STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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)	Evidentiary hearings conducted: June 26, 2020, and December 4, 2020

Order entered: 04/01/2021

ORDER MAINTAINING INJUNCTION PROHIBITING FURTHER SITE PREPARATION, RULING ON MOTIONS, AND DIRECTING SCHEDULING PROPOSAL

I. INTRODUCTION

This case raises the fundamental question of whether the Vermont Public Utility Commission ("Commission") can enforce the statutory prohibition against any company or person "begin[ning] 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."[1] We conclude that the Vermont Legislature has granted us this authority.

As the Vermont Department of Public Service ("Department") correctly notes, the developer's activities here "challenge the integrity of the Section 248 permitting process."[2] If we did not have authority to enjoin illegal site preparation, then every applicant for a certificate of public good ("CPG") would have an incentive to bulldoze its proposed project site before submitting an application, even if it meant the permanent destruction of trees, rare plants, and very rare plants, as well as other environmental degradation. After all, a proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental

[1] 30 V.S.A. § 248(a)(2)(A).
[2] Department Brief at 5.

impacts, which is directly contrary to legislative intent. This is why the Vermont Legislature has placed a blanket prohibition on even "begin[ning]" site preparation without a CPG.[3]

In this Order, we find that the petitioner has begun site preparation without a CPG, and we enjoin any further site preparation without a CPG. Because an evidentiary hearing addressing an injunction has been conducted, this injunction is permanent.[4] But, as discussed further below, this injunction is temporally limited. We also rule on pending motions regarding the admission of other filings into evidence.

On June 24, 2020, we opened an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors (collectively, "Allco" or "petitioner" or "Developer") were conducting site clearing on Apple Hill in Bennington, Vermont, in violation of Section 248(a)(2) of Title 30.[5]

On June 26, 2020, we conducted an evidentiary hearing and issued a temporary restraining order ("TRO") against Allco prohibiting any further tree clearing or other site preparation on any property for the facilities proposed by Allco in its petitions in Docket 8454 and Case No. 17-5024-PET.[6]

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[3] 30 V.S.A. § 248(a)(2)(A).

[4] *See Committee to Save the Bishop's House*, 136 Vt. 213, 218 (1978) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2942, at 368 (1973)); *see also* Commission Rule 2.406(A)(3) (noting that the Environmental Board may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

[5] Allco is the respondent in this investigation. Allco is referred to as the petitioner in the case caption because it has petitioned the Commission for two standard-offer contracts and for three certificates of public good ("CPGs") for proposed solar electric generation facilities on Apple Hill in Bennington, Vermont. The standard-offer contracts were executed in 2013 and 2014 and have been amended several times at Allco's request to extend the contracts' operational deadlines. *See Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 20-0185-PET, Order of 3/12/20 (granting a fourth extension of the operational deadline for the Apple Hill facility contract); *and Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET (granting a fourth extension to the operational deadline for the neighboring Chelsea Solar/Willow Road facility); *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a Certificate of Public Good authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont*, Docket 8302, Order of 2/6/16 (denying petition for CPG); *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending); and *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-PET, Order of 6/12/19 (denying petition for CPG) (appeal pending).

[6] Case No. 20-1611-INV, Order of 6/26/20.

In this Order we enjoin Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities on Apple Hill in Bennington, Vermont. This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished. In other words, this injunction will remain in place until we know whether the Developer will or will not build solar facilities on this site.

In this Order we conclude that Allco's preparation of the Apple Hill site for solar development without a CPG violated 30 V.S.A.§ 248(a)(2)(A), which requires a CPG before site preparation may begin, and warrants a proceeding to address the issuance of a civil penalty for that violation of Section 30, pursuant to 30 V.S.A. § 30.

We also direct that Allco communicate with the other parties and file a schedule for the next phase of this proceeding. This next phase of the proceeding will determine the civil penalty Allco must pay under Section 30 of Title 30 for violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.

II. BACKGROUND

On May 16, 2013, the Commission approved Allco's petition for a standard-offer contract for the electrical energy to be generated by the "Bennington" facility, which was one of two then-proposed 2.0 MW solar electric generation facilities to be located on a 27-acre parcel on Apple Hill in Bennington, Vermont. The Commission also denied Allco's request for a standard-offer contract for the second proposed facility, the adjacent Apple Hill facility.

On June 20, 2013, Allco executed a standard-offer contract for the Bennington facility, also referred to as the Chelsea Solar facility in Docket 8302 and then later with a different footprint as the Willow Road facility in Case No. 17-5024-PET. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the

project by no later than June 19, 2015.[7] In later orders, the Commission extended the deadlines for these development milestones.[8]

After the Commission's denial of a standard-offer contract for the Apple Hill facility, Allco successfully appealed that ruling to the Vermont Supreme Court, which reversed the Commission's determination.[9]

On May 13, 2014, Apple Hill Solar LLC, on behalf of Allco, was awarded a standard-offer contract for the electrical energy to be generated by the second of the two solar facilities proposed for the Apple Hill site. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than May 12, 2016. In later orders, the Commission extended the deadlines for these development milestones.[10]

On February 16, 2016, in Docket 8302, the Commission denied Allco's request for a CPG for the Chelsea Solar facility located on the site of the Bennington facility for which a standard-offer contract was executed on June 20, 2013.[11]

On September 26, 2018, in Docket 8454, the Commission approved Allco's request for a CPG for the Apple Hill solar facility for which a standard-offer contract was issued on May 13, 2014.[12] Neighbors appealed the Commission's approval of the Apple Hill facility. The Vermont

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[7] The Vermont Standard Offer Purchase Power Agreement is between Ecos Energy, LLC (an Allco subsidiary) and VEPP Inc., a Vermont nonprofit corporation.

[8] *In re request of Sudbury Solar, LLC and Chelsea Solar, LLC for an extension of time to commission their respective solar electric generating projects*, Order of 1/8/15; I*n re request of Chelsea Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*, Order of 3/31/16; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone,* Case No. 17-4695-PET, Order of 3/15/18; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[9] I*n re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29.

[10] *In re request of Apple Hill Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*; Order of 3/31/16; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 18-3727-PET, Order of 12/27/18; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[11] *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, filed 6/19/14.

[12] P*etition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454.

Supreme Court then reversed the Commission's approval in part and remanded the case to the Commission for further action consistent with its remand.[13]

On December 27, 2018, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the proposed Apple Hill facility a second time.[14] The commissioning deadline in Allco's May 13, 2014, standard-offer contract for Apple Hill was extended to twelve months after the date the Vermont Supreme Court issued a mandate letter for any appeal taken with respect to the Commission's final order in Docket 8454.

On June 12, 2019, in Case No. 17-5024-PET, the Commission denied an amended petition for the Bennington facility, now referred to as the Willow Road facility, for which a standard-offer contract was executed on June 20, 2013.[15] Allco has appealed our decision in the *Willow Road* case to the Vermont Supreme Court, where that matter is pending.

On August 20, 2019, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the Bennington/Chelsea/Willow Road facility a fourth time.[16] In this fourth extension, the commissioning deadline in Allco's June 20, 2013, standard-offer contract was extended to twelve months after the date the Vermont Supreme Court issues a mandate letter for an appeal taken with respect to the Commission's final order in Case No. 17-5024-PET.

On March 12, 2020, the Commission issued an order extending the commissioning deadline for the proposed Apple Hill facility a third time to twelve months after the Commission issued its decision on remand in Docket 8454.[17]

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition for the Apple Hill facility to reflect its intention to graze sheep at the site and to grow hemp on the neighboring 5-acre Orchard Lot.[18]

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[13] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

[14] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 18-3727-PET, Order of 12/27/18.

[15] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024.

[16] *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[17] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[18] Amendment to Petition for Certificate of Public Good of Apple Hill Solar LLC, filed 3/23/20.

On May 7, 2020, the Commission issued a final order on remand denying a CPG for the proposed Apple Hill facility in Docket 8454 and denying the motion to amend the petition to reflect grazing sheep at the project site.[19]

On June 19, 2020, public comments were filed by Annette Smith alleging that tree clearing was occurring on Apple Hill on the sites of the two proposed 2.0 MW solar electric generation facilities. Ms. Smith also alleged that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity.

Also on June 19, 2020, Allco filed a response to Ms. Smith's comments, alleging that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Agency of Natural Resources ("ANR") Environmental Enforcement Officer Patrick Lowkes, who "confirmed that NO [rare, threatened, or endangered species] area was being disturbed and that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion."[20]

On June 23, 2020, ANR filed preliminary comments in response to Ms. Smith's public comments. ANR stated that it "has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed."[21]

ANR also noted that the tree-clearing activity raised two concerns. The first concern is that Allco is conducting site preparation without a CPG. The second concern is that the site clearing has not been reviewed to ensure that it does not have an undue adverse effect on the environment. Specifically, ANR was concerned that the site clearing presented a substantial and immediate harm to "very rare" and "rare" plants at the site. ANR requested a cease-and-desist order to prevent irreparable harm to the plants.

On June 24, 2020, the Department also filed comments stating:

> In this case, based on the Agency of Natural Resources Environmental Enforcement Officer's initial findings regarding the site clearing activity, cause appears to exist

[19] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

[20] Email from Thomas Melone to the PUC Clerk, at 7:07 P.M. on June 19, 2020.

[21] ANR Comments at 2.

> meriting further investigation into whether petitioner initiated preparing the Apple Hill site for electric generation in violation of 30 V.S.A. § 248(a)(2).[22]

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors") filed comments in response to Ms. Smith's public comments. The Intervenors assert that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission; and (2) the Developer has engaged in site preparation in violation of 30 V.S.A. § 248 and the Commission should declare the petitions for those facilities to be withdrawn or abandoned.

On June 24, 2020, the Commission initiated this investigation.

On June 26, 2020, the Commission held the first of two evidentiary hearings in this proceeding and issued the TRO restraining Allco from further site-preparation activity on Apple Hill. The Commission also scheduled a second evidentiary hearing for July 9, 2020, to address whether the TRO should be lifted and whether Allco's tree-clearing activities were site-clearing operations in violation of 30 V.S.A. § 248(a)(2).

On June 27, 2020, Allco conducted additional site-clearing work at the Apple Hill site.

On July 1, 2020, the Commission issued a procedural order providing guidance for the July 9, 2020, injunction hearing.

Also on July 1, 2020, Allco filed a motion to vacate the injunction hearing.

On July 2, 2020, the Commission issued an order postponing the July 9 evidentiary hearing until after the Commission ruled on Allco's July 1 motion.

On August 26, 2020, the Commission issued an order denying Allco's July 1 motion and rescheduling the injunction hearing to September 8, 2020 (the "Jurisdiction Order").

On August 31, 2020, Commission staff conducted a status conference with the parties, and Allco requested that the injunction hearing be further postponed to allow Allco additional time to conduct discovery on the rare plant issue.

[22] Department Comments at 2.

On September 1, 2020, the Developer filed a notice of appeal to the Vermont Supreme Court seeking relief from the Commission's TRO and Jurisdiction Order. Also on September 1, 2020, the Commission cancelled the September 8, 2020, hearing.

On November 5, 2020, the Vermont Supreme Court dismissed Allco's appeal without prejudice to refiling it if an injunction is granted.

On November 13, 2020, the Commission provided the parties notice of a rescheduled injunction hearing and advised the parties of the procedures that would be used in that evidentiary hearing scheduled for Friday, December 4, 2020.

On December 4, 2020, the Commission conducted the second evidentiary hearing during which Allco requested that it be permitted to conduct additional limited discovery on ANR.

On December 8, 2020, the Commission issued an order establishing a briefing schedule and limiting the scope of additional discovery to four specific areas.

On December 17, 2020, ANR filed a motion on behalf of all the parties requesting a change to the post-hearing schedule.

On December 18, 2020, the Commission granted the parties' motion to alter the post-hearing schedule and set aside the previous post-hearing schedule. This revised schedule included a January 8, 2021, deadline for ANR to respond to additional discovery questions requested by Allco as well as a January 29 deadline for initial briefs and a February 12, 2021, deadline for reply briefs.

On January 26, 2021, Allco filed two motions and the supplemental prefiled testimony of Thomas Melone. We respond to these motions below.

On January 29, 2021, Allco, ANR, and DPS each filed post-hearing briefs.

On February 1, 2021, the Intervenors filed their post-hearing brief.

On February 8, 2020, ANR responded to Allco's motion for administrative notice. ANR requests that the Commission deny the motion because: (1) the documents are not "facts" as contemplated by V.R.E. 201(b); (2) the evidentiary record is already closed; and (3) the documents are irrelevant.

On February 12, 2021, the parties each filed post-hearing reply briefs.

On February 16, 2021, Allco replied to ANR's February 8 response to the motion for administrative notice asserting that the documents contain relevant facts and that the evidentiary

record is not closed. Allco also filed the supplemental prefiled testimony of Jim McClammer with six exhibits.

On February 23, 2021, ANR objected to the Commission's consideration of Allco's supplemental filings of February 16 because the evidentiary record is closed.

No other comments have been filed by the parties.

III. RULING ON EVIDENTIARY MOTIONS

The record in this proceeding was closed at the end of the second hearing on December 4, 2020. However, the Commission made a limited exception for parties to introduce new information that would address four specific factual concerns that had arisen in that hearing, and the evidentiary record was therefore kept open to address those—and only those—issues, including any relevant responses to the Intervenors' request for information from Allco and Allco's remaining discovery requests of ANR.[23]

In a December 8, 2020, order, the Commission reiterated the limited scope of evidence that may be submitted into the record. Specifically, based on Allco's representations during the hearing, Allco was to: (1) file a correction to the website link addressed in a footnote in its recent filings and queried by the parties during the hearing; (2) file the total number of rare plant populations inventoried by Arrowwood Environmental as shown in Figure 1 of its 2019 Apple Hill Solar Rare Plant Monitoring Report, exhibit ANR-14; (3) develop with ANR a reasonable and timely schedule for ANR to respond to the Developer's pending discovery requests on ANR; and (4) respond in a reasonable and timely fashion to the discovery request filed by the Intervenors on December 7, 2020.

On December 8, 2020, Allco filed an affidavit and exhibit from Robert Kobelia. This was directly responsive to the Commission's request that Allco respond to the Intervenors' discovery request. The Commission's December 8, 2020, Order allowed this filing. Further, this filing provides relevant information, and no one objects to it. For these reasons, the December 8, 2020, affidavit and exhibit of Robert Kobelia are admitted into the record.

[23] "The record is not open for new witnesses, new exhibits, new testimony, other than whatever responses you get from these discovery requests." Tr. 12/4/20 at 221 (Roisman).

On January 25, 2021, Allco filed supplemental prefiled testimony of Thomas Melone and three related exhibits. This filing addressed (1) the website link issue, and (2) the rare plant inventories of Arrowwood Environmental. These are both topics that the Commission said it would allow into the record in our December 8, 2020, Order. Again, this filing is relevant, and no party has objected to it. For these reasons, the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5) are admitted into the record.

On January 26, 2021, Allco filed two motions to supplement the record. The first Allco motion was a request that the Commission take administrative notice of six documents, marked as exhibits A through F, addressing rare plants by different declarants who have not been made available for cross-examination. The second Allco motion requested that the Commission further supplement the evidentiary record by admitting three additional exhibits (AH-JM-4, 5, and 6) that had been inadvertently omitted from Allco's response to discovery questions answered by Jim McClammer in his testimony of December 3, 2020. These documents address the presence of rare plants in the vicinity of Apple Hill.

On February 16, 2021, Allco filed another round of supplemental prefiled testimony from Mr. McClammer, along with six additional exhibits (AH-JM-7, 8, 9, 10, 11, and 12).

ANR objected to the admission of Exhibits A through F and the February 16, 2021, supplemental prefiled testimony and exhibits because they are late, irrelevant, and do not meet the requirements for administrative notice. ANR further requested that the Commission admonish Allco for ignoring Commission orders and directives.

We deny both of Allco's January 26, 2021, motions to supplement the record. We also deny Allco's attempt to place additional documents into the record on February 16, 2021—documents that cannot possibly be put into the record at this late date because they were not accompanied by any motion requesting their admittance into the record.

We deny Allco's motions for two reasons.

First, the information Allco seeks to admit into evidence, including the testimony of Mr. McClammer, is untimely and outside the scope of the limited information that we said could be submitted for the record. While Allco claims that the Commission left the door open to any evidence that is related in any way to ANR's answers to Allco's discovery questions, that is

incorrect. There have been two evidentiary hearings in this proceeding. And now, two months after the record was closed with the exception of specific limited items, and eight months after Allco requested discovery, Allco seeks to file new testimony and six articles totaling more than 400 pages. None of this new information was discussed or addressed in the second evidentiary hearing, nor was ANR or any other party given an opportunity to cross-examine Mr. McClammer on any of this information.

Second, even if the record remained open to the testimony and documents filed by Allco, administrative notice does not apply here. The testimony and attached documents are not the type of irrefutable information that might be given administrative notice and entered into the record. Mr. McClammer makes numerous assertions that are in dispute. Had this testimony or these documents been presented before or during the hearing, ANR could have cross-examined Mr. McClammer on these matters.

IV. FINDINGS

At the evidentiary hearing on June 26, 2020, the Commission admitted those exhibits listed in the transcript from that proceeding, including Commission Exhibit 1, ANR Exhibits 1-9, PLH Exhibits 1 and 2 and their attachments, and Intervenors Exhibit 1. The Commission provided an opportunity for parties to object to those exhibits remaining part of the record for future stages of this proceeding, and no party objected. Therefore, the transcript and exhibits admitted as part of the June 26, 2020, hearing remain part of the record. At the evidentiary hearing on December 4, 2020, the Commission admitted the additional exhibits listed in the transcript from that proceeding. As noted earlier in today's Order, the Commission is also admitting the December 8, 2020, affidavit and exhibit of Robert Kobelia, as well as the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5). Based on the exhibits admitted in the record and the testimony provided in the two evidentiary hearings, the Commission makes the following findings.

1. On June 16, 2020, the Apple Hill site was visited by ANR Environmental Enforcement Officer Patrick Lowkes, who observed that site-clearing activity was occurring on Apple Hill on the 27-acre parcel on which the Apple Hill and Willow Road solar facilities are proposed to be constructed. Tr. 6/26/20 at 22, 24 (Lowkes); Lowkes affidavit 6/24/20 at ¶ 5.

2. Allco's forester has cleared part of the site on Apple Hill by carving out a truck turnaround spot at the end of Willow Road on the Apple Hill site and clearing a path around the site to install soil-erosion fencing. This work cleared approximately 3 of the 27 acres. Allco's forester had anticipated completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020. Tr. 6/26/20 at 126-127 (Kobelia).

3. As part of its CPG petitions in Dockets 8302 and 8454 and Case No. 17-5024-PET, Allco had previously surveyed the site for rare, threatened, and endangered plants and located both rare (nimblewill muhly, *Muhlenbergia schreberi*) and very rare species (white arrow-leaved asters, *Symphyotrichum urophyllum*). Some of the very rare plants, the white arrow-leaved asters, were relocated to conservation areas set aside on the 27-acre site. These conservation areas were marked by Allco and enclosed with soil-erosion fencing. The rare plants were not relocated. Tr. 6/26/20 at 40 (Popp); tr. 6/26/20 at 114 (Kobelia); exh. ANR-10 through 15.

4. There are several areas outside the conservation areas where the rare plant species are located. These would be harmed by the proposed site-clearing activities. Tr. 6/26/20 at 40, 43, 46, 49, and 51 (Popp); exh. ANR-10 through 15.

5. Although Allco states that it is clearing the site to allow for grazing sheep and growing hemp, those activities would not begin until the 2021 growing season. Tr. 6/26/20 at 73 and 87 (Melone); Melone Affirmation 6/25/20 at 2.

6. Allco plans to build two facilities with a combined 4.0 MW of solar generation at this site. Tr. 6/26/20 at 63, 67, 70, and 81 (Melone).

7. Site clearing for a solar facility requires clearing trees. Tr. 6/26/20 at 65-66 and 88-90 (Melone); exh. ANR-10 at 10.

8. Sheep grazing is compatible with a ground-mounted solar facility, and in this case Allco plans to use sheep as part of its solar development. Sheep are used primarily to control vegetative growth at a solar site. Sheep and solar go together as part of Allco's business plan. Tr. 6/26/20 at 64-65, 92, 93 (Melone); tr. 12/4/20 at 129-130 and 137 (Melone).

9. Allco has paid $850,000.00 for Green Mountain Power Corporation to construct a line extension to Apple Hill that would serve the two solar facilities that have been proposed there. Tr. 6/26/20 at 69-70 (Melone).

10. Allco does not have binding contractual arrangements with any expert entities to begin sheep and hemp production on Apple Hill. Tr. 6/26/20 at 71 (Melone).

11. Allco's forester had conducted approximately three acres of clearing, laying out the boundary of the area to be clear-cut and installing a silt fence on Apple Hill before June 26, 2020. Tr. 6/26/20 at 121, 126 (Kobelia).

12. On June 26, 2020, Allco's forester participated as a remote witness in the Commission's TRO hearing and sent texts that afternoon asking Allco's Project Manager Chris Little about the "cease and desist potential" and whether he would be "ok for tomorrow" to do additional site-clearing work. Kobelia affidavit 12/8/20 at 2.

13. Around 1:30 P.M. on June 26, 2020, the Commission announced from the bench that it was issuing a temporary restraining order: "We've decided to issue a TRO. We will issue an order to explain our reasoning later today." The Commission then issued a written order around 10:30 P.M. that same day. Tr. 6/26/20 at 146 (Roisman); Order of 6/26/20.

14. Around 8:30 P.M. on June 26, 2020, after the Commission had issued its ruling from the bench, but before a written order was issued, Allco's Project Manager told Allco's forester that he had "not received a TRO yet, so unless we receive one tonight or tomorrow morning we're good to go. You will hear from me the moment I see it hit my inbox." Kobelia affidavit 12/8/20 at 2.

15. Allco's forester continued site-clearing work on June 27, 2020, at 7 A.M. having not been informed by Allco that the Commission had issued a temporary restraining order halting site-clearing work at the Apple Hill site by order on June 26, 2020. The forester's work on Apple Hill ended shortly after 1 P.M. on June 27, 2020, when he received a text from Allco informing him of the TRO at the same time that the sheriff arrived at the site and informed the forester of the order to cease and desist from work at the site. Tr. 12/4/20 at 41-44 (Kobelia).

16. Between 7 A.M. and 1 P.M. on June 27, 2020, the forester used a bulldozer to continue clearing a 100-foot-by-250-foot area of the Apple Hill site of vegetation after the TRO hearing. The forester bulldozed the area so that it could serve as a place where a truck could turn around. Tr. 12/4/20 at 49-53, 66 (Kobelia).

17. The forester was not contractually required to avoid rare plants while clearing the Apple Hill site. Tr. 12/4/20 at 53-55 (Kobelia).

18. During the site-clearing work done by Allco's forester before June 27, 2020, several white arrow-leaved aster plants and nimblewill plants were destroyed. The total number of plants destroyed and the number of plants that might be destroyed if the work continues remain uncertain in the absence of a seasonally appropriate survey for rare and endangered plant species at the site. Tr. 12/4/20 at 153-155, and 194-195; exhs. AH-RK-2, PLH-TMM-5, and AH-JM-6.

19. White arrow-leaved asters were present at the site of the vegetation cleared by the forester on June 27, 2020. Tr. 12/4/20 at 77, 79 (McClammer); exh. ANR-10 at 5; exh. ANR-14.

20. White arrow-leaved asters present on June 27, 2020, would have been difficult to locate and identify because at this time of year they would be diminutive and likely obscured by the foliage of other plants present at the Apple Hill site. Tr. 12/4/20 at 90-91 (McClammer).

21. ANR's system for the classification of rare, threatened, and endangered species, like the white arrow-leaved aster, is a rational technique for addressing those species. Tr. 12/4/20 at 85 (McClammer).

22. Cutting and skidding trees at the Apple Hill site would tear the aboveground portions of the white arrow-leaved asters and the nimblewill plants from their roots. In addition, the heavy equipment used to do the site clearing would compact the soil and crush any plant over which it is driven. Exh. ANR-10 at 9-10.

23. Thomas Melone is the sole owner of Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates. Tr. 12/4/20 at 98-101 (Melone).

24. Allco agreed not to develop the 5-acre parcel—referred to variously as Lot Number 1, the Orchard Lot, and the horticultural lot—in a settlement agreement with the Town of Bennington on September 14, 2018. Tr. 12/4/20 at 102-103; Intervenors Exh. 4 at ¶ 7.

25. This 5-acre parcel is adjacent to the 27-acre parcel hosting the proposed Apple Hill and Chelsea/Willow Road solar facilities. In Docket 8454, Allco filed exhibit AHS-MK-12, proposing that it would plant a row of trees at the northern edge of this parcel, which is owned by Allco, as part of the facility's landscaping plan as the "Hill Road Planting" to shield views of the solar facility from a neighboring property. The 5-acre parcel is part of the Apple Hill site where site-clearing activity is enjoined by this Order. Tr. 12/4/20 at 124 (Melone); Intervenors exh. 4 at exh. B.

V. DISCUSSION

Introduction

In 2013, Allco petitioned the Commission to construct two solar facilities on Apple Hill in Bennington using standard-offer contracts authorized by the Commission. The current form of those proposed solar facilities is reflected in petitions filed in Docket 8454 and Case No. 17-5024-PET. The Commission has denied CPGs to Allco based on those petitions, and those denials are currently under review by the Vermont Supreme Court. Allco has amended or sought to amend each of these proposed facilities significantly, altering their proposed footprints, solar technology, access routes, access to the distribution grid, and aesthetic and natural resources impacts.[24] The proposed facilities currently under review by the Vermont Supreme Court differ significantly from the facilities proposed by Allco in 2013 in the standard-offer petitions.

On January 6, 2020, the hearing officer in Docket 8454 issued a proposal for decision on remand in the Apple Hill case recommending that we deny the petition.

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition a second time.[25] This second amendment reflected a plan by Allco to use the neighboring Orchard Lot and the facility site for agricultural purposes accommodating sheep grazing and hemp production. Among the specific changes to the petition, Allco proposed clearing the facility site because "[b]y the time construction might commence on the solar project, the hemp and sheep operations would be established for quite some time (as the litigation over the project is likely to continue for at least a couple more years)."[26]

On May 7, 2020, the Commission issued an Order adopting the hearing officer's proposal for decision on remand that we deny the petition in Docket 8454. We also denied the second proposed amendment because we had no jurisdiction on remand to reopen the original petition and because it was untimely. We concluded that Allco's interpretation of the Commission's

[24] We denied two requests to amend the Chelsea Solar petition in Docket 8302 in Orders of 4/14/17 and 10/12/17. These denials were followed by Allco filing a new petition further revising the proposed facility as the *Willow Road* case in Case No. 17-5024-PET. As explained in more detail below, we also denied Allco's March 23, 2020, proposed amendment to the Apple Hill project in Docket 8454. Docket 8454, Order of 5/7/20, at 24-25.

[25] Allco's first amendment request in Docket 8454 was made on April 4, 2016, before a proposal for decision or final order had issued. The first request reflected technological changes that reduced the proposed facility's footprint. The hearing officer approved that amendment request, and we approved the petition as amended. The Vermont Supreme Court reversed our decision and remanded the case.

[26] Docket 8454, Second Proposed Amendment, filed March 23, 2020, at 1 n.1.

amendment rule "would lead to the absurd result of allowing amendments that would give a project proposal a potentially unlimited lifespan."[27] We required that "new projects be filed as new projects."[28]

Then in June 2020, Allco began to clear-cut the site of the neighboring proposed solar facilities on Apple Hill without a CPG. Allco claims that this was farming activity unrelated to the solar facilities and outside the Commission's jurisdiction. By their comments of June 23, 2020, ANR requested that the Commission declare that Allco was violating Section 248.[29] Later comments by ANR, as well as by the Department and the Intervenors, requested that we order Allco to stop clear-cutting its property on Apple Hill.

We initiated this investigation and learned that Allco was cutting down trees and doing other site preparation work on Apple Hill at the site of the two proposed solar facilities. Based on those facts and pursuant to our jurisdiction under 30 V.S.A. §§ 9, 10, 30, 209, 203, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65, we ordered Allco to stop clearing trees on the parcel because that action is harmful to the natural environment and the orderly regulation of the generation of electricity in Vermont.

The potential for harm remains, and we maintain that injunctive order. As discussed below, we also now declare that Allco's clearing activity is site preparation in violation of 30 V.S.A. § 248(a)(2)(A). We direct the parties to propose a schedule for the proceeding to address an appropriate civil penalty to be issued against Allco pursuant to 30 V.S.A. § 30.

A. The Commission has Jurisdiction to Oversee, Enjoin, and Penalize Allco

The Commission Has Jurisdiction over Allco

We have jurisdiction over Allco pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Allco has two standard-offer contracts, and it is in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts. Having submitted two petitions for CPGs for the proposed

[27] Docket 8454, Order of 5/7/20, at 24-25.
[28] *Id.* at 25.
[29] ANR Comments at 2-3; *see also* Commission Rule 2.403 (noting that the Commission may issue declaratory rulings).

Chelsea Solar/Willow Road facilities and an original petition that was later amended for the proposed Apple Hill facility, Allco has been continuously engaged in seeking CPG authorization to build these facilities since it acquired the standard-offer contracts in 2013 and 2014. Allco's actions on Apple Hill continue to be part of Allco's plan to develop the site for the two facilities that are the subject of its standard-offer contracts.

> Section 209 of Title 30 addresses the Commission's jurisdiction, in part, as follows:
>
> (a) General jurisdiction. On due notice, the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of *any corporation owning or operating* any plant, line, *or property subject to supervision under this chapter*, and shall have like jurisdiction in all matters respecting:
>
> (8) the sale to electric companies of electricity generated by facilities:
>
> (A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and
> (B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8).[30]

Because Allco is a "corporation owning or operating . . . property subject to supervision under this chapter," the Commission has jurisdiction over Allco and its activities at the sites where it seeks to build solar facilities.

In 2013 and 2014, Allco signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont. By doing so, Allco became subject to the Commission's jurisdiction. Because Allco has not relinquished or let expire the two standard-offer contracts at the Apple Hill site—in fact, Allco has repeatedly sought and obtained extensions of the expiration dates of those contracts—and has not abandoned development of the facilities to be located there, Allco is subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 209(a)(8).

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[30] 30 V.S.A. § 209 (emphasis added); *see also, Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248 authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont*, Docket 7970, Order of 8/4/14 at 3 (Commission temporarily halted all soil-disturbing activity of pipeline project pending completion of soil management plan pursuant to its general supervisory jurisdiction as a precautionary measure to protect public health and safety).

Under Section 248 of Title 30, electric generation facilities in Vermont must obtain construction and siting approval from the Commission. This approval is known as a certificate of public good, or CPG. Before the Commission 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. In addition to the CPG-permitting process, the Commission also oversees Vermont's standard-offer program, pursuant to 30 V.S.A. § 8005a. Under this incentive program, renewable energy plants of 2.2 MW capacity or less may receive long-term contracts with stable pricing. Allco has standard-offer contracts for two 2.0 MW solar facilities on Apple Hill in Bennington.

Allco is incorrect in its unsupported argument that the Commission's jurisdiction over the Apple Hill site would only arise after a CPG is issued. As long as Allco's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, Allco is subject to the Commission's jurisdiction. Such actions by Allco include the filing and amendment of any CPG petitions for the Apple Hill facilities, and the clear-cutting activities that Allco was engaged in here, and any other acts in preparation of the site for electric generation.

Additionally, Section 248(a)(2)(A) provides the Commission with the authority to oversee and limit preparation of the Apple Hill site by the Developer:

> (A) 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.

There is no doubt that this applies to the Developer because, regardless of whether the Developer also qualifies as a company, the Developer is a "person" as defined in 10 V.S.A. § 6001(14):

> "Person":
> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; …
> (iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.

We are not persuaded by Allco's argument that it is not a "collective person" as addressed in *In re Mountain Top Inn & Resort* because that case is factually different from and

irrelevant to these circumstances.[31] The legal and commercial entities embodied in the Allco corporate scheme are companies and "persons" in their own right as defined by 10 V.S.A. § 6001(14) and hence are subject to Commission oversight and jurisdiction.

If 30 V.S.A. § 248(a)(2)(A)'s prohibition of site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission's jurisdiction over a "proposed site" attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a "proposed site" remains within the Commission's jurisdiction until there is a "ceasing and abandoning" of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review.[32] The general jurisdiction conferred under Section 209 over "property subject to supervision under this chapter" further enhances the Commission's particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, including the site preparation proposed for solar facilities here.

Otherwise, developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval, thereby mooting out all review under the Section 248 criteria by the Department, ANR, the Agency of Agriculture Foods & Markets, the Division for Historic Preservation, and other agencies, interested parties, and the Commission. Agency-proposed conditions or objections would be meaningless, and facilities that would otherwise present an undue impact under the Section 248 criteria could perform the work that creates that impact before approval. Contrary to statute, the Commission would then be reviewing the site for a proposed facility not at the time it is filed, but instead at the moment before the CPG is issued. Thus, jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.

The denial of CPGs for the Chelsea Solar, Apple Hill Solar, and Willow Road Solar facilities by the Commission is not sufficient evidence of ceasing and abandoning those projects because Allco has appealed those decisions and continues to actively seek approval to build these facilities. In addition to actively pursuing reconsideration and appeal of denials of its CPG

[31] *In re Mountain Top Inn & Resort*, 2020 VT 57, 238 A.3d 637 (2020) (renters of resort homes not a "collective person" subject to Act 250 jurisdiction).

[32] *In re Audet,* 2004 VT 30, ¶ 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (providing analysis of abandonment in Act 250 context).

petitions, Allco still has standard-offer contracts for two 2.0 MW solar electric generation facilities on Apple Hill. Further, Allco has invested $850,000.00 to pay for GMP to upgrade the distribution line connecting the electric grid to the Apple Hill site and both proposed solar facilities, and Allco's clearing of trees from the 27-acre plot helps prepare the site for development of the proposed solar electric generation facilities.

Allco has admitted that it intends to pursue these electric generation facilities and has not abandoned those proposals.[33] Allco acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility.[34] Allco also states that it plans to build solar facilities on the Apple Hill site in order to sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts. Therefore, the Commission has jurisdiction to oversee Allco and has the jurisdiction to take the extraordinary step of providing injunctive relief pursuant to Commission Rule 2.406.

The Commission Has the Authority to Grant Injunctive Relief

We have jurisdiction to grant injunctive relief pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209 and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Section 9 of Title 30 provides the Commission with authority to enjoin those subject to the Commission's jurisdiction from violating Section 248 of Title 30:

> 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.[35]

As observed by the Department and ANR, Commission Rule 2.406 has long been used by the Commission to address requests by parties for injunctive relief, like the case here. The Commission did not exceed its authority when it issued the TRO on June 26, 2020. By this Order, having conducted an evidentiary hearing, we determine to maintain that injunction as a

[33] Finding 6, above. Further, with regard to the Apple Hill facility, Allco has made clear that at the Vermont Supreme Court it seeks approval of the project as Allco has proposed to amend it, but it also has not abandoned the alternative argument that the original proposal for this facility should be approved. Tr. 12/4/20 at 133 (Melone).

[34] Finding 7, above.

[35] 30 V.S.A. § 9.

permanent injunction as allowed under Commission Rule 2.406.[36] This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished.

Along with having the powers of a court of record under Section 9 of Title 30, other authorities support the Commission's ability to issue orders to restrain activities under its jurisdiction. These authorities include:

- 30 V.S.A. § 10(e), which states that "the Commission or a single member may grant temporary restraining orders";
- 30 V.S.A. § 209(a)(6), which allows the Commission to "restrain any company subject to supervision under this chapter from violations of law";
- 30 V.S.A. § 248(a)(2)(A), which specifically prohibits site preparation without a CPG;
- Commission Rule 2.406, which provides for temporary restraining orders, preliminary injunction, and permanent injunctions;[37]
- Vermont Rules of Civil Procedure Rule 65, which governs the granting of injunctions; and
- the precedent from cases such as *Petition of Vt. Elec. Power Producers, Inc.*, where the Vermont Supreme Court noted that the Commission "has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction."[38]

[36] Commission Rule 2.406(A)(3) (noting that the Commission may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

[37] Commission Rule 2.406 is similar to Vermont Rule of Civil Procedure 65. It promulgates the Commission's authority and the process for issuing TROs and injunctions—a process that the Commission observed in this proceeding. Further, the Legislature has declared that validly promulgated rules, such as Rule 2.406, "shall be valid and binding on persons they affect and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise." 3 V.S.A. § 845(a). No court has amended or revised Rule 2.406.

[38] *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996).

Further, as addressed above, approving site-preparation activities for electric generation facilities would occur with the approval of a CPG and is within the Commission's jurisdiction pursuant to 30 V.S.A. § 248(a)(2)(A). Section 203 of Title 30 also provides that the Commission has jurisdiction over companies or persons that manufacture electricity for the public "so far as may be necessary to enable [it] to perform the duties and exercise the powers conferred upon [it] by law."

Allco asserts that the Commission does not have any jurisdiction over the 5-acre "horticultural use" parcel that is adjacent to the 27 acres dedicated to the two solar facilities. We disagree. As we conclude in Findings 24 and 25, above, and as we previously stated in our Order of July 1, 2020,[39] this lot is subject to our jurisdiction because it was identified as a location for mitigation plantings in Docket 8454 and was admitted into evidence in Case No. 17-5024-PET as an element of the settlement agreement with the Town of Bennington that we adopted in that case. We observed in our July 1 Order that the TRO restricted site-preparation activities in the 5-acre parcel, and we reiterate that conclusion here. Because the 5-acre parcel is part of the project petitions in each of the two CPG cases, Allco also shall not engage in site-preparation activities on what it refers to as its "horticultural use" parcel.

Allco also argues that Section 30(h) and Section 7061 of Title 30 limit the Commission's authority. This argument is wholly misplaced. That statutory guidance in Title 30 is inapplicable to the Commission but instead applies to the Department and the Enhanced E911 Board, respectively.

Section 7061 is in Chapter 87 of Title 30, which applies to Enhanced 911; Emergency Services. The Developer refers to Section 7061(a), which states: "The Board may file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter. The court shall award the Board its costs and reasonable attorney's fees in the event that the Board prevails in an action under this subsection." Under Chapter 87 of Title 30, the "Board" means the Vermont Enhanced 911 Board established under section 7053 of Title 30.[40] Contrary to the Developer's arguments, this reference to the "Board" is not a reference to the Public Utility Commission.

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[39] Case No. 20-1611-INV, Order of 7/1/20, at 3, n.4.
[40] *See* 30 V.S.A. § 7051 Definitions at (4).

B. The Injunction Shall Remain in Place

Section 248(a)(2)(A) specifically prohibits site preparation without a CPG. The clearcutting of trees and other site work that Allco has already performed—and seeks to continue to perform—at this site constitutes site preparation without a CPG. An injunction remains necessary to prohibit this unlawful conduct.

Allco asserts that the site work does not constitute site-clearing activities in violation of 30 V.S.A. § 248(a)(2)(A), which requires a CPG before site preparation for the construction of an electric generation facility. Allco's claim that its activities are solely for farming does not alter our jurisdiction over its site-clearing activities on Apple Hill.[41] Allco acknowledges that tree clearing is an essential element of preparing a solar electric generation site and that the location it is clearing is the site of a proposed solar facility. In fact, Allco's proposed amendment of the Apple Hill petition filed on March 23, 2020, specifically acknowledges this by seeking to remove tree clearing from the amended petition because the site would already be cleared to accommodate farming activity. We are not persuaded that clearing a site for farming—when that site is already proposed for a solar project—provides a legitimate end-run around the clear statutory prohibition on site clearing for an electric generation facility before obtaining a CPG. As Mr. Melone stated as a witness under oath: "If there are trees on the site, you need to clear the trees to put solar."[42]

We are not persuaded by Allco's arguments that these activities are not site preparation and that "incidental overlap" is inapposite. The cases Allco references are all readily distinguishable factually and procedurally.[43]

In *Georgia Mountain*, the Commission responded to complaints of logging activities that had not been approved in a CPG.[44] However, in *Georgia Mountain* the landowner's logging was a preexisting activity and occurred in an unrelated location away from the approved electrical

[41] *See J.P. Carrara & Sons, Inc.*, #1R0589-ER (Vt. Envtl. Bd. Order issued 2/17/88), 1988 WL 220545 (Environmental Board had jurisdiction over tree clearing at proposed quarry site before filing of Act 250 permit because it was site preparation); and *Luce Hill Partnership*, #5L1055-EB (Vt. Envtl Bd. Order issued 7/7/92), 1992 WL 18664 (site of proposed residential subdivision was cleared before Act 250 review determined to be site preparation under Environmental Board jurisdiction).

[42] Tr. 6/26/20 at 89 (Melone).

[43] *See* Department's Reply Brief at 7-8 and ANR Reply Brief at 4-6.

[44] *Petition of Georgia Mountain Community Wind*, Docket 7508, Memorandum of 1/5/12 at 3.

generation construction.[45] Here, by contrast, the Developer's site-clearing activities are located at the precise location of Allco's two proposed solar facilities, including the location of the footprint of those facilities and the location of proposed solar facility aesthetic mitigation, and the Developer's site-clearing activities were not pre-existing uses of the land.

In *Beaver Wood*, the Commission did not exercise jurisdiction over the building of a wood pellet facility that we found to be distinct and independent of the electric generation facility.[46] The Commission limited its jurisdiction to activities related to the construction and operation of an electrical generation facility related to the wood pellet facility. Here, Allco has explicitly linked the clearing activity to its ultimate plan to construct the electric generation facilities, and we are similarly limiting Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties specifically identified in the standard-offer contracts and CPG petitions for its two proposed solar facilities on Apple Hill.

Finally, in *Monument Farms*, the Commission responded to a petition from a CPG holder to begin construction early while the CPG holder was still seeking an amendment to the CPG.[47] Here, by contrast, Allco is not a CPG holder but has nonetheless begun site-clearing activities in violation of Section 248(a)(2)(A). The cases Allco cites simply do not support its argument that the Commission does not have jurisdiction to enjoin its site-clearing activities on Apple Hill.

Our determination that Allco's activities are site clearing has not been altered since we issued the TRO on June 26, 2020, when we stated:

> The petitioner's activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The petitioner's claim in his affidavit that his activities are solely for farming purposes is not credible. The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is "devoted *primarily* to farming." The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location "primarily" to serve the proposed solar projects. This does not qualify as farming. Further, the petitioner testified that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. This violates 30 V.S.A. § 248(a)(2).[48]

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[45] *See, e.g.*, *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/2010 at Finding 39 (noting that the "existing uses" of Georgia Mountain included "active logging on portions of the mountain").

[46] *Petition of Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven*, Dockets 7678 and 7679.

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

[48] Case No. 20-1611-INV, Order of 6/26/20 at 4 (citing Vermont Agency of Agriculture, Food and Markets, Farm Definitions and Determinations, https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations).

In multiple filings and during the December 4, 2020, hearing, Allco has argued that we were incorrect to conclude that it planned to use sheep in this location "primarily" to serve the proposed solar projects. According to Allco, the sheep would also serve other solar facilities.[49] However, even if we accept Allco's assertion that these sheep would serve other facilities, this distinction is irrelevant. We still find that the primary purpose of placing sheep *at this location* is to keep down vegetative growth around the proposed solar facilities *at this location*, regardless of whether the sheep may also be used elsewhere.[50]

Allco also asserts that § 248(a)(2)(A) is unconstitutionally vague. It argues that the language "site preparation for an electric generation facility" provides "no standard for ordinary people to understand." Nonetheless, Allco, has shown that it knows what site preparation is. Specifically, Allco's witness and sole owner, Mr. Melone, stated: "If there are trees on the site, you need to clear the trees to put solar."[51] With the plain language of this testimony, Allco affirms its understanding of the clear language of the statute. Further, even if there were ambiguity, Mr. Melone has admitted that he is aware of the Commission's process for hearing petitions for declaratory relief, which could have resolved any alleged ambiguity before Allco went ahead with its site-clearing activities.[52]

We agree with the Department's reasoning and conclusion that Allco's constitutional arguments continue to fail on the merits. "The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for adjudication."[53]

Allco understands that tree-clearing is necessary site preparation for a solar facility. In its second motion to amend the petition in Docket 8454 to reflect the fact that the site would be cleared for agricultural use, Allco showed that it understands that clearing the trees for

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[49] Tr. 12/4/20 at 129-130 (Melone).

[50] Tr. 12/4/20 at 130 (Melone) ("[T]he primary motivation for getting into the business was the fact that we basically have this . . . captive revenue stream, because we have to maintain all these sites anyway . . . .").

[51] Tr. 6/26/20 at 89 (Melone).

[52] Tr. 12/4/20 at 131 (Melone); *see, e.g.*, *Agency of Nat. Res. v. Persons*, 2013 VT 46, ¶ 19, 194 Vt. 87, 94, 75 A.3d 582, 588 ("Based on the totality of facts, defendants had sufficient reason to know that the excavation work was prohibited without a permit or a conditional use determination. At the very least, defendants should have sought the advice of [a state agency] before commencing work."); *see also, e.g.*, *id.* at ¶ 17 (holding that due process requires less precision in delineating what is prohibited when a matter involves civil penalties rather than criminal penalties).

[53] Department's Reply Brief at 9-10.

agricultural purposes would prepare the site for a solar facility. Allco has further shown that it understands that it needs a CPG to clear trees by claiming, after Allco was denied a CPG for the Apple Hill solar facility, that PLH Vineyard Sky LLC is clearing trees for solely farming activity, albeit farming related to a future when the site will be used for a solar facility. Having been denied a CPG and an amendment to a CPG that would reflect farming activity, Allco began clearing trees and conducting site preparation without a CPG.

We are not persuaded by Allco's constitutional argument because the statute is clear, and Allco itself is acting in willful violation of the statute it claims is unconstitutionally vague.

The Vermont Supreme Court has held that, in general, when a municipality or state agency seeks "compliance with a local ordinance or state statute," as ANR and the Department seek here, the agency need not demonstrate "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."[54] As noted above, ANR and the Department have made that showing here by demonstrating Allco's failure to comply with 30 V.S.A. § 248(a)(2). Further, the clearcutting of 27 acres or more of trees—in an area that contains rare and very rare plant species—is a "substantial" violation.[55] It also demonstrates "conscious wrongdoing."[56] Allco was aware of the fact that it needed approval from the Commission before it could undertake site preparation, and Allco in fact sought approval for the very work it began undertaking here, but the Commission denied that approval on May 7, 2020, when we issued a final order that denied the motion to amend the petition to reflect grazing sheep at the project site.[57] Allco nevertheless went forward with that work. Further, Allco continued to do site preparation on the morning of June 27, 2021, a day after the Commission issued a TRO explicitly prohibiting that work, because, at best, Allco failed to communicate the TRO to its contractor before that work began.[58]

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[54] *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129, 582 A.2d 145, 148 (1990); *see also, e.g.*, *City of St. Albans v. Hayford*, 2008 VT 26, ¶ 12 183 Vt. 596, 599, 949 A.2d 1058, 1062 (holding that the failure to get a land-use permit cannot generally be considered so insubstantial that it would be inequitable to foreclose the unpermitted use).

[55] *Carpenter*, 155 Vt. 126, 131, 582 A.2d 145, 149 (1990).

[56] *Id.*

[57] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

[58] *See* Findings 12-16 (explaining that the TRO was issued from the bench at 1:30 PM on June 26, 2021, with a written order following that evening, and yet Allco did not tell its contractor until the afternoon of June 27, 2021).

Even applying the more stringent standard of Commission Rule 2.406, the likelihood that a substantial immediate and irreparable injury will result is all that is required under Commission Rule 2.406 to warrant the issuance of a temporary restraining order or a preliminary or permanent injunction. And that harm exists here in the form of the harm to the regulatory process by violating 30 V.S.A. § 248(a)(2), the harm to the rare and very rare plants, and the harm to the trees that would be cleared.

Furthermore, even if we were to also look at all of the factors that apply to an injunction under Vermont Rules of Civil Procedure Rule 65, those factors also weigh in favor of granting injunctive relief here. The Vermont Supreme Court has held that four factors are considered in determining whether to grant injunctive relief after an evidentiary hearing: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest."[59]

First, ANR and the Intervenors have established a threat of irreparable harm. In fact, they have established a substantial immediate and irreparable injury. This is the immediate harm to the regulatory oversight process and the public trust reflected in Allco's conducting site clearing without a CPG, an immediate harm to the rare and very rare plants on the site, and an immediate harm to the trees that would be cleared.

As for harm to rare plant species, rare and very rare species are found in areas on the site that are currently slated for clearing.[60] Allco's forester admitted that he is not contracted to avoid rare species and is relying on a 2018 survey and on his untrained understanding of the appearance of these rare plants, and that, although he and others visited the site in 2020 to look at the flagging that is currently in place, that visit did not include walking the 27 acres to look for new locations of rare plants. It is therefore likely that rare plants will be destroyed if this area is cleared. This creates the likelihood that a substantial immediate and irreparable harm will result.

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[59] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596, 178 A.3d 313, 319 (2017). The U.S. Supreme Court has held that these same factors "are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008); *see also Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

[60] Findings 3, 4, and 15-22, above.

Allco has sought to challenge ANR's classification system for rare and threatened plant species. However, this classification system involves the application of complex methodologies, and the Vermont Supreme Court requires deference to ANR's "determinations regarding complex methodologies."[61] The only exception is when the agency decision is "wholly irrational and unreasonable in relation to its intended purpose."[62] While Allco's own natural resources consultant disagreed with ANR's species expert as to his conclusions, he acknowledged that ANR's system was a rational way of classifying these plants.[63] We therefore must defer to ANR's classification system, and we find that Allco's activities have caused—and would continue to cause—substantial and immediate irreparable harm to rare and very rare species.

The proposed tree clearing also constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored. Thus, courts routinely hold that the logging of trees constitutes irreparable harm: "The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage."[64] Consequently, the logging of trees "is irreparable for the purposes of the preliminary injunction analysis."[65]

Second, the record demonstrates that there is little, if any, harm to Allco from being enjoined at this time. The only possible harm to Allco is a delay in its site-clearing activities, if it is ultimately allowed to undertake those activities. Further, even if there were a delay, other courts have held that when the "anticipated revenues from the logging" are "delay[ed]" due to an injunction, the harm is "at most the time value of the profit component of that revenue, a value which no one has bothered to quantify and which probably is trivial."[66] The same could be said here.

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[61] *In re Korrow Real Est., LLC Act 250 Permit Amend. Application*, 2018 VT 39, ¶ 21, 207 Vt. 274, 284, 187 A.3d 1125, 1132 (2018) (quoting *Plum Creek Me. Timberlands, LLC*, 2016 VT 103, ¶ 28, 203 Vt. 197, 155 A.3d 694).

[62] *Id.*

[63] Finding 21, above.

[64] *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

[65] *Id.*; *see also, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that the logging of trees "satisfies the 'likelihood of irreparable injury' requirement"); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that "trees cut down this fall will not have grown back to their present height" during the lifetime of most of the plaintiffs).

[66] *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

Third, regarding the merits of the underlying claim, we find that 30 V.S.A. § 248(a)(2) precludes Allco from site-clearing activities while it is still pursuing—and has not yet received—CPGs. As explained above, Vermont law explicitly prohibits site preparation for electric generation without a CPG, there are no CPGs for this site, and Allco admits that it continues to seek to place electric generation facilities at this site.

Fourth, the public interest favors an injunction here. As other courts have noted, there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury."[67] Further, "once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost."[68]

Additionally, Allco's activities challenge the integrity of the Section 248 permitting process. The Commission issued an order on May 7, 2020, denying Allco's request to amend a pending application for a certificate of public good.[69] Although Allco sought reconsideration of that order, we denied that motion for reconsideration, and although Allco has appealed our rulings to the Vermont Supreme Court, Allco has not obtained a stay of our orders. Thus, our decisions remain binding on Allco unless and until the Vermont Supreme Court overrules them. Yet, Allco has gone ahead with making the very same permanent changes to the landscape that we told it not to make when we denied its amendment request. And Allco continued making those changes even after the TRO issued. As ANR correctly notes, this is an affront to the Section 248 permitting process.[70] It creates a significant risk that undue adverse effects on the environment will occur before the Commission has had a chance to review the proposed project. This does not comply with the applicable statutes or serve the public interest.

The Vermont Supreme Court has recognized that injunctive relief is appropriate to avoid "irreparable damage during the pendency of the action" where "the injunction is required to preserve [the] status quo."[71] A temporary restraining order or injunction "preserves the status

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[67] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quotation omitted); *see also, e.g.*, *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (finding a public interest in "the need to preserve meaningful relief" throughout all stages of the litigation).

[68] *Id.* at 1137.

[69] Docket 8454, Order of 5/7/2020 at 23-25.

[70] ANR Reply Brief at 7-8.

[71] *State v. Glens Falls Ins. Co*., 134 Vt. 443, 450, 365 A.2d 243, 247 (1976).

quo."[72] This type of relief is particularly appropriate to prevent actions that "cannot be undone through monetary remedies."[73] The Vermont Supreme Court has thus denied injunctive relief when the challenged action "can be 'undone.'"[74] On the other hand, when there is no way to undo something at a later time, a stay is necessary to avoid irreparable harm.[75]

* * *

We have reviewed Allco's remaining arguments and, to the extent those arguments have not already been addressed in this or related dockets, we find them either outside the scope of this proceeding or without merit.

Conclusion

In this Order we restate our conclusion that Allco's site-clearing activity without a CPG is a violation of 30 V.S.A. § 248(a)(2)(A), and we enjoin any further site-clearing activity at this time. In our findings, we establish a factual basis for issuing a civil penalty for that violation. To further substantiate the extent of that civil penalty, additional proceedings are required to document the factual basis for the amount of that penalty using the criteria addressed in 30 V.S.A. § 30. The parties are therefore directed to confer and Allco is directed to propose a schedule for the penalty phase of this proceeding by no later than the close of business on Friday, April 16, 2021.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission ("Commission") of the State of Vermont that:

1. Allco initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)(A).

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[72] *Bank of New York Co. v. Ne. Bancorp, Inc*., 9 F.3d 1065, 1067 (2d Cir. 1993).
[73] *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).
[74] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 42, 205 Vt. 586, 606, 178 A.3d 313, 326.
[75] We observe here that the penalty phase of these proceedings, pursuant to 30 V.S.A. § 30, that will punish Allco for violating Section 30 is not designed to result in a damages fund that can be used to remediate the harm caused by Allco's unpermitted site clearing. The Commission has no jurisdiction to order damages.

2. The Commission extends its Order of June 26, 2020, enjoining Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors from conducting site preparation on the parcels on Apple Hill in Bennington, Vermont, identified in Docket 8454 and Case No. 17-5024-PET, including both the 27-acre site of the two solar facilities and the adjacent 5-acre site indentified in both petitions as mitigating the aesthetic impacts of those proposed facilities. This permanent injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished.

3. The parties are directed to confer and Allco is directed to file a proposed schedule for the penalty phase of this investigation by no later than the close of business on Friday, April 16, 2021.

Dated at Montpelier, Vermont, this 1st day of April, 2021.

Anthony Z. Roisman) PUBLIC UTILITY
)
)
Margaret Cheney) COMMISSION
)
)
Sarah Hofmann) OF VERMONT

OFFICE OF THE CLERK

Filed: April 1, 2021

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 20-1611-INV - SERVICE LIST

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