STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1261-NMP

Petition of MHG Solar LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 8010 and 248, to install and operate a 500 kW group net-metered solar electric generation facility in Manchester, Vermont	

Order entered: 09/17/2021

ORDER DENYING CERTIFICATE OF PUBLIC GOOD

In today's Order, the Vermont Public Utility Commission adopts the findings and recommendations of the Hearing Officer, subject to modifications discussed below. Accordingly, the application to construct a 500 kW net-metered solar array is denied.

PROPOSAL FOR DECISION

I. INTRODUCTION

This case involves an application filed by MHG Solar, LLC ("Applicant") with the Vermont Public Utility Commission ("Commission") for a certificate of public good ("CPG"), pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW solar group net-metering system in Manchester, Vermont (the proposed "Project"). The Project is on a preferred site identified in a joint letter of support from the municipal legislative body and municipal and regional planning commissions.

This case presents the difficult question of whether a 500 kW commercial solar array in close proximity to a residential neighborhood and in the foreground of a scenic viewshed but screened by landscaping would offend the sensibilities of an average person. Based on the below findings, I recommend that the Commission conclude that the Project would have an undue adverse effect on aesthetics under Section 248(b)(5). I recommend that the Commission deny the application.

II. PROCEDURAL HISTORY

On May 19, 2020, the Applicant filed an application for the Project with the Commission.

Notice and copies of the application have been provided pursuant to Commission Rule 5.100. The deadline for filing comments or requesting a hearing in this matter was June 26, 2020.

On June 9 through 29, 2020, Timothy Boucher, Glenn Cestaro, Joseph H. Charbonneau, Cosmo Penge, and Mark W. Slade filed either a motion to intervene or notice of intervention.[1] All intervention requests were granted.

On June 24, 2020, the Vermont Agency of Natural Resources ("ANR") filed comments on the Project.

On June 26, 2020, the Vermont Department of Public Service ("Department") filed comments on the Project.

On June 26, 2020, the Vermont Division for Historic Preservation ("DHP") filed a motion to intervene.

On June 26, 2020, the Vermont Agency of Agriculture, Food and Markets ("AAFM") filed comments on the Project.

On August 11, 2020, the Applicant filed reply comments.

In an Order dated August 27, 2020, the Commission granted the Department of Public Service's request for additional time to conduct an independent aesthetic review of the Project.

On December 11, 2020, the Applicant filed an additional visual analysis of the Project.

On December 30, 2020, the Department filed a report from its aesthetic expert.

On March 18, 2021, I issued information requests.

On April 2, 2021, the Applicant filed supplemental testimony and responses to the information requests.

On May 10, 2021, an evidentiary hearing was held.

On May 25, 2021, a site visit was held.

On May 27, 2021, the Applicant and the Intervenors filed briefs.

On June 3, 2021, the Applicant, the Department, and the Intervenors filed reply briefs.

[1] Collectively these parties are referred to as the "Intervenors." Cosmo Penge has filed a brief and a reply brief on behalf of the Intervenors.

III. PUBLIC COMMENTS

The Commission received many public comments in opposition to the Project.[2] The commenters assert that the Project is not appropriate for a residential area and that the proposed aesthetic mitigation would not be effective for several years. The commenters express concern about the aesthetic impact of the Project on Richville Road and the abutting neighborhood. According to the commenters, the area is prone to flooding and the Project could exacerbate flooding. Some of the comments state a concern that the Project would reduce property values in the area.[3]

IV. SUMMARY OF COMMENTS FROM STATE AGENCIES

ANR

ANR states that the Project would be in the groundwater source protection area for two wells of the Manchester Water Department, a public community water system. According to ANR, groundwater source protection areas are areas where contaminants released to the land surface or subsurface would be reasonably likely to reach a drinking water source. ANR recommends two conditions of approval to reduce the potential for the Project to inadvertently contaminate a public water system source. The Applicant has consented to these conditions.

ANR states that the Project occurs in the Special Flood Hazard Area but is outside the designated river corridor. ANR states that the Project must comply with and receive authorization under the Vermont Flood Hazard Area and River Corridor Rule and recommends a condition requiring the Applicant to obtain authorization under that rule before construction. The Applicant has consented to this condition.

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[2] Several of the Intervenors made filings that were styled as public comments. The issues raised in those filings are also addressed in the discussion sections under the relevant Section 248 criteria, below.

[3] Individual property values are generally not within the scope of the Section 248 review. As the Vermont Supreme Court stated in *Vt. Elec. Power Co. v. Bandel*, "Proceedings under 30 V.S.A. § 248 relate only to the issues of public good, not to the interests of private landowners who are or may be involved." (135 Vt. 141,145 (1977)). To the extent that property values of a wide area will be affected, the issue is relevant to the question of whether the Project will result in an economic benefit to the State and its residents. *Joint Petition of Vermont Electric Power Company, Inc., Green Mountain Power Corporation and the Town of Stowe Electric Department*, Docket 7032, Order of 3/16/06 at 26. The economic benefit criterion is conditionally waived for net-metering projects, and no participant has made a case that the waiver should be rescinded. Therefore, this issue is outside the scope of this proceeding.

ANR states that Bourne Brook, a tributary to the Batten Kill, is approximately 140 feet north of the Project, and that another unnamed tributary of the Batten Kill is also near the Project site. ANR recommends a condition requiring flagging to ensure that Project construction does not encroach on the buffers of these two streams. The Applicant has consented to this condition.

AAFM

AAFM states that the Project would impact approximately three acres of primary agricultural soils. AAFM recommended four conditions of approval to ensure that the Project's effect on primary agricultural soils is not unduly adverse. The Applicant has consented to AAFM's recommended conditions.

The Department

The Department engaged an independent aesthetics consultant to review the Project's aesthetic impact. The consultant concluded that the Project would not have an undue adverse effect on aesthetics. The consultant's report is discussed further under the aesthetics criterion, below. The Department stated that the Project does not raise any significant issues under the substantive criteria of Section 248 that are within the scope of the Department's review and recommended that the Project should be approved.

V. CONDITIONAL WAIVER OF REVIEW UNDER CERTAIN CRITERIA FOR NET-METERING PROJECTS

Pursuant to 30 V.S.A. § 8010 and Commission Rule 5.111, the Commission has conditionally waived review of the following criteria, and I recommend that the Commission find that no party presented any testimony that warrants rescinding any part of that waiver in this proceeding:

- 30 V.S.A. § 248(b)(2) (need)
- 30 V.S.A. § 248(b)(4) (economic benefit);
- 30 V.S.A. § 248(b)(6) (integrated plan);
- 30 V.S.A. § 248(b)(7) (electric energy plan);
- 30 V.S.A. § 248(b)(9) (waste-to-energy facilities); and
- 30 V.S.A. § 248(b)(10) (transmission facilities).

Therefore, only the criteria applicable to the system under Rule 5.111 are addressed in this Order.

VI. PENDING MOTIONS

A. Intervenors' Motion to Take Judicial Notice

On May 17, 2021, the Intervenors moved that I take judicial notice of (1) the Manchester Town Plan (adopted May 9, 2017), (2) the Manchester Energy Plan (adopted May 19, 2020), (3) the Bennington County Regional Plan (adopted March 19, 2015), and (4) the Bennington County Regional Energy Plan (adopted March 23, 2017). The Intervenors state that the request to admit the full documents is reasonable and will not result in any delay to the Commission's review of the application or cause prejudice to any party.

The Applicant argues that the Intervenors' motion is untimely and prejudicial because the Intervenors are seeking admission of materials that are not relevant or necessary to determine the outstanding issues in this case. However, the Applicant does not object to judicial notice of the Manchester Town Plan, the Bennington Country Regional Plan, and the Bennington County Regional Energy Plan, provided that this issue does not delay the Commission's review of the application. The Applicant does object to judicial notice of the Town of Manchester Energy Plan because the Plan had not been adopted by the Town at the time the application was filed. Therefore, it is the Applicant's position that the Energy Plan does not legally apply in this proceeding.

The motion to take judicial notice of the Manchester Town Plan (adopted May 9, 2017), the Bennington County Regional Plan (adopted March 19, 2015), and the Bennington County Regional Energy Plan (adopted March 23, 2017) is granted because the Applicant does not object to taking notice of the documents and because there is no prejudice to the Applicant in taking judicial notice of public planning documents that are relevant to the Commission's evaluation of the Project under the Section 248 criteria. The motion to take judicial notice of the Manchester Energy Plan (adopted May 19, 2020) is denied as moot because it was not necessary to rely on the Manchester Energy Plan to reach a decision in this case.[4]

[4] The Commission applies Vermont's vested rights doctrine. The Vermont Supreme Court has not resolved whether the filing of an application on the same day that an ordinance is amended triggers the application of the

B. Intervenors' Motion for Additional Discovery and Presentation of New Evidence

In their post-hearing brief, the Intervenors request that the Applicant be directed to provide additional studies about the Project's potential effect on flooding and the risk of per- and polyfluoroalkyl substances ("PFAS") contamination from solar panels. The Applicant objects to this request as untimely and outside the scope of the evidentiary hearing, which is limited to reviewing the Project's effect on orderly development and aesthetics under Sections 248(b)(1) and (5).

Commission Rule 5.118 provides that if a party wishes to offer contrary evidence or to challenge the accuracy of information contained in an application, a person may request a hearing within 30 days of receiving notice of an application. Requests for a hearing must identify the issues to be addressed at the evidentiary hearing. The Intervenors did not request a hearing in this proceeding. The Commission determined that an evidentiary hearing on the topics of aesthetics and orderly development was appropriate based on the Project's potential aesthetic impact on the surrounding neighborhood. The issues of flooding and PFAS contamination are outside the scope of the evidentiary hearing and its related discovery procedures. ANR has not identified solar panels as a potential source of PFAS that could contaminate drinking water. Therefore, the request for additional discovery is denied.

The Intervenors state that "[b]ecause of our lack of familiarity with the PUC process, we have not been able to participate in a way that assures the Commission has all the information we think is necessary to make a decision."[5] The Intervenors assert that Cosmo Penge and Joseph Charbonneau were unable to access the evidentiary hearing "despite numerous attempts to connect via the link provided."[6] The Intervenors state that they contacted the Department's attorney for assistance but did not receive a response. The Intervenors offer new information

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vested rights doctrine. *In re McCormick Mgmt. Co., Inc.*, 149 Vt. 585 n.1 (1988). Vermont case law could suggest that an application filed contemporaneously with the adoption of a revised town plan does not necessarily create a vested right. *Smith v. Winhall Plan. Comm'n*, 140 Vt. 178, (1981) (explaining that the minority rule of vested rights is "the more equitable rule in long run application, *especially where no amendment is pending at the time of the application*, as here.").

[5] Intervenors' Brief at 2.

[6] *Id.*

related to the Project's preferred-site letter, flooding, PFAS contamination of drinking water supplies, and issues of "site control" related to a private sewer system. The Applicant objects to the presentation of this new information because it is untimely and addresses topics outside the scope of the evidentiary hearing.

The Intervenors participated in the development of a litigation schedule for this proceeding.[7] The schedule included deadlines for discovery and for the Intervenors to file testimony and exhibits *before* the evidentiary hearing.[8] The Intervenors had ample time to prepare documents and file them. If they had difficulty with the filing process, they were advised that they could contact the Clerk of the Commission for help.[9] The Intervenors did not use these opportunities to present evidence, nor does the Clerk have any record of the Intervenors contacting her to seek assistance with filing or participating in the evidentiary hearing.[10] For these reasons, I find that the Intervenors' apparent difficulty accessing the virtual evidentiary hearing is not a valid reason to permit the introduction of new evidence in their post-hearing brief. The Intervenors have not explained why this information could not have been filed before the hearing, as is generally required by our rules.[11]

Further, the information contained in the Intervenors' brief related to flooding, the preferred-site letter, and potential public water supply contamination from PFAS relates to issues outside the scope of the evidentiary hearing. Therefore, the Intervenors' motion to supplement the evidentiary record is denied. I have not relied on any factual assertions in the Intervenors' briefs unless they are supported by information in the evidentiary record.

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[7] Order of 03/24/2021 at 1.

[8] *Id*.

[9] Tr. 3/11/2021 at 18 (Marren) ("If you have any questions about ePUC, you can email the Clerk, or you can call her at (802) 828-2358, and she's happy to walk you through how to use the computer system to file documents in this case.").

[10] In addition to not filing any testimony or evidence before the evidentiary hearing, the Intervenors also did not request to conduct any cross-examination of witnesses. One of the Intervenors, Glen Cestaro, did attend the evidentiary hearing but did not object to conducting the hearing without all of the Intervenors present.

[11] Commission Rule 5.122(C) ("Pre-Filed Testimony and Exhibits. Each party must pre-file a copy of all testimony and exhibits with the Commission. Copies of such filings must be provided to the applicant and other parties at the time of filing. At the discretion of the Commission, parties may present live direct or rebuttal testimony.").

VII. FINDINGS

Pursuant to 30 V.S.A. § 8(c), and based on the record and evidence before me, I present the following proposed findings of fact to the Commission.

Description of the Project

1. The Applicant is MHG Solar LLC, which has principal offices at 170 Bonnet Street, Manchester, VT 05255. Application; Thomas Hand, Applicant ("Hand") pf. at 1.

2. The Project is a group net-metered 500 kW solar electric generation project. Hand pf. at 1.

3. The Project is proposed to be sited on land that is currently under option to be purchased by the Applicant from Blackacre LLC, located off Richville Road in Manchester, Vermont. The Project's solar array would occupy approximately 5 acres of an approximately 8-acre vacant parcel currently owned by Blackacre LLC. Hand pf. at 2.

4. The site would be accessed through the southeast corner of the Project site via Richville Road. No additional roads are proposed for the Project. Hand pf. at 6; exh. MHG-TH-2.

5. The Project would include the installation of approximately 2,184 solar modules, approximately 375 watts each, mounted on fixed metal racks and other required electrical equipment. The array would consist of approximately 15 rows of racking. On-site electrical equipment would include 4 PV string inverters of 125 kW (AC) each and alternating current ("AC") collector system components consisting of underground conduit, wire, AC combiner panel boards, AC switchgear, and AC power zone for service to the PV system auxiliary equipment. Hand pf. at 2-3.

6. The Project would connect to the existing Green Mountain Power Corporation ("GMP") distribution line that runs along Richville Road. Hand pf. at 3; exh. MHG-TH-2.

7. Access to the Project site would be secured in compliance with the National Electrical Code ("NEC"). The solar field would either be surrounded by a minimum 7-foot-tall fence mounted on driven posts that would be secured and kept close to ground level for security and safety, or a "solar scrim" protective backing would be used to cover exposed wiring on the backside of the panels. Both options would comply with the NEC. If a fence is installed it

would have openings of 7 by 12 inches along the bottom to allow for migration of wood turtles. Hand pf. at 3; exh. MHG-MLS-1.

8. All switchgear equipment would be installed in UL-listed and code-approved electrical enclosures. Electrical lines that connect the string combiners to the inverters and switch gear enclosure, and from the switch gear enclosure to the riser to the pole-mounted transformers, would be installed in conduit. Appropriate electrical warning signs and/or placards would also be placed around the Project site, to the extent required by the NEC. Hand pf. at 3.

9. The final selection of specific equipment and manufacturers would be made after the CPG is obtained, depending upon market availability and contractor specifications. The Applicant expects that the selected equipment would be materially the same in terms of the Project's overall footprint and AC capacity. Hand pf. at 3-4; exh. MHG-TH-3.

10. The system would be monitored remotely in real time with an online system. The system would inform management about unusual operations such as a sudden drop in power output or an unusual output amount from one series of modules to the next. Site visits would be conducted on an as-needed basis. A long-term operations and maintenance contract would be in place with a maintenance company that would be responsible for keeping the system operating properly and for keeping the site mowed. Hand pf. at 6.

11. The sound generated by the Project construction would be of limited duration and would be comparable to the sound generated by light construction equipment. Construction activities for the Project would be limited to the hours between 7:00 A.M. and 7:00 P.M., Monday through Friday, and between 8:00 A.M. and 5:00 P.M. on Saturdays, as needed. Construction would not occur on state and federal holidays or Sundays unless authorized by the Commission. Hand pf. at 17.

12. The Project's transformers and the inverters are the only components that generate sound that may be audible from off-site locations. The inverters would be string inverter-type and would be located in the second southernmost row of panels. The transformers would be located at the southeastern corner of the solar array. Hand pf. at 17.

13. The estimated Project-related sound levels at the nearest residence to the Project's inverters and transformers are 39.1 dBA during the daytime and 37.4 dBA during the nighttime. Hand pf. at 17-18; exh. MHG-TH-11.

Discussion

Two issues raised in the Intervenors' post-hearing filings related to the Project's general description require discussion. The first is the potential presence of a sewer line that serves the residential neighborhood on Richville Road.[12] According to a Vermont Supreme Court case cited by the Intervenors, the original developers of the residential neighborhood constructed a private sewer system to serve the subdivision.[13] A pumphouse connects to a force-main that travels to the municipal sewer system, potentially across the Project parcel.[14] There has been substantial litigation concerning the financial responsibility for the sewer and whether it will be dedicated to the Town of Manchester.[15] The Intervenors request that the Project plans should be required to show the location of the sewer line and to ensure access for repairs.

Unfortunately, this issue was not raised until after the evidentiary hearing, and so there is no information in the record to help the Commission evaluate whether this issue is relevant to the Section 248 criteria or only to the private property interests of the Intervenors. Because the sewer line is located near streams and a public water supply, any disturbance of the sewer line could implicate several of the Section 248 criteria. Additionally, a Supreme Court decision suggests that the private sewer line could become public infrastructure.[16] Because I recommend that the Commission deny the application on other grounds, it is not necessary to review this issue further. However, if the Commission disagrees with my recommendation, the Commission should direct the Applicant to confirm that the Project will not encroach on the sewer easement.

The second issue is whether an Act 250 land-use permit applies to the Project parcel. The Applicant's witness testified that the Project parcel is not subject to an Act 250 permit.[17] The document filed as Exhibit 1 with the Intervenors' post-hearing brief purports to be a copy of the deed memorializing Blackacre LLC's purchase of the Project parcel. The parcel description states that the conveyance is subject to "State Land Use Permit EC-8-0009."[18] While this

[12] There is no information in the record showing the location of the easement.
[13] *Hayes v. Town of Manchester Water & Sewer Boards*, 2014 VT 126, ¶¶ 2-3.
[14] *Id*.
[15] *See Hayes v. Mountain View Ests. Homeowners Ass'n*, 2018 VT 41 (directing estate of developers to create a trust to fund the maintenance of the private sewer until the Town of Manchester accepts a dedication of the sewer system).
[16] *Id*. at ¶ 32.
[17] Hand pf. at 7.
[18] Intervenors' Exh. 1 at 4.

document is not in evidence and cannot be used to make findings about the Project, the Commission should require the Applicant to confirm that the Project parcel is not subject to an Act 250 permit before a CPG is issued if the Commission does not accept my recommendation to deny the application. This issue is material because if there is a land-use permit applicable to the site, then the Natural Resources Board is entitled to an opportunity to comment on the application.[19]

Applicable Rate Adjustors

14. The Applicant has elected to transfer the Project's renewable energy credits ("RECs") to Green Mountain Power Corporation. Hand pf. at 5.

15. The Project would be located on a preferred site, as defined in Commission Rule 5.103, because it would be located on a site identified in a joint letter of support. Hand pf. at 5.

Discussion

Pursuant to Commission Rule 5.127(C)(2), because the Project is greater than 150 kW and is located on a preferred site, a siting adjustor of minus two cents per kilowatt hour would apply to all energy generated by the net-metering system.

Because the Applicant has elected to transfer the ownership of the RECs generated by the net-metering system, the Project would be entitled to receive a REC adjustor of plus one cent per kilowatt hour for 10 years from the date the system is commissioned, pursuant to Commission Rule 5.127(B).

If a CPG were to issue for the Project, then the siting and REC adjustors would be stated in the Project's CPG, pursuant to Commission Rule 5.127(B)(2) and (C)(1).

Orderly Development of the Region

[30 V.S.A. §§ 248(b)(1) and 248(b)(1)(C)]

16. The Project would not unduly interfere with the orderly development of the region. In making this finding, due consideration has been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality.

[19] Commission Rule 5.107(F)(1)(f).

Substantial deference has been given to the land conservation measures and specific policies contained in the duly adopted regional plan. This finding is supported by findings 17 through 19, below.

17. The Project would not conflict with any land conservation measures in the Manchester Town Plan or Bennington Country Regional Plan. Hand pf. at 9; Christopher Ponessi, Applicant ("Ponessi") pf. at 7.

18. The Bennington Regional Plan has received an affirmative determination of energy compliance from the Department under 24 V.S.A. § 4352. Hand pf. at 11.

19. The Project is not consistent with Bennington County Regional Plan's specific policies for commercial solar development. Hand pf. at 11-12; exh. MHG-TH-8.

Discussion

The Commission must find that the Project will not unduly interfere with the orderly development of the region. In making this finding, the Commission must give due consideration to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. Substantial deference must be given to the land conservation measures and specific policies contained in the duly adopted regional plan.

The Intervenors contend that the Commission should give substantial deference to the following provision in the Bennington County Regional Plan: "Commercial-scale solar energy facilities occupy large open areas and should not be sited at important gateway locations or in the foreground of viewsheds that have been identified by communities as being of particular value.[20] According to the Intervenors, the Project is located in a gateway location and in the foreground of Mount Equinox.[21]

The Applicant contends that the Project site has not been identified as a gateway location or a viewshed of particular value. The Applicant also states that this language is not mandatory because the word "should" is used.

I accept that the Commission must give substantial deference to the policy cited by the Intervenors because the policy applies to specific resources within the region, such as gateways

[20] Exh. MHG-TH-8 at 115.
[21] Intervenors' Brief at 13, 15, and 18.

and locally-identified scenic viewsheds. I find that the Project is in the foreground of a viewshed that has been identified by the Town of Manchester as being of particular value.[22] The Regional Plan states that a commercial solar array like the Project "should not" be located in such a foreground. Therefore, the Project is inconsistent with this policy.[23]

The Commission must decide whether inconsistency with the policy will cause the Project to unduly interfere with the orderly development of the region. As discussed further below, I recommend that the Commission find that the Project would have an undue adverse effect on aesthetics, in part because of its location in the foreground of a scenic view. The Project's aesthetic impact would affect residents and travelers near Richville Road in Manchester, but it is not clear how the construction of the Project in the foreground of Mount Equinox would affect the orderly development of the region. Nor do we have any guidance on this issue from the Bennington County Regional Planning Commission. As discussed further below in my discussion of aesthetics, the Bennington County Regional Planning Commission's letter designating this area as a preferred site states that it defers to local preferred-site determinations unless there is a clear conflict with the Regional Energy Plan. The Town of Manchester's letter designating this area as a preferred site explicitly disclaimed any intent by the Town to take a position with respect to the Project's compliance with provisions of Vermont law. Thus, those letters are not evidence that the Project complies with the Bennington County Regional Plan. Further, the Regional Planning Commission did not enter an appearance in this case and did not argue that the Project is prohibited by the Regional Plan or that the Project would have a substantial regional impact.[24] Accordingly, I find this to be a close case, but I recommend that the Commission find that, while the Project is inconsistent with a policy of the Bennington County Regional Plan, the Project will not unduly interfere with the orderly development of the region.

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[22] Mount Equinox is identified in the Manchester Town Plan as a "significant natural feature . . . that provides a breathtaking backdrop to the Manchester valley." Manchester Town Plan at Appendix A – Significant Natural Features Inventory.

[23] "Substantial deference" is defined as "[a] specific policy shall be applied in accordance with its terms unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh the application of the measure or policy." 30 V.S.A. § 248(b)(1(C).

[24] Bennington Country Regional Plan at 196 (defining substantial regional impact).

Municipal Screening Requirements
[30 V.S.A. § 248(b)(1)(B)]

20. The Project complies with the screening requirements of applicable municipal bylaws or ordinances and recommendations of a municipality applying such a bylaw or ordinance. This finding is supported by findings 21 through 23, below.

21. The Town of Manchester has adopted a municipal screening ordinance that applies to the Project. The ordinance requires a minimum of four large trees of at least 30 feet in height at maturity and 12 small trees (less than 30 feet at maturity) or shrubs per 100 feet. Hand pf. at 10.

22. The tree requirement may be waived "for solar facilities on lots without adequate area to provide large trees within the buffer that would not shade the solar panels." Hand pf. at 10.

23. The Town of Manchester Select Board and Planning Commission requested that the height of trees be limited to 10 to 12 feet to preserve views of Mount Equinox. Hand pf. at 10.

Discussion

The Project is required by statute to comply with the Town of Manchester's screening ordinance and "the recommendation of a municipality applying such a bylaw or ordinance."[25] The Project's screening plan does not comply with the ordinance's large-tree requirement, but the large-tree requirement may be waived for solar facilities on lots without adequate area to provide large trees within the buffer that would not shade the solar panels.

The Applicant has not asserted that there is inadequate area to provide large trees within the buffer without shading the panels. Therefore, it is not clear that the Applicant would qualify for a waiver under the plain language of the ordinance. However, the Commission is also required to find that the Project would comply with the recommendations of the municipality applying the ordinance. The Town of Manchester has requested the limiting of tree heights to maintain views of Mount Equinox. Requiring large trees would not improve the aesthetics of the Project or provide any other benefit. Under these unusual circumstances, I recommend that the Commission resolve the apparent conflict between the text of the ordinance and the recommendation of the Town in favor of the Applicant and conclude that the Project complies with the Ordinance.

[25] 30 V.S.A. § 248(b)(1)(B).

Impact on System Stability and Reliability
[30 V.S.A. § 248(b)(3)]

24. The Project would not have an adverse effect on system stability and reliability. This finding is supported by findings 25 through 29, below.

25. The system would be designed to meet the applicable requirements set forth in the National Electrical Safety Code, National Electrical Code, the Institute of Electrical and Electronic Engineers, and Underwriters Laboratories as they relate to electrical compliance and safety, power quality, and interconnection. Hand pf. at 15.

26. A complete Interconnection Application pursuant to Commission Rule 5.500 was filed with GMP on September 20, 2019. GMP accepted the application on September 26,2019, and completed a Fast Track Analysis for the Project on October 9, 2019. Based upon the results of the Fast Track Analysis, GMP performed a Feasibility Study to determine whether the Project could be safely interconnected to the GMP distribution grid and what changes or upgrades would be needed to facilitate the Project's interconnection. GMP issued the Feasibility Study on November 25, 2019. Hand pf. at 12-13; exh. MHG-TH-10.

27. The Feasibility Study determined that the Project can move forward without the need for a System Impact Study or a Facilities Study subject to the following requirements: (i) construction of a small line extension; (ii) installation of a PCC recloser; (iii) payment of the transmission ground fault overvoltage protection scheme tariff fee after the implementation of the protection solutions as part of the GMP capital project process and before interconnection; (iv) the Project's inverters reconnect using the ISO-NE SRD gradual ramp rate of 2% of maximum current output per second with a modified reconnection time of 6.5 minutes; and (v) the Project's inverters must comply with the "Inverter Source Requirement Document of ISO New England. Hand pf. at 13; exh. MHG-TH-10.

28. GMP provided the Applicant with an executable Generator Interconnection Agreement on November 25, 2019. Hand pf. at 13-14.

29. The Project would be responsible for meeting the requirements and for the costs of the upgrades identified in the Feasibility Study. Hand pf. at 13-14.

Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment, the Use of Natural Resources, and Public Health and Safety
[30 V.S.A. § 248(b)(5)]

30. The Project would have an undue adverse effect on aesthetics. Subject to the conditions described below, the Project would not have an undue adverse effect on historic sites, air and water purity, the natural environment, the use of natural resources, or public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), impacts on primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts. These findings are supported by findings 31 through 101, below.

Outstanding Resource Waters
[10 V.S.A. § 1424a(d)] and [30 V.S.A. § 248(b)(8)]

31. The Project would not affect any outstanding resource waters as defined by 10 V.S.A. § 1424a(d) because there are no outstanding resource waters in the Project area. Exh. MHG-MLS-1.

32. The closest Outstanding Resource Water, the Batten Kill River, is located 650 feet west of the Project and would not be affected by the Project. Exh. MHG-MLS-1.

Air Pollution and Greenhouse Gas Impacts
[30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)]

33. The Project would not result in undue air pollution or greenhouse gas emissions. This finding is supported by findings 34 and 35, below.

34. The Project would cause temporary emissions of minimal levels of air pollutants from the use of typical construction equipment, and a nominal amount of dust may be generated. Hand pf. at 16.

35. Dust from construction activities can be controlled through the use of water. Once the Project is operational, only infrequent, minimal emissions may occur associated with normal maintenance operations. Hand pf. at 16.

Water Pollution
[10 V.S.A. § 6086(a)(1)]

36. The Project would not result in undue water pollution. This finding is supported by findings 39 through 103, under the criteria of headwaters through soils, below.

Headwaters
[10 V.S.A. § 6086(a)(1)(A)]

37. The Project is located in a headwaters area because it located within the groundwater source protection area for the Town of Manchester's public water system. Exh. MHG-MLS-1 at 3.

38. The Project would meet all applicable health and Vermont Department of Environmental Conservation regulations regarding reduction of the quality of the ground or surface waters. Exh. MHG-MLS-1 at 3.

39. All work during Project construction would be performed in accordance with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control. Exh. MHG-MLS-1 at 3.

40. The Project site, including space between the solar panels, would remain vegetated and maintained with mowing or brush-hogging conducted without the use of chemical herbicides. Exh. MHG-MLS-1 at 3.

41. The Project would not involve the disposal of wastes and would not involve the injection of waste materials or any harmful toxic substances into groundwater or wells. The Project would use non-toxic coolant in the pole-mounted transformers. Exh. MHG-MLS-1 at 3.

Discussion

ANR recommended several conditions of approval intended to ensure that any accidental spills of oil from the Project's transformers do not affect the Town of Manchester's public water supply. The Applicant has consented to these conditions. Therefore, I recommend that if a CPG is issued to the Applicant, the CPG should contain ANR's recommended conditions related to protecting headwaters.

The Intervenors' brief raised concerns that the Project's solar panels could contain PFAS and that the degradation of the panels over time could lead to contamination of the Town's drinking water. As discussed above, this issue was raised too late in this proceeding, and there is no evidence in the record suggesting that the Project's panels would contain any PFAS. Additionally, ANR is aware of the Project's proximity to a groundwater source protection area and did not raise this issue in its comments on the application. Accordingly, I recommend that the Commission find that the Project would be located in a headwaters area but would meet all applicable health and Vermont Department of Environmental Conservation regulations regarding preservation of the quality of the ground or surface waters.

Waste Disposal
[10 V.S.A. § 6086(a)(1)(B)]

42. The Project would meet all applicable health and Vermont Department of Environmental Conservation regulations regarding the disposal of wastes and would not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. Christopher Ponessi, Applicant ("Ponessi") pf. at 3; exh. MHG-MLS-1 at 3.

43. Where tree clearing would occur outside the Project's proposed perimeter fence, all trees would be cut flush with the existing grade and stumps would remain in place. If stumps were removed within the Project's perimeter, they would either be ground on site and used for erosion prevention and sediment control or be removed from the Project site and properly discarded. There is no stump dump proposed for this Project. Ponessi pf. at 3.

44. No on-site wastewater disposal system or buildings are associated with the Project. Ponessi pf. at 3.

45. Any metal or cardboard generated from the Project construction would be recycled. All construction waste that cannot be recycled would be disposed of in an approved sanitary landfill. Ponessi pf. at 3.

Water Conservation
[10 V.S.A. § 6086(a)(1)(C)]

46. The Project would not have an undue adverse effect on water conservation because the Project would not involve substantial use of water. Project water use would involve

infrequent dust control during construction and occasional panel clearing during operation. Ponessi pf. at 4.

Floodways
[10 V.S.A. § 6086(a)(1)(D)]

47. The Project is located within a floodway or floodway fringe but would not restrict or divert the flow of flood waters, significantly increase the peak discharge of a river or stream within or downstream from the Project, or endanger the health, safety, or welfare of the public or of riparian owners during flooding. Ponessi pf. at 4-5.

48. The Applicant would comply with the Vermont Flood Hazard Area and River Corridor Rule when constructing and operating the Project. The base flood elevation ranges at the site are between 2 and 3 feet. Accordingly, to ensure that the electrical components of the Project are at least one foot above the flood level, the base of the panels would be at least 4 feet above ground. Ponessi pf. at 4-5.

Discussion

The Intervenors' brief raised concerns about flooding at the site. According to the Intervenors, the Project's fence could trap debris and cause water to be diverted towards Richville Road and the nearby residences. There is no evidence in the record that supports the Intervenors' contention that the Project's fence would increase the risk of flooding at the site. ANR's comments on the Project recognized that the Project is within the Special Flood Hazard Area and recommended a condition requiring the Applicant to obtain authorization under the agency's Flood Hazard Area and River Corridor Rule. Subject to this condition, I recommend that the Commission conclude that the Project would satisfy the floodways criterion.

Streams
[10 V.S.A. § 6086(a)(1)(E)]

49. The Project would maintain the natural condition of all streams and would not endanger the health, safety, or welfare of the public or adjoining landowners because no work is required or proposed in any streams. This finding is supported by finding 50, below.

50. The closest surface water is Bourne Brook, a tributary to the Batten Kill, approximately 140 feet north of the Project site. The Project would not result in any clearing of forest vegetation within 50 feet of the top of the bank of the stream. Exh. MHG-MLS-1.

Discussion

ANR stated that it is concerned that Project construction or maintenance activities could result in disturbance of riparian zones. ANR requested a condition of approval to ensure that the Project does not accidentally encroach on riparian zones. The Applicant has consented to ANR's proposed condition. I recommend that any CPG issued for the Project contain ANR's proposed stream conditions.

Shorelines
[10 V.S.A. § 6086(a)(1)(F)]

51. The Project is not located on or near a shoreline. Exh. MHG-MLS-1.

Wetlands
[10 V.S.A. § 6086(a)(1)(G)]

52. The Project would not violate the rules of the Agency of Natural Resources relating to significant wetlands. This finding is supported by findings 53 through 55, below.

53. Two wetlands, a Class II and a Class III, were mapped and identified in the Project area. Exh. MHG-MLS-1.

54. The Vermont Wetlands Program determined that the Class III wetland lacks any functions and values. The Project impact on this wetland is limited to the placement of posts to support the solar modules. Exh. MHG-MLS-1.

55. The Project has been sited to avoid all impacts to the Class II wetland and its buffer. All disturbance associated with the Project is located outside the 50-foot wetland buffer. To avoid accidental encroachment, buffer zone boundaries would be demarcated before site

preparation and construction where the Project is within 100 feet of the Class II wetland . Exh. MHG-MLS-1.

Discussion

ANR stated that it is concerned that Project construction or maintenance activities could result in disturbance of the Class II wetland and its buffer. ANR requested a condition of approval to ensure that the Project does not accidentally encroach on the wetland. The Applicant has consented to ANR's proposed condition. I recommend that any CPG issued for the Project contain ANR's proposed wetland condition.

Sufficiency of Water and Burden on Existing Water Supply
[10 V.S.A. §§ 6086(a)(2) and (3)]

56. The Project would not cause an unreasonable burden on an existing water supply. This finding is supported by finding 57, below.

57. There is sufficient water available for the Project because the Project would not use significant amounts of water. Ponessi pf. at 4.

Soil Erosion
[10 V.S.A. § 6086(a)(4)]

58. The Project would not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. This finding is supported by findings 59 through 61, below.

59. The Project is sited on land that is mostly hay field and would only be disturbed during the construction phase for trenching, installation of piles, construction vehicles, and vegetative clearing. The Applicant would obtain authorization under the stormwater construction general permit before beginning any construction activities for the Project. Ponessi pf. at 5.

60. The Project would be constructed in accordance with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control (February 2020), and the Vermont Low Risk Site Handbook for Erosion Prevention and Sediment Control (February 2020). Ponessi pf. at 5.

61. The Project does not involve the creation of any new impervious area so no Operational Phase Stormwater Permit is required. Ponessi pf. at 6.

Transportation
[10 V.S.A. § 6086(a)(5)]

62. The Project would not result in undue traffic or congestion because the Project would cause only a small increase in traffic for a short duration during construction, and no transportation-related permits are needed for the delivery of equipment or materials. Hand pf. at 8.

Educational Services
[10 V.S.A. § 6086(a)(6)]

63. The Project would not place a burden on the ability of a municipality to provide educational services because the Project would not require or affect educational services. Hand pf. at 19.

Municipal Services
[10 V.S.A. § 6086(a)(7)]

64. The Project would not place an unreasonable burden on the ability of the affected municipality to provide municipal or government services because the Project would not require or affect local services. Hand pf. at 19.

Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas
[10 V.S.A. § 6086(a)(8)

65. The Project would have an undue adverse impact on aesthetics or on the scenic or natural beauty of the area because the Project would be out of character with its surroundings and would significantly diminish the scenic qualities of the area such that it would offend the sensibilities of an average person. The Project would not have an undue adverse effect on historic sites or rare and irreplaceable natural areas. These findings are supported by findings 66 through 80, below.

Aesthetics

66. The Project would be located off Richville Road in the Town of Manchester, Vermont. The Project site is currently an undeveloped lot, maintained as an open field with some mixed evergreen and deciduous vegetation present, primarily along the western side of the property. A GMP-owned 46 kV line and a railway run along the western edge of the Project parcel, but these features are behind the trees and not visible from Richville Road in the area where the Project would be located. Hand pf. at 1; exh. MHG-LT-1 at Figure 2b; exh. MHG-LT 3 at 1.

67. The topography on the Project parcel is flat, with little to no change in elevation across the Project site. Exh. MHG-LT-1 at 8.

68. The Project parcel is approximately 8.06 acres and is comprised of open field and forest land. Fields comprise approximately 3.88 acres, and the balance is forested. The proposed Project (solar field and fencing) would occupy approximately 3.05 acres. The 3.05 acres that would be occupied by the Project are comprised of approximately 2.41 acres that are open field and approximately 0.64 acre that is currently forested. Hand. pf. sup. 4/2/21 at 6.

69. The Project's solar panels would occupy approximately 62 percent of the Project parcel's open field and convert an additional 0.64 acre of forest to solar panels. Hand. pf. sup. 4/2/21 at 6.

70. The area adjacent to the Project is characterized by a residential neighborhood on Richville Road, Green Mountain Road, and Valley Pass, consisting of approximately 40 homes and a handful of small businesses. The Project site is located in the Mixed Use 2 (MU2) district, and the surrounding landscape (within a half mile) is comprised of a variety of uses, including residences and a mix of businesses. The structures in the wider area beyond the residences are mixed and vary from residential homes to office buildings and light manufacturing/warehouse facilities. Exhs. MHG-LT-1 at 7, MHG-TH-2(Rev.).

71. The Project's solar panels would be approximately 100 feet from Richville Road (the nearest public road). The Project's fence would be approximately 145 feet from the residence nearest the solar array. The Project's aesthetic mitigation would be closer to the road and adjacent residences and businesses. Exh. MHG-TH-2(Rev).

72. The Project's aesthetic impact would be adverse. The colors and materials of the solar arrays are out of context with the area. The array materials are either dark or galvanized

steel in color, compared to the residential structures, open fields, and vegetation that characterize the Project area. Exhs. DPS-1 at 4, MHG-LT-1 at 13, MHG-LT-3, MHG-TH-2(Rev.).

73. The eastern, northeastern, and southeastern side of the Project array would be visible from public viewpoints along Richville Road. It is anticipated that approximately ten residences or businesses near or adjacent to the Project site would have visibility of the Project. Exh. MHG-LT-1 at 11.

74. The Project would be visible to travelers on Richville Road between East Manchester Road and Natural Form Way. The duration of the view for drivers would be approximately 26 seconds. For pedestrians on the sidewalk of Richville Road the views would be longer. Drivers and pedestrians approaching Richville Road on both ends of Green Mountain Drive would be able to see the Project. Exh. MHG-LT-1 at 11-12.

75. There are no clear, written community standards that would prohibit the Project. Exh. MHG-LT-1 at 13.

76. The proposed visual mitigation plan includes planting along the east (Richville Road) side of the Project site to help mitigate potential views from Richville, Green Mountain, and East Manchester Road and Natural Form Way, as well as parcels across the street from the Project site. Exh. MHG-LT-1.

77. The proposed visual mitigation would not provide significant screening of the Project until approximately four to six years after planting. During leaf-off conditions, the character of the vegetative screening would be different and less effective because of the deciduous plants included in the mitigation plan. Exh. MHG-LT-3; Tr. 5/10/2021 at 17 (Thayer).

78. The Town of Manchester Town Plan designates Mount Equinox as a significant natural feature that "provides a breathtaking backdrop to the Manchester valley." Manchester Town Plan at Appendix A.

79. The Bennington County Regional Plan states: "Commercial-scale solar energy facilities occupy large open areas and should not be sited at important gateway locations or in the foreground of viewsheds that have been identified by communities as being of particular value." Bennington County Regional Plan at 115.

80. The Project would be in the foreground of views of Mount Equinox from Richville Road and several adjoining properties along Richville Road. The Project's aesthetic mitigation was chosen so that the vegetation would not block views of Mount Equinox. Exh. MHG-LT-3.

Discussion

In determining whether a net-metering system satisfies the aesthetics criterion contained in 30 V.S.A. § 248(b)(5), the Commission applies the so-called "Quechee test" as articulated by the Vermont Supreme Court in *In Re Halnon*.[26] The first step of the test is to determine whether the project would have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.[27] If the Project does not have an adverse effect on aesthetics because it is in harmony with its surroundings, then the project satisfies the aesthetics criterion.

If a project would have an adverse effect on aesthetics, such adverse impact would be found to be undue if any one of the three following questions is answered affirmatively: (a) Would the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? (b) Would the project offend the sensibilities of the average person? (c) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Turning to the first step of the Quechee test, a project has an adverse effect on aesthetics if it would be out of character with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open

[26] 30 V.S.A. § 8010(c)(3)(D) ("With respect to net metering systems that exceed 150 kW in plant capacity, the [Commission's] rules shall apply the so-called 'Quechee' test for aesthetic impact as described by the Vermont Supreme Court in the case of *In re Halnon*, 174 Vt. 515 (2002) (mem.)."); Commission Rule 5.112.

[27] Commission Rule 5.112(B).

space.[28] The Intervenors argue that the Project "would be out of character with its surroundings on Richville Road – open space, unobstructed views of a foreground field, midground forest and background Mt. Equinox."[29] The Intervenors also argue that the Town Plan designates the Project site's land use as "Neighborhood Residential Lands" and that in the event of a conflict between the Town Plan and zoning regulations, the Town Plan should control in this proceeding.

In contrast, the Applicant argues that the Project would not have an adverse aesthetic impact because it is in context with the varied land uses in the Mixed Use 2 zoning district and because its visibility is "limited" and only within a "highly localized area."[30]

The Project would occupy approximately 3.05 acres of an existing open field and wooded area and would introduce new components into the landscape that would create a visible change within the context of the immediate surroundings. The Project would be directly visible from Richville Road and from Green Mountain Road, East Manchester Road, and Natural Form Way where those roads intersect with Richville Road.[31] The Project would also be visible from approximately 10 residences.[32] These changes in context would adversely affect the aesthetics of the area.

The Applicant's testimony emphasizes the presence of commercial structures that are located farther from the Project site than the adjacent residential neighborhood on Green Mountain Drive. The Project site is characterized by its open field, woods, and the adjacent residential neighborhood. The larger commercial structures cited by the Applicant, such as the facility on Natural Form Way, are not visible from Richville Road in the vicinity of the Project and so they do not define the character of the Project area. The introduction of 3 acres of glass panels and steel structures to the area would be out of character with the area even considering the presence of the larger commercial structures in the broader area.

I also disagree with the Applicant's characterization of the Project's visibility as "limited."[33] The Project would be directly visible to drivers and pedestrians on Richville Road for approximately a quarter mile and would be visible permanently to approximately 10

[28] Commission Rule 5.112.
[29] Intervenors' Brief at 17.
[30] Applicants' Proposed Findings of Fact, May 27, 2021, at 24 and 27.
[31] Exh. MHG-LT-1 at 11.
[32] *Id*.
[33] Applicants' Proposed Findings of Fact, May 27, 2021, at 26.

residences in the adjacent neighborhood.[34] While there is screening proposed, this screening would not reach a mature height for several years and also would not fully screen the Project during part of the year due to the use of deciduous plantings in the mitigation plan.[35] Additionally, the screening itself would be a new element in the landscape that would be visible to travelers and residences on Richville Road. Under these circumstances, I do not credit the Applicant's testimony that the Project's visibility would be limited.

Having determined that the Project's aesthetic impact is adverse, the next step is to determine whether it is unduly so. The Project's aesthetic impact would be undue if it violates a clear, written community standard. The Intervenors argue that the Project violates the Manchester Town Plan because the Town Plan states that Richville Road provides scenic amenities and that "[p]ublic or private actions which would impact these roads must be carefully evaluated, and development must be planned to minimize adverse impacts."[36] Commission Rule 5.112(C) sets forth the Commission's interpretation of what statements qualify as a clear, written community standard. Statements must (1) designate specific scenic resources in the area where the Project is proposed and (2) provide specific guidance for project design.[37]

In this case, the Town Plan statement cited by the Intervenors specifically designates Richville Road as having scenic resources. The statement applies to the portion of Richville Road where the Project would be located due to the scenic views of Mount Equinox.[38] However, the statement does not provide concrete guidance for development. The Town Plan does not prohibit development on roads with scenic amenities; it only requires that such development must be carefully evaluated, and adverse impacts minimized. This statement is general in nature and does not give the Commission sufficient guidance because it "does not state with specificity what type of development is permitted" or prohibited along Richville Road.[39] Accordingly, I recommend that the Commission find that there are no clear, written community standards that would prohibit the Project.

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[34] *See* Exh. MHG-LT-1 at 11.
[35] Exh. MHG-LT-3 at 2; Tr 5/10/21 at 17 (Thayer).
[36] Manchester Town Plan at 30.
[37] Commission Rule 5.112(C)(1)-(2).
[38] *See* Manchester Town Plan at 30 and Appendix A (designating Mt. Equinox as a Significant Natural Feature and stating that Richville Road provides scenic amenities, including "especially scenic views").
[39] Commission Rule 5.112(C)(2).

The Project's aesthetic impact would be unduly adverse if the Applicant failed to take reasonably available mitigating steps. The Intervenors have criticized the effectiveness of the Project's proposed mitigation because it would not be mature for a decade and would only filter views in winter, but they have not identified any additional, reasonable mitigating steps that the Applicant could take to harmonize the Project with its surroundings. I asked the Applicant's witnesses about the possibility of using a berm to screen views of the Project, but this option was not available due to concerns about flooding at the site.[40] I recommend that the Commission conclude that the Applicant has taken all reasonably available mitigating steps.

This brings us to the last part of the aesthetic evaluation: whether the Project would offend the sensibilities of the average person. In considering this question, the Commission asks whether the Project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person.[41] The Commission considers the perspective of an average person viewing the project both from adjoining residences and from public vantage points.[42]

I recommend that the Commission conclude that the Project would be offensive to the average person viewing the Project from Richville Road and the adjacent residences. My recommendation is based on the following factors: (1) the Project's visibility,[43] (2) the Project's proximity to public roads and residences,[44] (3) the number of residences affected,[45] (4) the scale of the Project in relation to its site,[46] (5) the Project's location in the foreground of a scenic view of Mount Equinox,[47] and (6) the limitations of the Project's proposed mitigation plan.[48] Each of the above factors by themselves would not necessarily create an unduly adverse aesthetic impact, but the combination of these circumstances in the context of a residential neighborhood causes the Project to so significantly diminish the scenic qualities of the area that it would be offensive to the average person.

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[40] Tr. 5/10/2021 at 25 (Hand).
[41] Commission Rule 5.112(D).
[42] *Id*.
[43] Findings 73 and 74, above.
[44] Findings 70 and 71, above.
[45] Finding 70, above
[46] Findings 68 and 69, above
[47] Findings 78 through 80, above
[48] Finding 77, above

I do not agree with the analysis of this issue provided by the Applicant's aesthetic consultant, which is reproduced below:

> [T]he Project does not offend the sensibilities of the average person because it is not out of character with its surroundings or otherwise significantly diminish the scenic qualities of the area. The mitigation plan proposes to use plants that will be in the 10-12 foot range, as requested by the Town of Manchester's Selectboard and Planning Commission (see Hand PFT at 10-11) in height and are densely branched to help buffer views to the Project throughout the year. This plant selection is intended to preserve scenic views to Mount Equinox and the Taconics, while filtering visibility to the Project. Given the viewshed area, there is a very small area of visibility that is generally limited to the immediate Project vicinity. As a result, the Project will not disrupt the rural character of its surroundings, nor will it significantly diminish any scenic qualities of the area.[49]

As discussed above, the Project is out of character with its surroundings because it would locate a large glass and steel structure in an open field that sits across from the entrance to a residential community of approximately 40 homes.[50] The larger commercial structures in the area are not visible from Richville Road and, therefore, do not define the character of the Project area.[51] The scale of the Project would dominate the local landscape despite the filtering effects of the Project's proposed mitigation and the retention of the distant views because the Project runs the entire length of the field.[52] The Project would significantly diminish the scenic quality of the residential area by occupying the entirety of the foreground of scenic views of Mount Equinox from Richville Road and the nearby residences.[53]

For similar reasons, the Department's analysis of whether the Project would offend the sensibilities of the average person is unpersuasive:

> The Project is not considered to be shocking or offensive to the average person. The limited views where the Project will be visible are mitigated by the proposed landscape mitigation plan in conjunction with existing mitigating factors like the relatively short duration of view and highly limited viewshed area. In addition, the Project fits with existing land uses and is not within an area considered to have scenic value.[54]

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[49] Exh. MHG-LT-1 at 14.
[50] *Id*. at Figure 2b.
[51] *Id*.
[52] Exh. MHG-LT-3.
[53] The Bennington Country Regional Plan recognizes that preserving the foreground of significant views is a reasonable aesthetic consideration. Bennington County Regional Plan at 115.
[54] Exh. DPS-1 at 5.

The Project's views are significant within the 0.25-mile stretch of Richville Road adjacent to the Project.[55] The Project does not fit with the existing land uses in the Project area.[56] The Department's analysis also fails to account for the scenic qualities of Mount Equinox and the particular value assigned to this resource by the Town Plan.[57]

Next, I turn to the arguments raised in the Applicant's brief. The Applicant places great emphasis on the fact that the Town of Manchester designated the Project parcel as a "preferred site" and requested changes to the Project's aesthetic mitigation consistent with the Town's solar screening standards.[58] According to the Applicant, the Town and Regional determinations are "indicative that an average person would not find the Project shocking or offensive."[59]

I agree that local and regional recommendations should be considered when evaluating whether a Project would be offensive to the average person. However, in this case the Town and Regional preferred-site determinations do not have enough substance to make them persuasive indicators of how an average person would perceive the Project. The Town of Manchester's letter explicitly disclaimed any intent by the Town to take a position with respect to the Project's compliance with provisions of Vermont law except the Commission's definition of a preferred site under Rule 5.103.[60] The Town's preferred-site letter does not explain the Town's reasoning or its evaluation of the Project's aesthetic impact.[61] Therefore, the Commission cannot make reliable inferences about the Project's compliance with Section 248(b)(5) or Rule 5.112 based on the preferred-site letter.

Similarly, the Project's compliance with the Town of Manchester's request for screening is relevant but not dispositive as to whether the Project would be offensive to the average person. Compliance with a local screening ordinance is a separate and minimum standard for solar facilities.[62] A facility could comply with a screening ordinance but not pass muster under the

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[55] Finding 74, above.
[56] Findings 68-72, above.
[57] Manchester Town Plan at 30 and Appendix A.
[58] Applicant's Proposed Findings of Fact at 31.
[59] *Id*.
[60] Exh. MHG-TH-4 at 1 ("Note that in making this designation the Town of Manchester does not take a position certifying the proposed solar project's compliance with any other applicable provisions of Vermont law. The town's sole aim is to identify this particular project location as a preferred site for the proposed solar array under Net Metering Rule 5.103, 'Preferred Site,' (7), clause 2.").
[61] *Id*.
[62] 30 V.S.A. § 248(b)(1)(B).

Quechee test. In this case, even with the proposed screening plan, the Project's visibility, proximity to a residential neighborhood, scale, and scenic context make the Project's aesthetic impact unduly adverse.

The Bennington County Regional Planning Commission's letter states that the Regional Commission defers to local preferred-site determinations unless there is a clear conflict with the Regional Energy Plan.[63] Accordingly, I find that the Regional Planning Commission's preferred-site designation is not persuasive evidence of what an average person viewing the Project from Richville Road would think about the Project's aesthetics.

Next, I turn to the question of whether it is appropriate for the Commission to consider societal benefits in the Commission's aesthetic analysis of net-metering systems. For many years, the Commission's determination of whether a facility's aesthetic impact is unduly adverse under Section 248(b)(5) has been significantly informed by the overall societal benefits of the facility.[64] Previous iterations of the Commission's net-metering rule explicitly included the consideration of societal benefits along with a recitation of the elements of the Quechee test as the standard applicable to net-metering facilities.[65]

In 2014, the Legislature enacted Act 99 and directed the Commission to adopt revised net-metering rules. The statute requires that "[w]ith respect to net metering systems that exceed 150 kW in plant capacity, the rules shall apply the so-called 'Quechee' test for aesthetic impact as described by the Vermont Supreme Court in the case of *In re Halnon*, 174 Vt. 515 (2002) (mem.). The rules and application form shall state the components of this test."[66] This was a very specific instruction, considering that the Commission's rules already stated the components of the Quechee test, along with the Commission's explicit weighing of societal benefits.

In 2017, the Commission adopted revised rules that complied with Act 99's directive. The Commission's new rule states the components of the test verbatim from *Halnon* and does not include any direction that the Commission would consider societal benefits.[67] It is an open

[63] Exh. MHG-TH-4 at 37.
[64] *In Re: Northern Loop Project*, Docket 6792, Order of 7/17/03 at 28.
[65] Commission Rule 5.109(A)(3) (2014) ("Analysis of whether a particular project will have an 'undue' adverse effect on aesthetics and scenic or natural beauty is also significantly informed by the overall societal benefits of the project."). A copy of the old rule is available online at: https://puc.vermont.gov/document/board-rule-5100-net-metering.
[66] 30 V.S.A. § 8010(c)(3)(D).
[67] Commission Rule 5.112.

question whether the Commission's precedent of considering societal benefits when applying the Quechee test is applicable in net-metering cases.

The Applicant argues that societal benefits remain relevant to the review of net-metering projects and are not precluded from consideration under Rule 5.112. The Applicant asserts that the Commission has considered societal benefits in net-metering cases after the enactment of Act 99, but the two decisions cited in the Applicant's brief are inapposite—one is not a net-metering case, and the other concerns a net-metering application filed before the adoption of the new rule.[68] I have searched the Commission's cases since 2017 and found no cases where the Commission's determination of whether a net-metering facility's aesthetic impact was undue included an explicit consideration of societal benefits.[69]

The Applicant contends that 30 V.S.A. § 8010 directs the Commission to consider societal benefits and that the Supreme Court recognized that the Commission should balance "all appropriate policy considerations" in the *Halnon* decision.[70] Section 8010 requires that the Commission adopt a rule that, among other things, "advances the goals and total renewable targets" of Vermont, "accounts for all costs and benefits of net metering," and "balances, over time, the pace of deployment and cost of the program with the program's impact on rates."[71] The Commission has done this primarily through tailoring net-metering compensation to provide an incentive for development, while balancing the cost of that incentive with the benefits of net-metering and potential rate impacts.[72] The Commission does this with the aim of ensuring an appropriate pace of net-metering development that supports State policy objectives without undue rate impacts.

Therefore, even if the Commission's determination in this case were to be significantly informed by the societal benefits of the Project, I do not see a compelling reason to approve this

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[68] Applicant's Proposed Findings of Fact at 34 (*citing Petition of Chelsea Solar LLC,* Docket No. 17-5024-PET, Order of 6/12/19; and *Application of Novus Pine Hill Solar, LLC*, Docket No. NMP-6580, Order of 12/15/2015).

[69] A few cases decided as late as 2018 involved facilities that submitted complete applications before the adoption of Rule 5.112. These cases appropriately cite the old Rule 5.109 and its consideration of societal benefits because the Commission applies the rules in effect at the time an application was filed. 2013, No. 99 (Adj. Sess.), § 10(f) ("30 V.S.A. § 219a and rules adopted under that section shall govern applications for net metering systems filed prior to January 1, 2017.").

[70] Applicant's Proposed Findings of Fact at 34.

[71] 30 V.S.A. § 8010(c).

[72] Commission Rule 5.128(B); *In re: biennial update of the net-metering program*, Case No. 20-0097-INV, Order of 11/12/20 at 8.

Project because the Commission balances the societal benefits and costs of net-metering at a program level to achieve an adequate level of deployment. There is no need to put a thumb on the scale in favor of an individual net-metering project to achieve Vermont's policy goals because the program can be adjusted periodically to ensure adequate and appropriate resource development.

Accordingly, for these reasons I recommend that the Commission find that the Project would have an undue adverse effect on aesthetics and recommend that the Commission deny the application.

Historic Sites

81. The Project would not have an undue adverse effect on historic sites. This finding is supported by findings 82 through 84, below.

82. The Project site is not located in any of the Historic districts designated in the Town Plan. Hand pf. at 20; exh. MHG-LT-1.

83. The house located to the south of the Project area at 3195 Richville Road is listed in the National Register of Historic Places as the Amos Lawrence House. Views of the Project from the Amos Lawrence House are screened by existing vegetation. Exhs. MHG-TH-13 at 1, MHG-TH-2(Rev.).

84. DHP completed a preliminary review of the Project on May 15, 2020, and identified two areas in the northern part of the Project site that are archeologically sensitive due to the soils, topography, and presence of former river channels. These areas require a Phase I survey. The southern part of the Project site is not considered archeologically sensitive. Hand pf. at 19-20.

Discussion

To protect archeological resources at the site, the Applicant and DHP entered into a memorandum of understanding ("DHP MOU") that requires the Applicant to conduct Phase I archeological investigations and, if necessary, mitigation in two archeologically sensitive areas in the northern part of the Project site. The MOU has been admitted into evidence as Exhibit MHG-TH-13. I recommend that the Commission require compliance with the terms of the MOU as a condition if a CPG is issued for the Project.

Rare and Irreplaceable Natural Areas

85. The Project would not have an undue adverse effect on rare and irreplaceable natural areas because there are no rare and irreplaceable natural areas within the Project area. Exh. MGH-MLS-1.

Necessary Wildlife Habitat and Endangered Species
[10 V.S.A. § 6086(a)(8)(A)]

86. The Project would not have an undue adverse effect on any endangered species or critical wildlife habitat. This finding is supported by findings 89 through 93, below.

87. The wildlife habitat assessment of the Project site involved both a remote review of available digital maps for the Project area and a field inventory component. Site visits were conducted in the fall of 2019 to assess wildlife, wildlife habitats, and rare, threatened, and endangered species. Exh. MHG-MLS-1.

88. There was no mapped wintering habitat for white-tailed deer, and the weedy and early successional vegetation does not provide either the necessary habitat for the black bear or grassland bird habitat. No signs of black bear or deer wintering were found at the Project site. Exh. MHG-MLS-1.

89. No rare, threatened, or endangered plant species were documented during the Applicant's expert's rare plant species inventory conducted on September 26, 2019, and no impacts to rare, threatened, or endangered plants are expected. Exh. MHG-MLS-1.

90. The Project would not trigger a review for habitat loss of the northern long-eared bat because Project clearing would involve less than 0.5% of the total forested area within a 1-square-mile radius. A potential roosting tree for the Indiana bat was documented on the northern property line, but the tree would not be impacted by the Project. Thus, there would be no adverse impacts to bats or bat habitat from the Project. Exh. MHG-MLS-1.

91. The Project site overlaps with an area mapped by the Vermont Natural Heritage Inventory as habitat for the wood turtle (an S3-ranked uncommon species). To allow wood turtles access to this area, fencing, if used, would have 12" wide x 7" tall openings at the bottom to allow wood turtle entry and exit. All site mowing would be limited to the period between October 15 and March 15 when this species would not likely be present on the site. Exh. MHG-MLS-1.

Discussion

ANR requested a CPG condition requiring the use of fencing that would allow wood turtles to move through the site and limiting site mowing during times when turtles would be present. The Applicant has consented to this condition. I recommend that ANR's proposed CPG condition be included in any CPG issued for the Project.

Development Affecting Public Investments
[10 V.S.A. § 6086(a)(9)(K)]

92. The Project would not unnecessarily or unreasonably endanger the public or quasi-public investment in any facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of, or access to any such facility, service, or lands. The only nearby public investments are roadways, and those would not be materially impacted. Hand pf. at 20-21.

Public Health and Safety
[30 V.S.A. § 248(b)(5)]

93. The Project would not have any undue adverse effects on the health, safety, and welfare of the public. This finding is supported by findings 96 through 98, below.

94. The Project would meet applicable safety requirements in the National Electrical Safety Code, National Electrical Code, the Institute of Electrical and Electronic Engineers, and Underwriters Laboratories. Hand pf. at 15.

95. All Project switchgear equipment would be located within weather-tight enclosures, and all wiring would be installed in a conduit, with the exception of the DC wiring from the modules to the inverters that would be routed along the racking system. Hand pf. at 15.

96. The Project site would either be surrounded by a minimum 7-foot-tall fence, or a "solar scrim" protective backing would be used to cover exposed wiring on the backside of the panels. Hand pf. at 3, 15.

Discussion

The Department requested that the Applicant be required to notify the Department and the Commission upon making a determination regarding whether the Project would use solar

scrim or a fence to secure the Project. The Applicant has consented to this condition, and I recommend that the Commission include the condition in any CPG issued for the Project.

Primary Agricultural Soils
[30 V.S.A. § 248(b)(5)]

97. The Project would not have any undue adverse effects on primary agricultural soils as defined in 10 V.S.A. § 6001. This finding is supported by findings 100 and 101, below.

98. The Project site contains the following primary agricultural soils: Copake Gravelly Fine Sandy Loam, Limerick Silt Loam, and Pootatuck Fine Sandy Loam. Ponessi pf. at 7; exh. MGH-TH-2.

99. The primary agricultural soils would be temporarily impacted by trenching for the underground conduits and during tree clearing (including grubbing if necessary). Any soil disturbed from Project construction would be replaced and restored as necessary and would be included on erosion prevention and sediment control plans required for a construction stormwater permit. The construction of the Project would not permanently compact, alter, or remove the ability of these soils to be used in the future. Ponessi pf. at 7; exh. MGH-TH-2.

Discussion

AAFM has requested four CPG conditions intended to protect primary agricultural soils. The Applicant has agreed to the proposed conditions, and I recommend that the Commission include AAFM's proposed conditions in any CPG issued to the Project.

Minimum Setback Requirements
[30 V.S.A. § 248(s)]

100. The Project would comply with Vermont's statutory setback requirements for ground-mounted solar electric generation facilities because the Project's solar panels or support structures for the solar panels are set back at least 100 feet from the nearest road and at least 50 feet from the nearest property boundary line. Exh. MHG-TH-2 (Rev.).

Discussion

Section 248(s) of Title 30 requires that the nearest portion of a facility's solar panels or support structure for a solar panel be set back at least 100 feet from any state or municipal

highway and at least 50 feet from any property boundary that is not a state or municipal highway. The setbacks proposed for the Project's solar panels or support structures for the solar panels meet these minimum requirements.

VIII. DECOMMISSIONING PLAN

101. At the end of the Project's useful life, a determination would be made whether it can be re-powered (after any necessary regulatory approval), or whether it would be decommissioned and the site restored to its current condition. If decommissioned, the Project equipment would be removed from the site and re-used, recycled, or disposed of in accordance with applicable laws and regulations in existence at that time. In addition, the site would be restored to the condition it was in before installation of the facility to the maximum extent practicable. Hand pf. at 7; Exh. MHG-TH-6.

Discussion

Commission Rule 5.107(C)(12) requires that all applications for net-metering systems with capacities greater than 150 kW must include a plan for decommissioning the Project at the end of its useful life. The decommissioning plan must provide for the removal and safe disposal of Project components and the restoration of any primary agricultural soils, if such soils are present within the net-metering system's limits of disturbance. Hand pf. at 7; exh. MHG-TH-6.

Commission Rule 5.904(A) requires that a project with a capacity equal to or greater than 150 kW and less than or equal to 500 kW shall be removed once it is no longer in service, and the site shall be restored to the condition it was in before installation of the facility to the greatest extent practicable.

The Applicant has provided a detailed plan for decommissioning the Project. I recommend that the Commission approve that plan and require, as a condition of approval, that the Applicant comply with the terms and conditions of its proposed decommissioning plan, identified in the evidentiary record as exhibit MHG-TH-6.

IX. CONCLUSION

Based upon the certifications of the Applicant and the above findings, I recommend that the Commission conclude that the Project would have an undue adverse effect on aesthetics and should therefore be denied. The Project would comply with the remaining Section 248 criteria.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Jake Marren

Jake Marren, Esq.
Hearing Officer

X. COMMISSION DISCUSSION

On July 16, 2021, the parties filed comments on the proposal for decision, and on July 30, 2021, the parties filed reply comments. On August 13, 2021, Commissioners Cheney and Allen conducted a site visit.

Summary of Comments on the Proposal for Decision

The Applicant argues that the Hearing Officer has applied "a new multifactor test, which is not based on any Commission precedent."[73] The Applicant further argues that the Hearing Officer's evaluation of those factors is not supported by the weight of the evidence, and "arbitrarily substitutes[s] the Hearing Officer's judgment for the unrebutted testimony of aesthetic experts."[74] The Applicant contends that the Hearing Officer improperly discounted the significance of the designation of the Project site as a preferred site by local authorities.

The Department reiterates its aesthetic consultant's conclusion that the Project would not have an undue adverse effect on aesthetics. The Department states that the proposal for decision's discussion of the Project's aesthetic mitigation in the context of the first prong of the Quechee test was problematic because it suggested that aesthetic mitigation could be the cause of an adverse aesthetic impact.

Intervenors support the proposal for decision regarding the Project's aesthetic impact. The Intervenors argue that the Project is out of context with its surroundings and will not be adequately screened. The Intervenors argue that the Commission should not give substantial weight to the Project's preferred-site letter because the Town selectboard lacked knowledge of the proposal and did not listen to the Intervenors' concerns. The Intervenors also contend that this proceeding has not adequately addressed flooding issues at the site. The Intervenors argue that recent flooding events show that the Project cannot be built safely and that the Project's aesthetic mitigation would be damaged by future flood events. The Intervenors request that the Commission invite the Division of Emergency Management to investigate the Project's effect on flooding. Finally, the Intervenors request an oral argument.

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[73] Applicant Comments at 2.
[74] *Id*. at 3.

The Legal Standard

State law requires that the Commission "apply the so-called Quechee test for aesthetic impact as described by the Vermont Supreme Court in the case of *In re Halnon*, 174 Vt. 515 (2002) (mem.)" in its review of a net-metering system.[75] The issue in this case arises under the second prong of the Quechee test: whether the Project would offend the sensibilities of the average person and, therefore, have an undue adverse effect on aesthetics. A project will be found to offend the sensibilities of the average person if, among other things, the project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person. The Commission will consider the perspective of an average person viewing the project from both adjoining residences and from public vantage points.[76]

The Hearing Officer concluded that the Project would offend the sensibilities of the average person. In support of this conclusion, the Hearing Officer cited six factors that supported his conclusion: (1) the Project's visibility, (2) the Project's proximity to public roads and residences, (3) the number of residences affected, (4) the scale of the Project in relation to its site, (5) the Project's location in the foreground of a scenic view of Mount Equinox, and (6) the limitations of the Project's proposed mitigation plan. The Applicant asserts that the Hearing Officer has created a new legal test that is not found in the Commission's precedent.

We disagree with the Applicant's assertion that the Hearing Officer has created a new test. The Hearing Officer considered factors that are relevant to determining how an average person would perceive the character of the Project and the Project's effect on the scenic qualities of the area.[77] Our precedent shows that the Commission considers the same or similar factors when determining whether the views of a proposed facility would offend the sensibilities of an average person. For example, in *Halnon*, the Commission found a net-metered wind turbine would offend the sensibilities of an average person based on its visibility from an adjoining residence.[78] The Commission's assessment included consideration of the proximity of the wind

[75] 30 V.S.A. § 8010(c)(3)(D).
[76] Commission Rule 5.112(D).
[77] *Id*. (stating that a facility's aesthetic impact will be undue if "the project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person").
[78] *In Re Tom Halnon*, Case No. CPG NM-25, Order of Mar. 15, 2001, at 7

turbine to an adjoining landowner's home and the "lack of effective mitigation."[79] The Commission also considered how the scale of the proposed wind turbine would compare to other forms of nearby development.[80]

Accordingly, we reject the Applicant's argument that the Hearing Officer applied the wrong legal standard in this case. The relevant factors considered by the Hearing Officer are similar to those considered by the Commission in past cases.

Therefore, we next turn to the Applicant's argument that the Hearing Officer's consideration of those factors was not supported by the evidentiary record.

The Project's Visibility

The Applicant argues that the proposal for decision "fails to cite and take into account unrebutted evidence about the Project's limited visibility, particularly from residences, as well as the proposed landscape mitigation which further reduces off-site visibility[.]"[81] Specifically, the Applicant contends that its witness testified that the view from the ten residences will be filtered by existing vegetation and structures. The Applicant states that the Hearing Officer failed to consider that the proposed mitigation plan is anticipated to further mitigate the views and reduce Project visibility. Finally, the Applicant argues that the Project will only be partially visible because of the site's flat topography.

We have reviewed the record and adopt the Hearing Officer's findings regarding the Project's visibility. Finding 73, above, states that "[t]he eastern, northeastern, and southeastern side of the Project array would be visible from public viewpoints along Richville Road. It is anticipated that approximately ten residences or businesses near or adjacent to the Project site would have visibility of the Project." The Applicant has not rebutted the accuracy of this finding. We are also not persuaded by the Applicant's citation of testimony that existing vegetation or structures would reduce the Project's visibility. First, there are no existing structures and little existing vegetation that would effectively screen the views from the homes

[79] *Id*.
[80] *Id*.
[81] Applicant Comments at 3. The Applicant also noted that the citations in the proposal for decision were misnumbered; this typographic error in the proposal for decision has been corrected.

on Richville Road.[82] Those properties would rely entirely on the Applicant's proposed aesthetic mitigation plan. Existing vegetation and structures will reduce the visibility of the Project from some homes on Valley Pass, but the testimony cited by the Applicant does not state that the Project would be entirely screened from all residences on Valley Pass.[83] Therefore, we find no basis to disturb the Hearing Officer's finding that these homes would have visibility of the Project.

The Applicant also argues that the Hearing Officer failed to give weight to the Project's aesthetic mitigation plan. As discussed further below, the Hearing Officer correctly found that the aesthetic mitigation plan would not be effective for several years based on the Applicant's visual simulations of the Project's aesthetic mitigation.[84] During those years, the Project would be visible from the travelled way and homes on Richville Road, as well as some of the homes on Valley Pass, and all residents of the subdivision would see the Project as they enter and exit Green Mountain Drive. Accordingly, we do not accept the Applicant's argument that the Hearing Officer failed to properly consider the Project's aesthetic mitigation plan in assessing the Project's visibility.

The Project's Proximity to Public Roads and Residences

The Applicant argues that the proposal for decision focuses too narrowly on the adjacent neighborhood of approximately 40 homes and small businesses while ignoring other commercial uses in the area. The Applicant contends that the proposal for decision fails to properly account for the mixed commercial uses to the south and north on Richville Road and the large manufacturing/warehouse facility directly adjacent to the eastern side of the neighborhood.

The Hearing Officer considered the other commercial uses in the area but concluded that the character of the Project site is defined by the adjacent residential neighborhood because the larger commercial structures are not visible from Richville Road in the vicinity of the Project.[85] The Commission recognizes that some of the commercial uses, like a post office, are visible

[82] *See* Exh. MHG-TH-2 (showing several homes on Richville Road without intervening structures or significant vegetation).

[83] Exh. LT-1 at 3-4 ("There is expected to be a range of high to partial to no visibility from Green Mountain Road, Valley Pass, and East Manchester Roads depending on the location, viewer orientation, and existing visual obstructions.").

[84] Finding 77, above.

[85] Page 26, above.

from Richville Road if one travels away from the Project site. However, those facilities are not of the same scale as the Project. Similarly, there is no evidence in the record that the large manufacturing/warehouse facility to the east of the neighborhood is visible from Richville Road. The map of the area provided by the Applicant shows that this large commercial structure is separated from the neighborhood by existing vegetation and a bigger setback than the proposed facility.[86]

The Applicant also contends that the Project's distance from the nearest residences (145 feet) is similar to other facilities approved by the Commission. As the proposal for decision notes, siting a solar array near residences does not necessarily mean that a proposed project will offend the sensibilities of an average person. The cases cited by the Applicant are all factually distinguishable from this case because those facilities were not as close to public roads and residences as the Project, were screened by existing vegetation, and were not located at the entrance of a residential subdivision.

In *Charlotte Solar*, the Project's solar panels were set back 679 feet from the nearest road.[87] The nearest residences were also at least 260 feet from the Project and separated from the Project by an existing hedgerow that would screen views of the Project.[88] Additionally, the Commission found that it was necessary to reduce the footprint of the array to less than one-third of the open field "to ensure that the scale of the development is appropriate to the rural setting of the Project."[89] In contrast to the facility in *Charlotte Solar*, the Project is located only 100 feet from Richville Road, only 145 feet from residences, and would occupy a greater percentage of the open field on which it is sited.

In *BDE Waterford Suitor Lazar Solar,* the facility was visible from only one nearby residence. The view from this residence was screened by existing vegetation.[90] The three gaps

[86] Exhibit MHG-LT-1 at Figure 2b. Consistent with the map that is in the record, during the site visit, we were not able to see any large commercial structures from Richville Road in the area of the Project. If the Applicant objects to us relying on this observation from our site visit, it may file such objection during the 30-day reconsideration period.

[87] Exhibit CSF-LC/JM-12a from Docket No. 7844. This exhibit from Docket 7844 is admitted to the record in this proceeding. Any objection to the admission of this document must be filed within the reconsideration period for this Order.

[88] *Id*.

[89] *Petition of Charlotte Solar, LLC*, Docket 7844, Order of 1/22/2013 at 24.

[90] *Application of BDE Waterford Suitor Lazar Solar, LLC*, Case No. 16-0005-NMP, Order of 5/26/2016 at 15.

in the existing vegetation were filled in with mitigation plantings.[91] Unlike the Project, the facility at issue in *BDE Waterford Suitor Lazar Solar* was not located near a residential neighborhood and the single nearby resident did not raise any aesthetic concerns about the facility.

The facility approved in *ER Paper Mill Village Solar* was located 279 feet from the nearest residence, which is nearly twice the distance involved in this case.[92] The solar array only occupied a small portion of a large field and was screened by existing vegetation.[93] Similarly, the facility approved in *Forefront Power* was located 875 feet from the nearest roadway. That project was separated from the a nearby residential area "by a mature hedgerow that ranges from 50-60 feet in depth," resulting in minimal visibility.[94] No neighboring landowners raised any concerns about the facility's aesthetic impact in either of these cases.

For these reasons, we are unpersuaded by the Applicant's argument that the Hearing Officer failed to adequately consider the evidence in the record concerning the Project's proximity to public roads and residences.

The Scale of the Project in Relation to Its Site

The Applicant argues that the proposal for decision fails to account for how much of the Project would be visible due to the flat topography of the Project site. According to the Applicant, the solar array occupies less than 25% of the "field of view" from Richville Road and the adjacent residences. However, we have reviewed the record and agree with the Hearing Officer's conclusion that the Project's scale is one of the factors that would cause a reasonable person to find that the Project would so significantly diminish the scenic qualities of the area as to be offensive. The Project would stretch nearly the entire length of the open field along Richville Road.[95] The Project's panels would occupy 62% of the open field, leaving a narrow undeveloped strip between the panels and the Project's aesthetic mitigation. As a result, the Project would appear to occupy most of the field when viewed from Richville Road.

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[91] *Id*.

[92] *Application of ER Paper Mill Village Solar, LLC*, Case No. 16-0049-NMP, Order of 11/17/2016 at 5.

[93] *Id.* at 4 and 9.

[94] *Application of Forefront Power, LLC*, Case No. 16-0065-NMP, Order of 11/8/2017 at 14 ("This community is separated from the Project by a mature hedgerow that ranges from 50-60 feet in depth.").

[95] Exh. MHG-TH-2(Rev.).

The Applicant's exhibit depicting the Applicant's field-of-view calculation further supports our conclusion that the Project's scale and proximity to the road are inappropriate for its location. The photograph used in Exhibit MHG LT-5 is supposed to represent the field of view of a person standing on the sidewalk on Richville Road, and yet only three of the Project's 15 rows of solar panels are visible.[96] However, a person actually standing on Richville Road in the location where the photograph was taken would be able to look to the north and the south to take in the whole of the Project. The Project's scale, when combined with its proximity to a residential neighborhood and public road, causes the Project to dominate the scene and contributes to our overall conclusion that the Project's aesthetic impact is unduly adverse.

The Project's Location in the Foreground of Mount Equinox

In the proposal for decision, the Hearing Officer cited language in the Manchester Town Plan that designates Mount Equinox as a "significant natural feature" that "provides a breathtaking backdrop to the Manchester valley," and the Regional Plan's general direction that commercial-scale solar energy facilities should not be "sited in the foreground of viewsheds that have been identified by communities as being of particular value."[97] The Applicant argues that there is no Commission precedent that supports consideration of the town or regional plan under this prong of the Quechee test.

Commission Rule 5.112(D) states that "a project will be found to offend the sensibilities of the average person if the project would be so out of character with its surroundings or so significantly diminish the scenic qualities of the area as to be offensive or shocking to the average person." Therefore, any information relevant to the "scenic qualities of the area" is potentially relevant to the Commission's consideration of how an average person would perceive the Project. Mount Equinox is recognized in the Town Plan as a "significant natural feature."[98]

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[96] Post-Hearing Testimony of Lucy Thayer at 2; exh. MHG LT-5 at 3. The Applicant filed additional testimony and exhibits in response to questions posed by the Hearing Officer at the evidentiary hearing. The post-hearing testimony and exhibits of Lucy Thayer are admitted into the evidentiary record. Any objection to the admission of this evidence should be filed within the 30-day reconsideration period.

[97] Findings 78 and 79, above.

[98] *Id*.

Thus, the Project's effect on views of Mount Equinox is one of the factors the Hearing Officer appropriately considered when assessing the Project's aesthetic impact.[99]

To be clear, the Commission is not making a finding that the Project is inconsistent with any provision of the local or regional plans. The Commission also emphasizes that siting a facility in the foreground of a scenic view by itself does not automatically render the facility's aesthetic impact unduly adverse. The language of the local and regional plans cited by the Hearing Officer helps us better understand the Project's context and, therefore, the Project's effect on the scenic qualities of the area. The Commission finds that the Project site has particular scenic value and that the Project's location in the foreground of a scenic view is a factor that weighs against the Project.

The Limitations of the Project's Proposed Aesthetic Mitigation

The Applicant argues that "[t]here is simply no evidence in the record that the mitigation plan is insufficient at the time of planting."[100] Exhibit MHG-LT-3 shows simulations of the Project's mitigation at the time of planting and, based on this evidence, the Hearing Officer found that the Project would not be effective until four to six years after construction.[101] We think that an average person observing the Project from the homes on Richville Road would find this unscreened view offensive because of the Project's proximity to the road and homes and because of the Project's scale in relation to its setting next to the entrance to a residential neighborhood.

The Commission recognizes that mitigation plantings often need time to become mature. In most cases this is not a significant issue because the proposed facilities are not located as close to the road or residences, are not located at the entrance to a residential neighborhood, or are not of a scale like the Project in this case. The specific context of the Project makes the limitations of the Project's mitigation plan more significant than they would be in a typical Commission case involving aesthetic mitigation. We also emphasize that we do not hold that a project must be completely screened from public view to obtain approval.

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[99] The Applicant also contested the Hearing Officer's statement that the Project would occupy entirety of the foreground. Whether the Project occupies the entirety of the foreground is beside the point. It is the Project's location in the foreground of a scenic view that is most relevant in this case.

[100] Applicant Comments at 16.

[101] Finding 77, above.

The Weight Given to the Project's Preferred-Site Letter

The Applicant argues that the proposal for decision "inappropriately discounts the role of the Town in this proceeding and ignores the history of how the Preferred Site letter came to be issued and the input provided to the Selectboard and Planning Commission prior to the Town's granting preferred site status."[102] We disagree. The preferred-site letter disclaims any position about the Project's merits with respect to the Section 248 criteria.[103] Therefore, we cannot draw any conclusions about the Project's aesthetic impact based on the preferred-site letter or any process that led to it.

The Applicant's and Department's Expert Opinion Testimony

The Applicant argues throughout its comments that the Hearing Officer ignored the testimony of the aesthetic experts. To the contrary, the Hearing Officer considered the testimony offered by the witnesses of the Applicant and the Department and explained that their opinions were not persuasive because other facts in the record supported a different conclusion.[104] Therefore, the Hearing Officer did not "arbitrarily substitute [his] judgment for the unrebutted testimony of aesthetic experts."[105] The Commission is not required to agree with the opinions of aesthetic experts just because there is no oppositional testimony.[106]

The Department's Concerns About the Hearing Officer's Discussion of Aesthetic Mitigation and Adverse Aesthetic Effect

The Department expresses concerns about the Hearing Officer's analysis of whether the Project would have an adverse effect on aesthetics under the first step of the Quechee test. Specifically, the Department criticizes the Hearing Officer's statement that "the screening itself" is "a new element in the landscape that would be visible to travelers and residences on Richville

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[102] Applicant's Comments at 12-13.

[103] Exh. MHG-TH-4 at ("Note that in making this designation the Town of Manchester does not take a position certifying the proposed solar project's compliance with any other applicable provisions of Vermont law. The town's sole aim is to identify this particular project location as a preferred site for the proposed solar array under Net Metering Rule 5.1-03, "Preferred Site," (7), clause 2.").

[104] Pages 29-30, above.

[105] Applicant Comments at 5.

[106] *See In re Denio*, 158 Vt. 230, 236 (1992) (holding that the Environmental Board may make findings against an applicant on aesthetics issues even in the absence of opposition to a project: "The absence of opposition does not mean that [applicants] automatically prevail on the aesthetics issue.").

Road."[107] According to the Department, this statement implies that visibility of the aesthetic mitigation itself may be considered in determining whether a project is adverse under the first step of the Quechee analysis and could discourage future applicants from proposing aesthetic mitigation.

Commission Rule 5.112(B) states that a project has an adverse effect on aesthetics if it is out of character with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.

A threshold issue is whether aesthetic mitigation is a part of the "project" that is considered under this step of the Quechee test. Aesthetic mitigation is often an integral part of a proposal, and the Commission considers the entire proposal when assessing a project under the first step of the Quechee test. Aesthetic mitigation is not always limited to vegetative screening and can include berms, strategic siting, or other measures. Therefore, we think that the proper test is whether the project, including any proposed mitigation, is out of character with its surroundings, considering factors such as the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials within the immediate environment, the visibility of the project, and the impact of the project on open space.

In this case, the Hearing Officer found that the aesthetic mitigation itself would be a new element in the landscape that would be visible from Richville Road and surrounding residences. We agree with the Department that this statement could be read to mean that the proposed aesthetic mitigation itself is a reason why the Project would have an adverse aesthetic impact and could potentially result in applicants proposing less aesthetic mitigation. Therefore, we do not adopt this specific part of the proposal for decision and have not considered it.

We find that the Project will have an adverse effect on aesthetics because the Project, including the proposed mitigation plan, will be out of character with its surroundings. In making this determination, we considered the Project's visibility from Richville Road and the nearby

[107] Page 27, above.

residences.[108] The Project would introduce a large piece of utility infrastructure constructed of metal and glass into an open field next to a residential neighborhood. While the proposed aesthetic mitigation plan would improve the aesthetics of the Project relative to a situation without aesthetic mitigation, the Hearing Officer correctly found that the aesthetic mitigation plan would not be effective for several years based on the Applicant's visual simulations of that plan.[109]

The Intervenors' Request for an Investigation of Flooding Issues and Request for Oral Argument

In their reply comments on the proposal for decision, the Intervenors request that the Commission ask the Division of Emergency Management of the Department of Public Safety to provide an analysis of the flooding history of the Project parcel to determine whether any type of development is appropriate in this location. The Intervenors allege that flooding events in the past year have "produced huge blocks of ice filled with large tree debris."[110] The Intervenors have also submitted photographs of a recent flooding event that occurred in their neighborhood in the summer of 2021. Those photographs appear to show substantial flooding on Green Mountain Drive and show sediment and gravel deposited on the Project site.

The Division of Emergency Management is the state entity that has the responsibility to "[e]stablish and define emergency planning zones and prepare and maintain a comprehensive state emergency management strategy."[111] In contrast, ANR is the party designated by statute to appear in Section 248 proceedings to provide evidence and recommendations concerning any findings to be made under Section 248(b)(5), which includes the floodways criterion.[112] Accordingly, we decline the Intervenors' request to invite the Division of Emergency Management to participate in this proceeding.

The Commission does agree that the recent flooding event described in the Intervenors' reply filing raises significant issues that would need to be investigated before a CPG could be

[108] Exh. DPS-1 at 5 ("The materials provided by [the Applicant] indicate there are several private residences and business that will have more direct and stationary views of the Project and [the Applicant] concluded that the Project could be considered adverse from their view location.").
[109] Finding 77, above.
[110] Intervenors' Reply Comments at 4.
[111] 20 V.S.A. § 3a(a)(1).
[112] 30 V.S.A § 248(a)(4)(E).

issued. The Project is within the Special Flood Hazard Area.[113] Therefore, it would be appropriate to give ANR an opportunity to comment on whether the recent flooding event has any effect on ANR's opinion that the Project could be constructed in a manner that is consistent with the floodways criterion. The Commission would also request more information from the Applicant about any risk that flooding could pose to the Project's aesthetic mitigation and provide an opportunity for parties to comment on the filings of the Applicant and ANR. However, because the Commission has decided to deny the Application on other grounds, there is no need to conduct further process to investigate the recent flooding events near the Project site.[114] Accordingly, the Intervenors' request for additional process and oral argument is denied as moot.

[113] Page 3, above. Later in the discussion of the floodways criterion, the proposal for decision described the Project as located in the Special Flood Hazard Area and the river corridor. Page 19, above. The proposal for decision has been corrected to reflect that the Project is located in the Special Flood Hazard Area and *not* in the river corridor.

[114] *In re Application of Derby GLC Solar, LLC*, 2019 VT 77, ¶19.

XI. ORDER

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

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted, as modified by the discussion above. All other findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.

2. The application to construct a 500 kW net-metering system on Richville Road in Manchester, Vermont, is denied.

Dated at Montpelier, Vermont, this 17th day of September, 2021.

Anthony Z. Roisman) PUBLIC UTILITY
)
)
Margaret Cheney) COMMISSION
)
J. Riley Allen) OF VERMONT
)

OFFICE OF THE CLERK

Filed: September 17, 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. 20-1261-NMP - SERVICE LIST

Parties:

Kevin Anderson
Vermont Agency of Natural Resources
1 National Life Drive
Davis 2
Montpelier, VT 05620-3901
Kevin.Anderson@vermont.gov
(for Vermont Agency of Natural Resources)

Timothy Boucher, *pro se*
125 Valley Pass
Manchester Center, VT 05255
dtboucher@yahoo.com
(for L. Brooke Dingledine, Esq.)

Glenn Cestaro, *pro se*
107 Valley Pass Rd
Manchester Center, VT 05255
glenncestaro@comcast.net
(for L. Brooke Dingledine, Esq.)

Joseph H Charbonneau, *pro se*
374 Green Mountain Road
Manchester Center, VT 05255
jos.charbonneau@gmail.com
(for L. Brooke Dingledine, Esq.)

L. Brooke Dingledine, Esq.
Valsangiacomo, Detora & McQuesten, P.C.
P.O. Box 625
Barre, VT 05641
lbrooke@vdmlaw.com
(for Cosmo Penge) (for Timothy Boucher)
(for Mark William Slade) (for Glenn Cestaro)
(for Joseph H Charbonneau)

Eric B. Guzman
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov
(for Vermont Department of Public Service)

Thomas Hand
PO BOX 1204
Manchester Center, VT 05255
thomas@mhgsolar.com
(for MHG Solar, LLC)

Melanie Kehne, Esq.
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001
melanie.kehne@vermont.gov

(for Vermont Agency of Agriculture, Food and Markets)

Maxwell I Krieger, Esq.
Vermont Division for Historic Preservation
One National Life Drive, Davis Bldg., 6th Floor
Montpelier, VT 05620-0501
maxwell.krieger@vermont.gov

(for Vermont Division for Historic Preservation)

Cosmo Penge, *pro se*
328 Green Mountain Road
Manchester Center, VT 05255
dom@manchestercarpetcare.com

(for L. Brooke Dingledine, Esq.)

Andrew N. Raubvogel, Esq.
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
91 College Street
P.O. Box 545
Burlington, VT 05402-0545
araubvogel@dunkielsaunders.com

(for MHG Solar, LLC)

Zoë Sajor
Dunkiel Saunders Elliott Raubvogel & Hand, PLLC
91 College Street, P.O. Box 545
Burlington, VT 05402-0545
zsajor@dunkielsaunders.com

(for MHG Solar, LLC)

Mark William Slade, *pro se*
146 Carlen St
Manchester Center, VT 05255
mkwslade@gmail.com

(for L. Brooke Dingledine, Esq.)