

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

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

Case No. 21-2939-NMP

NEIGHBOR INTERVENORS' BRIEF AND FINDINGS OF FACT

January 12, 2023

Now come Neighbor Intervenor Michael Binder and Joan Allen, *pro se*, and hereby submit our Brief and Findings of Facts in support of our position that the Project unduly interferes with Orderly Development of the Region and will result in Undue Adverse Impacts on the Natural Environment.

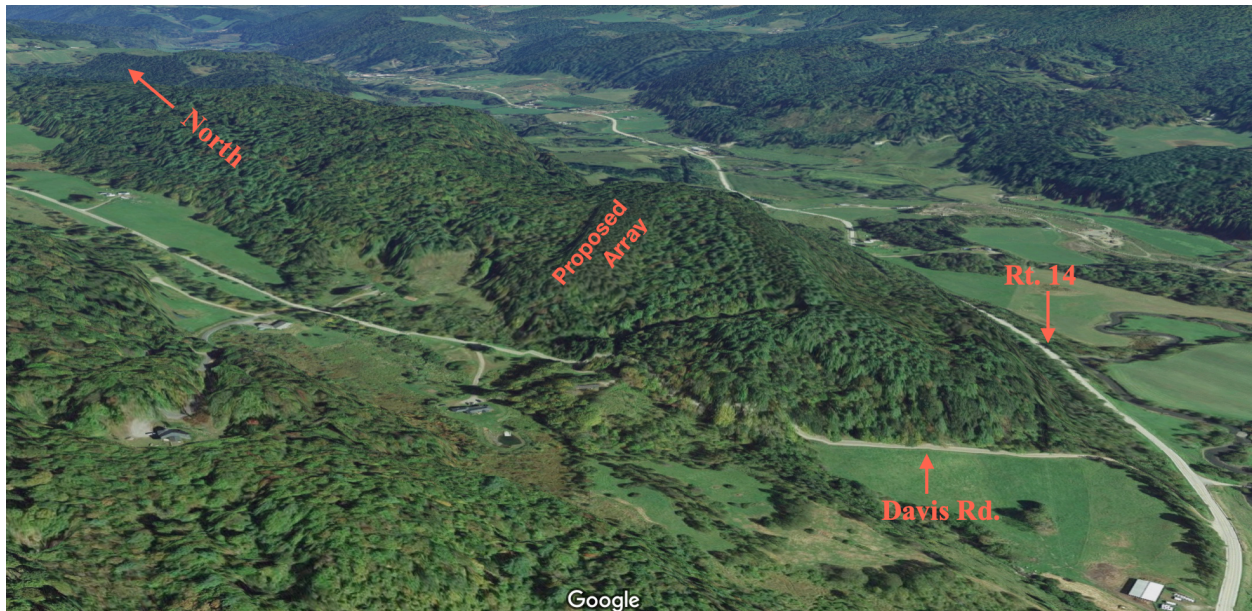
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Description of the Facility

Findings:

1. The Project site is in the northwest corner of a 21± acre parcel located approximately 1500± feet from the intersection of Davis Road and State Route 14 in Randolph Center.
Geographic coordinates are: 43.904700°N, -72.568771°W.
Ex. RDS MS-6 p. 2



2. The Project is located at approximately 850 feet above mean sea level according to U.S. Geologic Survey ("USGS") topographic data. Ex. RDS DB-2 p. 3
3. The Project parcel is identified as Rural Lands area in the 2019 Randolph Town Plan.
Ex. RDS MS-6, p. 2
4. The predominant slope of the land under the proposed array is west and southwest.
Ex. RDS MS-2. See Figure 3 in this Brief.
5. The panel racking will be arranged in multiple rows generally running east-west with panels facing to the south. Staskus PfT p. 5. Ex. RDS MS-2
6. Topographically, the site is on a steep hillside with slopes greater than 25% underlying approximately half of the Limits of Disturbance.
Ex. RDS MS-2 (filed 7/13/22), Ex. NI MB-32, NI MB-33, NI MB-39, NI JA-1

7. Some of the solar panels in the array are on slopes greater than 25%.
Binder SurT p. 3 Ex. NI MB-39.
8. Petitioner admits that a LiDAR slope layer would reveal that some of the array is on slopes greater than 25%. Binder SurT p. 3
9. Only lands with good exposure and gentle slopes make sense for solar development.
Binder SurT pp 5,7,9.
10. "The property is an undeveloped parcel consisting of wooded areas as well as signs of previous logging activity and log landings." Ex. RDS MS-6 p. 2.
11. The site is entirely forested. Binder RebT p. 4
12. Early successional habitat, forested wetlands, seeps, and mature forest on steep terrain make up the majority of the disturbed area. Allen PFT p. 9
13. Because new vegetation in seeps emerges very early in spring, they are an important food source for black bears, as well as for deer, turkey and other wildlife. The seeps also are a source of cold, well-oxygenated groundwater throughout the drier months, for a wide range of species, such as breeding birds and salamanders, in addition to bears. Allen RebT p.3
14. Black bears inhabit and feed at the site. Ex. NI JA-19. Allen PFT. p. 8
15. The VT Fish and Wildlife Department (VFWD) has mapped the Project area as white-tailed deer (*Odocoileus virginianus*) winter area (DWA). Ex. RSD DB-2 p. 8
16. The site had been a deer wintering yard prior to the 2016 logging of a red pine plantation, and may again be a deer wintering area if the early successional forest is left to regenerate.
Binder RebT p. 4
17. Mr. Noel Dodge from the Department of Fish and Wildlife conducted a site visit on July 29, 2021 and determined that the Project site does not now provide deer wintering habitat.
Ex. RDS DB-2 p. 1
18. There will be no site preparation, construction, or decommissioning activity proposed within the deer wintering area or its 300-foot buffer during the deer wintering period from December 15 to April 15, except with the prior written approval of the Vermont Fish and Wildlife Department. Staskus PFT p. 12

19. During the deer wintering period from December 15 to April 15, access shall be limited to once per month for maintenance or upgrades. Staskus PfT p. 12
20. The project site is part of a 753 acre habitat block, and is contiguous with core habitat within that block. Allen PfT p. 11
21. Bobcats, coyote, deer, turkey, and ruffed grouse cross Davis Road through the project site to reach a 688 acre habitat block south of Davis Rd, and from there to reach a 4610 acre habitat block across the second branch of the White River. Allen PfT p. 7. Allen SurT p.7.
22. The array equipment will be surrounded by a wildlife fence 8-foot high, with mesh size no smaller than 6 inches by 6 inches extending from the ground level up to three feet or higher. Staskus PfT p. 7
23. The entire 11.6 acre Limits of Disturbance is subject to clearing of vegetation. Staskus affidavit 4/19/22. As modified 6/24/22 in Staskus RebT p. 2 and Ex. RDS MS-2.
24. The corridor of the Second [middle] Branch of the White River is approximately 450 feet to the southeast of the Project. Ex. RDS DB-2 p. 5
25. Runoff from the site, including the headwater stream shown on the Site Plan, is directed towards one undersized culvert under Davis Rd. and flows through an unnamed stream into Reach M06 of the Second Branch of the White River. Ex. NI JA-5. Allen PfT p. 5
26. Reach M06 of the Second Branch of the White River is the location of the river's highest long-term bacteria readings. A mix of highly erodible fine sediments, lack of buffers in the reach, and dominant agricultural land use all likely contribute to this reach being a long term area for high bacteria readings. Ex. NI JA-5. Allen PfT p. 5
27. The Project is located in a headwater as it is located within a watershed with a drainage area less than 20 square miles and is characterized by steep slopes. Ex. RDS DB-2 p. 5
28. The site is in the Source Water Protection Zone 3 of the Royalton Fire District 1. Staskus PfT. P. 11, Ex. RDS MS-2
29. The Project Parcel's frontage on Davis Road has Class 2 wetlands that were shown on the original site plan. Ex. RDS MS-2 filed 8/8/21

30. Additional Class 2 wetlands, contiguous with the previously delineated wetlands, and extending north onto the Lands of Andrew and Lava Mueller, were identified on the fifth site plan. [see figure 2]. Ex. RDS MS-2 filed 6/24/22, Barton RebT p. 4
31. A perennial stream, not shown on any of the 6 site plans, runs in a very prominent swale from Mueller's pond [see figure 2], continues through or alongside the above mentioned class 2 wetlands, and then joins the stream that is shown on the site plan. The perennial stream and the class 2 wetlands are co-existent. The stream was flowing on March 25, 2021 and was viewed on that date by participants at the Site Visit.
Allen SurT p.5. Illustration is in Ex. NI JA-13. Allen PFT p. 12
32. A vernal pool complex on Neighbor Intervenor's land is a cluster of interconnected and isolated pools measuring 165 feet by 37 feet, and is contiguous with the project parcel. In the first four site plans, the Limits of Disturbance was on the Neighbor Intervenor's property line and contiguous with the vernal pool complex. Binder PFT p. 3, Allen PFT p. 13
33. The larger pools in the above mentioned vernal pool complex were identified by the Petitioner in exhibits and testimony on 6/24/22 and the Limits of Disturbance were moved away from the property line and vernal pool complex.
Ex. RDS MS-2 filed 6/24/22, Barton RebT p. 4
34. The staging area and the access road adjacent to the staging area are wetlands that have been used as a log landing and are degraded, but still grow both obligatory and facultative wetland species and are still wetlands. Allen PFT p. 12
35. There are two distinct areas (northern and southern) of Buckland Prime Agricultural Soil (PAS), totaling 1.8 acres, within the Limits of Disturbance. Ex. RDS MS-2 filed 6/24/22
36. The northern area of PAS underlies a 100 foot buffer zone that surrounds the larger pools in the above mentioned vernal pool complex, and also underlies part of the array. The southern area of PAS underlies the staging area and approximately 400 feet of the access road.
Ex. RDS MS-2 filed 6/24/22.
37. The site is to be accessed on a new gravel access road from Davis Rd.
Ex. RDS MS-2. Ex. NI MB-50. DPS Revised Comments 10/25/22 p. 2

38. The new gravel access road and its turnaround are 1100 feet in length.

Ex. RDS MS-2. Binder PfT p. 3

39. The new gravel access road is on steep slopes up to 39%. Ex. NI MB-8.

40. The grading contours [cut & fill] for the access road on the site plan show that part of the road is in a trench 6 feet deep, going uphill on a 24% grade. The roadbed takes up the full width of the trench and there is no room for a drainage ditch alongside the roadbed.

Ex. NI MB-50. Ex. NI MB-50 p. 8.

41. The grading contours [cut & fill] for the access road on the site plan show that part of the road is built up with fill to create a 9 foot high berm, and that prime agricultural soils are buried under the berm. Binder SurT p 6. Ex. NI MB-50 pp. 4-5.

Orderly Development of the Region

30 V.S.A. § 248(b)(1)

Introduction:

The Project will unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and to the land conservation measures contained in the regional and municipal plans, in accordance with 30 V.S.A. § 248(b)(1). That conclusion is supported by the following findings.

Findings:

42. The Town of Randolph has modified its Town Plan Energy Chapter to address some considerations in Act 174. Ex. RDS MS-6 p. 9
43. The Town of Randolph has NOT received a regional determination of energy compliance. Exhibit MS-6 page 9
44. Chapter 6 of the Randolph Town Plan contains a mandatory strict prohibition against energy facility development on lands over 25% slope:

For all energy generation facilities, the following policies apply:

3. [sic.] **Preferred Locations:** The Town supports the placement of new generation and transmission facilities on top of existing buildings, on landfills, on brownfields outside of the village center, on reclaimed quarries or gravel pits, on a site that was previously covered by a structure or impervious cover in compliance with setbacks. Additionally, the Town, by joint letter of the Planning Commission and Selectboard, may designate a site as preferred if the total project area of panels encompasses 10 acres or less and if the project, as designed, will not be visible in the growing season from town or state highways.
1. **Prohibited Locations:** Energy facility development shall have to meet principal structure setback for the relevant area in the town zoning, and shall be prohibited in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, lands over 25% slope.
2. All energy projects will be required to meet lot coverage and screening requirements found under site plan and conditional use approval processes in the respective zoning district, except solar arrays shall not be counted as lot coverage in the Industrial District.

Ex. NI MB-5 - Randolph Town Plan, page 29 (Bold in original, Underlined supplied).

45. Such steep slopes prohibition is a mandatory and specific land conservation measure contained in the Town Plan which would be violated by this project.
46. As slopes increase, the adverse impact on natural resources also increases, and the Town has drawn a line (25% slopes) above which it is in the Public Interest to avoid the development rather than to mitigate the development. Binder PfT. P.8
47. Slopes greater than 25% are found within the project's Limits of Disturbance. Exhibit RDS MS-2 (6th site plan filed 7/13/22), Binder PfT. pp. 5-6 Binder SurT p. 2, Ex. NI MB-39.
48. "Limits of Disturbance" means the boundary within which all construction, materials storage, grading, landscaping, and any other activities related to site preparation, construction, operation, maintenance, and decommissioning take place as a result of the net-metering system, including areas disturbed due to the creation or modification of access roads, utility lines, and the clearing or management of vegetation. PUC Rule 5.100
49. Over the entire Limits of Disturbance, this proposed energy facility development involves construction, materials storage, grading, landscaping, or site preparation including disturbing areas to create or modify the access road, utility lines and the clearing or management of vegetation. Ex. RDS MS-2 [6th site plan filed 7/13/22]. Binder PfT. p. 6, Ex. NI MB-39 Ex. NI MB-41, Ex. NI MB-50, Ex. NI MB-8, Staskus affidavit 4/19/22
50. Title 24, Chapter 117 of the Vermont Statutes, which governs Municipal and Regional Planning and Development under which the Randolph Town Plan was promulgated, provides the definition of land development as:

"Land Development" means the division of a parcel into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any building or other structure, or of any mining, excavation, or landfill, and any change in the use of any building or other structure, or land, or extension of use of land. 24 VSA 4303(10).
51. The project, as proposed, violates the Town Plan's prohibition of energy facility development on slopes greater than 25%. Binder PfT. pp. 5-6

Discussion:

The Petitioner asserts that the revised site plan [filed 2/16/22] avoids the Town Plan's steep slope prohibition by placing the individual solar panels at locations within the limits of disturbance that do not exceed 25% slope. Staskus supplemental testimony 2/25/22 p. 2. The assertion is futile for two reasons.

First, in the revised site plan, portions of the array itself, remain on slopes greater than 25%. (Findings 7,8). Second, excavation and filling of soils to build a road and then constructing the large industrial structures, is the very definition of "energy facility development" referenced in the Town Plan.

Moreover, there is nothing in the Town Plan that suggests that the prohibition of energy facility development on steep slopes (>25%) applies to only the base of each individual solar panel in an energy facility. "Land Development" has a broad definition under Vermont statute and includes the construction, reconstruction, conversion . . . of any building or other structure, or of any mining, excavation, or landfill, and any change in the use of any building or other structure, or land, or extension of use of land." 24 VSA 4303(10). That is exactly what this project proposes: change in use from forestry to industrial, excavation and filling of the land, road building, and construction of the solar array structures.

Therefore, because the proposed project falls squarely under the statutory definition of "development" and because the construction of such a project is proposed on steep slopes greater than 25% slope, including the access road to be built on 39% slopes, the project clearly violates the land conservation measure contained in the Randolph Town Plan, unduly interferes with the orderly development of the region and, consequently, a CPG should be denied.

Soil Erosion, Water Pollution, and Water Purity

30 V.S.A. § 248(b)(5) 10 V.S.A. § 6086(a)(1)(4) Rule 5.107(C)(7)

Introduction:

The Petitioner's testimony and exhibits do not contain sufficient facts to support a positive finding by the Commission [Rule 5.107(C)(7)] under the 10 V.S.A. § 6086(a)(1)(4) criteria and the Water Purity and Natural Environment criteria specified in 30 V.S.A. § 248 (b)(5).

Taking into consideration the impervious surface of the array and the access road, the underlying slope of the land, the orientation of the array against the contours of the land, the erodibility of the soils, the lack of structures to manage post construction stormwater effluent from both the array and the access road, logging within a mandatory forested buffer, and inadequate wetland buffers, the 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, will cause undue adverse water pollution, will have an undue adverse impact on water purity.

Findings:

52. The Project will apply for coverage under the Agency of Natural Resources Department of Environmental Conservation Construction General Permit. Ex. RDS DB-2 p. 5
53. The Petitioner asserts that project does not require an operational stormwater permit because solar panels are not an impervious surface. Homsted RebT p. 6
54. The four predominant soil types in the disturbed area are rated "highly erodible" or "potentially highly erodible", have either "high runoff potential" or "slow infiltration rates", and are considered "susceptible to erosion and require additional protective measures". Allen PfT p. 5, Ex. NI JA-3, Ex. NI JA-4
55. Slopes of between 30 and 50% predominate above the Class 2 wetlands and the streams that run along the site's northern frontage on Davis Rd. Ex. NI MB-32.
56. The storm runoff from solar panels, the access road, and other impervious surfaces are effluents. [Dictionary]
57. ANR requested that the applicant identify on the site plan all new impervious surfaces. Staskus PfT p. 11

58. The site plan does not include solar panels in the calculation of new impervious surface.

Ex. RDS MS-2. Homsted RebT p. 6

59. Solar panels are impervious surfaces. Binder SurT p. 4, Ex. NI MB-40 p. 2 Allen PFT p.7

60. The leading cause of increased runoff from any site is typically the addition of impervious surfaces. Homsted RebT p. 6

61. On steep slopes, failure to recognize the impervious area of an array leads to erosion of the underlying soils and has caused environmental catastrophe.

Ex. NI MB-40. Binder SurT p. 5.

62. The berms, swales, level spreaders, detention ponds, and other stormwater management structures that are necessary to prevent severe erosion on steep slopes are not shown on the site plan. Binder SurT p. 8

63. Solar arrays are known to cause concentrated runoff at the dripline, which channelizes and accelerates flow, causing scour and erosion. Allen PFT p. 7, Ex. NI MB-40.

64. The site plan shows no structures to prevent erosion (scouring) under the drip line of the array. Ex. RDS MS-2.

65. Runoff is concentrated when an array is not parallel to elevation contour lines.

Ex. NI MB-40 p.1

66. For the most part, the proposed array is not parallel with the elevation contour lines.

Ex. RDS MS-2. Ex. NI MB-40 p.2

67. The Commission takes notice that an array on steep slopes may not be treated, from a stormwater perspective, as a pervious surface in the States of Pennsylvania, Maryland, Rhode Island, and Connecticut. Ex. NI MB-40

68. The Commission takes notice that in Pennsylvania "Solar panel farm projects completed on slopes exceeding 15% can be permitted, however they would be pushing the threshold of current constructability, especially if any substantial earth disturbance is proposed."

Ex. NI MB-40 p.3, Ex. NI MB-44B

69. No drainage is shown for the access road on the site plan. There are no culverts or road ditches, either by general specification or location. Binder PFT p.17 Binder SurT p. 8.

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70. The grading contours (cut & fill) for the access road do not include a ditch on the side of the roadbed in locations where the roadbed is at the bottom of a trench on steep slopes.

Ex. NI MB-50 pp. 7-9

Discussion:

The access road and the array are the predominant impervious surfaces in this project. The profile of the access road, at the bottom of a trench going uphill on a 24% slope, and without a roadside ditch or culverts, is the profile of an aqueduct. Obviously, the road will wash out.

Regarding the array, the Petitioner's arguments in support of the proposition that the project will not cause unreasonable soil erosion, or undue adverse water pollution, or undue adverse impact on water purity, or undue adverse impact on the natural environment, hinges on the Petitioner's assertion that solar panels are not an impervious surface and that therefore the Project does not require an Operational Stormwater permit. That assertion is not persuasive because of the steepness of the site and the erodibility of the soils.

Rule 5.107(C)(7) requires the Petitioner to produce testimony and evidence containing sufficient facts to support a positive finding by the Commission under applicable Section 248 criteria, which include 30 V.S.A. § 248 (b)(5) and 10 V.S.A. § 6086(a)(1)(4) criteria.

10 V.S.A. § 6086(a)(1) requires that in determining whether a development will cause undue adverse water pollution, the District Commission shall at least consider, *inter alia*, the slope of the land and its effects on effluents and the availability of streams for the disposal of effluents.

Taking into account the imperviousness of the array and the road, the Petitioner has not produced sufficient facts, based on testimony and evidence, for the Commission to find that, accounting for the slope of the land and its effects on effluents and the availability of streams for disposal of effluents, this project will not cause undue adverse water pollution in accordance with 10 V.S.A. § 6086(a)(1).

Taking into account the imperviousness of the array and the road and the steepness of the site, the Petitioner has not produced sufficient facts, based on testimony and evidence, for the Commission to find that this project will not cause unreasonable soil erosion or reduction in the

capacity of the land to hold water so that a dangerous or unhealthy condition may result in accordance with 10 V.S.A. § 6086(a)(4).

Taking into account the imperviousness of the array and the road and the steepness of the site, The Petitioner has not produced sufficient facts, based on testimony and evidence, for the Commission to find that this project will not have an undue adverse impact on water purity and the natural environment in accordance with 30 V.S.A. § 248(b)(5).

For all of the above reasons the Project should be denied a CPG.

Buffers for Wetlands and Streams

Rule 5.107(C)(7) 30 V.S.A. § 248(b)(5) 10 V.S.A. § 6086(a)(1)(E)(G)

Introduction:

Taking into consideration the impervious surface of the array and the access road, the underlying slope of the land, the orientation of the array against the contours of the land, the erodibility of the soils, the lack of structures to manage post construction stormwater effluent from both the array and the access road, logging within a mandatory forested buffer, and inadequate wetland buffers, this Project will have an undue adverse effect on the natural environment of significant wetlands and of streams.

Findings:

71. The Wetland Buffers proposed for the Class 2 Wetlands that run along Davis Road are 50 feet wide and do not take into consideration the slope of the land.
72. The Streams that run along Davis Road pass through or alongside the Class 2 Wetlands that run along Davis Road. Both types of Buffers (for Streams and for Wetlands) apply to the co-existent Streams and Wetlands that run along Davis Road.
73. Mandatory Forest Buffers for logging apply to streams and other waters and take into account the slope of the land. The Commission takes notice that the Acceptable Management Practices (AMP) for Logging are Rules adopted pursuant to 10 V.S.A. §2622(a) and (b), 10 V.S.A. §1259(f), 3 V.S.A. §801(b)(11) and 3 V.S.A. §2853(5).
74. The AMP Rules state in relevant part:

SECTION 1: INTRODUCTION [AMP Rules p. 1]

Additionally, logging operations that are in compliance with the AMPs are exempt from the discharge permit requirements in accordance with 10 V.S.A. §1259(f), the stream alteration permit requirements pursuant to 10 V.S.A. §1021(f), and the stormwater permit requirements pursuant to 10 V.S.A. §1264(d)(1)(C). Logging operations for the purposes of sustained forest management in compliance with the AMP's are also exempt from permit requirements pursuant to 10 V.S.A. §913(a) and Sections 6.01 – 6.05 of the Vermont Wetland Rules.

SECTION 4: APPLICABILITY. [AMP Rules p. 2]

The AMPs apply to all logging operations on public and private lands in Vermont regardless of the purpose of the logging. For example, logging may be conducted for forest management purposes or logging may be conducted for the purpose of clearing

land for some other type of land use, such as commercial, residential or utility development.

75. The AMP Rules for logging require a minimum forestry buffer for streams and other waters of 90 ft. on slopes of 21-30%, 110 ft. for slopes of 31-40%, and an additional 20 ft. for each 10% increase in slope above 40%. Allen PfT. p. 13, Allen RebT p. 4
76. When the site was logged in 2016, at least a 100 foot forested buffer was left intact above the wetlands and streams. Binder RebT p. 4
77. The project's Limit of Disturbance, in which logging and land clearing (stump removal, grading, mulching, seeding etc.) will occur, is inside of a mandatory forestry buffer. Binder RebT p. 4 Allen SurT p. 2
78. "Vermont wetland rules establish a minimum 50 foot protective buffer for class II wetlands." Direct quote from Barton RebT p. 5
79. Only the minimum 50 foot wetland buffer is proposed to protect the class 2 wetlands along Davis Road. Ex. RDS MS-2. Allen RebT pp.3-4
80. A 50 foot buffer on the steep slopes of this project site is inadequate to prevent undue adverse impact on the class 2 wetlands along Davis Rd. Allen RebT p.3-4

Discussion:

Rule 5.107(C)(7) requires the Petitioner to produce testimony and evidence containing sufficient facts to support a positive finding by the Commission under the 10 V.S.A. § 6086(a)(1)(E)(G) criteria in accordance with 30 V.S.A. § 248(b).

10 V.S.A. § 6086(a)(1) requires that the District Commission shall find that the development will not result in undue water pollution. In making this determination it shall at least consider, *inter alia*, the slope of the land and its effects on effluents and the availability of streams for the disposal of effluents.

The Standard 50 foot Wetland Buffers used in the Petitioner's site plan do not take into account the slope of the land. The Petitioner has not produced sufficient facts, based on evidence and testimony, for the Commission to find that, accounting for the slope of the land and its effects on effluents and the availability of streams for the disposal of effluents, the minimum 50

foot wetland buffer is adequate to protect the natural environment of the wetlands from undue adverse water pollution, both during and after construction.

Mandatory Forested Buffers for logging apply to streams and other waters and take into account the slope of the land. The Petitioner's plan to log and clear land inside a mandatory Forestry Buffer is a violation of applicable mandatory AMP Rules.

The Petitioner has not produced sufficient facts, based on evidence and testimony, for the Commission to find, taking into consideration the impervious surfaces of the array and the access road, the underlying slope of the land, the orientation of the array against the contours of the land, the erodibility of the soils, the lack of structures to manage post construction stormwater effluent from both the array and the access road, logging within a mandatory forested buffer, and inadequate wetland buffers, that this Project will not have an undue adverse effect on the natural environments of significant wetlands and of streams.

For all the above reasons this project should be denied a CPG.

Greenhouse Gas (GHG) Emissions

30 V.S.A. § 248(b)(5)

Rule 5.107(C)(7)

Introduction:

The Commission does not automatically assume that all solar projects reduce or offset greenhouse gas emissions. Rather, the Commission considers the GHG impacts of particular projects as they come before the Commission.

Findings:

81. The Petitioner presents a numerical estimate for the CO₂ emissions that will be offset by the electrical output of the solar array. Staskus PfT at 14 line 6.
82. The Petitioner does not present a numerical estimate of GHG emissions caused by construction (including manufacture and transportation of materials). Binder RebT p. 5
83. This project is not a typical installation and the construction emissions will not be typical. Binder RebT p. 5
84. The Petitioner does not present a numerical estimate of GHG emissions caused by decommissioning. Binder RebT p. 5
85. Forests and forest soils sequester and store carbon. Allen PfT p. 14.
86. This project will result in 11.6 acres of deforestation.
Staskus affidavit 4/19/22 as modified by Staskus RebT p. 2
87. The Petitioner does not present a numerical estimate for the effect of deforestation on GHG emissions. Binder RebT p. 5
88. The Petitioner's estimate of greenhouse gas emissions to be reduced or offset by this project is not credible because the estimate does not account for increased GHG emissions caused by the manufacture and transportation of materials, excavation, construction, decommissioning, and most importantly, the effect on GHG emissions caused by 11.6 acres of deforestation. Binder RebT p. 5

Discussion:

The Petitioner's estimate of greenhouse gas emissions to be reduced or offset by this project is not credible because the estimate does not account for increased GHG emissions caused by the manufacture and transportation of materials, excavation, construction, and decommissioning, and most importantly, does not account for the reduced offset of GHG emissions caused by the loss of carbon sequestration and storage which will occur after 11.6 acres of deforestation.

The Petitioner has not produced sufficient facts, based on evidence and testimony, to support a positive finding by the Commission [Rule 5.107(C)(7)] under the Greenhouse Gases criteria specified in 30 V.S.A. § 248(b)(5).

A project that reduces or offsets GHG emissions promotes the general good of the State of Vermont. The Commission weighs that benefit against adverse effects on other 30 V.S.A. § 248(b)(5) criteria, with due consideration given to certain 6086(a) criteria and PAS.

The Petitioner has failed to establish as a fact, with testimony and exhibits, that the project provides a benefit by reducing or offsetting GHG emissions. A CPG for this project should be denied because there is no benefit for the Commission to weigh against the undue adverse impacts of this project on Orderly Development and the Natural Environment.

Prime Agricultural Soils

30 V.S.A. § 248(b)(5) 10 V.S.A. § 6086(a)(9)(B) Rule 5.107(C)(7)

Introduction:

The soil erosion, water purity, natural environment, and water pollution issues raised elsewhere in this Brief are applicable to Prime Agricultural Soils (PAS) but are not further pursued in this section.

Findings:

89. A portion of the site area disturbed during installation is on soils identified by Natural Resources Conservation Service as PAS. Staskus PFT. P. 5 Ex. RDS MS-2.

90. Page 2 of AAFM's 9/9/22 Revised Comments:

Conditions to Mitigate Impacts on Primary Agricultural Soils.

AAFM requests that any CPG issued in this matter include the following conditions, which are intended to ensure *inter alia* that excavated soils are stockpiled during construction, stored appropriately on site, and replaced at decommissioning; that all infrastructure is removed; and that impacts from soil compaction are minimized:

- 1) For areas of soil disturbance of PAS on the Project site and to the extent consistent with other more specific conditions set forth herein, the CPG Holder shall comply with the AAFM Act 250 Procedure: Reclamation of Vermont Agricultural Soils (rev. Oct.30, 2014) ("AAFM Guidelines"), except as otherwise provided in more specific conditions herein, currently available online at: [broken link removed] The CPG Holder shall also comply with the AAFM Guidelines with respect to sequencing for returning soils at the conclusion of construction or project decommissioning.
- 2) Except for grading to create the access road, the Project shall not include any grading of primary agricultural soils. Any fill or gravel used for roads or staging areas shall be separated from native soils by a suitable barrier such as geotextile fabric.
- 3). Soil shall not be stockpiled on slopes greater than 15%.
- 4). In areas of tree cutting, if stumps are to be removed, stump removal will occur simultaneously with tree cutting and other construction activities using light equipment such as a skid steer or small excavator. Grubbing in the proposed tree cutting/grubbing area will minimize soil disturbance to include only what is necessary to effectively remove tree stumps and woody debris to construct the Project. Tree stumps that are removed will be shaken clean over the area from

which they were removed. Stumps will either be chipped or ground up. Chips and ground wood will be used to fill any minor depressions from areas from which trees were removed, widely dispersed so as not to form significant piles, and/or transported off the site for proper disposal. Wood in any form shall not be piled on the site after construction is complete.

...

- 7). As provided in 30V.S.A. § 248(t), notwithstanding any contrary provision of the law, primary agricultural soils as defined in 10 V.S.A. § 6001 located on the site of a solar electric generation facility approved under this section shall remain classified as such soils, and the review of any change in use of the site after construction of the facility shall treat the soils as if the facility had never been constructed.

91. The Petitioner has agreed to abide by the conditions requested by AAFM. Staskus PFT. p. 5
92. The Petitioner plans to disturb the southern area of PAS by burying it under up to 9 feet of fill rather than stockpiling it, in violation of the requested condition that disturbed PAS be stockpiled. Ex. NI MB-50. Binder SurT p. 6
93. PAS, compacted and anaerobic under 9 feet of fill, cannot be meaningfully reclaimed at decommissioning. Binder SurT p. 6
94. No suitable barrier, such as geotextile fabric, has been specified to separate native soil from fill, in violation of the requested condition that "any fill or gravel used for roads or staging areas shall be separated from native soils by a suitable barrier such as geotextile fabric." Ex. RDS MS-2
95. The Petitioner plans to stockpile PAS on slopes greater than 15%, in violation of the requested condition that "soil shall not be stockpiled on slopes greater than 15%." Ex. NI MB-41
96. The site plan has only one PAS storage area, but two PAS storage areas are required in order to comply with regulations [Reclamation Guidelines for Agricultural Soils] about the sequencing of the return of soil horizons at decommissioning. Binder SurT p. 6
97. Permanent stormwater management structures such as (but not limited to) berms, swales, level spreaders, stone dams, culverts, or detention ponds must be built on PAS in order to avoid severe erosion of PAS. Binder SurT p. 8, Ex. NI MB-40

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98. The Petitioner does not comply with Rule 5.107(C)(5)(e) and fails to show what, if any, permanent stormwater management structures will be built on PAS or anywhere else.
Binder SurT p. 8

Discussion:

PAS has regulatory constraints that are in addition to the constraints on all other soils. The Project as proposed is incompatible with several of AAFM's reasonable requested conditions.

The Petitioner's testimony and exhibits do not contain sufficient facts to support a positive finding by the Commission [Rule 5.107(C)(7)] under the Prime Agricultural Soils criterion specified in 30 V.S.A. § 248(b)(5).

Regarding the northern area of PAS, if the Petitioner builds the (as yet unspecified) stormwater management structures on PAS that are essential to prevent unreasonable erosion caused by effluent runoff from the array on steep slopes, the Petitioner will be in violation of the AAFM condition: "Except for grading to create the access road, the project shall not include any grading of primary agricultural soils." It is not plausible that stormwater management structures can be built on PAS without grading the soil.

Regarding the southern area of PAS, the Petitioner's plans will violate AAFM conditions by burying PAS under fill rather than stockpiling it for reclamation, stockpiling PAS on greater than 15% slopes, building only one stockpile for two different horizons of PAS, and not specifying a barrier to separate PAS from fill.

For all of the above reasons this project should be denied a CPG.

Natural Environment

30 V.S.A. § 248(b)(5)

Introduction:

The forest to be cleared will create new forest borders on the remaining forest that surrounds the Limits of Disturbance. This will introduce invasive species into the remaining forest (both on the project parcel and abutting properties) and reduce the forestry potential of the remaining forest. It will adversely affect the Vernal Pool Complex and its special forest ecosystem which are adjacent to the project site on Neighbor Intervenor's land.

The Project site is a wildlife crossing area and the wildlife fence will interfere with wildlife movement.

Findings:

99. Clearing 11.6 acres of forestland will facilitate the advance of non-native invasive plants, especially honeysuckle, buckthorn, barberry, and chervil, along with non-native grass sown under the solar array. Allen PfT p.15
100. This proposed development will create a new forest edge for us and lead to invasive species growing into our forest, including our vernal pool complex.
Binder PfT p. 3. Allen PfT pp. 13-14
101. Some of the affected forest, including the Vernal Pool Complex, is on PAS contiguous with the northern area of PAS on the project site. Ex. RDS MS-2 filed 6/24/22.
102. Uplands adjacent to vernal pools should be dominated by areas of uncompacted leaf litter, coarse-woody debris, and closed canopies for maintaining a suitable forest floor microclimate. An intact forested buffer of 633 ft. from the edge of the vernal pool depression is required to protect the Amphibian Life Zone, which is forested habitat to protect the average migration distance from the vernal pool of wood frogs, the eggs of which have been identified in our vernal pool. Allen PfT p13.
103. The once-common breeding birds whose numbers are in decline and that depend on early successional habitat and are present in the Davis Road neighborhood include Ruffed Grouse, Woodcock, Chestnut-sided and Golden-winged Warbler, Veery, Eastern Towhee, and Kingbird. Other species dependent on this habitat include snakes, turtles, native bees and

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other beneficial insects, and butterflies. Bobcat, bear, fisher, weasels coyote, and fox use this early successional habitat at certain times of the year, for its abundance of small prey and soft mast. Allen PFT p.9

104. Some of the affected forest, including the Vernal Pool Complex, is on PAS contiguous with the northern area of PAS on the project site.

Ex. RDS MS-2 filed 6/24/22

105. Neighbor Intervenor's forest is working forest land and is enrolled in Vermont's Use Value Appraisal program. Binder PFT p. 1.

Discussion:

30 V.S.A. § 248 (b)(5) refers to the criteria specified in 6086(a)(1) through (8) and (9)(K), impacts to primary agricultural soils, and greenhouse gas impacts. It does not refer to 6086(a)(9)(B) and 6086(a)(9)(C).

The language in 6086(a)(9)(B)(i) and 6086(a)(9)(C)(i) is quoted here because it so well describes the adverse effect of this project on the Natural Environment of forests: This project will *significantly interfere with or jeopardize the continuation of agriculture or forestry on adjoining lands or reduce their agricultural or forestry potential*. In particular, this project will reduce the forestry potential on adjoining lands by unleashing invasive species into the forests on adjoining lands.

Furthermore, reduction of forestry potential on working forest land will inevitably lead to reduction in the harvesting of forestry products, a natural resource. The Use of Natural Resources is a criterion under 30 V.S.A. § 248 (b)(5).

The 100 foot buffer accorded the vernal pool complex is inadequate to protect the Amphibian Life Zone surrounding the vernal pool complex.

The Project site is in a habitat block, contiguous with core habitat, and is a wildlife crossing area. Fragmentation of the habitat block and the wildlife fence will hinder wildlife movement, including the movement of bears to their spring feeding sites in the forested seeps.

The degradation of the Natural Environment caused by this development will have adverse effects on a much larger area than the project site. The cumulative adverse effects of this project on multiple criteria constitute undue adverse effects on the Natural Environment.

For all of the above reasons this project should be denied a CPG.

Randolph's Preferred Sites Letters**Introduction:**

The Randolph Planning Commission reviewed this project in June 2021. The Town Plan's strict prohibition of siting an Energy Facility on slopes greater than 25% was not discussed. No criteria other than aesthetics were considered. A Preferred Sites Letter was issued. Later that month, the Selectboard considered the project. The Selectboard had no process or criteria for issuing a Preferred Sites Letter. Selectboard Chair Brassard, whose father was negotiating the sale of the property to the Petitioner, participated in the meeting and argued for accepting, without further review, the Planning Commission's determination that the site was a preferred site. The Selectboard signed the Preferred Sites Letter.

In October 2021, Neighbor Intervenor alert alerted the Planning Commission to the slopes prohibition in the Town Plan and requested the Planning Commission rescind its Preferred Sites Letter. The issue was discussed at the December 2021 Planning Commission meeting, there was unanimous agreement that some of the array was on a 40% slope, and it was agreed at the meeting to seek a legal opinion from the Town attorney.

A week later the Planning Commission, in violation of Vermont's Open Meeting Laws, voted by email not to rescind the Preferred Sites Letter; in return for which the Petitioner assured the town that the panels would be rearranged and would not be on steep slopes.

The Petitioner obtained a survey of the site in January 2022, rearranged the array, submitted a revised site plan to the PUC in February 2022, and asserted that none of the rearranged array was on slopes greater than 25%. The Petitioner also asserted that the revised site plan avoids the Town Plan's steep slope prohibition by placing the solar panels only at locations within the limits of disturbance that are less than 25% slope.

The Petitioner's evidence (a ground based survey) that the array is not on steep slopes is not credible and the Petitioner admits that a LiDAR slope layer would reveal that some of the array remains on steep (>25%) slopes.

Regardless of whether the array itself is or is not on steep slopes, the project is not in compliance with the Town Plan. There is nothing in the Town Plan that suggests that the prohibition of Energy Facility Development on Steep Slopes (>25%) applies to only the solar array of an energy facility.

The distinction between development of the array on steep slopes, and development of the remainder of the energy facility on steep slopes is an artificial distinction invented by the Petitioner and Randolph Planning Commission Chair Holt in private and voted on illegally by the Planning Commission in December 2021.

The Preferred Site Letters from the Town of Randolph are tainted by the Petitioner's misleading presentations to both the Planning Commission and Selectboard, tainted by violations of Randolph's Conflict of Interest Policy, tainted by violations of Vermont's Open Meeting Laws, and tainted by the lack of process or criteria for issuing the Letters. Planning Commission Chair Holt was neither fair nor impartial in the conduct of his official duties. The Preferred Sites Letters from the Town of Randolph deserve no weight.

Findings:

106. Chapter 2, Land Use Policy G (Aesthetics) of the Randolph Town Plan, was the Randolph Planning Commission's only criterion when it issued its Preferred Sites Letters in June 2021. Binder PFT p.6. Ex. NI MB-9 pp. 1-5

107. There are many other criteria in the Town Plan relevant to this project, including a steep slopes prohibition, that were not considered by the Randolph Planning Commission in June 2021. Binder PFT p.6, Ex. NI MB-10

108. In June 2021, when the Project came before the Randolph Selectboard, Perry Armstrong [a member of both the Selectboard and the Planning Commission] was asked to describe the process at the Planning Commission. He replied:

“so we looked at like, so OK so who's it gonna be visible to, where can it be seen from, and so that seems to be the key piece of a lot of these projects, is you know, what's it visible to, you know could panels be reflecting, you know, reflecting light back against other properties you know down the road away from the panels somebody 5 miles away or 3 miles away on the other side of the hill see something here. So those are all the things that are taken into consideration and that's how the Gifford project was put together too. So you know these are the most recent projects, this one here and the Gifford project and we just, you know, we just all looked at the map and kind of you know figured out who was around it and felt that OK if we think it's an OK site we'll give it our blessing...”

Selectboard Vice Chair Satcowitz responded: “so the thing, the aspect of this that you focused most on was really the visibility of the site?” Mr. Armstrong elaborated:

“that seems to be the priority, that was what the conversations were, you know, every time we had these conversations in the Planning Commission we were trying to come out with whether we do preferred sites or no preferred sites, it was always who’s gonna see it and where are they gonna see it from. You know, is it gonna be visible on the roadside, is it gonna be visible or is it gonna be glaring in some neighbor’s eyes you know is it gonna deter their or take away from their view shed, those are a lot of considerations that were talked about for that 2.5 years. And it seemed like visibility of a project was the most prevalent problem. And, you know, were they gonna cut trees and make it more visible for somebody else’s project so, [correcting himself] or somebody else’s property. So I mean we’ve been very conscious from the Planning Commission standpoint to try to, you know if somebody comes with a project, you know, so far they’ve all taken all those things into consideration and I think that they’ve, you know, they’ve [pause] everybody who’s come so far has done a good job of taking into consideration the surrounding you know scenic vistas, neighbors, those kind of things.”

Ex. NI MB-9 p. 3-4

109. In June 2021, when the Project came before both Randolph’s Planning Commission and Selectboard, Selectboard Chair Brassard’s father owned the Project parcel and was negotiating the sale of the property to the Petitioner.

Binder PfT p. 6.

110. In June 2021, Planning Commission member Paul Rae was brokering the sale of the project parcel to the Petitioner. He violated the Town’s Conflict of Interest Policy and participated in the June 2021 Planning Commission meeting. Binder PfT pp. 6-7, Ex. NI MB-11.

111. Randolph Selectboard Chair Brassard, violating the Town’s Conflict of Interest Policy, participated in the June 2021 Selectboard meeting. She argued for “Rubber Stamping” the decision of the Planning Commission to issue a Preferred Sites Letter.

Binder PfT p. 7, Ex. NI MB-13 p. 3, Ex. NI MB-11.

112. In June 2021 the Selectboard had no process or criteria for issuing Preferred Sites Letters.

Ex. NI MB-13 pp. 1-4

113. At the June 2021 Selectboard meeting, Selectboard member French stated: “Whether or not I vote for this tonight I will vote no on all future ones [preferred sites letters] unless we have a process that shows that we actually considered something.” Ex. NI MB-13 p. 4.

114. In October 2021, Neighbor Intervenor sent a letter to the Randolph Planning Commission pointing out that the Preferred Sites were issued in violation of the Town Plan, and requesting that it rescind its Preferred Sites Letter at its next meeting (which was Dec. 7, 2021 because the November meeting was cancelled). Binder PfT p. 8 Ex. NI MB-14
115. The day after receiving Neighbor Intervenor's letter, Josh Jerome [Randolph Zoning Administrator] requested the Petitioner overlay a 25% slopes layer on the site plan. Later that day the Petitioner replied with a preliminary site plan including the requested slope overlay. Ex. NI MB-30 p. 8-9. Ex. NI MB-33.
116. The above mentioned preliminary site plan with a slope overlay does not include the entire Limits of Disturbance, but does clearly show the array is on steep slopes greater than 25%. Ex. NI MB-33. Ex. NI MB-39 pp. 15-21.
117. At the December 7, 2021 Planning Commission meeting, Neighbor Intervenor's struggled to convince skeptical members of the Planning Commission that the project site was too steep. The existence of the above mentioned preliminary site plan with a slope overlay was not revealed at the December 7, 2021 Planning Commission meeting. Ex. NI MB-30 p. 9.
118. The day before the December 7, 2021 Planning Commission meeting, Chair Holt wrote to Martha Staskus:
- “Can you give me the current status? Has the project gone out for public comment and if so has Norwich Solar received any comments? Is the project still on track for PUC approval?”
- Ms. Staskus responded the same day:
- “There were numerous documents filed by the Allen/Binders. I'll send those next. If the Allen/Binders request a hearing this will be a much slower process as they will need to file testimony and there are a number of legal back and forths at the PUC that would then occur.”
- Ex. NI MB-30 p. 7
119. At the December 7, 2021 Planning Commission meeting, swayed by the irrelevant legal arguments of the Petitioner's lawyer that were forwarded to him, Chair Holt claimed the Town had no authority to have a steep slopes prohibition. He pointed out that the PUC does not consider steep slopes as a disqualifier for solar projects.
- Ex. NI MB-29, Ex. NI MB-30 p. 1, Ex. NI MB-27 p7.

120. At the December 7, 2021 Planning Commission meeting the Neighbor Intervenor were questioned several times about their dealings with the PUC. Mr. Binder replied:

“We probably won’t need to respond [to the PUC] if the [preferred sites] letter is rescinded because I think that’ll force them [Petitioner] to come back for, you know, with a new project or new reconfiguration and then come back to you to get another approval. So yes it does, I don’t think we would bother asking for an evidentiary hearing if you rescind the Letter”

Ex. NI MB-30 p.7

121. At the December 7, 2021 Planning Commission meeting Mr. Binder passed out a paper copy of the Petitioner’s Elevation Drawing [RDS MS-3] which unambiguously showed part of the solar array on a 40% slope. It was then unanimously agreed that the solar array was on greater than 25% slopes. There was discussion about whether to rescind the Preferred Sites Letters immediately or whether to allow the Petitioner to prove that the array was not on steep slopes over 25%. Binder PfT pp. 8-9 Ex. NI MB-30 pp.2-3, 7-8. Ex. NI MB-7 pp. 1-2. Ex. RDS MS-3 filed 8/8/21

122. At the December 7, 2021 Planning Commission meeting it was ultimately agreed to seek an opinion from the Town attorney explaining how the Planning Commission might rescind its Preferred Sites Letter and whether the Town might incur a liability for doing so. Nothing else was agreed on the matter of rescinding the Preferred Sites Letter.

Binder PfT pp. 8-9 Ex. NI MB-30 pp. 4-5, 7-8. Ex. NI MB-7 pp. 1-2

123. Chair Holt knew that Neighbor Intervenor had a Dec. 14, 2021 deadline to request an Evidentiary Hearing at the PUC and he created a false sense of urgency to resolve the issue in favor of the Petitioner before Dec 14. There was no urgency for the Planning Commission to not rescind the Preferred Sites Letter because doing nothing would have the same effect as voting to not rescind the Letter.

Binder PfT p. 11. Ex. NI MB-28 p. 5.

124. Chair Holt wrote in an email that if the Planning Commission did not vote [to not rescind the Preferred Sites Letter] before December 14, Neighbor Intervenor might be prompted to request an evidentiary hearing at the PUC. Ex. NI MB-28 pp. 8-9

125. After the December 7, 2021 Planning Commission meeting Chair Holt negotiated in private with the Petitioner and invented a "Notice of Discrepancy".
Binder PFT p. 9, Ex. NI MB-7, Ex. NI MB-16 Ex. NI MB-28
126. Planning Commission Chair Holt ignored the advice from the Town Manager to base any letter to the Petitioner on the advice from the Town attorney.
Ex. MB-28 p. 2 Binder PFT p. 11
127. In response to the Notice of Discrepancy, the Petitioner assured the Planning Commission that a survey would be obtained and the array reconfigured so that it would not be on slopes greater than 25%. Ex. NI MB-16 Binder PFT p. 9
128. The Planning Commission, violating Vermont's Open Meeting Laws, voted by email on December 14, 2021 to accept the assurances of the Petitioner and to not rescind the Preferred Sites Letter. Binder PFT p. 9. Ex. NI MB-28
129. Chair Holt did not wait for the Town attorney's opinion (which arrived on December 19, 2021) before voting on December 14, 2021 to not rescind the Preferred Sites Letter.
Ex. NI MB-7 Ex. NI MB-17 p.87. Ex. MB-28 pp. 4, 8, 9.
130. Planning Commission Chair Holt sought approval of his negotiations with the Petitioner from Selectboard Chair Brassard who he knew to have a conflict of interest in the matter.
Binder PFT p. 11. Ex. NI MB-28 p. 8-11
131. In reply to Planning Commission Chair Holt's request for approval of his negotiations with the Petitioner, Selectboard Chair Brassard wrote back to him: "I am fine with this but can't be the one to approve sending!" Ex. NI MB-28 p. 9-10
132. Planning Commission Chair Holt was biased, in favor of the Petitioner, in the conduct of his official duties on the matter before him. Binder PFT pp. 10-11.
133. After the illegal Planning Commission vote on December 14, 2021, Neighbor Intervenor's requested the Randolph Selectboard rescind its Preferred Sites Letter at its January 2022 meeting. Intervenor's letter to the Selectboard explained the issues of the Town Plan's steep slopes prohibition and the Open Meeting Law violations. Ex. NI MB-7

134. At the January 2022 Selectboard meeting Chair Brassard still had the same conflict of interest that she had at the June 2021 Selectboard meeting.
Binder PFT p. 12
135. At the January 2022 Selectboard meeting Vice Chair Satcowitz said: "I do agree that the process, at best, was flawed and at worst has been illegal with some of the open meeting laws violations..." and Selectboard member Ayers said "I do have a concern, and it's almost an overarching one, about the potential violation of open meeting laws here and way the decision was made." Binder PFT pp. 12-13.
136. At the January 2022 Selectboard meeting, Jim Merriam described how his company had filed a letter accepting as a condition of their permit that they will not place solar panels on slopes greater than 25%. He emphasized repeatedly that the Public Utilities Commission will enforce that condition. Ex. NI MB-12 p.1
137. At the January 2022 Selectboard meeting the slopes issue and the Open Meeting Law violations were entangled. Chair Brassard's conduct of and participation in the meeting influenced the outcome and prevented the slopes issue from being voted. She asked, four times, for more information about the Planning Committee's actions and wanted to hear their side of the story. Planning Commission and Selectboard member Armstrong was in attendance, and declined twice when asked to comment on the Planning Commission's actions. The Selectboard, tabled the discussion of both topics (slopes and open meeting law) until the February 2022 meeting, and the Preferred Sites Letter was not rescinded.
Binder PFT p. 13. Ex. NI MB- 12 pp. 1-4
138. The Selectboard continued its consideration of the slopes issue at the February Selectboard meeting. Ex. NI MB-12 p. 3
139. The cross-section of the access road on all six site plans is misleading and incompatible with its location on steep terrain. Ex. NI MB-50
140. Paper copies of the second Site Plan (revision date 2/9/22, filed 2/16/22), including its misleading cross-section of the access road, were passed out at the February 2022 Selectboard meeting at which there was a long discussion about what constitutes development of a road. Ex. NI MB-19, Ex. RDS MS-2 filed 2/9/22
141. At the February 2022 Selectboard meeting, Selectboard member Ayers said:

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“Brooke has just asked the question that I was going to ask... and its relative to the access road. We’ve been focused on the siting of the solar arrays, but we haven't really addressed the question of the access roads and I'm wondering if in communications with the PUC if Norwich intends to commit to not putting the access road on a slope of 25% or more?”

Brendan Malley, speaking for the Petitioner, spent 4 minutes not answering the question.

Referring to the PUC process, he did say:

“speaking based on my personal experience with other solar projects, there is a preference for using existing access rather as opposed to putting in new access. This particular property has several existing access ways”

Ex. NI MB-12 p. 3

142. At the February Selectboard meeting Vice Chair Satcowitz, apparently believing what he had been told by Mr. Malley, said:

“I don’t know where you draw the line between it being development and not development. ... I know that this is an existing road and that any changes are going to be rather modest”

The discussion then ended without the Selectboard taking action. The Preferred Sites Letter was not rescinded. Ex. NI MB-19. Binder PFT p. 14-15.

143. At the June 2021 Planning Commission and Selectboard meetings, the December 2021 Planning Commission meeting, and the January and February Selectboard meetings, the Petitioner misled the Town by claiming that the access road was an existing road that would be top dressed with gravel, and that the PUC preferred projects with existing roads. Binder PFT pp. 14, 16-17.

144. Regarding the scale of the project (which at the time had a Limits of Disturbance of 11.9 acres), in June 2021 the Petitioner misled the Planning Commission by asserting:

“The array takes up about 3 acres and about 5-6 acres of total associated footprint when you include shade tree cuts, roads and fencing”,

and misled the Selectboard by asserting:

“it utilizes between 2.5 and 3 acres of solar array footprint and somewhere between 4 and 5 acres of total area including the area around the array where we manage vegetation growth so the array isn’t shaded and to account for things like access and a temporary laydown during construction.”

Binder PfT p. 15

145. At the June 2021 Planning Commission and Selectboard meetings, the Petitioner misled the Town about soils and wetlands. Binder PfT pp. 15-16 Ex. NI MB-9 p. 5

146. In the Petitioner's communications with the Town in October and November of 2021, the Petitioner misled the Town regarding the Law. Ex. NI MB-29. Ex. NI MB-33.

Discussion:

The Preferred Site Letters from the Town of Randolph are tainted by the Petitioner's misleading presentations to both the Planning Commission and Selectboard, tainted by violations of Randolph's Conflict of Interest Policy, tainted by violations of Vermont's Open Meeting Laws, and tainted by the lack of process or criteria for issuing the Letters. Planning Commission Chair Holt was neither fair nor impartial in his official duties. The Preferred Sites Letters from the Town of Randolph deserve no weight.

Witness Credibility

Introduction:

Ms. Barton presents testimony and exhibits that are not credible. Where her testimony conflicts with Neighbor Intervenor's testimony, it deserves very little or no weight.

Findings:

147. Ms. Barton asserts that the facility is generally sloped to the southeast.

Ex. RDS DB-2 p. 4.

148. Ms. Barton's stream assessment involved both a remote review of the USGS topographic map, Vermont Hydrography Dataset (streams, rivers, and waterbodies), LiDAR derived topography, and field investigation in June 2021.

Ex. RDS DB-2 p. 6

149. In May 2022 Ms. Barton returned to the site and found Neighbor Intervenor's vernal pool complex and additional Class 2 wetlands in the project area that she had missed in her initial testimony and exhibits.

Ex. RDS MS-2 filed 6/24/22, Barton RebT p. 4

150. After her May 2022 site visit, Ms. Barton continues to assert that all streams have been identified in the Project area. Barton RebT p. 4

151. After her May 2022 site visit, Ms. Barton continues to assert that there is no wetland in the area of the log landing. Barton RebT p. 4

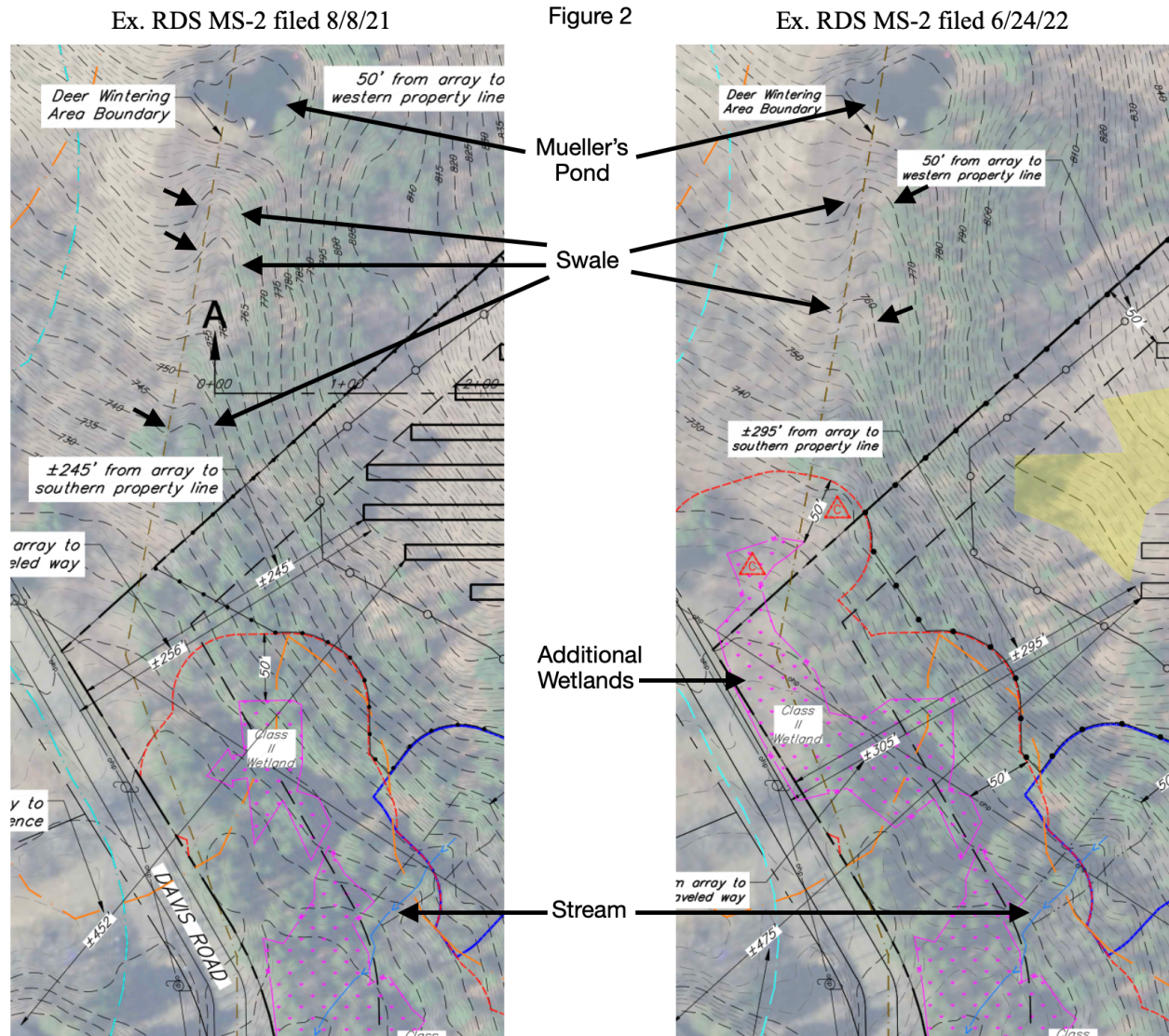
152. Ms. Barton asserts that there were no signs of bears identified in the Project area on her site visit. No potential black bear spring feeding wetlands were identified on her site visit.

Ex. DB-2 pp. 8-9

Discussion:

Ms. Barton asserts that the facility is generally sloped to the southeast, but the predominant slope is to the west and southwest. This is not a substantive issue, but it speaks to the reliability and credibility of Ms. Barton's testimony. See Figure 3.

Ms. Barton's stream assessment involved a review of LiDAR derived topography, but she overlooked a pond and swale that are very obvious on the LiDAR topography of the site plan. [See Figure 2] A perennial stream runs down the swale and into the class 2 wetlands.



Ms. Barton overlooked a vernal pool complex, contiguous with the limits of disturbance, in her initial June 2021 site visit. She found it on her May 2022 site visit.

Ms. Barton overlooked Class 2 wetlands along Davis Rd. in her initial June 2021 site visit. The wetlands she overlooked are contiguous with the wetlands she did find and delineate. When she delineated the perimeter of the wetlands that she initially found in June 2021, she must have walked through the contiguous wetlands that she overlooked.

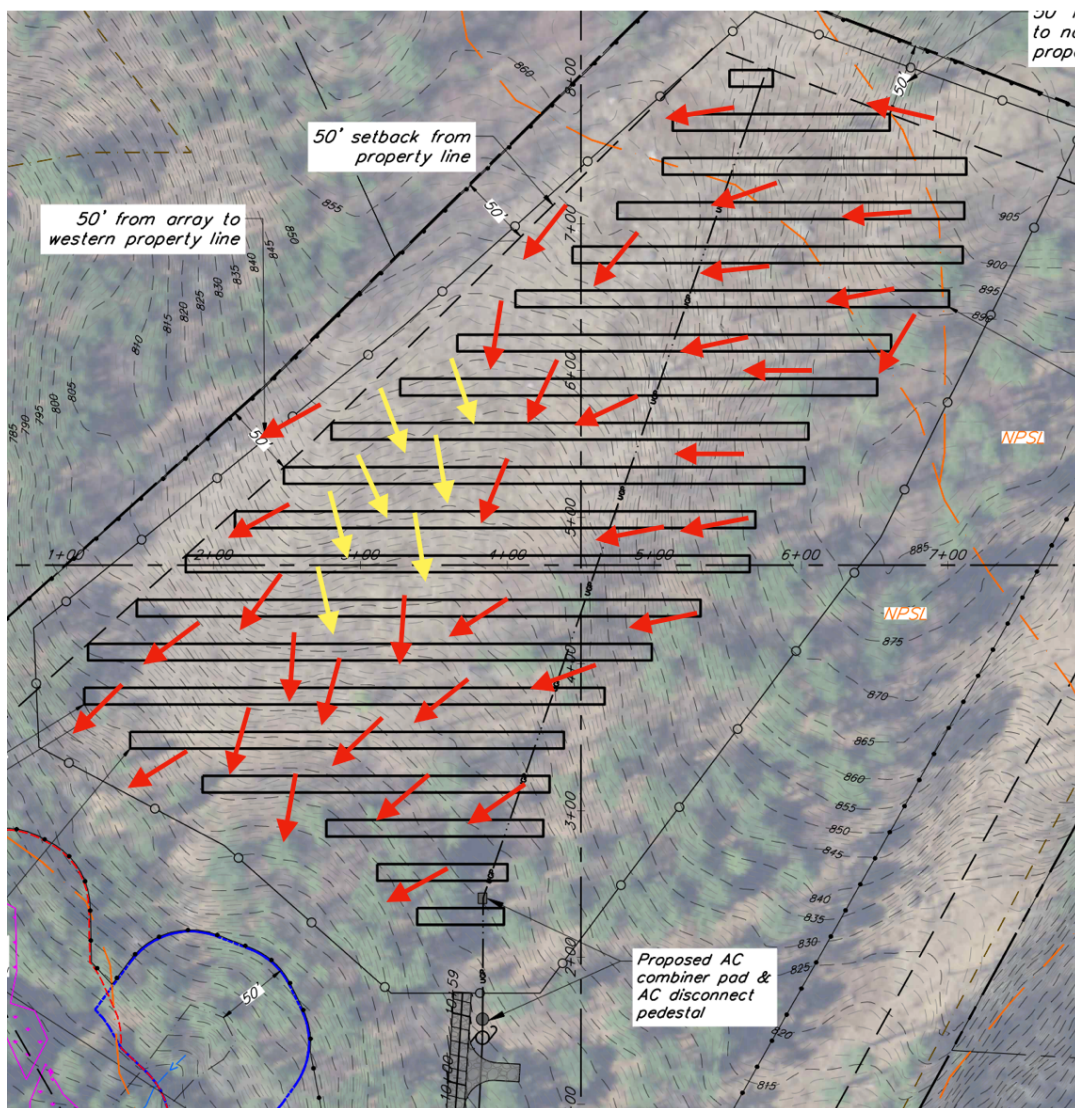
After her May 2022 site visit, Ms. Barton continues to assert that she did not overlook a perennial stream. The stream was flowing on March 25, 2021 and was witnessed by participants of the Site visit. Presumably the stream was not flowing in May 2022 or June 2021 when

Ms. Barton did her wetland delineations, or she would have noticed it. Neighbor Intervenor Allen depicted the overlooked stream in exhibit NI JA-13.

After her May 2022 site visit, Ms. Barton continues to assert that the log landing [staging area and adjacent road on the site plan] is not a wetland. The presence of obligatory wetland plant species growing on the site indicates that she is incorrect.

Ms. Barton asserts that there were no signs of bears identified in the Project area on her site visit, and she identified no potential black bear spring feeding wetlands. There are seeps in the wetlands and stumps from the 2016 logging have been torn apart by bears grubbing for insects.

Figure 3 RDS MS-2 filed 8/8/21



Arrows point downhill.

The predominant slope of the terrain is west and southwest (red arrows).

Conclusion

This project is not entitled to a CPG because of its undue adverse impact on Orderly Development in the Region, because of the undue adverse impact it would have on Water Purity and the Natural Environment, and because it has no demonstrable beneficial impact on Greenhouse Gasses.

The Commission should deny this project a CPG because it violates the Orderly Development criterion. This project should also be denied because it requires permanent stormwater management structures and an Operational Stormwater permit. Without proper engineering this development on steep slopes will cause undue adverse impact on many components of the Natural Environment. The precedent of pretending solar panels are pervious, which makes sense when “only lands with good exposure and gentle slopes make sense for solar development”¹ should not be extended to this project because it is too steep.

/s/ Joan Allen

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¹ TRORC Plan page 242 is on page 257 of Exhibit MB-3 submitted May 6, 2022