STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-2939-NMP

Petition of Randolph Davis Solar LLC for a certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the installation and operation of a 500 kW group net-metered solar electric generation system in Randolph, Vermont	

Order entered: 06/23/2022

PROCEDURAL ORDER

I. INTRODUCTION

In today's Order, I rule on the evidentiary objections filed by Randolph Davis Solar LLC ("Petitioner") on May 31, 2022 (the "Motion") and June 6, 2022 (the "Supplemental Motion"). For the reasons discussed below, the Petitioner's requests to exclude certain testimony and exhibits is granted in part and denied in part. Specifically, Exhibits MB-2, JA-2, 6, 7, 11, 12, and 14 are excluded as inadmissible hearsay. Additionally, a portion of Michael Binder's testimony is struck as hearsay, as described below. The remaining testimonies of Michael Binder and Joan Allen and all remaining exhibits are admitted.

II. LEGAL STANDARD

Vermont Rule of Evidence ("V.R.E.") 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence that is not relevant is not admissible.[1]

V.R.E. 701 addresses opinion testimony by a lay witness and states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical or other specialized knowledge within the scope of [V.R.E.] 702.

[1] V.R.E. 702.

V.R.E. 702 addresses testimony by experts and states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

V.R.E. 703 establishes the factual bases of opinion testimony by experts and states in relevant part:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted.

V.R.E. 801 states that hearsay is not admissible except as provided by the rules of evidence or by other rules prescribed by the Vermont Supreme Court or by statute. Additionally, the Vermont Administrative Procedure Act, 3 V.S.A. § 810(1), provides that, in contested cases, the Commission may deviate from the Vermont Rules of Evidence as follows:

> Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent [people] in the conduct of their affairs.

In ruling on an objection to the admissibility of testimony, the Commission does not determine the persuasive weight to be given to that testimony. Rather, the Commission decides the narrower question of whether the testimony may be admitted into the evidentiary record pursuant to the rules of evidence and the discretion accorded the Commission in making such admissibility decisions under 3 V.S.A. § 810. Relevant evidence must in some way advance the inquiry to have probative value. The Commission's review of a project or transaction under Title 30 is as an expert body that is engaged in a "legislative, policy-making process."[2] In this

[2] *In re Amended Petition of UPC Vermont Wind*, 2009 VT 19, ¶ 2 (citing *In re Vt. Elec. Power Co.*, 2006 VT 69, ¶ 6).

capacity, the Commission serves as the trier of fact and there is no jury to protect from exposure to unreliable evidence.[3]

The Commission has traditionally favored a strong presumption that each party's evidence should at least be admitted for consideration. The Commission may then exercise its discretion in weighing the admitted evidence as it sees fit.

III. DISCUSSION

Objections to the Testimony and Exhibits of Michael Binder

The Petitioner objects to Answers 4 and 14 through 40 of Mr. Binder's testimony, as well as Exhibits 9, 11, 12, 13, 17, 21, 22, 23, and 27 through 30, on the basis that these address the irrelevant subject of the process used by the Town of Randolph to designate the Project site as a preferred site. According to the Petitioner, this matter is not relevant to the Section 248 criteria.

Section 248(b)(1) of Title 30 of the Vermont Statutes Annotated requires the Commission to find that a proposed electric generation facility will not unduly interfere with the orderly development of the region, "with due consideration having been given to the recommendations of the municipal . . . planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality." I conclude that the recommendations of the Town of Randolph Selectboard and Planning Commission that the Project site is a preferred site are relevant to the Commission's analysis under Section 248(b)(1) and, therefore, Mr. Binder's testimony and exhibits offered for the purpose of impeaching those recommendations are also relevant. The motion to strike Mr. Binder's Answers 4 and 14 through 40 and Exhibits 9, 11, 12, 13, 17, 21, 22, 23, and 27 through 30 addressing the preferred sites letters on the grounds of irrelevancy is denied.

The Petitioner moves for the exclusion of Mr. Binder's Answer 7 and Exhibit MB-2 because Mr. Binder is not an expert on vernal pools. According to the Petitioner, Mr. Binder has failed to establish that he satisfies the three-part test for qualifying as an expert under Rule 702.

In Answer 7, Mr. Binder describes the location and size of vernal pools on his property and their distance from the Project. Mr. Binder states that amphibians lay eggs in these pools and references photographs purporting to show amphibian eggs. Mr. Binder cites Exhibit MB-

[3] *Petition of Barton Solar LLC for a certificate of public good*, Docket 8148, Order of 5/9/14 at 2.

2—which is a "Research Note" titled *Suggested Guidelines for Timber Harvesting Around Vernal Pools* by the Vermont Center for Ecostudies—for the proposition that "fauna of this [vernal pool] complex depend on a 400-600 foot buffer of forest habitat." Mr. Binder also quotes Exhibit MB-3—the Two Rivers Ottauqueechee Regional Plan—for the proposition that "[s]cientists recommend a continuous forested buffer of roughly 500 feet around vernal pools."[4]

Under Rule 701, a non-expert witness may offer testimony in the form of opinions or inferences that are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of V.R.E. 702. I find that the presence and size of vernal pools is information that a landowner can give based on their perception. Similarly, a lay-witness landowner can testify about their observation of amphibian eggs on their property. The Petitioner has not presented any credible argument that only an expert can identify vernal pools or amphibian eggs. A lay person has the ability to measure distances and dimensions without relying on scientific, technical, or other specialized knowledge. Therefore, the Petitioner's motion to strike these portions of Answer 7 of Mr. Binder's testimony on the grounds that it is improper expert testimony is denied.

However, the portion of Answer 7 quoting Exhibit MB-2 and the Exhibit itself are inadmissible as hearsay. As a lay witness, Mr. Binder may testify about subjects that he has personal knowledge of, but he may not provide out-of-court statements to prove the truth of the matter asserted. Accordingly, the portion of Answer 7 on page 3 of Mr. Binder's testimony beginning "According to the Vermont Center for Ecostudies," through the end of the answer is struck pursuant to V.R.E. 802.

Objections to the Testimony of Joan Allen

The Petitioner moves for the exclusion of Ms. Allen's Answers 8, 9, and 10 because Ms. Allen lacks sufficient expertise in the topics of stormwater, water quality, and flood resiliency. The Petitioner also argues that portions of Answer 8 are irrelevant because they rely on

[4] Exh. MB-3 at 152 (plan page 136).

"unidentified statements from third-party entities, rather than the Vermont stormwater rules and standards."[5]

A witness may qualify as an expert witness through knowledge, skill, experience, training, or education.[6] Ms. Allen holds an MS in Natural Resource Management and has 22 years of work experience as a "land protection professional" for the Nature Conservancy and Vermont Land Trust. Ms. Allen also serves on the board of a local watershed non-profit. Based on this education and experience, I find that Ms. Allen is qualified to testify about the Project's impacts on stormwater and erosion. Therefore, the Petitioner's motion to exclude Answers 8, 9, and 10 under Rule 702 is denied.

The Petitioner's argument that a portion of Answer 8 is irrelevant because it addresses the standards of other jurisdictions is without merit. Section 248(b)(5) requires the Commission to find that a proposed electric generation facility will not have an undue adverse effect on the natural environment. In doing so, the Commission is required to give due consideration to the criteria in 10 V.S.A. § 6086(a)(4), which asks whether a project will cause "unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result." The thrust of Ms. Allen's testimony is her opinion that development on steep slopes can cause "reduced water quality, degradation of aquifer recharge areas, increased downstream runoff, soil erosion, flooding, slope failure, and habitat degradation and loss."[7] She cites standards adopted in other jurisdictions that she argues corroborate her opinion. This testimony is relevant to the Commission's statutory obligation to consider whether the Project will cause unreasonable soil erosion or a reduction in the capacity of the land to hold water resulting in a dangerous or unhealthy condition. Nothing in the text of Section 6086(a)(1)(4) or the Commission's precedent holds that the Commission's consideration of the soil erosion criterion is limited solely to whether a facility will comply with Vermont's stormwater regulations.

The Petitioner argues that Exhibit JA-2 is inadmissible hearsay. The document is titled *Water Runs Downhill: Managing Runoff on Steep Slopes* and was published by the Southern Tier Central Regional Planning & Development Board, a planning agency from New York. The

[5] *Id*. at 6.
[6] V.R.E. 702.
[7] Allen pf. at 4.

document describes the importance of steep slopes and states that development on such slopes can create challenges for controlling erosion. The document also quotes the New York State Stormwater Design Manual as stating that no development on slopes greater than 25% "should even be considered."[8] While these documents may be legitimate research sources for Ms. Allen's opinion that development on steep slopes is inappropriate, the documents themselves cannot be offered to prove the truth of the matter asserted unless the author of the document is made available for cross-examination. Accordingly, Exhibit JA-2 is inadmissible hearsay.

The Petitioner moves for the exclusion of Exhibit JA-3 because it lacks foundation, including its author or a description of how the document was derived. Therefore, according to the Petitioner, the exhibit should be excluded under V.R.E. 402 because its probative value is substantially outweighed by the danger of unfair prejudice. In response, the Intervenors state that Ms. Allen prepared the document with data from sources identified in the document, including USDA soil surveys. The document describes the "soil characteristics" of the site by summarizing the types of soils present and characterizing those soils' erodibility on steep slopes. Ms. Allen cites the exhibit to support her opinion that the Project site is inappropriate for development because the soils are "highly erodible."[9] I find that the Petitioner's arguments go to the weight that should be given to the exhibit and not its admissibility.

The Petitioner argues that Answers 11 through 14 should be struck because they are "mere speculation.[10]" Ms. Allen does concede that she is uncertain whether the Project site is necessary wildlife habitat but she maintains that it is *possible* based on her observations of tracks and other signs of wildlife on the Project parcel and property.[11] This may be a close case, but the Vermont Supreme Court has held that the "[Commission] is not bound to the strict relevancy standards of a trial court when ruling whether to hear evidence."[12] I find that Answers 11 through 14 are not speculative because Ms. Allen's opinion that it is possible for the Project parcel to contain necessary wildlife habitat is reasonably probable because it is based on her

[8] Exh. JA-2 at 2.
[9] Allen pf. at 5.
[10] Motion at 7.
[11] Allen pf. at 8.
[12] *In re New England Tel. & Tel. Co.,* 135 Vt. 527, 536 (1977) (citing *Vermont Electric Power Co. v. Bandel*, 135 Vt. 141 (1977)).

personal observations of wildlife signs and tracks. The Petitioner's arguments go to the weight that should be given to Answers 11 through 14.

The Petitioner argues that Exhibits JA-6, 7, 11, and 12 should be excluded because they lack foundation, are provided in partial form with no context, and are hearsay. The Intervenors respond that the Exhibits are from the Agency of Natural Resources ("ANR") Biofinder and Vermont Center for Geographic Information. As discussed above, while these documents may be reasonable sources Ms. Allen can use to form opinions about the Project's compliance with the Section 248 criteria, the documents themselves cannot be offered to prove the truth of the matters asserted. Accordingly, the Petitioner's motion to exclude these exhibits is granted.

The Petitioner also objects to Ms. Allen's Answer 13 based on its belief that issues related to forest clearing are outside the Commission's jurisdiction. These arguments have been raised in other proceedings before the Commission and have been rejected.[13] The contested testimony relates to the Project's potential impact on the natural environment, which is relevant to the Commission's analysis under Section 248(b)(5).

Finally, the Petitioner moves for Ms. Allen's Answers 11 through 17 to be struck because "she is not a wetland biologist, ecologist, or scientist."[14] The Petitioner states that Ms. Allen has conceded in discovery that she does "not consider [her]self an expert wetland ecologist or wildlife biologist."[15] Despite this concession, I conclude that based on Ms. Allen's education, work experience, and the significant research that Ms. Allen has conducted in preparing her testimony, she is qualified under V.R.E. 702 to offer the opinions contained in Answers 11 through 17.

The Petitioner also moves for Exhibit JA-14, which is an excerpt from a logging best management practices manual. Ms. Allen is not the author of this document and, as such, cannot offer the document itself to prove the truth of the matter asserted. Accordingly, this exhibit is excluded as hearsay under V.R.E. 802.

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[13] *Petition of Golden Solar, LLC*, No. 18-4163-PET, Order of Apr. 10, 2019 (*citing Petition of Otter Creek Solar LLC*, Case Nos. 8797/8798, Order of 2/27/18 at 28-31 and *Joint Petition of Green Mountain Power Corporation*, Case No. 7628, Order of 7/12/11 at 29-30).

[14] Motion at 5.

[15] Supplemental Motion at 2.

IV. CONCLUSION

For the reasons stated above, the Petitioner's motion to strike is granted in part and denied in part. Mr. Binder's testimony is admitted, except the portion ruled hearsay in this Order. Exhibit MB-2 is excluded as inadmissible hearsay. Exhibits JA-2, 6, 7, 11, 12, and 14 are inadmissible hearsay. The testimony of Joan Allen and her remaining exhibits are admitted.

SO ORDERED.

Dated at Montpelier, Vermont, this 23rd day of June, 2022.

Andrea C Poppiti

Andrea Poppiti
Hearing Officer

OFFICE OF THE CLERK

Filed: June 23, 2022

Attest: Holly L Anderson

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. 21-2939-NMP - SERVICE LIST

Parties:

Joan Allen, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
joanbarballen@gmail.com

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

Michael Binder, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
michaeljbinder@yahoo.com

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

Kimberly K. Hayden, Esq. (for Randolph Davis Solar LLC)
Paul Frank + Collins PC
One Church Street 05402
P.O. Box 1307
Burlington, VT 05401
khayden@pfclaw.com

Aaron Kisicki, Esq. (for Vermont Agency of Natural Resources)
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
aaron.kisicki@vermont.gov

Elizabeth Tisher, Esq. (for Agency of Agriculture, Food & Markets)
Office of the Attorney General (for Vermont Agency of Agriculture, Food and Markets)
109 State Street
Montpelier, VT 05609-1001
elizabeth.tisher@vermont.gov