

IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2021-085

In re: Apple Hill investigation pursuant to 30 V.S.A. §§ 30 and 209 into
whether the petitioner initiated site preparation at Apple Hill in
Bennington, Vermont, for electric generation in violation of 30 V.S.A. §§
248(a)(2)

APPEAL FROM THE VERMONT PUBLIC UTILITY COMMISSION
Docket No. 20-1611-INV

Brief for Appellee
Agency of Natural Resources

STATE OF VERMONT

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ISSUES PRESENTED

- I. Whether the appeal should be dismissed as premature because the PUC's order was not a final judgment concluding the litigation.
- II. Whether the decision should be upheld because Appellants conducted their site preparation work for solar activities, and not exclusively for farming.
- III. Whether the decision should be upheld because the PUC has authority to enjoin site clearing activities that were conducted without a Certificate of Public Good ("CPG").
- IV. Whether the decision should be upheld because the prohibition on unlawful site clearing without a CPG is constitutional and is not vague or standardless.
- V. Whether the decision should be upheld because the PUC relied on ANR's technical expertise in classifying rare plant species.
- VI. Whether the decision should be upheld because the PUC properly relied on clear factual evidence that rare plant species would be adversely affected.

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STATEMENT OF THE CASE

Appellants Thomas Melone, Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC (collectively, “Allco” or “Appellants”) are a combined business venture for developing and constructing solar facilities. In June 2020, they began clearing trees and other site preparation for a solar facility at a location known as Apple Hill in Bennington, Vermont. PC 2. The Public Utility Commission (“PUC”) opened an investigation and issued a temporary restraining order against such activities because they violated 30 V.S.A. § 248(a)(2). Appellants appealed that temporary order to this Court, which was dismissed because “TROs are not ordinarily appealable.” *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209, No. 2020-242*, 2020 WL 6799008, at *2 (Vt. Nov. 5, 2020) (unpub. entry order).

The PUC then conducted another proceeding, holding evidentiary hearings in December 2020, and briefing through February 2021. On April 1, 2021, as a result of that proceeding, the PUC issued another order. In that order, the PUC held that Appellants violated section 248(a)(2)(A), and enjoined Appellants from conducting site preparation at Apple Hill in Bennington, until either: (i) Appellants have obtained a Certificate of Public Good (“CPG”); or (ii) if a CPG is denied, all appeals have expired and Appellants no longer have valid contracts to develop a solar facility at Apple Hill. PC 31. The order was “temporally limited” so that it expires once it is clear that “Developer will or will not develop solar facilities on this site.” PC 3.

As the PUC summarized, the main reason for the order was Appellants’ illegal site preparation without a CPG, and without any formal or environmental review. PC 1-2 (noting that Appellants’ planned work could destroy trees and rare plants, and that “[t]his destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent.”). In doing so, the PUC partly relied on the Agency of Natural Resources’ (“ANR”) classification policy regarding rare plant species. *See Supplemental Printed Case (“SPC”) at 1-33.*

The PUC’s April 1 order also directed the parties to submit a schedule for “the next phase of the proceeding”—to determine a civil penalty against Appellants for their unlawful site preparation. PC 3.

On June 11, 2021, the PUC issued a subsequent order on the penalty proceeding. The PUC concluded that Appellants were not entitled to a stay of the penalty proceeding, but “to avoid any complications,” the PUC would wait until this Court “determines whether it will hear Allco’s premature appeal of the Injunction Order.” *See* SPC 35 (June 11, 2021, PUC Procedural Order).

Appellants have prematurely challenged the April 1 injunction order in this appeal, primarily arguing that: (1) Appellants are merely farmers and not solar developers; (2) the PUC has no authority to regulate entities under section 248(a)(2); (3) section 248(a)(2)’s prohibition against site preparation without a CPG is unconstitutional because it is vague and standardless; (4) the ANR classification system for rare plant species is unenforceable and thus cannot be relied on by the PUC; and (5) as a factual matter, there was and would be no harm to plants and trees.

Appellee ANR responds to these issues, and asks this Court to dismiss the appeal as premature, or alternatively to uphold the PUC’s order in its entirety.

STANDARD OF REVIEW

The Court reviews PUC decisions with “great deference to the [PUC’s] expertise and judgement,” allowing for a “strong presumption of validity to the [PUC’s] orders.” *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2, 185 Vt. 296, 969 A.2d 144 (quotations omitted). Absent a compelling indication of error, or unless the interpretation is unjust or unreasonable, the PUC’s interpretation of Section 248 is entitled to deference. *In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 23 (internal quotations and citations omitted).

Additionally, “agencies’ interpretations of their own regulations are usually given great weight by this Court,” *In re Peel Gallery of Fine Arts*, 149 Vt. 348, 351, 543 A.2d 695, 697 (1988) (quotation omitted), and an agency’s “interpretation may be overcome only by compelling indications of error,” *Conservation Law Found. v. Burke*, 162 Vt. 115, 121, 645 A.2d 495, 499

(1993); *see also In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 17, 196 Vt. 467, 98 A.3d 16 (“Appellants therefore bear the burden of showing that ANR’s interpretation is wholly irrational and unreasonable in relation to its intended purpose.” (quotation omitted)).

ARGUMENT

I. Appellants’ appeal is premature because the PUC’s Order was not a final judgment concluding the litigation.

An aggrieved party may appeal a “final order, judgment, or decree” of the PUC to the Supreme Court. 30 V.S.A. § 12. As this Court has explained, a final judgment is one that fully concludes the litigation below: “[t]he judgment rendered must *conclude* the litigation in the court below to the extent that if no exceptions were taken, the controversy would end, and the case would pass out of court.” *Appliance Acceptance Co. v. Raymond*, 121 Vt. 153, 155 (1959) (emphasis added).

Here, the case has not concluded nor passed out of the PUC’s jurisdiction.¹ The PUC’s decision describes it as “temporally limited” until it is clear that Appellants “will or will not develop solar facilities on this site.” PC 3. Further, the PUC’s decision noted that there is a “next phase of the proceeding” to determine a civil penalty. PC 3. As the PUC recently explained in a subsequent ruling denying Appellants’ attempt to stay the penalty phase: “Because we have not yet begun, much less concluded, the penalty phase of this proceeding, the Injunction Order does *not* ‘conclude the litigation in the court below.’” SPC 37 [emphasis original and quoting *Raymond*, 121 Vt. at 155]. Thus, the current appeal should be dismissed outright because Appellants have not satisfied the final judgment rule.²

¹ In fact, this Court recently remanded the underlying Apple Hill solar project back to the PUC after denying Appellants’ petition for a CPG. *In re Petition of Apple Hill Solar LLC*, 2021 VT 69, Docket No. 2020-232 (Sept. 3, 2021).

² Appellants also cannot meet any of the exceptions to the final judgment rule, such as a right to an interlocutory appeal. *See* V.R.A.P. 5(b), 5.1 (party must obtain judicial permission before taking interlocutory appeal); *Petition of Cent. Vt. Pub. Serv. Corp.*, 142 Vt. 138, 140, 453 A.2d 1108, 1109 (1982) (allowing for interlocutory appeal only where appellant proves that “the final

Even if the appeal is considered, Appellants' claims fail on the merits, as discussed below.

II. Appellants conducted site preparation for solar, not farming.

Appellants are not farmers, as Appellants' brief contends (at 5-6). Appellants are business entities who engage in solar development, many of whom have the word "solar" (or "renewable energy") in their corporate name: for example, Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC.

The record is replete with Appellants' own admissions that their site preparation work related to their planned solar facilities. *See* PC 24 (Appellant was using sheep "primarily to serve the solar projects" and "Allco has explicitly linked the clearing activity to its ultimate plan to construct the electric generation facilities"); *see also* PC 20, 23, 25.

Further, the PUC determined that Appellants' affidavit testimony that the work was exclusively for farming was "not credible." PC 24. *See State v. Arrington*, 2010 VT 87, ¶ 9, 188 Vt. 460 ("Determining the credibility of witnesses falls within the 'exclusive province' of the trial court, and we defer to the trier of fact's decision to credit a particular witness or piece of evidence."). In fact, the PUC found that to hold otherwise under the clear facts of this case would constitute an illegitimate "end-run" around section 248. PC 23. These findings cannot be overturned absent clear error, and Appellants have raised none. *Benson v. Hodgdon*, 2010 VT 11, ¶ 10, 187 Vt. 607, 610, 992 A.2d 1053, 1058 (2010).

Therefore, Appellants' argument regarding their claimed farming activities should be rejected.

decision would not provide an adequate remedy."); *cf. Taylor v. Town of Cabot*, 2017 VT 92, ¶ 8, 205 Vt. 586, 178 A.3d 313 (reviewing preliminary injunction after "[t]he trial court granted interlocutory appeal of its ruling").

III. The PUC has authority to enjoin site clearing activities that were conducted without a CPG.

Appellants claim that the PUC has no authority to regulate Appellants because they have not obtained a CPG. Appellants' Br. 9. This is not so.

First, the PUC has authority to grant injunctive relief over "all matters" within its jurisdiction. *See* 30 V.S.A. § 9 ("The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State."); *see also* *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996) (noting that PUC "has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction"); 18-1-1 Vt. Code R. § 2.406 (PUC provisions for temporary restraining orders, preliminary injunctions, and permanent injunctions).

Next, the PUC's jurisdiction expressly includes regulating site-preparation activities for electric generation facilities. Title 30 provides that "no company . . . and no person . . . *may begin site preparation* for or construction of an electric generation facility . . . *unless the Public Utility Commission first finds* that the same will promote the general good of the State and issues a certificate to that effect." 30 V.S.A. § 248(a)(2) (emphases added). It also provides that the PUC has jurisdiction over companies or persons that manufacture electricity for the public "so far as may be necessary to enable [it] to perform the duties and exercise the powers conferred upon [it] by law." *Id.* § 203(1)-(2).

Thus, the PUC has clear jurisdiction to enjoin unlawful site preparation activities, and the Court should uphold the order on that point.³

³ Additionally, ANR formally joins the arguments on this issue made by the Department of Public Service ("DPS"). *See* DPS Brief.

IV. The prohibition on unlawful site clearing without a CPG is constitutional and is not vague or standardless.

Appellants claim that the prohibition on unlawful site clearing contained in section 248(a)(2)(A) is unlawful, vague and standardless. Appellants' Br. 16. Section 248(a)(2)(A) states:

[N]o company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.

This language satisfies due process. At the outset, Appellants have not met their heavy burden to challenge section (a)(2)(A). Statutes are presumed constitutional. *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367, 10 A.3d 469; *In re Montpelier & Barre R.R. Corp.*, 135 Vt. 102, 103 (1977), 369 A.2d 1379, 1380 (“In testing statutes for their compliance with constitutional standards, every presumption is to be made in favor of constitutionality.”). As such, a person challenging a statute’s constitutionality bears a “heavy burden.” *Barre R.R. Corp.*, 135 Vt. at 103, 369 A.2d at 1380; *In re LaBerge NOV*, 2016 VT 99, ¶ 18, 203 Vt. 98, 105, 152 A.3d 1165, 1170 (2016) (“[T]he proponent of a [due process] challenge has a *very weighty burden to overcome*.”) (emphasis added; citations and quotation marks omitted).

Next, the language of section 248(a)(2) is clear. It provides notice to companies and persons, like Appellants, that they are subject to the prohibitions contained therein. “Statutory language that conveys a definite warning as to proscribed conduct when measured by common understanding and practices will satisfy due process.” *In re Palmer*, 171 Vt. 464, 472, 769 A.2d 623, 628 (2000). *See also Brody v. Barasch*, 155 Vt. 103, 110, 582 A.2d 132, 137 (1990) (noting that a statute must be sufficiently clear to give a person of “ordinary intelligence a reasonable opportunity” to know what is proscribed, and holding that “moral unfitness” to practice psychology is not impermissibly vague). Further, the standard in question does not need to be defined and does not need to detail each act that is prohibited. *Id.* at 111.

Here, there is no question about the plain meaning of section 248(a)(2)(A). It clearly states that no one can begin site preparation for a solar facility without a CPG. “Site preparation” is a plain term that means any work related to developing a solar facility, and Appellants understand what that means. *See* PC 20 (“Allco acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility.”). Appellants are in the business of planning and developing solar facilities. Appellants thus know what it means to prepare and construct a solar facility, and Appellants did exactly that here by clearing trees. *Id.*; *see also* PC 25 (Allco’s witness and sole owner, Mr. Melone, testified: “If there are trees on the site, you need to clear the trees to put solar.”).

Therefore, the Court should reject Appellants’ void-for-vagueness challenge.⁴

V. The PUC properly relied on ANR’s technical expertise in classifying rare plant species.

Appellants’ challenge ANR’s technical expertise to evaluate and classify rare plant species. Appellants’ Br. 18-19. Appellants’ challenge is unfounded.

As the PUC noted, ANR’s classification system for rare plant species “involves the application of complex methodologies.” PC 28. Under this Court’s precedent, “substantial deference” is given to an agency’s interpretation and application of technical standards, such as the plant classification system here. *Lowell Mountain*, 2014 VT 50, ¶¶ 15-17 (“according substantial deference to ANR’s interpretation of [a stormwater manual]” because the case “involve[d] complicated methodologies within an agency’s expertise”). In *Lowell Mountain*, the Court further explained that an appellant challenging ANR’s technical determinations must show that the agency’s interpretation is “wholly irrational and unreasonable in relation to its intended purpose.” *Id.* ¶ 18 (quotation omitted).

⁴ Additionally, ANR formally joins the arguments on this issue made by the Department of Public Service. *See* DPS Brief.

Here, there were extensive evidentiary findings relating to ANR's classification system for rare plant species.⁵ The PUC found that ANR's system was "a rational technique for addressing those species." PC 14. Indeed, even Appellants' own expert witness also "acknowledged that ANR's system was a rational way of classifying these plants." PC 28. Certainly, Appellants presented no evidence that ANR's classification system was either "wholly irrational and unreasonable," *Lowell Mountain*, 2014 VT 50, ¶ 18, or would result in "unjust, unreasonable or absurd consequences," *In re Verburg*, 159 Vt. 161, 164-65, 616 A.2d 237, 239 (1992). See PC 587 (Appellants' expert admitting: "No, I wouldn't call it irrational," in response to question about classification system's rationality). Therefore, the PUC's decision should be upheld on this issue.

Next, ANR has not exceeded its authority in developing its classification on rare plant species, and the PUC is entitled to rely on ANR's classification. The classification is not beyond ANR's authority nor *ultra vires*, as Appellants erroneously contend. Appellants' Br. 18.

Here, ANR created its rare plant classification based on its expertise and statutory authority, both of which are entitled to deference. *In re Peel*, 149 Vt. at 351, 543 A.2d at 697; *Lowell Mountain*, 2014 VT 50, ¶¶ 15-17. The classification is "intended to inform . . . planners, developers, and the general public about our rare native flora." SPC 1. The classification goes on to explain that it is *not* a threatened or endangered plant list and that such plants are classified separately under Vermont's Endangered Species Law. *Id.* As the agency with expertise in this area, ANR is certainly authorized to create a rational classification of Vermont's rare plants, separate from any threatened or endangered plants. This is a rational system, because in order to protect plants from becoming threatened or endangered, one first needs to know if they are rare or uncommon. See SPC 1 (plant "species may be rare because they have very particular habitat requirements, are at the edge of their range, [or] are vulnerable to disturbance or collection").

⁵ For example, ANR has classified the white arrow-leaved aster (*Symphyotrichum urophyllum*) as "very rare", and it is located at the Apple Hill site. PC 14; SPC 26.

This classification system is no different than any other policy or guidance document that is standard practice under the Vermont Administrative Procedure Act (“VAPA”) where an agency does not need any specific statutory authorization to issue such policy or guidance. *See* 3 V.S.A. § 801(b)(14) (guidance documents are “issued by the agency to assist the public” in explaining or interpreting the agency’s position on topics within its expertise); *see also id.* § 806(b) (agency can create guidance documents in response to public inquiries); § 835(b) (describing use of guidance documents). Thus, the VAPA recognizes that guidance documents are a standard practice for agencies, and no further statutory authorization is required. The same applies to a policy interpretation like the rare plant classification here. *See King v. Gorczyk*, 2003 VT 34, ¶ 23, 175 Vt. 220, 232, 825 A.2d 16, 27 (2003) (noting that agencies may create “policies and procedures [that are exempt] from administrative rulemaking requirements”).

Lastly, the PUC is entitled to rely on ANR’s classification as a tool for planners, as it did here. *See* 3 V.S.A. § 835(b) (providing that guidance’s failure to have force of law “is not intended to affect whether a court or quasi-judicial body gives deference to a procedure or guidance document issued by an agency whose action is before the court or body”). Further, in a recent proceeding, the PUC recognized that ANR policy documents are not, and need not be, enforceable rules. In that proceeding, ANR sought a discovery response about a solar project’s location in relation to specific geographic areas identified in an ANR policy document. The applicant objected that the request was irrelevant and ANR’s policy document was “not legally enforceable under 3 V.S.A. § 835.” *Petition of Golden Solar, LLC*, No. 18-4163-PET, Order Granting in Part & Den. in Part Mot. to Compel Disc., 2019 WL 1732071, at *14 (Vt. Pub. Util. Comm’n Apr. 10, 2019). The hearing officer ruled the discovery request was proper even though the agency document did not have the “force of law.” *Id.* Because the PUC could consider the document regardless of the document’s formal or standalone enforceability, the request was relevant: “[N]othing in the statute cited by [the company] prohibits the Commission from considering the [agency document] in assessing impacts from the proposed project under relevant Section 248 criteria.” *Id.*

Thus, the PUC can still properly rely on ANR's rare plant classification as it did here, regardless of its enforceability.

VI. The PUC properly relied on clear factual evidence that rare plant species would be adversely affected.

The PUC's Order should be upheld for the additional reasons that the PUC found clear evidence of potential adverse effects based on Appellants' actions for site preparation. Without an injunction, the PUC found that Appellants could potentially bulldoze the Apple Hill site "even if it meant the permanent destruction of trees, rare plants, and very rare plants, as well as other environmental degradation," and that "[t]his destruction would all be done without any review of its environmental impacts." PC 1.

The PUC then reviewed the actual impacts in this case, with substantial evidence and testimony, to support its findings that there would be actual and potential impacts to plants and trees.

First, the PUC found potential adverse effects to trees. Appellants were "cutting down trees" and clearing trees for their solar project. PC 12; PC 6. Absent an injunction, the PUC found that the tree cutting would occur *before* it could be properly evaluated in a CPG proceeding. If the tree cutting involved erroneous clearing, then there would be no adequate remedy after the fact. *See, e.g., Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014) ("Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage."); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that "trees cut down this fall will not have grown back to their present height" during the lifetime of most of the plaintiffs). As the PUC concluded, this would result in irreparable harm. PC 28.

Next, the PUC found even more potential adverse effects to plants, including rare plants. Specifically, the PUC found that:

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

PC 14.

Regarding the aster plants, a number of very rare aster were actually destroyed by Appellants' clearing, and more would have been destroyed if the clearing continued. PC 768 (Appellants' map confirming actual and anticipated impacts to aster). Further, contrary to Appellants' assertion in their brief at 16, the number of asters has not "doubled" in the conservation areas, and in fact, some plots have declined. PC 734 (Figure 3) and PC 758 (Table 1 and Figure 2). Similarly, Vermont's asters are not fungible and not "readily-available from Walmart-type nurseries" as Appellants suggest. Appellants' Br. 16. ANR's expert went on to clarify that while a generic aster might be available from a nursery in the Midwest, that is no substitute for the genetically distinct attributes of the very rare, native Vermont asters. PC 249. Lastly, there was additional evidence of harm to the nimblewill plant and that it would be destroyed if the clearing resumed. PC 650.

Again, Appellants attempted to conduct this destructive work without any review. PC 1-2 ("This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent.").

Appellants have not shown any clear error to overcome these factual findings. *See In re Miller Subdivision Final Plan*, 2008 VT 74, ¶ 13, 184 Vt. 188, 955 A.2d 1200 (2008) (It is not enough for an appellant to show that factual findings "are contradicted by substantial evidence," as this Court will only overturn those findings if there is "no credible evidence" to support them.).

Lastly, in contrast to these clear environmental harms, the PUC found no real harm to Appellants in enjoining their activities, other than mere slight delay while the project could be fully evaluated. PC 28.

These factual findings all properly support the issuance of the PUC's injunction, which should be upheld here.

CONCLUSION

The decision of the Public Utility Commission should be affirmed.

Dated: September 17, 2021

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CERTIFICATE OF COMPLIANCE

Justin Kolber, Assistant Attorney General and Counsel of Record for the appellee, State of Vermont, Agency of Natural Resources certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 4,008 words.

A handwritten signature in black ink, appearing to read "Justin Kolber", is positioned above a horizontal line.

Justin Kolber
Assistant Attorney General