Capitalized terms used herein and not otherwise defined herein shall have the meanings ascribed to such terms in the Respondents’ Initial Brief filed on January 29, 2021 (the “Initial Brief”).

To obtain a permanent injunction, a party must demonstrate that: (1) it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.³ None of these four factors are satisfied.

(A) PUC RULE 2.406 Requires a Showing of Irreparable Harm and None Exists.

As explained in Respondents' opening brief, none of the proponents can show an irreparable injury to it that satisfies the *Winter* standard which requires a showing of harm to the proponent of the injunction – not just to the environment⁴. The Supreme Court long ago rejected the notion that a mere interest in a problem – in particular, a concern for the environment- is enough to establish an injury for purposes of standing to assert a claim, let alone to satisfy the more demanding requirement of irreparable harm in the absence of injunctive relief for purposes of obtaining injunctive relief. *See Sierra Club v. Morton*, 405 U.S. 727 (1972).

ANR, with full knowledge that it is unable to demonstrate any irreparable injury to it or to the environment, argues that a government entity, in seeking to enjoin a threatened or existing violation of a zoning regulation, need not show damage accruing to it by reason of the violation. *See* ANR Initial Brief at 13. In support of this presumption of irreparable injury, ANR cites the case of *Johnson v. Murzyn*, 1 Conn. App. 176, 180 (1984)⁵. This is the case cited by the Vermont

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

⁴ The standard for injunctive relief under *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365 (2008) ("*Winter*") requires a showing of harm to the proponent of the injunction – not just to the environment.

⁵ ANR also references *Trybulski v. Bellows Fall Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941) for the proposition that the Commission has the discretion to issue a permanent injunction without a finding of irreparable harm. Presumably, this is a mistaken citation by ANR as that case has nothing to do with injunctions and is only relevant for its holding that the Commission "is a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction." *Id.* at 7.

Supreme Court in *Town of Sherburne v. Carpenter*, 155 Vt. 126 (1990) (“*Sherburne*”) for the proposition that:

Generally, where a statute authorizes a municipality or public agency to seek an injunction in order to enforce compliance with a local ordinance or State statute, **and is silent as to the injury caused**, the municipality is not required to show irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance. See, e.g., *Johnson v. Murzyn*, 1 Conn. App. 176, 180-81, 469 A.2d 1227, 1230 (1984).

Sherburne at 129 (emphasis added).

Here, assuming *arguendo* that the PUC has the jurisdiction to issue an injunction in these proceedings, the Commission Rule that the Department and ANR argue authorizes the PUC to issue an injunction is not “silent as to the injury caused”. Rule 2.406 specifically requires a showing of irreparable injury, so the holding of *Sherburne* and the presumption of irreparable harm simply does not apply here. An agency is bound by its rules. See, e.g., *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979) (“[W]e do not believe the Commission should have authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations.”) (internal citations and footnotes omitted.).

More importantly, however, *Sherburne* would still require a showing that a local ordinance or State statute was violated in order for an injunction to issue without a showing of irreparable harm. That aspect of *Sherburne* is also missing here because no local ordinance or State statute has been violated. The state agencies argue that the clearing was done in violation of 30 V.S.A. §248(a)(2) but that conclusion is unsupported by any evidence. Section 248(a)(2) precludes site preparation **for an electric generating facility** without a CPG. The evidence is uncontroverted in these proceedings that the landowner’s activities are not being done in connection with the preparation of an electric generating facility. As Mr. Melone testified: “PLH’s clearing activities

are site preparation for its farming activities.” Prefiled Direct Testimony of Thomas Melone, December 3, 2020 (“Melone PFT”), page 9.

The site work was not performed in anticipation for the construction of an electric generation facility, neither the Chelsea or Apple Hill facilities have been granted CPGs and it is unclear if they ever will receive CPGs. The site work was done in connection with the Horticultural and Farming activities, two completely separate businesses of the landowner. Again, the testimony on this point is clear:

None of the site work is being undertaken in preparation for an electric generation facility or the construction of an electric generation facility. As I also explained at the TRO hearing, the site preparation for the farming use is more expensive and more involved than clearing and site preparation for a solar project. For example, in the case of a solar project, tree stumps do not need to be removed unless they end up being in the way of a post for the support racking of the modules. Clearing for PLH’s farming use, however, requires that all the stumps be removed, which can more than double the cost of clearing.

Melone PFT page 9-10.

As Mr. Melone made clear, the site preparation was done in connection with the Horticultural and Farming activities and is more costly than clearing for a solar array. That there is some overlap between the area to be cleared for the Horticultural and Farming activities and the area that may or may not be cleared in the future in connection with a solar facility does not change the landowner’s right to engage in such lawful activities.

It is not surprising that multiple pages in the ANR Initial Brief are dedicated to arguing in favor of a presumption of irreparable harm rather than trying to prove an irreparable harm that does not exist. All of two conclusory sentences in the ANR Initial Brief are dedicated to attempting to demonstrate that irreparable injury has occurred: “irreparable injury has been suffered because multiple individuals of, not one but, two separate species of rare plants have already been destroyed...” and “the Developer has cleared mature trees at the Apple Hill site...”.

See ANR Initial Brief at 3-4. First, ANR does not allege any harm to it as required by *Winter*. Second, with respect to the plants, ANR's argument contradicts the testimony of its only witness who stated that irreparable harm would only occur if the 10% Rule were violated, which is not the case as explained in detail in the Initial Brief. With respect to the trees, ANR is unable to demonstrate irreparable harm *in the absence of the issuance of the injunction* because at the end of the day, whether the injunction is continued or not, the trees will ultimately be cleared. Even if the effects of clearing could qualify as irreparable harm to ANR, enjoining the clearing of the trees for the solar facilities provides no relief to ANR because the trees still come down. No interest of ANR would be protected through the issuance of an injunction. The injunction may delay the inevitable but delaying the inevitable is not the purpose of a permanent injunction.

In any event, the issue of irreparable harm is a red herring because none of the species that would be affected by the landowner's activities are protected by the Vermont Endangered Species Law. As a matter of law there can be no irreparable harm to a plant species that is not affirmatively protected by law, and none of the species here are so protected.

(B) Not only Does an Adequate Remedy at Law Exist Under 30 V.S.A. § 30(h), it is the Exclusive Remedy Available.

Assuming *arguendo* that there is a violation of section 248(a), the Legislature provided for the path that must be followed and that is laid out in 30 V.S.A. § 30(h). Section 30(h) provides: "In accordance with the process set forth in this subsection, the Department may issue an administrative citation to a person the Department believes after investigation violated section 246, 248, 248a, or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections."

Here the allegation is that some entity has violated section 248's prohibition on site preparation. That allegation falls squarely within 30 V.S.A. §30(h). The Vermont Supreme Court

has consistently held that the more specific provision governing conduct applies, which here is 30 V.S.A. §30(h). *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, P19 (“when two statutes appear to apply to the same situation in conflicting ways, and one statute is enacted later and is more specific than the other statute, we construe the later-enacted and more-specific statute as controlling.”) In any case, 30 V.S.A. §30(h) does not authorize the Department or the Commission to issue injunctive relief. 30 V.S.A. §30(h) does authorize the Department to seek remedial retrospective relief in the form of an administrative citation (i.e., an adequate remedy at law), but not injunctive relief.

(C) The Balance of Hardships Criteria Favors Respondents.

In considering the balance of hardships, the DPS Initial Brief states (incorrectly) that there is no real hardship to the Respondents. In support of this statement, DPS references the Commission’s statement in the TRO Order that “the only possible harm to the [Developer] is a delay in his site-clearing activities if he is ultimately allowed to undertake those activities.” TRO Order at 5 (emphasis added). This statement from the Commission and echoed by DPS and ANR exemplifies a fundamental misunderstanding of the legal right of the landowner to clear its land and the hardship that the landowner is being forced to endure due to the TRO’s continued infringement of that right. There is no question as to the landowner’s ultimate ability to undertake the clearing, whether that clearing is done (i) solely in connection with the Horticultural and Farming Activities outside of the 248 proceedings or (ii) combined with the construction of solar generating facility after the issuance of and in accordance with any conditions in a CPG if one is ever issued.

The Department argues (again referencing the TRO Order) that the Respondents are unlikely to do any sheep farming or hemp growing in 2020 and suggests that because of that no

hardship to the Developer will occur should it be permanently enjoined from site clearing. *See* DPS Initial Brief at 4. That argument is preposterous for obvious reasons. What the landowner could or could not have accomplished in 2020 may have be relevant to the issuance of the TRO, but it has no bearing on the balance of hardship inquiry with respect to the permanent injunction that the Department is requesting. As argued in the Respondents’ opening brief, the harm continues on a daily basis. The landowner has already applied for and received a hemp license for 2021. As a result, the continued injunction causes increasing harm to the landowner. The landowner harm is exacerbated daily by its inability to get the parcel ready for sheep and to build the structures for those sheep.

Neither the Commission nor any other proponent offer an explanation as to why the delay that the Respondents is being forced to endure does not constitute a very real and irreparable injury to the landowner.

ANR argues that “At worse, the Developer’s “plans” to “farm” the site are only delayed temporarily pending the conclusion of the underlying Section 248 matters...” *See* ANR Initial Brief at 5. ANR’s characterization still means there is concrete, particularized harm to the landowner and ANR offers no basis on which that harm would be compensated for by ANR or the other proponents of the injunction. As such the harm to the landowner’s is irreparable.

(D) The Public Interest is Disserved By the Injunction.

ANR argues that the public interest would be served by the issuance of a permanent injunction because the public has a strong interest in protecting natural resources. First, from a statutory perspective, ANR cannot make such an argument as ANR has no authority to classify plants outside of Title 10, Ch. 123, 10 V.S.A. § 5401 et seq. (the “Vermont Endangered Species Law” or “ESL”) as explained in the Respondents’ opening brief. Second, the issuance of a

permanent injunction does nothing to protect natural resources in this case. ANR has already done its job by negotiating and executing the ANR MOU which addresses the “rare” plants. There is nothing left for ANR to do with respect to the plants in this case, except to address the changes described in the Amendment. A continued injunction will only succeed in delaying the inevitable and continuing to irreparably harm the landowner, neither of which constitutes a legal justification for a permanent injunction in Vermont.

ANR and the Department also make the argument that the public interest would be least served if the Commission were to refrain from issuing a permanent injunction because the Respondents’ activities “challenge the integrity of the Section 248 permitting process”. *See* DPS Initial Brief at 5. DPS states that if the TRO were dissolved it would serve as a signal to developers that they will be permitted to commence site clearing without a CPG and without consequence. *Id.* ANR makes a similar argument that ANR cannot perform its role if developers’ activities occur before potential impacts are fully assessed. ANR’s and DPS’s concerns are divorced from the facts. Here, both DPS and ANR had more than sufficient opportunity to review all environmental impacts.

If ANR wants to expand its portfolio to beyond the Vermont ESL, then it needs to go to the Legislature, and not this Commission. Under current law, a landowner has an absolute right to commence site clearing without a CPG if the site clearing is not being performed as site preparation for an electric generation facility. *See, e.g., Georgia Mountain*⁶, *Monument Farms*⁷ and *Beaver Wood*⁸.

⁶ *Georgia Mountain*, Docket No 7508, Order of January 5, 2012 (“*Georgia Mountain*”).

⁷ *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) (“*Monument Farms*”).

⁸ *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011) (“*Beaver Wood*”).

The public interest is disserved when landowners are precluded from exercising their legal right to clear their land in connection with lawful farming activities. The 248 process cannot be “thwarted” when the action that took place is outside of the purview of 248. The 248 process is only “thwarted” when the Commission ignores its own precedent on what constitutes “site preparation” and attempts to broaden the scope of its 248 oversight to activities that are wholly unrelated. The PUC is “a body exercising special and statutory powers not according to the course of the common law, as to which nothing will be presumed in favor of its jurisdiction.” *Trybulski v. Bellows Fall Hydro-Electric Corp.*, 112 Vt. 1, 7 (1941).

IV. Unable to Demonstrate Irreparable Harm, DPS and ANR Erroneously Argue that it can be Presumed.

From their briefs, it is clear that both the Department and ANR are fully aware that neither of them can demonstrate irreparable injury *to them* from the clearing of the land sufficient to satisfy the *Winter* standard. As such, each state agency now relies of the holding of *Sherburne* to make the case that irreparable injury is not required for the Commission to continue the injunction even though PUC Rule 2.406(D) specifically requires a showing of irreparable injury. Each agency attempts to make the case that the landowner’s site clearing without a CPG amounts to a direct violation of section 248(a)(2) meriting a permanent injunction. In other words, a proponent of an injunction must only show a violation of the governing law. This idea that no showing of irreparable injury is required to issue an injunction simply ignores (i) the holding in *Sherburne*, and (ii) PUC Rule 2.406(D).

First as discussed above, the Vermont Supreme Court in *Sherburne* held:

Generally, where a statute authorizes a municipality or public agency to seek an injunction in order to enforce compliance with a local ordinance or State statute, **and is silent as to the injury caused**, the municipality is not required to show irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the

ordinance. *See, e.g., Johnson v. Murzyn*, 1 Conn. App. 176, 180-81, 469 A.2d 1227, 1230 (1984).

Sherburne at 129 (emphasis added)

Here, assuming *arguendo* that the PUC has the jurisdiction to issue an injunction in these proceedings, the Commission Rule that the Department and ANR argue authorizes the PUC to do is not “silent as to the injury caused”. Rule 2.406 specifically requires a showing of irreparable injury, so the holding of *Sherburne* simply does not apply here. Moreover, *Sherburne* would still require a showing that a local ordinance or State statute was violated in order for an injunction to issue. That aspect of *Sherburne* is also missing here because the reality is that no local ordinance or State statute has been violated. The state agencies argue that the clearing was done in violation of 30 V.S.A. §248(a)(2) but that conclusion simply ignores the only applicable evidence on the record to that point.

What is more is that the PUC knows that ANR’s argument is without merit. The ability to seek an injunction for violation of a statute absent irreparable injury is only where the statute expressly provides for injunctive relief. *See, Allco Finance Ltd. v. Roisman*, Case No. 2:20-cv-103 (D. Vt. October 20, 2020):

In *SEC v. Management Dynamics, Inc.*, 515 F.2d 801 (2d Cir. 1975), the Second Circuit held that “[u]nlike private actions, which are rooted wholly in the equity jurisdiction of the federal court, SEC suits for injunctions are ‘creatures of statute.’” *Id.* at 808. For this reason, the Second Circuit held that the SEC did not have to establish irreparable harm and the inadequacy of other remedies as a condition precedent to its pursuit of a statutory injunction enjoining a party’s future illegal activities.

Here, section 248 does not provide for injunctive relief. Therefore, normal *Winter* standard would apply.

(A) There is no violation of 248(a)(2), let alone a “substantial” one.

As discussed above, the holding in *Sherburne* regarding a presumption of irreparable harm is not applicable here because irreparable harm is specifically required by Rule 2.406. Further, the Vermont Supreme Court in *Sherburne* was considering the issue of an affirmative injunction, not a negative injunction like we have in these proceedings. Therefore, again, it is not clear how *Sherburne* is at all relevant. Assuming *arguendo* that *Sherburne* does apply, and no showing of irreparable harm is required despite Rule 2.406 requiring it, the decision in *Sherburne* informs us that when a zoning ordinance is violated, the trial court in considering whether to issue an affirmative injunction should consider (i) whether the violation is “substantial” and (ii) whether the activity involves a “conscious wrongdoing”. As discussed above, the site preparation that occurred was not for the construction of an electric generation facility. Therefore, not only is there not a substantial violation of 248(a)(2), there is no violation.

Assuming *arguendo* that the PUC reverses course and ignores its own precedent in *Georgia Mountain*, *Monument Farms* and *Beaver Wood* and adopts a new “no overlap” rule for site preparation activity under 248(a)(2), then the question under *Sherburne* is whether the site clearing that took place rises to the level of a “substantial” violation of 248(a)(2). The Department concludes that it is a substantial violation but offers no justification or explanation for why it believes the clearing that took place is substantial. ANR argues that the “conscious destruction of very rare (and rare) species (and mature trees), no matter the number”, can not be considered to be insubstantial. ANR Initial Brief at 9 (emphasis added). What ANR considers “substantial” is the destruction of *any* rare plant or any mature tree⁹. Obviously, that is not a reasonable standard, nor the standard it applies in section 248 proceedings under its published “guidance.” Under ANR’s

⁹ See Exhibit AHS-ECOS-17 in Docket 8454 for a description of the trees in question by Bennington Select Board Vice Chair Don Campbell (“the forest is in terrible condition (basal area is so low it barely qualifies as forest in many places and it is rife with invasives”).

view in this case, a landowner with plans to develop a solar facility could be precluded from walking around their property in fear of damaging a single “rare” plant which ANR would view as a “substantial” violation of 248(a)(2).

As described in detail in the Respondents’ Initial Brief, a total of 24 of the 1,924 Asters were impacted or potentially impacted by the purported violation. Impacting or potentially impacting 1.25% of the local Aster population is not “substantial”, especially considering the Aster plants have increased by 189% in the Apple Hill conservation area since transplantation and are easily replaced. Nor does the removal of 1.4 acres of “mature” trees in a 27-acre parcel constitute a “substantial” violation of 248(a)(2), especially when the trees in question will ultimately be removed whether within or outside of the context of a 248 proceeding.

(B) There is no “conscious wrongdoing” where the Landowner relied on 30 V.S.A. §248(a)(2)(A) and PUC precedent to engage in permissible activities outside of the context of Section 248.

The Department and ANR each make the argument that an injunction should issue under *Sherburne* because the landowner engaged in a conscious violation of section 248(a)(2). More specifically, they argue that the landowner “commenced site clearing after the Commission explicitly denied it from doing so.” *See* Department Initial Brief at 6. In support of this “conscious violation” argument, the State agencies reference the TRO Order that states: “Yet, the petitioner has gone ahead with making the very same permanent changes to the landscape that we told him he could not make when we denied his amendment.”¹⁰ That erroneous statement from the Commission represents another fundamental error in these proceedings.

AHS did not file the Amendment as a request for the PUC’s permission to clear the land because, based on the PUC’s own precedent¹¹ and Rule 2.204(G)(1), no approval from the PUC is

¹⁰ Case No. 20-16-11-INV, Order of 6/26/20 at 5-6.

¹¹ *See Georgia Mountain, Monument Farms and Beaver Wood.*

required to do that. The Amendment was an update to the CPG petition based on changes to the land that would occur outside of the context of section 248 (i.e. the Farming and Horticultural Activities). The PUC's refusal to accept the Amendment by the PUC was premised on the request being outside the scope of the PUC's jurisdiction on remand. Even if the PUC needed to approve the Amendment, the refusal to so approve would not be (nor could it be) a denial of the landowner's right to engage in lawful activities for purposes of other than the construction of an electric generation facility. The PUC's refusal or even rejection of the Amendment could not function as a denial to "make the very same permanent changes to the landscape" because the PUC, based on its own precedent and its Rule, does not have the authority to preclude such permanent changes to the landscape which occur outside of the 248 proceedings.

The uncontroverted evidence in these proceedings is that the clearing that took place (and that is planned) relates to preparing the land for the Farming and Horticultural Activities, not in preparation for the construction of an electric generating facility that may or may not be built one day.

V. Intervenor Brief

The Intervenor Brief includes 12 pages of Factual Findings but does not include any discernable issues of law as required by Commission Rule 2.223. Neither the standards for a permanent injunction nor any case law discussing the applicability of a permanent injunction is included. Notwithstanding the forgoing, Respondents will briefly address the following the "factual findings"¹²:

Findings 15 through 18. These "factual findings" state that paper copies of the Amendment were sent only to Ms. Harris. In fact, hard copies were sent out to the ten (10)

¹² For the record, Respondents are not admitting to any of the "factual findings" contained in the Intervenor Brief.

statutory parties and twenty-seven (27) adjoining landowners in the same manner that hard copies of the original 248 petitions in Docket No. 8454 and No. 8302 were distributed. The implication that Respondents were somehow targeting Ms. Harris with a targeted mailing is disingenuous and could have been disproved by Ms. Harris or Attorney Dingleline by picking up the phone and calling one of the 26 adjoining landowners who received the same package (which included the Apple Hill Homeowners Association, Attorney Dingleline's own client).¹³

Finding 28. This "finding" states Melone was putting sheep in this location "primarily" to serve the proposed solar projects. As explained in the Respondents' opening brief, this conclusion is based on a mischaracterization by the PUC of the testimony of Mr. Melone, and is simply false. See Initial Brief page 25.

Findings 32 through 35. These "findings" discuss the hemp registration process. As explained in detail in the Prefiled Direct Testimony of Thomas Melone filed on December 3, 2020, the landowner did not know how long the 2020 hemp registration process would take and expected the earliest they would be approved would be for the 2021 growing season.

Conclusion

For the reasons, stated above the TRO should be promptly vacated, and this case closed.

Dated: February 12, 2021

Respectfully submitted,

/s/Michael Melone

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¹³ Attorney Dingleline was not sent a hard copy because her notice of appearance in Case No. 8454 was limited to the technical hearing.

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