STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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)	)))))	Case No. 20-1611-INV

RESPONSE OF THE VERMONT AGENCY OF NATURAL RESOURCES TO MOTION TO STAY PROCEEDINGS

The Agency of Natural Resources ("Agency") opposes Apple Hill Solar LLC's ("Apple Hill") Motion to Stay Proceedings filed with the Vermont Public Utility Commission ("Commission") on November 4, 2022. Apple Hill's motion is based on the faulty premise that a pending Supreme Court appeal will decide "whether or not [the Agency] has the authority to regulate plants outside of the parameters of the delegation of power set forth in 10 V.S.A. § 5402(a) (the 'Vermont Endangered Species Law' or 'ESL')."[1]

Decisions on motions to stay proceedings "involve[] trial court discretion and will be overturned only if the discretion is 'exercised upon grounds clearly untenable, or to an extent clearly unreasonable.'"[2] A court—here, the Commission—has "the power 'to control the disposition of the causes on its docket.'"[3] Apple Hill must "'make out a clear case of hardship or inequity in being required to go forward' if there is a possibility that a stay will damage someone else."[4]

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[1] Apple Hill Motion dated November 4, 2022, at 1.
[2] *In re Woodstock Community Trust & Housing Vt. PRD*, 2012 VT 87 ¶ 36, 192 Vt. 474, 60 A.3d 686.
[3] *Id.*
[4] *Id.*

Apple Hill has not presented a valid reason to stay this proceeding, much less made out a clear case of hardship or inequity because, among other things, the Supreme Court is not poised to decide the extent of the Agency's authority to seek to protect rare plant species in the pending appeal. Instead, the issue is whether the Superior Court properly dismissed Otter Creek's[5] claims related to the Agency's rare plant guidance documents because the documents were not reviewable there.[6] The Superior Court did not decide the merits of Otter Creek's claims.[7] Thus, even though Otter Creek briefed the merits of its claims in the Supreme Court appeal, the merits are not actually before the Supreme Court and waiting for that decision is not expected to provide the relief that Apple Hill now claims it will.

Further, the primary "hardship" Apple Hill points to is spending time and money in the penalty proceeding. But Apple Hill will need to spend similar time and money in the penalty proceeding regardless of the Supreme Court's decision—even if that decision were relevant as Apple Hill claims (which it is not). The Agency's recommendations generally, and rare plants specifically, are just a portion of the Commission's penalty considerations in this proceeding.

In determining the amount of a penalty, the Commission considers, among other things: the extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment . . . or the other interests of utility customers;[8]

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[5] Both Otter Creek Solar LLC and Apple Hill Solar LLC are affiliated with Allco Renewable Energy Limited.
[6] *See,* Otter Creek Solar LLC v. ANR, No. 169-2-20 Cncv, Decision on Motions to Dismiss, at 28 (Vt. Super. Ct. Nov. 17, 2021) (Hoar, J.) ("because the challenged 'guidance documents' are not rules and do not have the force of law, and because this challenge is properly brought before the PUC in the first instance rather than this court, ANR Counts I, II, and III must be dismissed").
[7] *Id.* at 27 ("[ANR's] arguments are persuasive and so obviate the need to delve into the substance of Plaintiffs' allegation or the challenged ANR 'guidance' documents.").
[8] 30 V.S.A. § 30(c)(1).

whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;[9] the deterrent effect of the penalty;[10] and any other aggravating or mitigating circumstance.[11] Here, the Commission has already determined, in issuing the April 1, 2021, injunction prohibiting further site clearing, that: Apple Hill's site clearing "caused – and would continue to cause - substantial and immediate irreparable harm to rare and very rare species;"[12] Apple Hill's tree clearing "constitutes substantial immediate and irreparable harm;"[13] "[Apple Hill's] activities challenge the integrity of the Section 248 permitting process;"[14] and "[Apple Hill had] gone ahead with making the very same permanent changes to the landscape that [the Commission] told it not to make when [the Commission] denied its amendment request."[15]

There are multiple penalty factors and harms attributed to Apple Hill's actions which apply here, beyond rare plants. Thus, Apple Hill's "hardship" argument fails.

In contrast, staying the penalty proceeding would result in unnecessary delay, prolonged use of the Agency's resources in this matter, and penalize those who regularly participate in, and are governed by, the Commission's Section 248 process (e.g., other Section 248 petitioners, statutory parties such as the Agency, intervenors, etc.). These participants, and the public, rely on the integrity of that process for vetting energy projects and ensuring that projects that are approved are appropriately constructed and

[9] 30 V.S.A. § 30(c)(2).
[10] 30 V.S.A. § 30(c)(5).
[11] 30 V.S.A. § 30(c)(8).
[12] Order of 4/1/2021 at 28.
[13] *Id.* at 28.
[14] *Id.* at 29.
[15] *Id.* The Commission also determined in its injunction order that Apple Hill continued is prohibited activities even after the Commission had issued a temporary restraining order, and concluded such actions constituted "an affront to the Section 248 permitting process" which do "not comply with the applicable statutes or serve the public interest." *Id.*

operated. Simply stated, the process is necessary to ensure that project developers, such as Apple Hill, comply with the rules.

Strict adherence to the Section 248(a)(2) prohibition on site clearing and construction without first obtaining a CPG is necessary to preserve the integrity of the Section 248 permitting requirements. It is also necessary to protect the integrity of the Legislature's directive that the Agency, acting on behalf of the people of Vermont, be able to provide evidence and make recommendations to the Commission concerning an energy facility proposal's potential to impact the natural environment of Vermont. Should prohibited activities, such as the site clearing undertaken by Apple Hill, occur before potential impacts of any given project are fully assessed, the Agency's cannot perform this role. Similarly, unnecessarily delaying the penalty phase of a proceeding where the Commission has already determined that a violation occurred undermines the integrity of Section 248 and Agency's ability to see that harms to the environment are timely and adequately addressed. Unnecessarily delaying imposition of a penalty for clear violations of the Section 248 process also harms energy developers who comply with Vermont's regulatory requirements.

In sum, for the reasons discussed above, it is not "clearly untenable or . . . unreasonable" for the Commission to deny Apple Hill's motion.

Dated November 18, 2022, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources

By: _____

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