

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-0861-RULE

Proposed revisions to Vermont Public Utility Commission Rule 5.400	
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Order entered: 06/16/2022

ORDER RE FURTHER PROPOSED REVISIONS AND REQUEST FOR COMMENTS

I. INTRODUCTION

On February 9, 2021, the Vermont Public Utility Commission (“Commission”) issued an order opening a rulemaking to begin a review of Commission Rule 5.400. The order included a draft of the changes to Rule 5.400 being proposed by the Commission and set a deadline for comments on the proposed changes.

Comments and response comments were filed by participants on or before March 8, 2021, and April 23, 2021, respectively.

On July 12, 2021, the Commission issued an order responding to the comments it had received, including new proposed revisions to Rule 5.400 that reflected the Commission’s consideration of the comments, and giving notice of a workshop to be held on September 2, 2021.

Comments were filed by participants in advance of the September 2, 2021, workshop on August 9, 2021.

After the September 2, 2021, workshop, participants filed comments on or before October 8, 2021.

Today’s order responds to the comments that participants filed after the September 2 workshop and includes another set of revisions to the amendments proposed for Rule 5.400.

We are also setting a deadline for participants to file comments on the draft changes accompanying today’s order. After we review those comments, we will determine whether additional steps are necessary before we begin the formal rulemaking process.

II. DISCUSSION

In this order, the Commission responds to certain comments received on specific parts of the proposed amended Rule 5.400 and makes changes in response to those comments where the Commission deems them appropriate. In some instances, the Commission has made changes to the proposed amendments in response to comments that were not contested and that the Commission agreed with. Therefore, it is necessary for participants to review the draft proposed amendments to Rule 5.400 that accompany this order to see the full scope of revisions the Commission has made since it issued the previous version on July 12, 2021. This discussion section is arranged by topic areas, below.

1. Act 250 issues (sections 5.402(C)(2)(d); 5.403(A)(7)(I) and (A)(10))¹

After much consideration, the Commission has decided to remove many of the Act 250-related requirements from the revised draft rule. Specifically, the Commission is removing the requirements that: (1) Act 250 permit numbers be included in advance submissions (proposed Rule 5.402(C)(2)(d)); (2) Act 250 site plans be included in petitions (proposed Rule 5.403(A)(7)(I)); and (3) Act 250 permit statements of consistency be included in petitions (proposed Rule 5.403(A)(10)).² The Commission is removing these requirements for three reasons.

First, the Commission was considering incorporating these requirements into Rule 5.400 in part for consistency with the filing requirements for net-metering projects in Commission Rule 5.100. However, the primary reasoning underlying the requirement that a net-metering project provide Act 250 permit information in a project application does not exist for non-net-metering projects. The rates and credits that a net-metering project receives can vary if it is constructed on a preferred site. Thus, it is necessary to accurately determine whether a particular site qualifies as preferred at the time of application.

¹ Unless otherwise indicated, references to rule sections that have been revised are references to the sections as they were numbered in the July 12, 2021, draft amendments to Rule 5.400. In some instances, changes made in the revisions that accompany today's order resulted in changes to other rule sections that are reflected in the current draft.

² Because these sections are discussed here as a group, they are not discussed individually below along with other section modifications. Advance submission requirements for the Natural Resources Board are discussed in the next section.

One category of preferred site is “[t]he disturbed portion of a lawful gravel pit, quarry, or similar site for the extraction of a mineral resource, provided that all activities pertaining to site reclamation required by applicable law or permit condition are completed prior to the installation of the plant.” Because this category of preferred site requires a gravel pit to be lawfully permitted in the first instance and that all permit requirements related to site reclamation be performed before a project’s installation, it is necessary for applicable permits, including Act 250 permits, to be disclosed as part of the application.

This reasoning does not apply to non-net-metered projects and therefore does not provide a basis for requiring Section 248 petitioners to engage in potentially extensive Act 250 permit research to complete their applications. However, if a Section 248 petitioner is aware of the existence of an Act 250 permit that may be affected by a proposed project, failure to disclose the permit’s existence could lead to a finding that a petition is incomplete.³

Second, it has been the Commission’s experience that Act 250 permit issues are not common in cases involving Section 248 petitions. We believe that the higher incidence of Act 250 permits related to net-metering cases is largely driven by the program’s incentives for locating projects on preferred sites, including gravel pits, which are often subject to those permits. The same incentives do not exist under Section 248, which we believe reduces the likelihood of a project encountering such a permit. Given the reduced likelihood of encountering Act 250 permits in the Section 248 context, we do not believe it is appropriate to impose the burdens associated with attempting to identify and interpret Act 250 permits for every parcel of land involved in every Section 248 petition.

Third, many of the criteria from Act 250 are incorporated into Section 248 for consideration of a project’s impacts on the natural environment under the standards of Section 248 in lieu of requiring these projects to undergo Act 250 review. However, while we believe this means that disclosure of Act 250 permit information is not a necessary part of a Section 248 petition, it also means that the potential for a Section 248 project to conflict with an existing Act 250 permit may well be relevant to the Commission’s review under Section 248. Thus, while we will not require Act 250 permit information to be part of an application, we also will not

³ As discussed below, this does not mean that the existence of an Act 250 permit applicable to a parcel identified in a petition for a certificate of public good under Section 248 is not relevant to a determination on that petition.

implement a prohibition on the introduction of evidence of an Act 250 permit that may be related to a project proposal being reviewed under Section 248. Such questions will be resolved on a case-by-case basis.

The Commission is not removing these Act 250 filing requirements because it agrees with the legal arguments advanced by some participants in this rulemaking. To the contrary, the Commission believes those arguments to be misplaced and based on a mischaracterization of the intent behind the original proposal to include Act 250 permit information in Section 248 applications.

Some participants who challenged the Commission's authority focused on the exemption provided for Section 248 projects from the requirements of Act 250. Others characterized the originally proposed amendments as the Commission attempting to "enforce" Act 250 permits, noting that the Commission is without authority to do so. Still others questioned the relevance of the required Act 250 information in a Section 248 proceeding not only because Section 248 projects are exempt from Act 250 review, but also because Section 248 makes no mention of Act 250. Lastly, another pointed out the Commission's inability to force a third-party Act 250 permit holder that is not a Section 248 petitioner to amend the Act 250 permit to resolve any conflict between that permit and a proposed Section 248 project.

None of these arguments is persuasive or provided a basis for the Commission's decision to not require Act 250 permit information as part of Section 248 applications because they all mischaracterize the purpose behind the originally proposed requirements.⁴ The Commission continues to believe that the potential for conflict between a proposed Section 248 project and an existing Act 250 permit is relevant to a determination of the public good under Section 248(a), and that taking advantage of an opportunity to voluntarily resolve potential conflicts is a better path for all involved, including underlying landowners whose property may be subject to an Act 250 permit, than ignoring potential conflicts only to have them arise in the context of an enforcement proceeding before another state agency. As such, the Commission remains open to the presentation of evidence regarding such potential conflicts in individual cases.

⁴ For a more detailed analysis rejecting these arguments, *see* Case No. 21-0861-RULE, order of 7/12/21.

2. Additional Persons and Entities Entitled to Pre-filing Notice
(5.402(A))

We have carefully considered all the comments on the expanded list of entities and persons entitled to receive 45-day advance submissions under the new rule. The only change we are making is to require that notice be given to the Natural Resources Board (“NRB”) for all Section 248 projects. This is necessitated by our removal of the requirements related to Act 250 in other areas of the rule. If a petitioner is not required to search for Act 250 permits as part of the application process, then it is necessary for the NRB to receive advance notice of each petitioner’s intent to seek a certificate of public good under Section 248. As discussed above, the Commission believes that the NRB is a relevant voice in Section 248 proceedings if there is a potential conflict between a proposed project and an underlying, pre-existing Act 250 permit. Therefore, it is appropriate for the NRB to receive advance notice of expected Section 248 filings.

This means that in cases where the petitioner is unaware of the existence of an underlying Act 250 permit, the NRB will need to determine whether there is such a permit and whether a proposed project presents a potential conflict with that permit. We have made these changes after careful consideration of all the participants’ comments on this topic. We understand that the NRB would prefer to only receive notice of Section 248 filings when underlying Act 250 permits have been identified, as opposed to receiving notice of every intended filing. However, the volume of Section 248 projects proposed each year, and their related advance submissions, is significantly less than the number of net-metering petitions that are received. Additionally, the NRB has stated its opinion that Act 250 permits are not particularly cumbersome to identify while other participants have described the process as difficult and time-consuming. Therefore, we conclude that the equities lie in favor of asking the NRB to identify any relevant Act 250 permits that are implicated by a Section 248 filing in cases where a petitioner is unaware of the existence of such permits.

With respect to any continued objections to any expansion of the list of persons and entities entitled to receive the advance submission, the Commission refers participants to its discussion of this issue and of the Commission’s general authority in its order of July 12, 2021.

3. Identification of Adjoining Landowners

Several comments were received asking that options for the identification of adjoining landowners be expanded beyond use of a municipality's certified grand list. The Commission agrees that some flexibility is warranted given the increased use of online databases and has incorporated that option into the rule. Additional comments on the proposed language are welcome.

One commenter asked that the Commission exclude the advance submission requirement for adjoining landowners for linear projects because the time period between the issuance of the advance submission and the filing of a petition will almost always result in having to check the adjoining landowner identities a second time. The Commission declines at this time to make an exception for adjoining landowners from the advance submission requirement for linear projects for two reasons. First, if an extended period of time has passed since the advance submission was issued, it is appropriate to make sure that the adjoining landowner list is current so that any new landowners will receive notice that the petition has been filed. Second, adding the option for online database searching as a means of identifying adjoining landowners should lessen the burden associated with this requirement.

4. Contents of Advance Submissions, Property Boundaries **(5.402(C)(2)(a))**

The Commission has given careful consideration to the comments from participants regarding the benefits and burdens of requiring property boundary information versus project boundary information, and has adjusted this proposed section to require project boundary information. This is being done in recognition of the fact that developers of some projects might not have access to property boundary information and may need to incur substantial expense to obtain it (for example, by performing a land survey). However, there are still instances where property boundary information is needed for a project application to be considered complete because certain Section 248 criteria make that information relevant. For example, the information is needed for ground-mounted solar projects to assess compliance with the setback requirements found in Section 248(s). Additionally, information on property boundaries and

distances to surrounding residences may be necessary for projects that produce sound for the Commission to make certain required findings under some Section 248 criteria.

Applicants should consider these two instances as examples only and not a comprehensive list of times when property boundary locations are relevant and necessary for an application to be considered complete. Each applicant must assess the characteristics of its proposed project to determine whether property boundary information is relevant to a determination of compliance with any applicable Section 248 criteria before filing its petition. Failure to do so will increase the possibility of the Commission determining that an application is incomplete.

5. Timing of Advance Submissions (5.402(D))

One participant has asked that advance submissions expire after 180 days rather than 365 days. Others have stated that 365 days is preferable because petitioners will file their petitions as soon as possible regardless of the expiration deadline, and because larger projects often benefit from having a longer period of time to address the concerns of advance submission recipients before a petition is filed. Having the advance submission expire in a shorter time period means that a petitioner will either have to start the process all over again or file its petition without a full opportunity to address the concerns of interested persons.

On balance we believe that the better option is to retain the 365-day period for advance submissions to remain in effect. We realize this is a departure from the requirements of our net-metering rule, which has a 180-day expiration period. However, Section 248 utility-scale projects are often larger and more complex than net-metering projects and can affect more people. Therefore, having a longer period of time to respond to concerns that arise in response to an advance submission is justified.

6. Contents of Petition, Generally (5.403)

The Commission has modified this section to refer to a new section that defines linear projects and modifies the petition contents for those projects.

7. Contents of Petitions, Site Plans (5.403(A)(7))

The information required to be included with site plans has been modified to reflect only the type of information that can be readily included in those plans. Information that was originally required to be included in site plans has been moved to other subsections of Rule 5.403, and the remainder of that section has been renumbered accordingly.

8. Linear Projects (5.404)

A new Section 5.404 has been added to address concerns expressed by participants about linear projects. This required that all remaining sections and the cross-references to various sections be renumbered accordingly.

Subsection (A) is a proposed definition of linear projects. The intent is to capture that portion of a project that is truly “linear” in nature while excluding portions within a larger project that are not linear in nature. For example, a substation that is being upgraded or constructed as part of larger transmission line project would not be eligible for the treatment described in this subsection, while the line portion of that transmission project would be eligible.

Subsection (B) modifies for linear projects some of the content requirements for advance submissions and petitions otherwise found in Sections 5.402(C) and 5.402(A). The intent behind the modifications to this subsection is to recognize that linear projects can present unique challenges when compared to projects that occupy a more limited area, while also ensuring that the Commission, the parties, and the public have sufficient information to fully understand and review proposed linear projects.

9. Service and Notice of Petition (5.407)⁵

The provisions of this section have been changed to allow for electronic service of the petition and notice of petition with the permission of the recipient.

10. Intervention by Certain Persons and Entities (5.409)⁶

The only change the Commission has made to this section is to clarify that the NRB’s automatic right to intervene is limited to those cases in which an Act 250 permit applies to a land

⁵ Renumbered section.

⁶ Renumbered section.

parcel that is subject to a Section 248 proposal. This change is intended to reflect the changed advance submission requirements in Section 5.402(A) and the removal of certain Act 250 requirements from the proposed amended rule.

Some participants continue to question the Commission's authority to expand the list of persons and entities entitled to intervene as of right. The Commission refers those participants to its discussion of this issue in its July 12, 2021, order in this proceeding.⁷ In particular, the Commission refers participants to its discussion, at pages 8-9 of that order, of the Vermont Supreme Court's decision in *In re Petition of Green Mountain Power Corp.*, 2018 VT 97, ¶ 23.

11. Substantial Change Before Decision on Petition (5.412)⁸

Clarifying language was added to this section.

12. Amendments to Projects Approved Under Section 248 (5.413)⁹

This section of the rule has been divided into three subsections to capture three different potential scenarios and to apply differing requirements based on those scenarios.

Subsection (A) addresses cases where a project has received a CPG and a substantial change to the project is proposed after it has been commissioned. This subsection appropriately treats this situation as one where existing infrastructure is being modified in a way that implicates Section 248 approval for a new project. Provided the change can reasonably be characterized as a modification to the previously approved and commissioned project, the fees associated with the proposed changes are those established for project modifications under 30 V.S.A. § 248c(d)(B)(3). However, if the proposed change is more accurately characterized as a completely new project, then the fees associated with a new project will apply under 30 V.S.A. §§ 248b and 248c. Factors that the Commission will consider in making this determination will include the amount of time that has passed since the original project was commissioned, the

⁷ In response to the Commission noting its statutory authority to adopt rules of procedure, one commenter stated that "calling something procedural does not make it so." (Vermont Electric Cooperative, Inc. comments dated 10/8/21 at 10.) However, the Vermont Supreme Court has codified the rules of intervention for civil court proceedings in Vermont within the Vermont Rules of Civil Procedure. Therefore, the Commission believes that promulgating a rule of intervention under its statutory authority to adopt procedural rules is a reasonable exercise of that authority.

⁸ Renumbered section.

⁹ Renumbered section.

nature of the proposed changes, the identities of the persons or entities involved in the original and modified projects, and any changes in capacity to the original project.

Subsection (B) addresses cases where a CPG has been issued but the approved project has not been commissioned. This subsection is intended to recognize that there may be times when conditions in the field might be encountered that could not have been reasonably foreseen or anticipated at the time the project was proposed for approval. The changes strike a balance between the interests of persons and entities that need to receive notice of the proposed changes and the investment of time and resources that have been expended by all parties in the review of a project that has yet to be completed. Accordingly, the procedures associated with a new case, including the requirement for an advance submission, do not apply. Eliminating the advance submission requirement and allowing the changes to be proposed in the original CPG case recognizes that changes to approved yet only partially completed projects should be processed in a more efficient manner than changes that are made to already commissioned projects.

Subsection C is intended to relieve concerns over requests for CPG amendments that are required for project changes that do not meet the definition of “substantial change” but are nonetheless needed because of wording in the original CPG.

13. Material Deviation

For several years, the Commission has included the concept of a “material deviation” from approved project plans as an event that required Commission approval before such a change could be implemented by a project developer. At times, the inclusion of this requirement has led to uncertainty on the part of some developers, and the Commission seeks comments on whether its continued inclusion in CPG conditions serves a useful purpose.

One possibility the Commission is considering is to revise the language of what is often found as Condition 1 in Section 248 CPGs so that it reads as follows:

Site preparation, construction, operation, and maintenance of the Project shall be in accordance with the plans and evidence submitted in this proceeding. Any substantial change to the Project must be approved by the Commission. Failure to obtain advance approval from the Commission for a substantial change to the Project may result in the assessment of a penalty pursuant to 30 V.S.A. §§ 30 and 247. At the time the Project is commissioned, the CPG Holder must file “as-built” plans with the Commission along with a narrative description of any non-substantial changes to the Project that have not been approved by the Commission.

The Commission seeks comments on this approach, the goal of which is to eliminate any uncertainty created by the lack of a definition for “material deviation” and to ensure that the Commission has accurate plans on file for Section 248 projects that have been constructed with non-substantial changes made to the originally approved proposal.

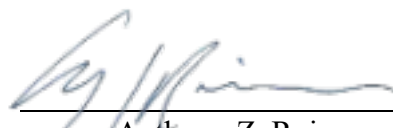
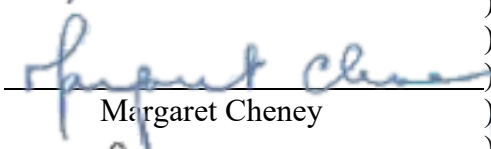
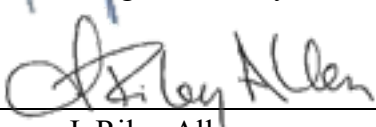
However, if commenters believe that the term “material deviation” serves a useful purpose, the Commission seeks proposed definitions for “material deviation” to be included in the amendments to Rule 5.400.

III. DEADLINE FOR COMMENTS

Participants are requested to file comments on the attached revised draft rule no later than close of business on July 8, 2022. The Commission will review those comments and determine whether additional steps are necessary before beginning the formal rulemaking process.

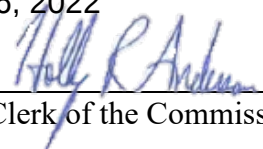
SO ORDERED.

Dated at Montpelier, Vermont, this 16th day of June, 2022.

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

OFFICE OF THE CLERK

Filed: June 16, 2022

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)

PUC Case No. 21-0861-RULE - SERVICE LIST

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