

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 21-2939-NMP

Petition of Randolph Davis Solar LLC for a	)	
certificate of public good, pursuant to 30 V.S.A.	)	January 12, 2023
§§ 248 and 8010, authorizing the installation and	)	
operation of a 500 kW group net-metered solar	)	<i>Filed via ePUC</i>
electric generation system in Randolph, Vermont	)	

VERMONT AGENCY OF NATURAL RESOURCES’S BRIEF

The Vermont Agency of Natural Resources (“Agency”), by and through undersigned counsel and pursuant to 30 V.S.A. § 248(a)(4)(E), submits this brief. On September 9, 2022, *pro se* intervenor Michael Binder submitted prefiled surrebuttal testimony in this proceeding. A portion of Mr. Binder's testimony, entitled “Impervious Precedent,” addressed his concerns about the Agency’s determination that elevated solar panels are generally not impervious surfaces for purposes of making stormwater permitting decisions at solar facilities. See Binder spf. at 4-6. On October 31, 2022, the Hearing Officer issued a Procedural Order Requesting Information seeking the Agency’s “perspective . . . on the issues raised by Mr. Binder.” Order of Oct. 31, 2022 at 1. This brief responds to the Hearing Officer’s information request.

The stormwater discharge permitting issues raised by Mr. Binder fall within the Agency’s authority to decide

Mr. Binder takes issue with certain Agency determinations related to stormwater permitting requirements and process. Those determinations, as well as any other issue related to stormwater permitting fall squarely and exclusively within the Agency’s authority granted by the Vermont legislature.

The legislature explicitly tasked the Agency with developing rules to manage stormwater runoff, which resulted in the adoption of the Stormwater Permitting Rule. See 12 V.S.A. § 1264(f); Vt. Admin. Code 16-3-506 (“Stormwater Rule”):22-102. The Agency’s interpretation of the Stormwater Rule is granted a deferential standard of review that may be overturned only if the “interpretation of its own promulgated regulation . . . exceeds the authority granted under the state enabling statute, . . . conflicts with past agency interpretations of the same rule, . . . results in unjust, unreasonable or absurd consequences, or . . . demonstrates compelling indications of error.” *In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 23, 214 Vt. 73, 88, 251 A.3d 899, 912 (2021).

The legislature has made clear that stormwater permitting determinations are to be made only by the Agency. The Agency is also generally vested with the authority to interpret the Stormwater Rule’s definition of “impervious surface.” See Stormwater Rule § 22-201(23). While the Hearing Officer has noted that the Commission’s consideration of the soil erosion criteria is not “limited solely to whether a facility will comply with Vermont’s stormwater regulations,” Mr. Binder’s testimony focuses only to a criticism of the Agency’s determinations about such project compliance. Order of June 23, 2022 at 5. The Agency’s interpretation of the Stormwater Rule and its permitting decisions related to this specific project are not issues for the Commission to review as part of its related but distinct review of project effects under the § 248(b)(5) criteria. The limits on Commission review of collateral Agency permitting decisions at the Certificate of Public Good (“CPG”) application review stage have recently been recognized by the Commission.

In *Application of Michael Hespos*, case number 20-3422-NMP, the full Commission presided over an evidentiary hearing where a *pro se* intervenor sought to call into question the underlying basis for Agency issuance of a stormwater permit related to a proposed wind facility. Commission Chairman Anthony Roisman repeatedly explained to the intervenor during the

evidentiary hearing that issues related to runoff that can be addressed through stormwater permitting are within the Agency's jurisdiction to address. Chairman Roisman explained, "[i]f you have a concern about whether . . . [the project] may have an impact in terms of water or runoff or storm damage, this is an issue that you should be pursuing with the Agency of Natural Resources. . . . this line of questioning does not relate to an issue that we will be deciding." *Hespos*, June 13, 2022 Ev. Hrg. Tr. 13:6-12; 14:1-2. Chairman Roisman further explained that the Commission § 248 review process is not for "litigating whether an ANR permit should be issued or what kind of permit should be issued. . . . We will not decide the ANR permit question in this proceeding." April 7, 2022 Ev. Hrg. Tr. 68:8-16.

The Chairman did recognize that the Commission may make findings and rulings on stormwater concerns that are not "a matter that will be addressed in the permitting process in front of the Agency of Natural Resources," but that the party raising that issue must "have some argument to suggest . . . that it's outside the scope of [the Agency's] jurisdiction. June 13, 2022 Tr. 14:17-22. The Commission ultimately issued a CPG for the *Hespos* project, concluding that the "Project satisfies [the soil erosion] subcriterion of criterion (b)(5) of Section 248" because, in part, "the Applicant is working with ANR on obtaining all necessary permits for the future work on site, and our CPG requires that the Applicant obtain and comply with those permits." *Hespos*, Final Order, November 3, 2022 at 12.

Here, Mr. Binder's testimony speaks only to stormwater issues and concerns that fall squarely within the Agency's scope of permitting authority. More importantly, Mr. Binder has not made any argument that suggests that his concerns lie outside the Agency's jurisdiction to address. Mr. Binder has, however, been afforded options outside of the Commission's initial CPG review process to challenge the Agency's issuance of (or declining to issue) a stormwater permit. Any

person aggrieved by an act or decision of the Secretary related to a renewable energy plant may appeal the action to the Commission pursuant to 10 V.S.A. § 8506(a).¹ A person may also request to an agency to amend a rule under the Vermont Administrative Procedures Act. 3 V.S.A. § 806(a). Instead, Mr. Binder now asks that the Commission conclude that Agency stormwater permitting in this case is somehow deficient; something that the Commission has clearly stated that it will not do – and cannot do under Vermont law.

If the Commission were to make the kinds of determinations Mr. Binder appears to seek, a burdensome set of competing permitting requirements related to stormwater runoff and soil erosion would be created. The Agency’s stormwater permitting practices are prescribed by the duly adopted Stormwater Rule. The Agency’s permitting requirements and processes could not change in response to a contrary Commission determination in this (or any other) case; it would remain constrained by the Stormwater Rule requirements. A Commission finding that solar panels should be considered impervious surface would likely result in competing stormwater permitting requirements in § 248 cases: an Agency process consistent with its current practice supported by rule, and a unique requirement applicants must meet based on whatever different standard the Commission articulates.

The Agency issued stormwater permit is sufficiently protective

Setting aside the clear jurisdictional boundaries presented in this case, the stormwater construction permit requirements that apply to the proposed project site are sufficiently protective in response to Mr. Binder’s concerns about runoff on steep slopes. The Secretary of the Agency (“Secretary”) is empowered to issue general permits and require applicants to secure authorization

¹ No appeal of the NOI discussed below was filed within the statutory 30 day window following the Secretary’s authorization.

to discharge stormwater under those general permits. Stormwater Rule §§ 22-301, 22-303(b). The Secretary has issued the General Permit 3-9020 for Stormwater Runoff from Construction Sites (May 19, 2020) (“Construction GP”).

On October 22, 2022, the Agency issued an authorization for the Applicant’s Notice of Intent for construction activity stormwater discharge under the Construction GP at the project site (“NOI”). See ANR Attachment 1.² The Agency determined that Construction GP coverage was required because project construction will disturb more than one acre of earth. Stormwater Rule § 22-501(a). However, the Project did not meet the one-half acre impervious surface development threshold that would trigger the need to secure an Operational Stormwater Permit 3-9050, based in part on the Agency’s interpretation of the Stormwater Rule’s “impervious surface” definition to exclude disconnected solar panels. *Id.* § 22-901(a)(1)(B); Exh. MB-52 at 44 (Comment 131). The Agency also determined that the project site is a Low Risk Site based on a risk evaluation of site-specific characteristics. The Agency considered a site map that is materially the same as Exhibit RDS MS-2 (Rev. July 13, 2022) showing the location of slopes greater than 25% as part of its risk evaluation of the site. See ANR Attachment 2.

The NOI subjects the Applicant to all provisions of the Construction GP. Under the Construction GP for Low Risk Sites, the Department of Environmental Conservation’s Low Risk Site Handbook for Erosion Prevention and Sediment Control (“EPSC”) (“Low Risk Handbook”) is equivalent to a project-specific EPSC Plan. General GP § 1.3(A)(1). The Low Risk Handbook, in turn, requires the implementation of a variety of EPSC measures to control both construction-

² The Agency recognizes that the documents offered for judicial notice in its December 12, 2022 request, labeled ANR Attachment 1 through 3, might more appropriately be referred to as Exhibits in this brief. However, the Hearing Officer has made no ruling on the Agency’s Request for Judicial Notice to date. The Agency has therefore decided to continue to use the original identification convention for the documents in this brief in an attempt to avoid potential confusion.

related and permanent stormwater runoff risks, including final stabilization of graded surfaces, the use of upland runoff diversion measures in disturbed areas with an average slope of 20% or more, the use of perimeter controls, and the use of specific slope protection practices on slopes greater than 33%. See ANR Attachment 3, Low Risk Handbook at 13, 17, 21, 45. The Low Risk Handbook specifically contemplates construction activities taking place on slopes greater than 25%, with 33% slopes classified as “moderate” and 50-100% classified as “very steep.” *Id.* at 63. Indeed, Mr. Binder has not identified a single instance in Vermont where a solar facility constructed in accordance with submitted site plans with EPSC measures required by an applicable Agency stormwater permit has experienced undue soil erosion, much less an ill-defined “environmental catastrophe” that his testimony warns of.

Foreign jurisdiction guidance documents do not provide a sound basis for Commission review of the soil erosion criterion

Finally, even if the Commission sought to review Agency permitting practices and found the NOI authorization to be deficient, Mr. Binder provides no independent basis for the Commission to make findings related to the soil erosion subcriterion. Mr. Binder offers a number of guidance documents from foreign jurisdictions related to stormwater considerations at solar facilities. These documents are offered without any contextualization or specific reference in his testimony, but appear to support a broad proposition that Agency stormwater permitting practice is flawed because other jurisdictions consider disconnected solar panels to be impervious surfaces. Any Commission consideration of these documents is problematic for two reasons. First, the documents do not provide an understanding of the specific policy and technical challenges each respective jurisdiction sought to address with its guidance. The documents do not, for instance, identify the unique geographic, hydrologic, and soil conditions that are generally present in each

jurisdiction that may explain why a particular impervious surface determination was made. Likewise, the specific policy considerations made by each jurisdiction in developing the guidance documents aren't known. The Commission can only make a largely blind comparison of Agency practice to other jurisdictions given the level of information offered by Mr. Binder, which is not a sound basis for making determinations that may have a broad impact on CPG review practice.

Second, the guidance documents do not say what Mr. Binder appears to want them to. None of the documents state that solar development is prohibited at facility sites with steep slopes. To the contrary, most of the offered documents clearly contemplate development on slopes of 15% or greater even when panels are considered impervious surfaces. See Exhs. MB-44B at 8, MB-45 at 2, and MB-46 at 3. In each instance, slope determinations inform the level of engineering design or specific erosion control measures that must be employed at a given site.

The question of whether the Agency considers solar panels impervious has little relevance in the overall comparison between its approach to stormwater control and that of other jurisdictions. The guidance documents reveal that the implementation of adequate EPSC measures at steep sloped sites is the primary concern in other jurisdictions, not whether the panels are considered impervious. The use of appropriate EPSC measures is required by the NOI in this case. Furthermore, all of the guidance documents identify the need for adequate vegetation near panel drip edges to allow for infiltration of runoff. Panel precipitation contact with vegetated ground surface is an explicit requirement for the Agency's consideration of solar panels as pervious surfaces. In sum, Agency permitting practices are generally consistent the guidance documents offered by Mr. Binder, irrespective of whether panels are considered impervious surfaces.

Conclusion

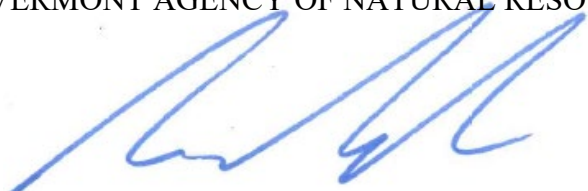
Mr. Binder's stormwater runoff and soil erosion concerns fall within the Agency's jurisdiction to address through its statutorily authorized permitting process. That process has resulted in the authorization of the Applicant's NOI for construction related stormwater discharges in this case. The requirements of the of the authorized NOI have empirically been sufficiently protective against undue soil erosion at sites with steep slopes. Based on the foregoing, the Commission should apply its reasoning outlined in *Hespos* and conclude that Mr. Binder's concerns are not appropriate for consideration in this proceeding.

Alternatively, if the Commission does determine that Mr. Binder's concerns fall within its jurisdiction to consider, Mr. Binder has not provided the Commission with a basis to find that the implementation of EPSC measures required by the NOI may result in undue adverse soil erosion at the site.

DATED this 12th day of January 2023 at Montpelier, Vermont.

Respectfully submitted,

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