

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Norwich Upper Loveland Solar LLC)
for a certificate of public good pursuant to 30)
V.S.A. §§ 248 and 8010, authorizing installation) 21-3587-NMP
and operation of a 500 kW (AC) photovoltaic)
group net-metering system in Norwich, Vermont)

**PETITIONER’S MOTION TO STRIKE PORTIONS OF
LANDOWNERS’ DIRECT PREFILED EVIDENCE**

NOW COMES Norwich Upper Loveland Solar LLC (the “Petitioner”) and moves the Vermont Public Utility Commission (“Commission”) to strike certain prefiled testimony and exhibits submitted by Mr. Gorman, Mrs. Goulet and Ms. Kenseth filed on behalf of intervenor landowners Steve Gorman; Jay & Heather Benson; Joy Kenseth; Jennifer & Daniel Goulet; Samin Kim & Jayoung Joo; and Larry Ufford (the “Landowners”) dated December 1, 2022 regarding the Norwich Upper Loveland Solar Project (the “Project”).

I. Standard of Review

Evidentiary matters in Commission proceedings are governed by the Rules of Evidence (“V.R.E.”) as applied in civil cases. 3 V.S.A. § 810(1); Rule 2.216. The evidentiary rules discussed below are relevant here.

A. Only Relevant Evidence is Admissible

Evidence that is not relevant, is immaterial, or unduly repetitious is not admissible. 3 V.S.A. § 810(1)(“Irrelevant, immaterial, or unduly repetitious evidence shall be excluded”); V.R.E. 402 (“Evidence which is not relevant is not admissible”). “Relevant evidence” means “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.” V.R.E. 401.

B. Evidence is Inadmissible if it Will Cause Confusion of the Issues, Undue Presentation of Cumulative Evidence, or Waste of Time

Evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence” even if relevant.

Joint Petition of NorthStar Decommissioning Holdings, LLC et al, Docket No. 8880, Order of 2/8/18 at 4 (quoting V.R.E. 403).

C. Both Lay Witness Testimony and Expert Testimony Must Satisfy Additional Specific Standards for Admissibility

Parties may offer testimony from a lay witness or an expert. “A witness may testify as an expert where ‘specialized knowledge’ would ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” *State v. Kolts*, 2018 VT 131, ¶ 32, 205 A.3d 504 (quoting V.R.E. 702). The Commission “must find an adequate foundation for the admission of expert testimony.” *Trotier v. Bassett*, 174 Vt. 520, 523, 811 A.2d 166 (Vt. 2002). First, the witness must be qualified as an expert through demonstrated knowledge, skill, experience, training, or education. *In re Petition of Randolph Davis Solar*, Case No. 21-2939-NMP, Order of 6/23/33 at 2 (citing V.R.E. 701). The Commission has held that testimony involving scientific or technical matters is inadmissible if offered by a lay witness that lacks the requisite skill, experience, or training to qualify as an expert on a subject. *See Joint Petition of NorthStar Decommissioning Holdings, LLC et al*, Docket No. 8880, Order of 2/8/18 at 6 (striking witness testimony on nuclear radiation exposure and health outcomes where witness failed to demonstrate he was qualified to provide expert testimony on potential health risks associated with exposure to radiation).

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.” *In re Petition of Randolph Davis Solar*, Case No. 21-2939-NMP, Order of 6/23/33 at 1 (quoting V.R.E. 701). In *Randolph Davis*, the Hearing Officer ruled that testimony from an adjoining landowner about vernal pools was lay witness testimony, where the witness had not offered any evidence as to their qualifications to speak as an expert on natural resources. *See id.* at 3-4 (landowner testimony about vernal pools was lay witness testimony limited to personal observations of facts).

Where a witness purports to offer expert testimony on matters involving scientific, technical, or other specialized knowledge within the scope of V.R.E. 702, in addition to demonstrating the witness' qualifications, the witness testimony must satisfy a three-part test:

First, 'the testimony is based upon sufficient facts or data,' second, it is 'the product of reliable principles and methods,' and third, 'the witness has applied the principles and methods reliably to the facts of the case.'

State v. Kolts, 2018 VT 131, ¶¶ 32, 34, 205 A.3d 504 (quoting V.R.E. 702)(expert opinion excluded where witness having a degree in psychology gave a psychological opinion, but failed to "explain how [her] experience le[d] to the conclusion reached, why that experience [wa]s a sufficient basis for the opinion, [or] how that experience [wa]s reliably applied to the facts"). Where a self-professed "expert" lacks experience and cannot demonstrate that the foundational opinions offered are based upon reliable principles or methods, or prior experience, the testimony should be excluded. *See id.* "Expert testimony must meet a standard of 'reasonable probability.'" *Everett v. Town of Bristol*, 164 Vt. 638, 639, 674 A.2d 1275 (Vt. 1996). "[A]n expert's opinion may not be based on mere speculation." *Turgeon v. Sneider*, 150 Ct. 268, 274-45, 553 A.2d 548 (Vt. 1987). "Opinion based on speculation is irrelevant, and is not admissible." *Id.* at 275 (quoting V.R.E. 401, 402).

D. Hearsay Evidence is Inadmissible

Hearsay evidence, whether introduced by a lay witness or expert witness, is inadmissible. V.R.E. 802. Hearsay means "an out-of-court statement offered for the truth of the matter asserted." V.R.E. 801. Accordingly, the Commission has excluded from evidence both documents that constitute hearsay and quotes included in witness testimony from hearsay documents. *See In re Petition of Randolph Davis Solar*, Case No. 21-2939-NMP, Order of 6/23/33 at 4 ("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"); *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, Order of 2/2/10 at 4 (excluding landowner exhibits consisting of newspaper articles and letters from anti-wind organizations).

Further, while expert witnesses are permitted to rely upon hearsay material in forming expert opinions stated in testimony, neither the underlying hearsay documents nor quotes from such documents are admissible. *See id.* at 4, 6 (“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”).

E. While 3 V.S.A. § 810(1) Gives the Commission Some Flexibility in Admitting Evidence, It Nevertheless Precludes Irrelevant, Immaterial, or Unduly Repetitious Evidence

3 V.S.A. § 810(1) provides that, in contested cases, the Commission may deviate from the Vermont Rules of Evidence “[w]hen 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.” 3 V.S.A. § 810(1). Notwithstanding this flexibility, Section 801(1) unequivocally provides: “Irrelevant, immaterial, or unduly repetitious evidence *shall be excluded.*” *Id.* The Rules of Evidence as applied in civil cases in the Superior Courts of this State shall be followed.

F. In Addition to V.R.E. 403’s Prohibition of Evidence That Causes Undue Confusion or Waste of Time, the Commission Must Apply Simplified Procedures in its Section 248 Review of this Project

30 V.S.A. § 8007 directs the Commission to apply “simplified procedures” in its review of renewable energy plants between 150 kW and 2.2 MW in certificate of public good proceedings under Section 248. 30 V.S.A. § 800730 V.S.A. § 8007 (the PUC “[s]hall simplify the petition and review process as appropriate”). This directive applies to evidentiary matters and standards.

II. Inadmissible Landowner Evidence in This Case

A. Direct Evidence Prefiled by Mr. Gorman

Mr. Gorman’s resume, Exhibit NN-SG-1, reflects that he has some education and experience regarding the natural environment. However, portions of his Exhibits NN-SG-2 and

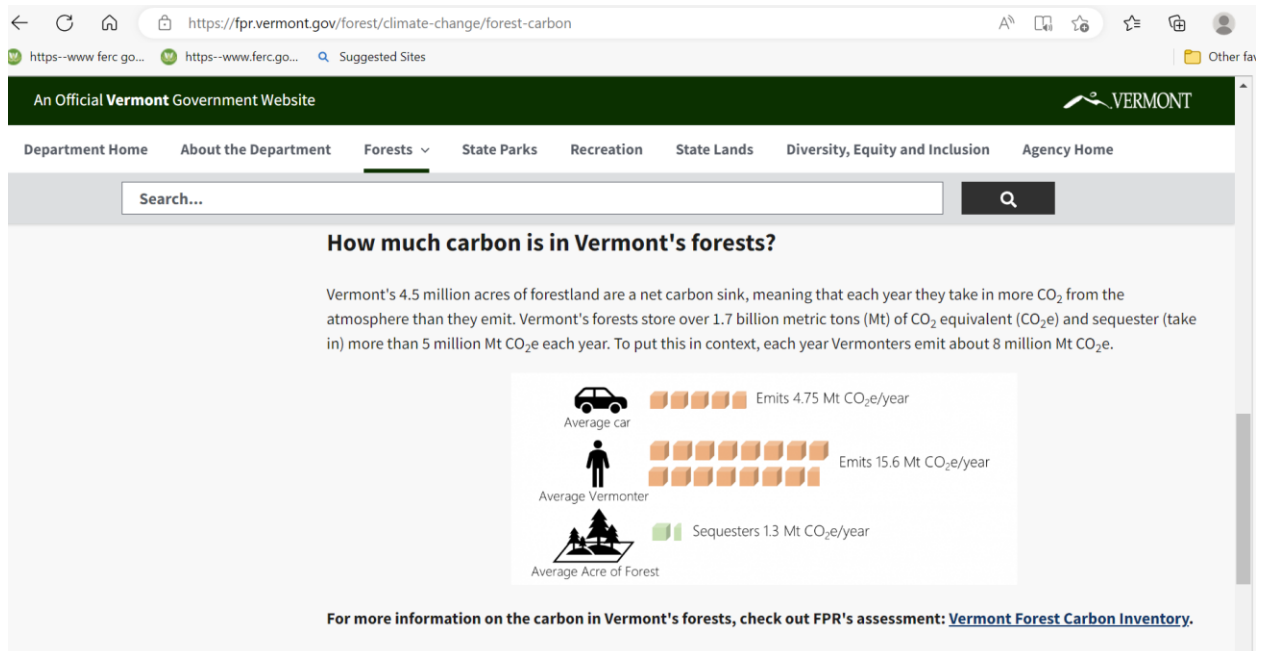
NN-SG-3 attest to matters as to which he is not qualified as an expert, are misleading or inaccurate, are irrelevant, or are hearsay.

1. **Exhibit NN-SG-2 “Forest Value and Carbon Costs Associated with the proposed 500kW Solar Array off of Upper Loveland Road in Norwich, Vermont”**

a. Page 17, first full paragraph appears to contain erroneous statistics about the carbon absorption of Vermont's forests and attributes the assertions to the Vermont Department of Forests website. Mr. Gorman asserts:

“Just one acre of Vermont forest absorbs the carbon dioxide emissions of 62 automobiles each year. The 8.2+ acres that will be cut to make room for the Upper Loveland Road solar project absorb the annual emissions of 514 automobiles each year – a sizable percentage of Norwich's vehicles. Multiply that by the 25-year life cycle of the solar development, and those 8.2+ acres of forest absorb the equivalent annual emissions of 12,850 automobiles. - Vermont Department of Forests”

See the below graphic from [Forest Carbon | Department of Forests - Parks and Recreation \(vermont.gov\)](https://fpr.vermont.gov/forest/climate-change/forest-carbon):



The paragraph on page 17 is inaccurate, misleading, and leads to undue confusion, and its admission would impose the unfair burden on Petitioner to spend unnecessary time and expense

on discovery, rebuttal and or cross examination on this issue. The entire paragraph should be stricken under V.R.E. 403.

b. Page 4, second and third full paragraphs under the heading: "Affects, Mental and Spiritual Health", describe and include quotes from a Kaiser Family Foundation article that discusses how little time American youth spend outside. This information is wholly irrelevant to the Project and the Section 248 criteria that are at issue in this case and is inadmissible pursuant to V.S.A. § 810(1) and V.R.E. 402. Further, the quoted text in the third paragraph is inadmissible hearsay under V.R.E 802 and does not fall under any exception to the hearsay rule.

c. Pages 5 and 6 include quotes from *Yale Environment 360*. The quoted text is inadmissible hearsay, does not fall under any exception to the hearsay rule, and therefore should be deemed inadmissible under V.R.E. 802.

d. Pages 9-10, beginning with the second and third full paragraphs through the first sentence on page 10, under the heading: "Development in Norwich's Forest", discuss a "new concept" in psychiatry "coined" solstalgia, and include quotes from articles in *National Library of Medicine* and *BBC Future*. Mr. Gorman is not a qualified psychiatrist or psychologist and is not an expert qualified to speak to this purported mental disorder, nor does he provide any relevant personal observations. Further, the quoted text is hearsay, and the entirety of both paragraphs is irrelevant. These paragraphs should be deemed inadmissible under V.S.A. § 810(1), V.R.E. 402, V.R.E. 702, and V.R.E. 802.

e. Pages 12-14 under the heading: "Land Conversion for Renewable Energy" is inadmissible for numerous reasons. First, Mr. Gorman, while perhaps qualified in environmental studies, is not a qualified energy expert on land use requirements for siting energy facilities. Second, none of the sources cited on land conversion at pages 12-14 are specific to Vermont or even purport to address energy generation land conversion in the State of Vermont, the Two Rivers Ottauquechee Regional Commission ("TRORC") region, or the Town of Norwich. The excerpts are entirely irrelevant to this Project and the applicable Section 248 criteria at issue in this case. For these reasons, the entire Land Conversion section Mr. Gorman's report should be deemed inadmissible under V.S.A. § 810(1), V.R.E. 402 and V.R.E. 702.

f. Page 12 discusses a paper published in *PLOS ONE* and asserts that "the largest driver of land conversion is energy sprawl." The express implication is that land conversion

from solar renewable energy generation is a meaningful part of this purported land conversion. However, the weblink to the *PLOS ONE* article cited by Mr. Gorman demonstrates, in fact, that this is not accurate, as shown in the Figure 2 graphic in the article inserted on the next page.



The bar graphs illustrated in the article show the different energy sources estimated in four scenarios between 2014-2040. Solar, depicted in bright yellow, is barely if at all discernibly reported in the results. Petroleum, coal, and natural gas energy resources dominate the chart. Mr. Gorman’s statements attributing land conversion to solar energy is misleading and leads to undue confusion, and its admission would impose the unfair burden on Petitioner to spend unnecessary time and expense on discovery, rebuttal and or cross examination on this issue. The entire paragraph should be stricken under V.R.E. 403.

g. Page 12, second and third full paragraphs under the heading: “Land Conversion for Renewable Energy” quote from an article in *Cool Green Science*. The quoted text is inadmissible hearsay, does not fall under any exception to the hearsay rule, and therefore should be deemed inadmissible under V.R.E. 802.

h. Pages 13-14 include quotes and graphs from *Bloomberg*, *Cool Green Science*, and *The Nature Conservancy*. This material is inadmissible hearsay, does not fall under any exception to the hearsay rule, and therefore should be deemed inadmissible under V.R.E. 802.

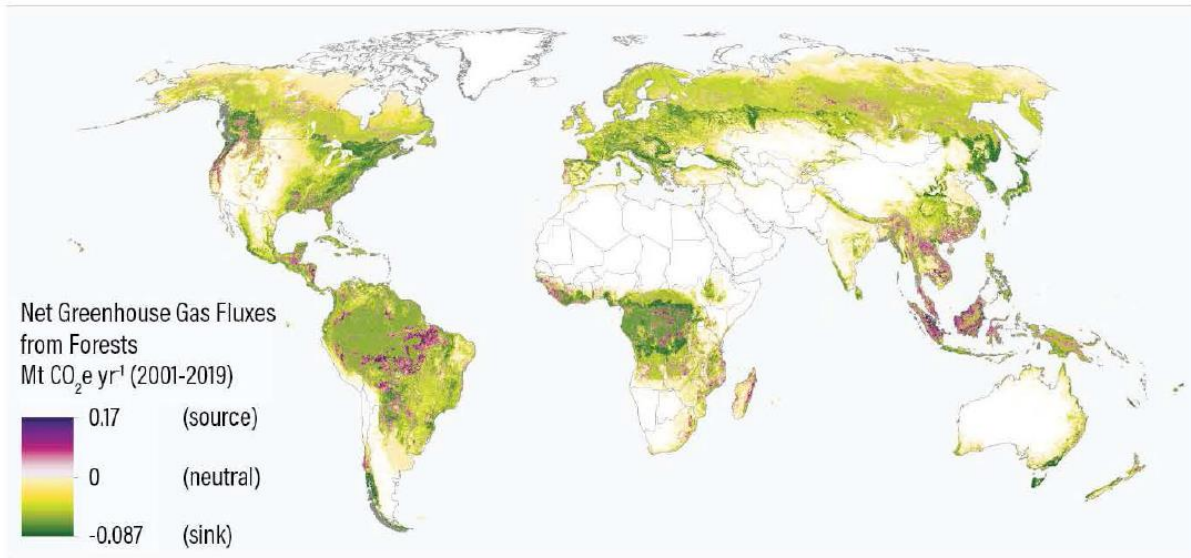
i. The fourth and fifth paragraphs on page 14 include quotes from an article *Wildlands and Woodlands – Broadening the Vision for New England*. The quoted text is hearsay and should be deemed inadmissible under V.R.E. 802.

j. Page 16, under the heading: “Relationship Between Climate Change and Deforestation”, references and quotes from an article in the *Independent* asserting that the Town of Norwich’s capacity to mitigate and adapt to climate change is diminished by ongoing forest loss. The reference to and reliance on this article for this assertion is misleading and irrelevant. As is clear from the content of the article, its focus and discussion have nothing to do with clearing of forests in Norwich, the region, the State of Vermont, or even the U.S. generally, nor does it address impacts of tree clearing from solar generation siting in Vermont or any other part of the globe. Rather the focus is on the rapid loss of tropical rain forests around the earth’s equator and its contribution to climate change. See [Deforestation: The hidden cause of global warming | The Independent | The Independent](#) (“The accelerating destruction of the rainforests that form a precious cooling band around the Earth's equator, is now being recognised as one of the main causes of climate change.”). The out-of-context reference to this article on rainforest destruction leads to undue confusion and its admission would impose the unfair burden on Petitioner to spend unnecessary time and expense on discovery, rebuttal and or cross examination on this issue. The entire paragraph should be stricken under V.R.E. 403.

k. The first two paragraphs on page 17 under the heading: “Relationship Between Climate Change and Forests”, and the second full paragraph on page 18 under the header: “Carbon Storage” cite an article and statistics from *World Resources Institute*. As is clear from the content of the article itself, however, its focus is not on tree clearing or forest carbon storage in Norwich or the region, but rather the focus is on the rapid loss of tropical rain forests around the earth’s equator and its contribution to climate change. See [Quantifying Carbon Fluxes in the World’s Forests | World Resources Institute \(wri.org\)](#). These paragraphs on page 17 are inadmissible under 3 V.S.A. § 810(1) and V.R.E. 402.

Further, while the cited article does not address the Town of Norwich or Vermont specifically, the map illustrated in the article to depict locations of forest carbon sinks and sources demarcates Vermont within a forest carbon sink region of the globe:

Forests: Carbon Sinks or Carbon Sources?



Source: Harris et al. 2021
20.01.21



WORLD RESOURCES INSTITUTE

Therefore, even if relevant, the Gorman report is misleading in citing this article and probative value of these paragraphs on pages 17 and 18 is outweighed by the fact that the out-of-context references are misleading, lead to undue confusion, and their admission would impose the unfair burden on Petitioner to spend unnecessary time and expense on discovery, rebuttal and or cross examination on this issue. The entirety of all the paragraphs should be stricken under V.R.E. 403.

1. The last full paragraph on pages 17-18 under the heading: "Relationship Between Climate Change and Forests" cites to David Foster et al, *Wildlands and Woodlands – Broadening the Vision for New England* for the assertion that "[c]onverting forests into housing, commercial development, and sprawling alternative energy development is likely to exact an even greater impact than climate change on our forests... ." However, this report does not once mention or address forest conversion from alternative energy, other than to note that forests are a

source of energy for biomass generation. See [Wildlands and Woodlands 2017 Report.pdf](#). As a result, these paragraphs are irrelevant under 30 V.S.A. § 810(1) and V.R.E. 402. In addition, the probative value of this paragraph is outweighed by the fact that the statements and attribution to this report are misleading, will lead to undue confusion, and their admission would impose the unfair burden on Petitioner to spend unnecessary time and expense on discovery, rebuttal and or cross examination on this issue and should be stricken under V.R.E. 403.

2. Exhibit NN-SG-3 “Other Considerations Associated with The Carbon Costs of the proposed 500kW Solar Array off of Upper Loveland Road in Norwich, Vermont”

a. The second and third paragraphs cite to and quote from publications that are hearsay and are not exceptions to the hearsay rule and should therefore be deemed inadmissible under V.R.E. 802.

b. The entirety of pages 3-5 under the heading: “Global Energy Consumption” should be deemed inadmissible for multiple reasons. First, Mr. Gorman is not an energy expert, nor does he claim to have any training or experience on world or local energy markets and their emissions profiles. As a lay witness on this topic, Mr. Gorman’s exhibit must be limited to his personal observations, none of which are reported. This portion is therefore inadmissible under V.R.E. 702.

Second, Exhibit NN-SG-3 is irrelevant to the Project and the applicable Section 248 criteria that are at issue in this case. Instead, it discusses global events not tied directly or indirectly to the issues in this case. The section is inadmissible under 30 V.S.A. § 810(1) and V.R.E. 402.

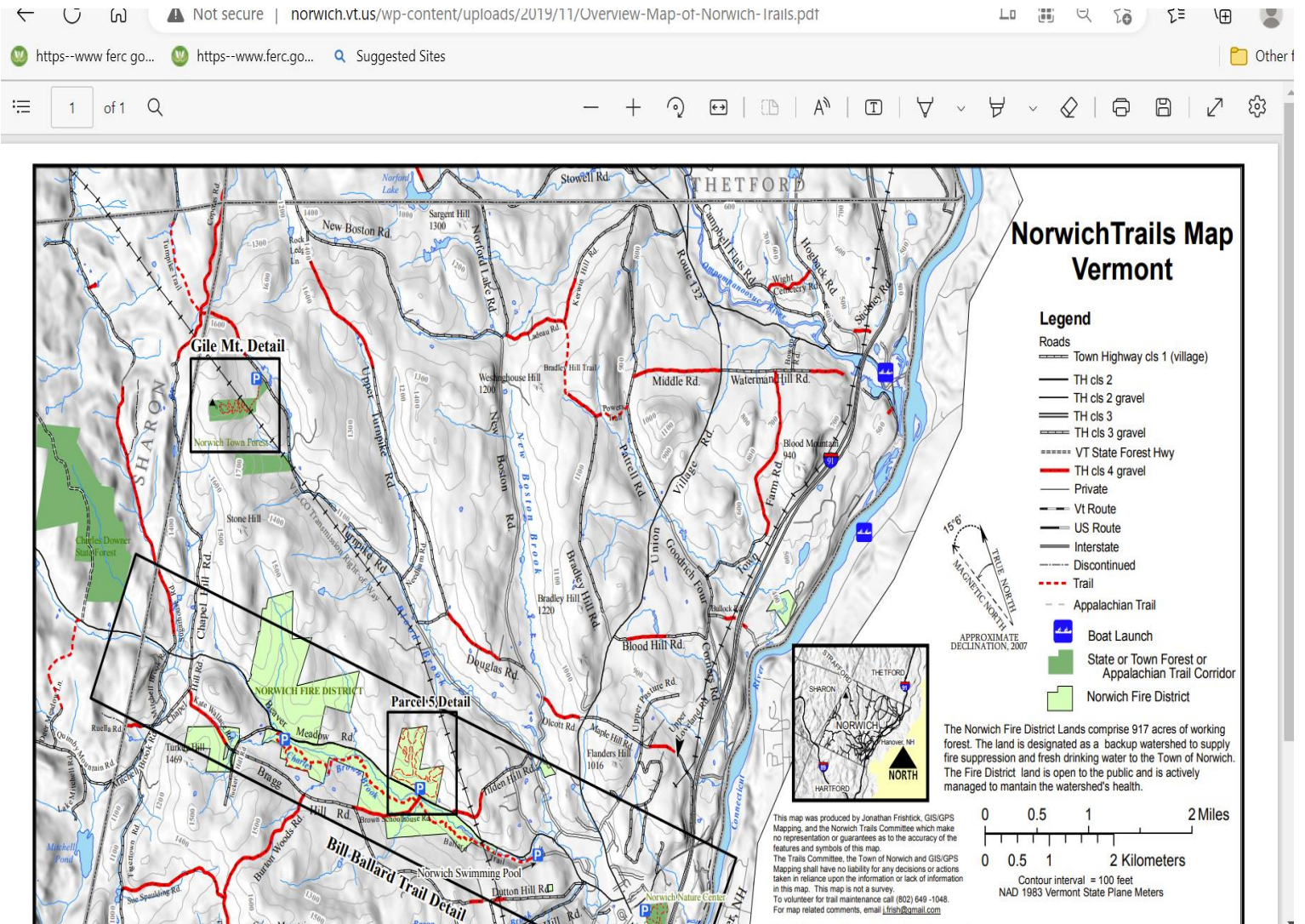
Third, most of the discussion in this section is quotes from hearsay materials. These quotes are inadmissible under V.R.E. 802.

B. Inadmissible Evidence submitted by Joy Kenseth

1. Exhibit NN-JK-7 “Video of Solar Site From Town Forest”

Exhibit NN-JK-7 is a video labeled: “Video of Solar Site from Town Forest”. The video is inadmissible for multiple reasons. First, there is no foundation laid to identify specifically where the video is taken, who produced the video, or the specific location of the proposed

project. Second, Ms. Kenseth fails to lay a foundation that establishes that there is a "Town Forest" in proximity to the Project limit of disturbance ("LOD"). The Town Plan does not mention a Town Forest. The Town website for the Town "Trails Committee" includes a map of Town hiking trails at [Overview-Map-of-Norwich-Trails.pdf](https://www.norwich.vt.us/wp-content/uploads/2019/11/Overview-Map-of-Norwich-Trails.pdf). The map, inserted below, depicts a Town Forest in the upper left quadrant in a boxed inset for "Gile Mtn Area", which is significantly north of the Project area, and further shows no trails or Town designated "Town Forest" in the location of the Project area:



The Exhibit is therefore irrelevant and should be stricken under V.R.E. 402. In addition, its probative value is outweighed because it is misleading and will lead to confusion, and as such should be stricken under V.R.E. 403. The Landowners have offered no evidence to establish the presence of a Town designated or managed Town Forest in the area alleged.

2. Exhibits NN-JK-8 “Transcript of 7-13-21 Norwich Planning Commission Meeting” and NN-JK-9 “Transcript of 8-11-21 Norwich Selectboard Meeting”

Exhibits NN-JK-8 and NN-JK-9 are both labelled “transcripts”, but neither is a transcript duly prepared by a licensed Court Reporter, and Ms. Kenseth offers no foundation to attest to who prepared the documents or to verify the accuracy of the transcriptions. Even if a proper foundation were laid, the documents are hearsay as both purport to reflect out of court statements offered for the truth of the matter asserted. The documents are both inadmissible hearsay under V.R.E. 802 and should be stricken.

III. Request for Relief

Petitioner respectfully asks the Hearing Officer to strike the above-referenced evidence for the reasons provided herein.

Dated at Burlington, Vermont, this 15th day of December, 2022.

Respectfully submitted,

Norwich Upper Loveland Solar LLC



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