

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Solar LLC for a	)	
certificate of public good pursuant to 30 V.S.A.	)	
§§ 248 and 8010, authorizing installation and	)	21-2939-NMP
operation of a 500 kW (AC) photovoltaic group	)	
net-metering system in Randolph, Vermont	)	

APPLICANT’S REPLY BRIEF AND MOTION TO STRIKE

NOW COMES Randolph Davis Solar LLC (“Applicant”) and submits this reply brief in response to the January 12, 2023 proposed findings and briefs submitted by the Agency of Natural Resources (“ANR Brief”), the Vermont Department of Public Service (“Department Brief”), and by intervenors Michael Binder and Joan Allen (“Landowners’ Brief”).

This submission also serves as Applicant’s motion to strike portions of Landowners’ Brief.

Capitalized terms used herein not otherwise defined have the meaning set forth in the Applicant’s January 12, 2023 proposed findings and brief (“Applicant’s Brief”).

I. Reply to the ANR and Department Briefs

The Applicant agrees with and supports the ANR and Department Briefs.

II. Motion to Strike Portions of Landowners’ Brief

A. Figures 1, 2 & 3 to Landowners’ Brief are New Evidence Not Admitted in the Record and Must be Stricken

Figure 1 to Finding 1 is a Google image that was never introduced or admitted into evidence, and Applicant has had no opportunity to file discovery on or testimony regarding this new evidence. The image should be stricken as it is not in evidence admitted in this case.

Similarly, Figures 2 and 3 appearing on pages 34 and 35 of Landowners’ Brief, also were not admitted into the evidence in this case. If they were, the Landowners’ Brief fails to properly cite the evidence. Figure 2 appears to be a side-by-side map comparison apparently derived from versions of Exhibit RDS MS-2, but text and arrows have been added and are not in any version of Exhibit RDS MS-2 or any of Landowners’ evidence admitted in this case. Figures 2 and 3, finding 31, and any other references to Figure 2 should be stricken, as they are not evidence admitted in this case.

B. Allegations re Witness Credibility

In addition, the entirety of the “Witness Credibility” section appearing at pages 33-35 of Landowners’ Brief should be stricken. This section of the Brief does not address findings and legal brief to address the substantive water resource criteria, which are addressed in prior sections of the Landowners’ Brief. Instead, its sole purpose is to personally attack and discredit Ms. Barton’s expertise as an environmental expert, as evidenced by the introductory paragraph to that section:

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

Landowners’ Brief at 33.

Nothing in the record supports a finding that Ms. Barton or her work in this case are not credible. “A credible witness is a witness who comes across as competent and worthy of belief. Their testimony is assumed to be more than likely true due to their experience, knowledge, training, and sense of honesty.” Cornell law School Legal Information Institute at [credible witness | Wex | US Law | LII / Legal Information Institute \(cornell.edu\)](https://www.law.cornell.edu/wex/USLaw/LII/LegalInformationInstitute/cornell.edu). A trier of fact will use these factors to determine whether they believe the witness is credible. *Id.*

Ms. Barton’s resume (Exh. RDS DB-1) reflecting her years of experience, education, and training and prior testimonies submitted and relied upon in numerous cases before this Commission establish that she and her expert work are credible. The fact that Landowners disagree with Ms. Barton’s environmental assessment does not establish that Ms. Barton is not a credible environmental expert nor has presented testimony and exhibits that are not credible. ANR agrees completely with Ms. Barton’s delineations and determinations, which further bolsters the correctness of her work.

Moreover, the alleged “stream” marked in figure 2 to the Landowners’ Brief is not a stream, a fact further proven by Landowners themselves who identify it as originating from a “swale,” which by definition, is not a stream:

The full length and width, including the bed and banks, of any watercourse, including, but not limited to, bodies named creek, brook, river, branch, and kill. A stream has a channel that periodically or continuously contains moving water, has a defined bed, and has banks that

serve to confine water at low to moderate flows. Streams include intermittent streams that have a defined channel and evidence of sediment transport, even if such streams does not have surface water flow throughout the year and/or throughout the channel. For the purpose of this guidance, constructed drainageways including water bars, ***swales, and roadside ditches, are not considered streams.***

ANR Stream Guidance, available at:

<https://anr.vermont.gov/sites/anr/files/co/planning/documents/guidance/Guidance%20for%20Agency%20Act%20250%20and%20Section%20248%20Comments%20Regarding%20Riparian%20Buffers.pdf> (emphasis added).

If Landowners had wanted to challenge Ms. Barton's credibility as an expert or the credibility of her natural resource delineations, they should have cross-examined her, which they chose not to do having requested to cancel the hearing they originally requested. It is improper for them in legal brief to challenge her credibility solely based on their partial opinions because they disagree with her conclusions. *See, e.g., State v. O'Brien-Veader*, 318 Conn. 514, 525, 122 A.3d 555 (Conn. 2015) ("It is well established that an expert witness can be examined concerning the factual basis of his [or her] opinion.... to expose to the jury facts from which it may gauge the credibility of an expert witness ... a [lawyer] may not *express his own opinion of the witness' credibility, such as by engaging in a line of questioning designed to mock and belittle that witness*") (emphasis added). Here, rather than examining the factual basis for Ms. Barton's expert opinions through cross-examination, Landowners instead have re-asserted their own opinions as if factually and legally correct, using vituperative aspersions that Ms. Barton "overlooked" natural resources. The repeated statements that Ms. Barton "overlooked" a stream, a wetland, and a vernal pool, are not substantiated by any testimony in this case. Such unsubstantiated, derogatory statements in a public proceeding impugns her professional integrity and that of her firm. The entire section of the Brief is offered for an improper purpose and should be stricken.

Under Commission Rule 2.201(B), "anyone appearing as a pro se representative shall be under all the obligations of an attorney admitted to practice in this state with respect to the matter in which such person appears." Counsel and pro se advocates acting as their own legal counsel have an obligation to follow proper procedure and law. The proper process to challenge the

credibility of an expert report is through a cross-examination of the expert about the factual basis for the report. Landowners failed to do that here and failed to elicit any testimony from Ms. Barton to demonstrate that she “overlooked” anything. Had Ms. Barton been cross-examined, she would have answered unequivocally, as she has already in her prefiled testimonies, that she did not overlook any natural resources. The fact that ANR agrees with Ms. Barton’s assessments reinforces the accuracy of her work and expert report.

III. Reply to Remainder of Landowners’ Brief

The Applicant’s Brief for the most part already addresses the areas covered by the remainder of the Landowners’ Brief, and responses are therefore not repeated here. However, there are a number of portions of the Landowners’ Brief that deserve attention.

A. Landowners’ Findings Challenged by the Applicant

The Applicant challenges the following Landowner Findings:

Steep Slopes/Erosion Control

1. Finding 8: The Applicant did not “admit[] that a LiDAR slope layer would reveal that some of the array is on slopes greater than 25%.” Mr. Binder testified to this. Applicant did not, nor did Applicant admit this. The Exhibit RDS MB-24, ANR Slopes Map, is a map compiled from aerial imagery and is meant to provide a gross representation of where steep slopes may exist. Homsted reb. pf. at 4. For this Project Horizons Engineering has prepared a detailed “on the ground survey” that in conjunction with a computerized digital elevation model gives a more accurate assessment of where steep slopes exist in the area of the array. *Id.* The solar array was reconfigured to avoid steep slopes, in support of the Town’s request. The Project still scores “Low Risk” in terms of State of Vermont Construction General Permit 3-9020. *Id.* See also Applicant’s Brief at 20-24.

2. Finding 53: This finding notes that when the petition was first filed, the Applicant stated that it would apply for coverage under the ANR Department of Environmental Conservation (“DEC”) Construction General Permit (“CGP”). The finding is inadequate in that it fails to acknowledge that Applicant received authorization to proceed as a Low Risk Site under the CGP. See Appellant’s Brief at 20-24 and ANR’s Brief at 1-8.

3. Findings 54-70: Without any record citation, finding 56 states: "The storm runoff from the solar panels, the access road, and other impervious surfaces are effluents. [Dictionary]" Whatever dictionary definition Landowners had in mind, they failed to provide it and in any event it is immaterial. The remainder of the findings in this section of Landowners' Brief are largely unsupported opinion testimony offered by Landowners whom themselves admitted they are not qualified engineers with respect to stormwater control measures or permitting. See Exhibits RDS MS-19 – MS-25 and Applicant's Brief on soil erosion; ANR Brief.

Pursuant to 10 V.S.A. § 1264(f), ANR is responsible for stormwater regulation, including determining what constitutes appropriate stormwater management control for construction and with respect to what constitutes an impervious surface for purposes of operational stormwater regulation. Consistent with ANR's stormwater regulations, the Applicant obtained authorization to proceed with construction as a Low Risk Site, and correctly calculated that this site adds approximately only 0.3 acres of impervious surface, which is well below the State of Vermont July 1, 2022 threshold of 0.5 acres of impervious surface and therefore will not require an operational stormwater permit. Homsted reb. pf. at 6. ANR concurs. See ANR 9/9/22 Comments; ANR Brief.

4. At pages 24-32 of Landowners' Brief, Landowners challenge the Town of Randolph's determination that the Project qualifies as a preferred site for siting solar. The decision making procedures that govern Town planning commissions and selectboards is set forth in Title 24 of the Vermont Statutes Annotated. The Commission is not delegated any role to arbiter town procedures or considerations when they issue preferred site letters, or to override the Town of Randolph's decision to issue a preferred site letter for the Project.

Moreover, under Vermont law, municipal plan provisions regarding solar generation siting are not zoning ordinances, and therefore cannot prohibit solar generation siting. See *In re Petition of Rutland Renewable Energy, LLC for a Certificate of Public Good Pursuant to 30 V.S.A. § 248*, 2016 Vt. 50, ¶ 36 (affirming that Section 248 preempts local zoning). In siting cases before the Commission, provisions in a municipal plan may be afforded substantial deference by the Commission, but only duly adopted enhanced energy plans that have received an affirmative determination of energy compliance by the regional commission. 30 V.S.A. § 248(b)(1)(C). Plans that have not received an Act 174 determination of energy compliance are

afforded only “due consideration.” 30 V.S.A. § 248(b)(1). The Randolph Planning Commission considered and voted not to adopt an enhanced energy plan. Exhibit RDS MS-17 (Randolph Planning Commission minutes 2019-03-11). The Randolph Town Plan has not been certified by the Two Rivers Ottaquechee Regional Commission (“TRORC”) pursuant to Act 174. As such, the language regarding steep slopes may only be afforded due consideration under Section 248(b)(1).

The “prohibited” designation for steep slopes in the Energy Chapter of the Randolph Town Plan is not consistent with Act 174 of 2016, which calls for mapping exercises to identify “preferred”, “suitable”, and “unsuitable” locations, but does not speak to designations as “prohibited.” See 24 V.S.A. § 4348a(a)(3). Act 174 does not authorize towns or regions to prohibit areas for solar siting. Instead, the framework under Act 174 allows municipalities to identify preferred and constrained areas, based on standards developed by the Department pursuant to Act 174. 24 V.S.A. § 4352. The DPS Standards for Energy Compliance for municipal plans are available at [Act 174 Recommendations and Determination Standards | Department of Public Service \(vermont.gov\)](#). Steep slopes are not mentioned as a possible constraint under these standards. Nothing in Act 174, the State Energy Plan, the TRORC Regional Plan, or the Department’s Standards for Energy Compliance suggest a blanket prohibition on steep slopes, but rather encourage and require identification of suitable areas to meet the greenhouse gas reduction requirements of Vermont law.

Finally, the steep slopes language in the Randolph Town Plan Energy Chapter also does not constitute a “clear community standard” under the second prong of the Quechee aesthetics test or Commission Rule 5.112. To constitute a clear community standard, a town plan provision must be “intended to preserve the aesthetics or scenic, natural beauty of the area.” Rule 5.112(A). It must “identif[y] the area of th[e] project for special protection to protect aesthetics or scenic beauty.” Exh. RDS MS-6 at 7 (quoting *In re Petition of Rutland Renewable Energy, LLC. for a Certificate of Public Good Pursuant to 30 V.S.A. § 248*, 2016 Vt. 50, ¶ 36). The language in the Randolph Town Plan regarding steep slopes does not state or imply that it is intended to preserve the aesthetic, scenic, or natural beauty of the area. To the contrary, the context of the provision suggests that it is directed to protecting water quality. The Applicant has addressed the applicable water quality criteria with substantial evidence supported by ANR

and obtained authorization to construct the Project under ANR's stormwater construction general permit.

Forested Areas

5. Finding 11: The site is not "entirely forested." As observed at the site visit, the site is a combination of woods and cleared land. Staskus pf. at 5.

6. Finding 20: The ANR habitat block mapping and BioFinder are not regulatory tools and do not have regulatory standards associated with them. Nevertheless, the mapped habitat block at the Project location is only ranked 4 out of a possible 10. Barton reb. pf. at 3. The proposed Project is at the edge of the far southern end of the block and does not significantly fragment the block or encroach into the existing contiguous forested habitat at the site. *Id.* Contrary to Ms. Allen's testimony, the ANR BioFinder has not identified any Community and Species Scale or Landscape Scale components of Highest or Priority for the area of the habitat block on the subject property or within the Project limits. *Id.*

Necessary Wildlife Habitat

7. Finding 14: While black bears may feed in the area of the Project, that does not establish that it is necessary wildlife habitat for black bears. *See* findings 112-118 of Applicant's Brief.

Streams

8. Finding 31: Contrary to the statements in this finding, a second "stream" does not run from the "swale" on the Mueller's land to the roadside stream south of the Project. *See* discussion, above, confirming that a "swale" is not a jurisdictional stream for purposes of Section 248.

Pursuant to 10 V.S.A. § 905b, the legislatively directed agency to establish and enforce regulations for the protection of wetlands is the Department of Environmental Conservation ("DEC") of ANR. 10 V.S.A. § 905b; Vt. Admin. Code Ch. 056. In its October 20, 2021 Comments, ANR noted that the Project site plan showed a stream surrounded by a 50-foot riparian buffer south of the proposed solar array and requested as an additional CPG condition that the Applicant maintain the buffer undisturbed and naturally vegetated in the riparian zone. ANR concluded that provided these CPG conditions are included in the Project CPG, ANR

found that the Project would not have undue adverse effects or warrant a hearing regarding criteria of Agency concern under 30 V.S.A. § 248(b)(5).

After the Project site visit, which was attended by ANR staff, and during which Landowners directed the Hearing Officers to the Mueller's pond and attempted to advocate the link between the pond and the roadside stream, ANR filed updated comments stating that it appreciated the opportunity the Commission provided for a site visit, and that after further consultation with the relevant departments and programs, it continued to find that the Project as proposed will not have undue adverse effects on the natural environment and the use of natural resources under the relevant criteria under the Agency's review enumerated in 30 V.S.A. § 248(b)(5), provided the proposed Certificate of Public Good ("CPG") incorporates the conditions outlined in the Agency's October 10[sic], 2021 comment letter. ANR 6/24/22 Comments at 1.

Wetlands/Vernal Pool

9. Finding 34: There are not wetlands within the staging area or access road. See Applicant's Brief at 20; Barton reb. pf. at 4. Arrowwood Environmental mapped all the wetlands within the Project area based on the protocols put forth in the United States Army Corps of Engineers' Wetlands Delineation Manual, as required by and in accordance with Section 3.2 of the Vermont Wetland Rules. Barton reb. pf. at 4.

Pursuant to 10 V.S.A. § 905b, the legislatively directed agency to establish and enforce regulations for the protection of wetlands is the Department of Environmental Conservation ("DEC") of ANR. 10 V.S.A. § 905b; Vt. Admin. Code Ch. 056. On October 20, 2021, the Vermont Agency of Natural Resources ("ANR") filed comments that it concurs with conditions 12, 13, 14, and 15 in the Applicant's proposed CPG to mitigate impacts on wetlands, source protection, and deer wintering areas. ANR 10/20/21 Comments. ANR stated that these conditions facilitate compliance with the Vermont Wetland Rules and respond to Agency comments on the advance notice for the Project. *Id.*

10. Finding 102: Citing Ms. Allen's prefiled testimony at page 13, finding 102 states that an intact forest buffer of 633 feet from the vernal pool is required to protect the amphibian life zone. Ms. Allen cites to Vermont Center for Ecosystem Studies ("VCE") and her Exhibit JA-14. According to JA-14, VCE is not a Vermont regulatory authority, but rather an independent conservation group. See [Forestry Best Management Practices for Conserving](#)

[Vernal Pools And Adjacent Habitats \(vtecostudies.org\)](http://vtecostudies.org), referenced in JA-14. Pursuant to 10 V.S.A. § 905b, the legislatively directed agency to establish and enforce regulations for the protection of wetlands is the Department of Environmental Conservation ("DEC") of ANR. 10 V.S.A. § 905b; Vt. Admin. Code Ch. 056. ANR recommends a 100-foot vernal pool buffer, which the Project satisfies. Barton reb. pf. at 4; ANR 9/9/22 Comments at 2.

Dated at Burlington, Vermont, this 26th day of January, 2023.

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