

**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' REPLY BRIEF AND FINDINGS OF FACT

January 26, 2023

Now come Neighbor Intervenor Michael Binder and Joan Allen, *pro se*, and hereby submit our Reply 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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A Construction Stormwater Issue

Discussion:

Both the Petitioner and ANR are obsessed with Neighbor Intervenor's concern about Construction Stormwater management, regulation, permits, EPSC measures, Low Risk Handbook, Notice of Intent, etc. It should be noted that the Intervenor's evidence and concern about Construction Stormwater is very limited and very specific: The wetland buffers are inadequate because of steepness. [NI Brief Finding 80]

*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.*

NI Brief pp. 15-16 [emphasis added].

Before granting a permit, 6086(a)(1) requires that the District Commission find the development will not cause undue water pollution, and in determining that, it shall at least consider the slope of the land and its effect on effluents, and the availability of streams for disposal of effluents.

The wetland buffers are on very steep slopes, and slope was not taken into consideration by Ms. Barton when she specified only the minimum 50 foot wetlands buffer.

Petitioner asserts: [Petitioner's Brief Finding 62]

The Petitioner's proposed 50-foot riparian buffer along the stream identified by Arrowwood Environmental is consistent with ANR's Guidance for Agency Act 250 and Section 248 Comments Regarding Riparian Buffers. ANR 10/20/21 Comments at 2.

Petitioner neglects to include this quote from page 21 of that same ANR guidance document:
[emphasis added]

*Riparian buffers filter stormwater runoff that flows through them as sheetflow. Buffer vegetation catches sediment and absorbs some of the nutrients and other pollutants contained in the runoff. Pollutant removal depends on the pollutant load and type, the composition and slope of the buffer, and the amount of runoff (Chase et al 1995). In general, to provide the same level of pollutant capture, **buffers in steep slope areas will need to be wider** as flows are typically faster moving and more concentrated.*

Guidance for Agency Act 250 and Section 248 Comments Regarding Riparian Buffers p. 21
<https://anr.vermont.gov/planning-and-permitting/planning-tools/act-250-and-section-248-guidance>

The Petitioner's and ANR's arguments about *Construction* stormwater measures, authority and permitting, Low Risk Handbook, EPSC, NOI, etc. are a distraction from the larger stormwater issue. Other than inadequate wetland buffers during and after construction, Intervenors' evidence for stormwater related undue adverse effects on 248(b)(5) and 6086(a)(1)(4) criteria is primarily related to post-construction concentrated runoff (effluent) from the array and the road.

Two Buffers

Discussion:

Inasmuch as the wetlands along Davis Road are co-existent with streams, both Wetland and Logging buffers apply. [NI Brief Finding 72]

Mandatory logging buffers (which take into account steepness) are at least twice the 50 foot wetland buffers. [NI Brief Finding 75]

Intervenors note that if the mandatory logging buffers are respected and enforced, the inadequacy of the 50 foot wetland buffers during construction is likely to be ameliorated.

Engineering

Introduction:

The Petitioner asserts:

Krebs & Lansing has worked on dozens of sites that required State of Vermont Construction Stormwater Permits since the program was implemented in 2003. It is their experience that the measures implemented on sites to be in compliance with these permits are effective at preventing erosion and preventing sediment laden stormwater from leaving the site. Homsted reb. pf. at 6.

Petitioner's Brief Finding 91.

Krebs & Lansing has worked on dozens of sites that required Construction Stormwater Permits, but the Petitioner has not produced evidence that any of those sites involved solar panels on very steep slopes and without permanent stormwater management structures.

In Discovery, Intervenors asked: “*Produce a list of all other solar energy projects permitted or built by Norwich Solar Technology, that have slopes greater than 25% within their Limits of Disturbance.*” The Petitioner objected because they did not have such a list. The Petitioner has had at least two opportunities (rebuttal and surrebuttal) since Discovery to produce evidence that Krebs & Lansing has experience designing solar projects on steep sites.

Finding: (continuing the numbering sequence from NI Brief)

153. Extreme engineering is required to build an array on greater than 15% slopes when the array is oriented against the contours of the land. Engineers must recognize that the array, when on steep terrain, must be treated as impervious.

Binder SurT p. 9. Exh. NI MB-40 p.2

Discussion:

The Commission should have grave concerns about the general engineering of this project and the lack of permanent post-construction stormwater management structures. No amount of *construction* stormwater permitting or management will prevent a poorly engineered road from washing out after it is built, or prevent unreasonable erosion caused by an unprotected drip line on steep slopes after an array is installed.

Siting an array on 15% slopes with the orientation of the panels against the contours of the land can be done, but it requires extreme engineering. [see NI Brief Finding 68] Siting an array on greater than 15% slopes, against the contours of the land, and without any permanent stormwater management structures is reckless engineering.

The original August 2021 submission of the site plan and testimony had solar panels on a 40% slope with the orientation of the panels almost perpendicular to the contours of the land, and declared no intention to apply for an operational stormwater permit. No structures were specified to manage erosion at the drip line or to manage and disperse concentrated runoff. That was reckless. The reason the array was rearranged in the first amended Site Plan was because of Town regulation, not because the Petitioner understood the recklessness of the project. This project now, after two amendments, still has parts of the array on greater than 25% slopes without any permanent stormwater management structures.

A long stretch of this Project's access road will lie on the bottom of a trench with no roadside ditch, on a steep slope, and with no culverts. Obviously, it will wash out. That is reckless.

Apparently, the quality of the engineering of a project is not considered when ANR issues a Construction Stormwater Permit. The quality of the engineering does not manifest itself until after the Construction Stormwater Permit has served its purpose.

Unlike ANR, the Commission may look at the grading contours on the Site Plan and see a road that will wash out because it is set in a trench on a steep slope with no roadside ditch or drainage.

Unlike ANR, the Commission may look and see unprotected drip lines perpendicular to the contour lines on steep slopes that will cause scouring and unreasonable erosion.

Unlike ANR, the Commission may look and see generic "boilerplate" road cross sections and other engineering drawings that are not applicable to the site and do not comply with Rules 5.107(C)(5)(e) and (g).

Unlike ANR, the Commission may wonder how an 1100 foot road on steep slopes up to 39% could have no culverts, not even generic "boilerplate" culverts to convey surface and sub-surface water.

This project will require proper engineering and permanent post-construction stormwater management structures if it is not to cause undue adverse effects on multiple 248(b)(5) and 6086(a)(1)(4) criteria. Proper engineering could come about because ANR requires an Operational Stormwater Permit, or it could come about because the Petitioner complies with Rule 5.107(C)(5)(e)(g) and shows the Commission and the Parties a Site Plan with credible

*Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a **permanent** measure*

and credible

*Plans of any proposed access driveway, roadway, or parking area at the project site, including **grading, drainage,** and traveled width, as well as a cross-section of the access drive indicating the width, depth of gravel, paving, or surface materials.*

The Petitioner's plans are neither detailed nor credible. The Site Plan does not *fully comply* [Rule 5.107(B)(4)] with Rule 5.107(C)(5)(e)(g). The Petitioner's Application, if not denied should at the very least be treated as withdrawn.

ANR's Authority

Introduction:

ANR writes:

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)

ANR Brief p. 2.

ANR has cited Stormwater Rule § 22-201(23):

"Impervious surface" means those manmade surfaces, including paved and unpaved roads, parking areas, roofs, driveways, and walkways, from which precipitation runs off rather than infiltrates.

Stormwater Rule § 22-201(23)

Discussion:

If it is ANR's prerogative to interpret "impervious" to mean "pervious", by that logic ANR can interpret "no" to mean "yes". That is absurd.

It should be noted that Neighbor Intervenors do not contest ANR's authority to issue Construction and Operational stormwater permits. Not requiring an Operational Stormwater Permit for this Project is an arbitrary and injudicious use of ANR's authority to interpret the Stormwater Rule's definition of "impervious surface".

It may not be in the Commission's authority to compel ANR to require an Operational Stormwater Permit; in which case the Commission may use its authority to promote the general good for the State of Vermont and deny this project a CPG.

ANR warns:

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.

ANR Brief p. 4

It is not surprising that the Commission might articulate a different standard than ANR's current practice. ANR's current practice depends upon interpreting "impervious" to mean "pervious" regardless of slope. The Commission's standard depends on being shown sufficient facts based upon persuasive evidence that unreasonable erosion, undue water pollution, and undue adverse impact on water purity, the natural environment, and PAS will not occur both during and after construction.

Land Conservation Measures

Introduction:

Petitioner's Brief [Finding 22 on p. 10] quotes from the Randolph Town Plan:

"[t]o meet this demand, we will need generation from 26,825 -32,786 MWhs of electricity each year. We currently only generate about 9% of that. This will require a massive increase in generation, primarily from solar PV arrays."

The Petitioner fails to include the entire paragraph. The paragraph continues: [emphasis added]

*While the numbers are large, the amount of land needed is comparatively small. Assuming we meet this need only with solar, we could generate only another 9% if we were able to use all of the roofs. **But we have sufficient land that does not have natural resources constraints, nor is too steep, to meet the goal nearly 45 times over.***

Page 70 of Randolph Town Plan, Exh. NI MB-5

DPS Brief page 3:

However, the cited slope prohibition relied upon by the Intervenors does not appear to constitute a land conservation measure that would be afforded due consideration, consistent with the plain language of Section 248(b)(1). The Town Plan contains a general prohibition of all energy generation facility development within areas with greater than a 25% slope, however it does not specify the purpose or policy for the general prohibition. [footnote 7] Rather, the slope prohibition appears more analogous to a municipal zoning regulation. As such, the slope prohibition contained in the Town Plan may not constitute a land conservation measure that is afforded due consideration by the Commission.

DPS Footnote 7:

Land conservation measures must evince a specific policy directed towards land conservation; general policy statements in plans that apply indiscriminately throughout the

municipality do not rise to the level of a land conservation measure. See Petition of Vermont Electric Power Company, Inc. and Green Mountain Power Corporation for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing VELCO to construct the so-called Northwest Vermont Reliability Project, Docket 6860, Order at 201-202 (Jan. 25, 2005)

Finding:

154. The Randolph Town Plan contains several Policies that are evinced by this language:

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.

These are policies to protect wetlands and encourage flood resiliency. The language evinces the Chapter 5 Natural Resources Wetland Goal Policies A, B, and C; the Chapter 5 Natural Resources Flood Hazard and Floodplain Goals Policies A and B; the Chapter 2 Land Use Policies A and B; and the Chapter 5 Natural Resources Forest Blocks and Habitat Connectors Policy A1. Exh. NI MB-10, Exh. NI MB-5 pp. 9, 22-25

Discussion:

The purpose or policy for Randolph's energy facility Slope Prohibition is clear from the text:

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.

These specific prohibitions are all about stormwater and landscape resiliency, which language evinces the several Town Plan Goals and Policies that protect floodways and wetlands and streams and encourage flood resiliency.

The prohibition against energy facility development in floodways, wetlands, streams, and steep (>25%) slopes is the polar-opposite of a general policy statement that applies indiscriminately throughout the municipality; rather, it is a very specific prohibition that applies to very specific and very limited environmentally sensitive areas in the Town.

The clearly erroneous position of the Department of Public Service completely confuses the standard for assessing whether a provision of the Town Plan is a land conservation measure for purposes of Orderly Development. DPS's position fails to recognize the latest Supreme Court case precedent on Orderly Development which clearly and explicitly spells out the specificity of the provisions required, which case is strikingly on point. It is disappointing that the Department

of Public Service, which has the responsibility to represent the public's interest, would disregard the binding precedent of the Vermont Supreme Court, and take a position contrary to the public (the Intervenor-Neighbors) as well as the public's interest in following the law.

DPS's erroneous understanding of what constitutes a land conservation measure for purposes of Orderly Development requires review of the recent Supreme Court opinion in *In re Petition of Apple Hill Solar, LLC*, 2021 VT 69, in which the Court considered the denial of a CPG based upon two provisions in the Bennington Town Plan. The Court explained as follows:

¶ 31. Local land-use standards as reflected in the Town Plan potentially impact the analysis in this case in two different ways. Before granting a certificate of public good under § 248, the PUC must find that the project “will not 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 the land conservation measures contained in the plan of any affected municipality.” 30 V.S.A. § 248(b)(1).

The Court then went on to examine two provisions in the Bennington Town Plan to determine whether they were “land conservation measures” for purposes of the Orderly Development criterion. The first Town Plan provision was described by the Court as, “general language about preserving the rural character of the entire Rural conservation District”, and was determined by the Court not to be the kind of specific, clear, written standard that can render an adverse impact undue under 248(b)(1):

¶ 34. In this case, the PUC relied primarily on two provisions in the Town Plan relating to the Rural Conservation District, where the proposed project was to be located. First, with respect to the RCD, the Town Plan explains, “The purpose of the Rural Conservation Districts is to preserve this distinctive rural character while accommodating low density residential development Agriculture, forestry, very low density single-family residential development, and certain limited uses that are suitable in rural areas are permitted in the district.” The PUC concluded that these and other provisions embodied a standard that the Rural Conservation District “shall not include new commercial uses unless such uses are compatible with the rural character of the area.”

1. No Development Incompatible with Rural Character of the Area

¶ 36. We conclude that the PUC erred in relying on its conclusion that the project would violate a clear, written standard in the Town Plan and Regional Plan favoring development consistent with the rural character of the Rural Conservation District because the broad and general statements in the Town and Regional Plans are not sufficiently specific to constitute a basis for denying a permit under § 248.

¶ 40. In a related but distinct context, we evaluated the clarity of language in a town plan that was almost identical to the language relied upon by the PUC in this case. In *re* Chaves Act 250 Permit Reconsider, 2014 VT 5, 195 Vt. 467, 93 A.3d 69, clarified on other grounds by *In re* B&M Realty, LLC, 2016 VT 114, ¶ 31 n.2, 203 Vt. 438, 158 A.3d 754 (“We clarify here that we review without deference the environmental court’s interpretation of the terms of a regional plan as well as its legal conclusion that a project does or does not conform to a regional plan.”). In *Chaves*, neighbors who appealed the award of an Act 250 permit for a sand-and-gravel quarry argued that the project violated a provision in the town plan describing the purpose of the district where the project would be located as to “provide for agriculture, forestry, low-density residential development and other compatible land uses in a manner that maintains the Town’s rural character, scenic landscape and natural resources.” *Id.* ¶ 40. We affirmed the Environmental Division’s conclusion that the language did not create a specific policy prohibiting the project for purposes of 10 V.S.A. § 6086(a)(1). *Id.* ¶ 41. We explained, “The language relied on by neighbors is broad and nonregulatory, espousing general policies about maintaining features, protecting valuable areas, and minimizing impacts, but contains no specific requirements that are legally enforceable.” *Id.* We also noted that the town plan expressed other general aspirations which would favor the proposed development. *Id.* ¶ 42. Though the context of our observation was different—we were applying a factor in an Act 250 case which does not have an exact counterpart under § 248—our description of the breadth and generality of this language applies equally well in this context.

Next, the Court analyzed the second Town Plan provision: “Development . . . cannot be sited in prominently visible locations on hillsides” to determine whether that was a “land conservation measure” for purposes of the Orderly Development criterion:

2. No Development Sited in Prominently Visible Locations on Hillsides

¶ 44. The second pertinent standard relied upon by the PUC in its aesthetics and orderly development analysis is the design standard providing that “development . . . cannot be sited in prominently visible locations on hillsides.”

¶ 45. In contrast to the broad and general language relating to the preservation of the rural character of the project’s surroundings, this design standard has the kind of specificity that qualifies as a clear, written community standard for purposes

of the aesthetics analysis, and it amounts to a land-conservation measure for purposes of the orderly development analysis. We reject petitioner's argument that the absence of a more precise definition of "hillside" and "prominently visible" render the requirements impermissibly vague. We are not persuaded otherwise by the Act 250 cases cited by petitioner. See, e.g., *In re Kisiel*, 172 Vt. 124, 130, 772 A.2d 135, 139-40 (2000) (concluding in context of Act 250 permitting proceeding that in face of debate as to whether proposed project on slopes ranging between 5-20% would constitute development on "steep" slopes, the town plan goal of preventing development on "steep slopes" was a "nonregulatory abstraction"); *In re Green Peak Estates*, 154 Vt. 363, 367, 369, 577 A.2d 676, 678-79 (1990) (similarly considering Criterion 10 of Act 250, and affirming finding that project would not conform to regional plan because it would violate "specific policy" prohibiting "residential development on slopes exceeding twenty percent").

¶ 46. In *Kisiel*, the Court wrestled with a provision in a town plan that defined—with reference to gradients—slight, moderate, severe, and extreme slopes, and provided that "steep slopes and hillsides" are generally unsuitable for development. 172 Vt. at 130, 772 A.2d at 139. Without any indication in the town plan or town ordinances as to what degree of slope qualified as "steep," we concluded that there was no objective measure to guide enforcement of the steep-slope prohibition, and there was no basis for the Board to conclude that the project was not in compliance with the policy. Id. By contrast, in this case, the applicable design precludes development on hillsides that is "prominently visible." This descriptor establishes a specific, actionable requirement and it is not contradicted by other goals.

¶ 50. The PUC's findings are supported by the evidence, and the findings support its conclusion that the facility would be "sited in a prominently visible location on a hillside" in violation of a clear, written community standard and in violation of a land-conservation measure in the Town Plan. . . .

In re Petition of Apple Hill Solar, LLC, 2021 VT 69 (**bold/underlined** emphasis supplied).

It is obvious that DPS's position with regard to the Town Plan is against the legal precedent in this State and should be disregarded because it is just plain wrong.

Lastly, DPS's suggestion that because the base of the panels have been moved to locations within the limits of disturbance that do not exceed 25% slope, the developer should get a "pass" on being held to the steep slope prohibition, is extremely disturbing because it completely ignores the impact of the concentration of stormwater from the panels onto the steep slopes and pretends that the access road is not being developed on very steep slopes, 39% in some locations! Therefore, development of the energy facility on this site will require excavation

("development") on those 39% slopes, which is significantly steeper than the 25% slope prohibition. Therefore, DPS's position is utterly indefensible and should be totally disregarded by the Commission.

Determined

Introduction:

The Petitioner writes:

Notwithstanding repeated objections from Landowners and Attorney Dingledine, the Randolph Planning Commission and Selectboard both determined not to rescind the Preferred Site designation, and accepted Petitioner's assurances that the array will not be constructed on slopes greater than 25%. Staskus 2/25/22 supp. pf.; exhs. RDS MS-12 – MS-15; exhs MB-14 – MB-16, MB-18, and MB-20 – MB-23.

Petitioner Brief finding 8.

The Randolph Planning Commission and Selectboard both determined not to rescind the Preferred Site designation, and accepted Petitioner's assurances that the array will not be constructed on slopes greater than 25%. Moreover, both the Selectboard and Planning Commission re-visited the issue, understanding that portions of the Project site outside of the array involved slopes exceeding 25%, and chose not to rescind the Preferred Siting for the Project. Findings 8 and 9, above.

Petitioner Brief Finding 27.

Discussion:

Petitioner's use of the word "determined" is incorrect. The Planning Commission's December 2021 vote to not rescind the Letters was illegal and hardly counts as a determination. The Planning Commission has not cured its Open Meeting Law violation.

The Selectboard has not voted to rescind or not to rescind its Preferred Sites Letter. Rescinding the Letter was discussed at three meetings but no action was taken, nothing was determined.

The Preferred Sites Letters stand by inaction of the Town to rescind them. The Preferred Sites Letters deserve no weight. See NI Brief pp. 24-32.

Regional Impact

Introduction:

DPS writes:

Furthermore, the Commission has previously held that “in some instances localized impacts may be found to interfere with orderly regional development due to their character or severity,” however there must be “credible evidence” of a regional impact to reach a finding of an undue interference with orderly development of the region. [footnote 11]

DPS Brief Page 4

DPS footnote 11: In re Rutland Renewable Energy, LLC, 2016 VT 50, ¶ 12, 202 Vt. 59, 66, 147 A.3d 621, 626 (2016).

Discussion:

The adverse effects of this project are regional. The adverse effects on forest productivity and the amphibian life zone around a vernal pool complex extend beyond the project parcel. The fragmentation of a habitat block and the interference with animal migration between habitat blocks at a wildlife crossing area are adverse effects that affect several thousand acres of habitat and core habitat. The erosion and water pollution caused by the project will enter the White River in a Reach that has the highest long term bacteria readings. The additional sediments from this project will have an adverse impact on the river, which is a regional impact. The project site is in a source water protection zone of the Royalton Fire District which is a regional water resource.

Preferred Location

Introduction:

DPS Brief page 3:

Importantly, the Project was designated as a “preferred location” consistent with the Town Plan’s siting policies, [footnote 9] as the Town, by joint letter of the Planning Commission and Selectboard, designated the site as a preferred site.

DPS footnote 9: “Preferred Locations:... 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.” Town Plan at 29.

Discussion:

The Preferred Sites Letters deserve no weight. See NI Brief pp. 24-32.

Due Consideration

Introduction:

DPS writes:

Petitioner has given due consideration to the Town Plan and the Town of Randolph Planning Commission's concerns with respect to the slope prohibition by amending the Project site plan to relocate the Project's solar arrays on slopes less than 25%.

DPS Brief Page 2

the Petitioner has amended the Project plans, in response to the Intervenor's and the Town of Randolph Planning Commission's concerns, to relocate the facility's proposed solar panels on land at the Project site that is less than a 25% slope.

DPS Brief Page 3

Finding:

155. The project was amended, based on a topographic land survey (and slope layer) which served the purpose of hiding slopes greater than 25%. Exh. NI MB-39 pp. 14-22

Discussion:

The Petitioner misled the Town and the Commission about steep slopes. After two minor amendments, some panels still remain on slopes greater than 25%. The Petitioner admits that a LiDAR slope layer would reveal that some of the array is still on slopes greater than 25%. The Petitioner's evidence that the array is not on steep slopes (>25%) is a topographic survey with low horizontal resolution and a contrived slope layer that serves the purpose of hiding steep slopes, and it deserves no weight.

[see NI Brief Finding 7,8, Finding 155 above, Binder SurT p. 3]

Regardless of whether or not part of the array remains on slopes greater than 25% in the amended site plans, there is nothing in the Town Plan that says the prohibition of siting energy facilities on floodways, wetlands, within 50 feet of the top of banks of perennial streams and on steep slopes applies to only the solar panels in an energy facility development.

Other Jurisdictions

Discussion:

ANR writes: [emphasis added]

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.**

ANR Brief p. 7

Mr. Binder has not testified that this project cannot be engineered and built, rather he has testified that it will require extreme engineering. The engineers will have to account for and disperse runoff from the array. If the engineers pretend the panels are pervious on steep slopes, then they are pretending that rain will just pass through the panels as if they were not there at all, and their engineering design will fail.

In other states, as ANR points out, the level of engineering design required and/or the specific erosion control measures that must be employed is determined by slope. Regarding the level of engineering design required, Vermont's rules compare favorably to the other jurisdictions. In contrast to those other states, all Vermont projects, regardless of slope, that are subject to Rules 5.107(C)(5)(e) and (g) must provide:

***Detailed plans** for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a **permanent** measure*

and

*Plans of any proposed access driveway, roadway, or parking area at the project site, including **grading, drainage,** and traveled width, as well as a cross-section of the access drive indicating the width, depth of gravel, paving, or surface materials.*

As mentioned above in the Engineering section of this Reply Brief: The Site Plan does not *fully* comply [Rule 5.107(B)(4)] with Rule 5.107(C)(5)(e)(g). The Petitioner's Application, if not denied should at the very least be treated as withdrawn.

Bears

Introduction:

In the second round of Discovery, the Petitioner asked:

Q:PET:Allen.2-1: a) With respect to A4 of your rebuttal testimony, Identify the exact location where Exh. JA-19 was taken and produce the photograph metadata.

Ms. Allen answered:

A:PET:Allen.2-1: a) The **three** photos were taken on site, about 50 -75 feet into project site from the western property line of the site.

Ms. Allen also provided the requested metadata which clearly showed the Petitioner that the **three** photos in Exhibit NI JA-19 were taken at **three** different locations on the project site over a period of 6 minutes and 39 seconds.

The Petitioner asserts Ms. Barton's surrebuttal testimony is factual in Petitioner's Brief

Finding 116:

The **single** stump shown in Exhibit JA-19 is not reflective of a "concentrated" habitat. The wetland near Davis Road discussed by Ms. Allen is outside of the LOD and will not be "destroyed" or "significantly imperiled" by the Project. In fact, the wetland will not be impacted at all. To the extend black bears visit that wetland, they will continue to have access after the solar array is installed. Barton surr. pf. at 2.

Finding 116 Petitioner Brief p. 28

Findings:

156. The Project site is in a habitat block, contiguous with core habitat, and is a wildlife crossing area between habitat blocks. Both the wildlife fence and the fragmentation of the habitat block will hinder wildlife movement, including the movement of bears to spring feeding sites in the forested seeps. Allen PfT pp. 3, 11 Allen SurT. Pp. 4, 6-7.

157. The property has numerous seeps and springs in the forested wetlands near the road.

Ms. Allen has witnessed the seeps and springs, and they were also seen by the participants in the March 25, 2022 site visit. Allen RebT p.3

Discussion:

On her site visits, Ms. Barton overlooked the stumps and logs that were torn apart by bears grubbing for insect larvae. Now, in Finding 116 of the Petitioner's Brief, the Petitioner asserts that Ms. Barton's surrebuttal testimony is factual and also asserts that only a single stump is shown in Exhibit NI JA-19. The Petitioner's assertion demonstrates, inter alia, the inability of Ms. Barton to count the number of stumps photographed by Ms. Allen in the three photographs taken at three locations in Exhibit NI JA-19.

The stumps in Ms. Allen's exhibit are representative of the numerous stumps that were left after the 2016 logging of the site. The stumps and logs were about 5 years old when Ms. Allen took photographs of them in October 2021. There were many other bear grubbing stumps and logs that Ms. Allen did not photograph. Ms. Allen also testified [Allen RebT p.3] that, as evidenced by fresh bear scat she witnessed in blackberry season, the brambles growing in the early successional habitat are attractive to bears.

Findings 12-14, and 80 in Neighbor Intervenor's Brief, and Finding 156-157 above, indicate that Finding 116 in Petitioner's Brief is not factual and further evince the unreliability of Ms. Barton's testimony, exhibits, and conclusions.

Conclusion

There is no credible evidence that this project will have a beneficial impact on Greenhouse Gasses. The project unduly interferes with Orderly Development. The Petitioner has failed to provide the Commission with sufficient facts to support a positive finding that the Project will not cause Unreasonable Erosion, undue adverse Water Pollution, and undue adverse impact on Water Purity and the Natural Environment.

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

Dated January 26, 2023

/s/ Joan Allen

Joan Allen, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
joanbarballen@gmail.com

Dated January 26, 2023

/s/ Michael Binder

Michael Binder, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
michaeljbinder@yahoo.com