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**Vermont Agency of Natural Resources**

Office of Planning

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June 24, 2022

Holly R. Anderson, Clerk

Vermont Public Utility Commission

112 State Street – 4<sup>th</sup> Floor

Montpelier, VT 05620-2701

Re: Reply Comments on Draft Rule 5.100, 19-0855-RULE

Dear Ms. Anderson:

The Vermont Agency of Natural Resources (“Agency”) offers the following comments in reply to comments filed by the Vermont Association of Planning and Development Agencies (“VAPDA”), VHB, Norwich Solar, Charles Van Winkle, Renewable Energy Vermont (“REV”), and Heath Bunnell on May 27, 2022, in Case No. 19-0855-RULE. These reply comments pertain to the April 29, 2022, draft revisions to Rule 5.100 that modify the definition of preferred site and establish a new standard and definition for significant forest clearing. The Agency appreciates the additional time granted by the Vermont Public Utility Commission (“Commission”) to reply.

**I. Proposed Revisions to Rule 5.100 Regarding Forest Clearing**

The comments referenced above raise several concerns about draft changes to Rule 5.100 that would restrict the amount of forest clearing that may occur at preferred sites to one acre of a forest block. Commenters critique the appropriateness of imposing a forest clearing cap at preferred sites and the proposed definition of significant forest clearing. Some commenters propose exceptions to and refinements of the forest clearing restriction. Norwich Solar argues the forest clearing restriction creates conflicts with Act 174 of 2016. The Agency replies to these comments as follows.

***Appropriateness of Imposing a Forest Clearing Cap at Preferred Sites***

The Agency reaffirms its position that Rule 5.100 should be revised to reduce forest conversion, consistent with the intent of the preferred siting standards, and that the 208 acres of forest conversion observed by the Agency between July 2017 and August 2021 is

significant considering the many values forests provide.<sup>1</sup> Forest conversion should not be incentivized with above market, near retail compensation rates. A preferred siting program should steer net-metering away from forests. Evidence shows that the current preferred siting program has been, at best, only partially successful in this regard.

The Commission's proposed forest clearing restriction does not differentially penalize renewable energy development or preclude landowners from installing a net-metering solar array. By attaching to the definition of preferred site, it only applies to Category II and III net-metering systems. It does not restrict non-net-metering systems. 73 percent of net-metering systems (146 of 202) analyzed by the Agency between July 2017 and August 2021 proposed to clear less than one acre of forest per system. Thus, it appears quite feasible to construct a net-metering system requiring less than one acre of forest clearing.

Recall that 14 percent of net-metering systems analyzed by the Agency between July 2017 and August 2021 required more than 3 acres of clearing per system. Five of these systems required more than 7 acres of clearing each, over twice the area of the footprint of a typical 500-kW solar array. Since tallying this data in advance of the workshop on August 24, 2021, more net-metering systems have been proposed that would clear several acres of forest each. Some of these projects are being litigated by neighbors, in part because of what neighbors perceive as an excessive amount of forest clearing. Absent a change to Rule 5.100 that would ratchet down the amount of forest clearing that may occur at preferred net-metering sites, the Agency does not believe this issue will abate.

### ***Consistency with Act 174 of 2016***

Norwich Solar argues that due to standards contained in Act 174 of 2016, the proposed forest clearing restriction would have the perverse repercussion of requiring municipalities to prohibit all types of development in forests. The Agency disagrees. Act 174 and implementing standards developed by the Public Service Department do not require municipalities or regional planning commissions to designate forests as unsuitable for energy development, including forests subject to municipal or state regulation. Thus, the Act 174 standard that requires like treatment of land uses in "unsuitable areas" only applies if municipalities or regional planning commissions choose to designate forests as such.<sup>2</sup>

The Commission's proposed forest clearing restriction would narrow the availability of land for two categories of net-metering. As noted in Agency comments filed September 24, 2021, exclusion of treed areas from geographic datasets created to assist municipalities and

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<sup>1</sup> See Agency comments filed September 24 and October 7, 2021, in Case No. 19-0855-RULE.

<sup>2</sup> See standard 13A for regional plans and standard 14A for municipal plans in, "Appendix B: Act 174 Enhanced Energy Planning Standards for Regions and Municipalities," available online at: <https://publicservice.vermont.gov/content/2022-plan>.

regions with enhanced energy planning does not appear to jeopardize attainment of in-state renewable energy generation goals. Indeed, no rulemaking participant has demonstrated there is a shortage of non-forested sites available for net-metering. Moreover, Act 174 does not mandate attainment of municipal or regional renewable energy generation targets through net-metering.

### ***Defining Significant Forest Clearing***

In comments filed May 27, 2022, the Agency expressed its support for the proposed forest clearing restriction, including use and definition of the term, “forest block.” The meaning ascribed to forest block in the draft revisions to Rule 5.100 is copied from 24 V.S.A. § 4303 and was vetted during passage of Act 171 of 2016.

The Agency continues to believe that use forest block, as defined in statute, in Rule 5.100 is reasonable. Its use in Title 24 need not preclude its application in other contexts. However, recognizing that several commenters find the term difficult to interpret, the Agency recommends that the Commission consider an alternative definition of significant forest clearing that relies instead on a definition of “forest.” The Agency believes this alternative definition, presented below, would help clarify that an old field is *not* forest and that land recently harvested for timber and still managed as forest *is* forest.

The Agency agrees with VAPDA’s suggestion to limit application of the significant forest clearing restriction to areas outside of state-designated Village Centers, Downtowns, New Town Centers, Neighborhood Development Areas, and Growth Centers. These areas are easily identified from maps maintained by the Department of Housing and Community Development and represent areas where municipalities, through a public planning process, identify areas to focus development and revitalization resources.<sup>3</sup> Because of the variability with which municipal and regional plans address forest conservation, the Agency does not recommend linking the significant forest clearing restriction to future land use designations in municipal and regional plans as suggested by VAPDA and VHB. Such a standard would be too open to interpretation and may cancel out the benefits of the significant forest clearing restriction.

In consideration of the above, the Agency recommends that the Commission consider revising the definition of significant forest clearing in Rule 5.100 as follows:

*“Significant Forest Clearing” means clearing of more than one acre of a forest not in a state-designated Village Center, Downtown, New Town Center, Neighborhood Development Area, or Growth Center. For purposes of this rule, the term forest block means land that has at least 10 percent crown cover by*

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<sup>3</sup> See <https://accd.vermont.gov/community-development/designation-programs>.

~~*live trees of any size or has had at least 10 percent crown cover of live trees in the past and has stumps, snags, or other evidence indicating that it has not been converted to a non-forest use at the time of CPG application filing. block means a contiguous area of forest in any stage of succession and not currently developed for non-forest use. A forest block may include recreational trails, wetlands, or other natural features that do not themselves possess tree cover, and uses exempt from regulation under subsection 4413(d) of Title 24.*~~

The above definition of forest, recommended by the Agency's Department of Forests, Parks, and Recreation, is modified from the definition of "forest land" used in the Forest Inventory and Analysis conducted by the U.S. Forest Service.<sup>4</sup>

If the Commission adopts this alternative definition of significant forest clearing, Sections 5.106(E)(5)(d) and 5.107(C)(5)(d) should be revised to require the acreage of forest clearing rather than the acreage of forest blocks.

If the Commission intentionally chose to define significant forest clearing in relation to forest blocks with the understanding that forest blocks possess certain conservation values or are a useful unit of analysis, a hybrid definition of significant forest clearing that uses both "forest" and "forest block" may be appropriate. The Agency would be pleased to recommend such a hybrid definition if desired by the Commission.

## **II. Proposed Revisions to Rule 5.100 Regarding Preferred Sites (2) and (5)**

### ***Parking Lot Canopies***

VAPDA and REV take issue with the Commission's proposed modifications to the definition of preferred site (2), parking lot canopies. VAPDA states that it does not understand the purpose of adding, "impervious or engineered pervious surfaces" to the definition. REV argues that the revision fails to recognize that unpaved parking lots are substantially similar to paved parking lots in terms of environmental impact and recommends that the definition, instead, read more simply, "A parking lot canopy over a parking lot provided that the location remains in use as a parking lot."

It appears that the term "paved" was inadvertently reinserted into the definition of preferred site (2) following the first draft of revisions to Rule 5.100 issued April 16, 2019. The Agency recommends deleting "paved" to resolve the ambiguity raised by VAPDA but does not object to REV's recommended definition.

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<sup>4</sup> See: <https://www.nrs.fs.fed.us/fia/data-tools/state-reports/glossary/>.

### ***Sanitary Landfills***

REV contends that the addition of, “actively maintained under the authority of a post-closure certification, administrative order, or assurance of discontinuance, or in custodial care as recognized by the Agency of Natural Resources” to the definition of preferred site (5), sanitary landfills, would stymie investment needed to bring landfills that have fallen out of compliance back into compliance. The Agency acknowledges that revenue generated from the development of net-metering systems at closed landfills could be used to fund post-closure care but respectfully disagrees with REV that the proposed modification to the definition is problematic.

To satisfy criterion 1(B) of 10 V.S.A. 6086(a), net-metering systems atop landfills should evince compliance with waste disposal regulations for reasons articulated in the Department of Environmental Conservation’s (“DEC”) policy on solar photovoltaic systems on closed landfills.<sup>5</sup> For the several net-metering systems that have been constructed atop closed landfills to date, DEC staff have worked proactively with closed landfill custodians and renewable energy developers to bring those facilities into compliance. The Agency does not believe that making regulatory compliance a requirement of preferred site designation, which the Agency would seek to ensure happen regardless through its analysis under 30 V.S.A. § 248(b), represents an unreasonable burden on net-metering applicants or a significant deterrent to net-metering development. Further, the current definition of preferred site (5) requires the Agency to certify that the host landfill is, “suitable for development of the plant.” The Agency does so only if the subject landfill has been closed in accordance with an Agency-approved post closure plan and been adequately maintained since closure under current authority or facility certification, order, assurance, or custodial care authorization.

### **III. Conclusion**

In 2017, the Commission revised Rule 5.100 to offer incentives to net-metering systems on preferred sites such as roofs and previously developed areas to lessen environmental impacts and steer development away from undeveloped fields and forests.<sup>6</sup> Despite this change, forest clearing, often at preferred site (9), still occurs. For some net-metering systems, the amount of forest cleared significantly exceeds the footprint of the system.

The Agency encourages the Commission to move forward with the proposed modifications to Rule 5.100 that would restrict significant forest clearing at preferred sites, considering the revision to “significant forest clearing” recommended herein, and to maintain the

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<sup>5</sup> See, “Policy on Constructing Solar Photovoltaics on Closed Solid Waste Landfills,” Vermont Department of Environmental Conservation, 2018. Available online at: <https://dec.vermont.gov/sites/dec/files/wmp/SolidWaste/Documents/Solar-Landfills-Policy.pdf>

<sup>6</sup> Vermont Public Utility Commission, *Report to the Vermont General Assembly on the Net-Metering Program Pursuant to Act 99 of 2014* (“2017 Net-Metering Program Report”), January 20, 2017, at 9.

definition of preferred site (5) as most recently proposed. Not restricting significant forest clearing will mean more acres of forest cleared for rule-incented net-metering when viable, less carbon intensive sites appear available.

Thank you for soliciting reply comments and for the Commission's continued attention to the preferred siting of net-metering systems. Please contact me if the Agency can be of further assistance in this matter.

Respectfully submitted,

/s/ Kevin Anderson

Kevin Anderson

Regulatory Policy Analyst

Vermont Agency of Natural Resources

cc: Service List (by ePUC only)