

**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' RESPONSE TO PETITIONER'S MOTION TO
STRIKE PORTIONS OF NEIGHBOR INTERVENORS' BRIEF**

February 6, 2023

Now come Neighbor Intervenors Michael Binder and Joan Allen, *pro se*, and hereby oppose
Petitioner's January 26, 2023 Motion to Strike Portions of Neighbor Intervenors' Brief. The
Motion to Strike Portions of Neighbor Intervenors' Brief is contained in Section II of Petitioner's
Reply Brief.

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Regarding NI Brief Figure 1

The Petitioner writes:¹

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.

Neighbor Intervenors included the Google Earth image as a demonstrative aid to NI Brief Finding 1, a finding that is not contested. Neighbor Intervenors did not refer to Figure 1 in their Brief. It is not there to assert any truths or facts. NI Brief Figure 1 (without the red labels) is the result of plugging the latitude and longitude of the site into Google Earth.

Streams and Swales Together

The Petitioner writes:² [the emphasis in the definition was added by the Petitioner]

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: ...

Here the Petitioner is confused about swales and streams in at least two ways:

1) The “alleged stream” marked in NI Brief Figure 2 is a stream. It is the headwater stream that the Petitioner depicts in the Site Plan. Neighbor Intervenors have not drawn a stream on the Site Plan or tampered with the Petitioner’s evidence in any way. Neighbor Intervenors’ arrow (in NI Brief Figure 2) is pointing to a light blue line on the Site Plan. The Site Plan legend clearly indicates that light blue line is a stream. The same stream from the Site Plan is shown below (next page) with greater magnification than was shown in NI Brief Figure 2.

¹ Petitioner Reply Brief p. 1

² Petitioner Reply Brief p. 2-3

2) The Petitioner quotes [above] from ANR's Stream Guidance, but apparently does not understand the last sentence in the quotation: [Intervenors' change the Petitioner's emphasis]

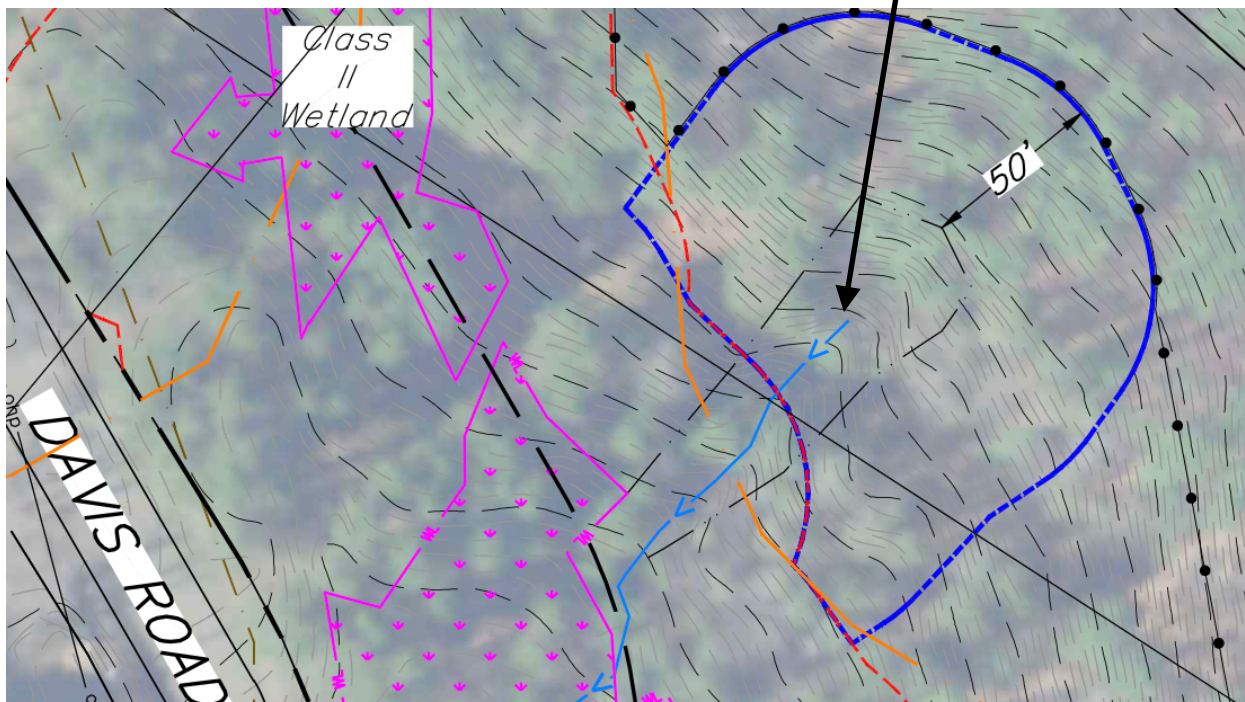
For the purpose of this guidance, **constructed** drainageways including water bars, swales, and roadside ditches, are not considered streams.

Swales may be natural or constructed. Constructed swales are usually for the purpose of stormwater management. Water flowing in a constructed swale is not a stream. In NI Brief Figure 2, the prominent swale that Intervenors point out in the Site Plan is a natural swale.

Intervenors agree with the Petitioner that by definition a swale is not a stream. The Petitioner then asserts that a stream cannot originate in a swale. That is nonsense. To demonstrate that a stream may originate in a natural swale, Intervenors turn to the Petitioner's own Site Plan:

Exhibit RDS MS-2 filed 8/8/21

Stream originating in a natural swale



The stream originating in the above figure is the same stream that Neighbor Intervenors point out in NI Brief Figure 2.

Regarding NI Brief Findings 30 & 31

The Petitioner writes:³

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.

NI Brief Findings 30 and 31 both refer to NI Brief Figure 2. The Motion to Strike does not explicitly mention NI Brief Finding 30.

Ms. Allen testified:⁴

The site plan shows one stream located by Arrowwood Environmental. There is another stream on the property that is not shown on the plan. It drains a small pond on the abutting Mueller property and joins the located headwater stream.

Ms. Allen also testified:⁵

There is a second stream located on the property, outside the LOD. It drains the small pond on the abutting Mueller property, enters the wetland, and joins the first identified stream. Contour lines on the LiDAR topographic map clearly show the swale draining the Mueller pond, and it was viewed by participants on the March 25, 2022 site visit.

Neighbor Intervenors acknowledge an editing error in NI Brief Finding 31. Ms. Allen has not testified that the overlooked stream is perennial. It is intermittent. Other than mistakingly describing the stream as perennial (in the Brief, not in the testimony or exhibits), Finding 31 is factual.

NI Brief Finding 31: [with the word “perennial” stricken]

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.

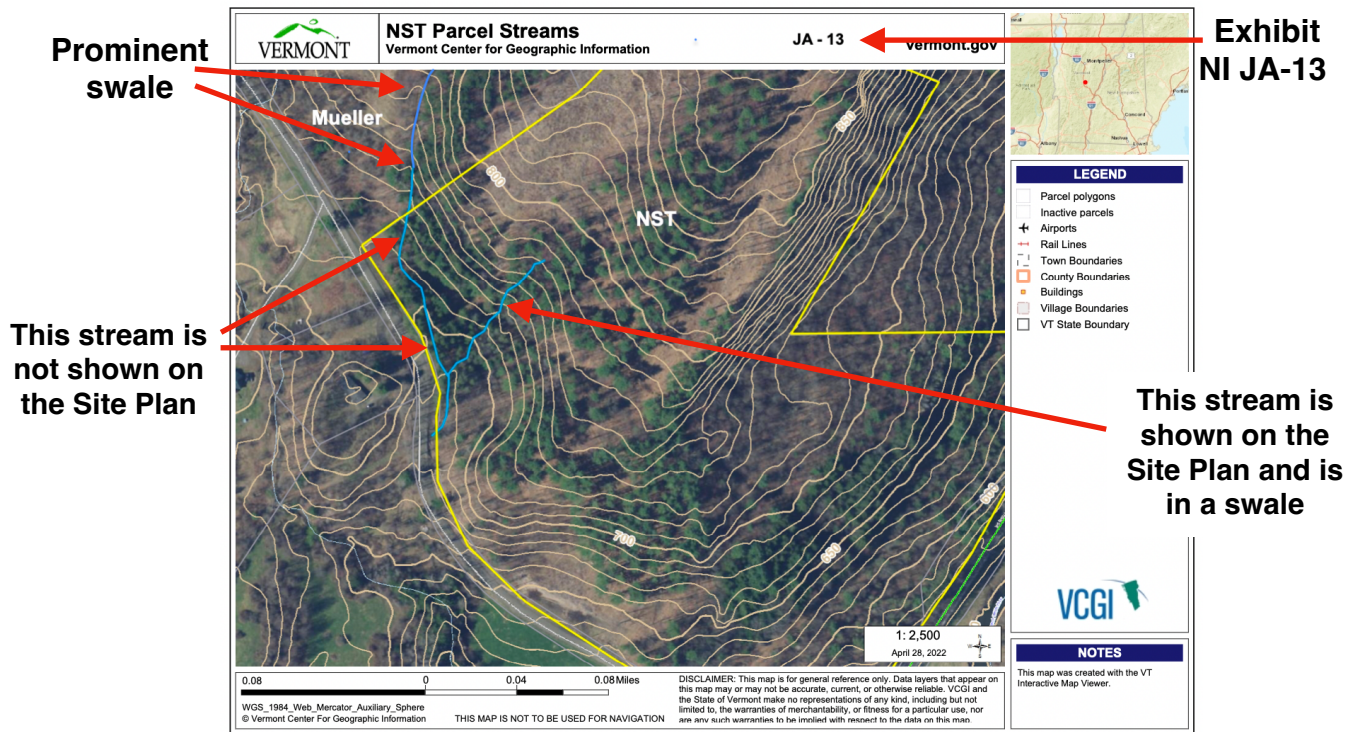
Allen SurT p.5. Illustration is in Ex. NI JA-13. Allen PFT p. 12

It should be noted that the distinction between perennial and intermittent streams is not material to the issues at hand. Both perennial and intermittent streams meet the definition of a stream.

³ Pet. Reply Brief & Motion to Strike p.1

⁴ Allen PFT p. 12

⁵ Allen SurT p. 5



Ms. Allen submitted Exhibit NI JA-13 which is her depiction, drawn on a VCGI map, of the overlooked stream that is not present on the Petitioner's site plans. Ms. Allen's exhibit does not extend far enough north to include Mueller's pond.

Both NI Brief Findings 30 and 31 are well substantiated by testimony and exhibits. There is no justification here to strike or dismiss factual findings prior to considering the weight of the admitted evidence that supports the findings.

If NI Brief Figure 2 is stricken, only the reference to Figure 2 should be stricken from NI Brief Findings 30 and 31.

Regarding NI Brief Figure 2

The Petitioner writes:⁶

Figure 2 appears to be a side-by-side map comparison apparently derived from versions of Exhibit [sic] 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.

NI Brief Figure 2 is indeed a side-by-side comparison of two versions of Exhibit RDS MS-2, and the two cropped images are labeled as such. Arrows point out Mueller's pond, a prominent swale south of the pond, and a stream. Also pointed out in Figure 2 are the additional wetlands that were recognized in the site plan filed 6/24/22.

It is permissible for a Party to quote from another Party's written evidence and to comment on it. Analogously, it is permissible for Neighbor Intervenors to show the Petitioner's pictorial evidence (the Site Plan) and comment on and point out features in that evidence. One way to point out features in pictorial evidence is with arrows. As stated above, the Site Plan images that are used in NI Brief Figure 2 are the Petitioner's evidence and are not modified.

Ms. Barton has testified⁷ that her stream assessment "involved both [sic] a remote review of the USGS topographic map, Vermont Hydrography Dataset (streams, rivers, and waterbodies), **LiDAR derived topography**, and field investigation in June 2021." [emphasis added]

Ms. Allen has testified⁸ that "**contour lines on the LiDAR topographic map** clearly show the swale draining the Mueller pond". [emphasis added]

Ms. Barton asserts that she used LiDAR topography to assist in locating streams, but she overlooked the stream in the prominent topographic swale that Ms. Allen described in her testimony. Many swales are identifiable on the Site Plan's LiDAR topography. Arrows are used in NI Brief Figure 2 to point out the swale of Ms. Allen's testimony.

Intervenors use NI Brief Figure 2 to show their interpretation of features in the Site Plan. The Petitioner has properly used their Reply Brief to argue against the Intervenors' interpretation of the Site Plan. There is no justification here for striking NI Brief Figure 2.

⁶ Petitioner Reply Brief p. 1.

⁷ NI Brief Finding 148 and Exhibit RDS DB-2 p. 6

⁸ Allen SurT p. 5

Regarding NI Brief Figure 3

NI Brief Figure 3, like NI Brief Figure 2, is the Petitioner's Site Plan with arrows added. The arrows are placed to point downhill, using the LiDAR contours on the plan as reference. Figure 3 demonstrates that the predominant slope of the landscape under the array is not south east as the Petitioner asserts.

There is no justification here for striking NI Brief Figure 3. It is the Petitioner's evidence and it demonstrates that NI Brief Finding 4 is factually correct⁹. The Petitioner should have used their Reply Brief to argue against the facts asserted in NI Brief Finding 4, rather than moving to strike NI Brief Figure 3.

Regarding NI Brief "Witness Credibility"

Petitioner writes:¹⁰

In addition, the entirety of the "Witness Credibility" section appearing at pages 33-35 of Landowners' Brief should be stricken. ... its sole purpose is to personally attack and discredit Ms. Barton's expertise as an environmental expert...

It is not the purpose of the "Witness Credibility" section to personally attack and discredit Ms. Barton's expertise as an environmental expert. Furthermore, Neighbor Intervenors have not attacked or discredited either Ms. Barton's credentials or her qualifications to be an expert.

Experts may disagree with each other and experts may make mistakes. Ms. Barton's work has been unreliable on this project and the section "Witness Credibility" in NI Brief contains Natural Resource findings where Neighbor Intervenors' evidence conflicts with Ms. Barton's testimony and exhibits. Neighbor Intervenors' Reply Brief has a section, "Bears", that also speaks to Ms. Barton's credibility and reliability on this project.

The Findings in the "Witness Credibility" section of NI Brief stand on their own as factual findings. There is no justification here to strike or dismiss factual findings prior to considering the weight of the admitted evidence that supports the findings.

⁹ NI Brief Finding 4: "The predominant slope of the land under the proposed array is west and southwest."

¹⁰ Petitioner Reply Brief p. 2

Petitioner writes:¹¹

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.

It should be noted that the Petitioner has challenged the credibility of both Ms. Allen's and Mr. Binder's testimony and conclusions, but has chosen not to cross examine either of them.

Petitioner writes:¹²

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.

Therefore, Neighbor Intervenors were correct to not waste the Commission's time with a Hearing that would only rehash Ms. Barton's prefiled testimony.

Petitioner writes:¹³

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.

The Intervenors' statements and findings that Ms. Barton "overlooked" a stream, a wetland, and a vernal pool, are substantiated by testimony in this case.

Ms. Barton has testified¹⁴ that based on her May 2022 site visit she delineated additional wetlands along Davis Road and a vernal pool that she had not delineated in her original June 2021 site visit. Intervenors take that to mean she "overlooked" wetlands and a vernal pool in her original filings (August 2021) which were based upon her June 2021 site visit and research.

Ms. Barton has not admitted that the log landing is a wetland. Ms. Allen has testified¹⁵ that she has witnessed both obligatory and facultative wetland plants growing on the log landing and that, although damaged, the log landing is still a wetland. Intervenors' assertion that Ms. Barton "overlooked" this wetland on both of her site visits is substantiated by Ms. Allen's testimony.

¹¹ Petitioner Reply Brief p. 3-4

¹² Petitioner Reply Brief p. 4

¹³ Petitioner Reply Brief p. 3

¹⁴ Barton RebT p.4

¹⁵ Allen PfT p. 12

Ms. Barton has not admitted that there is a second stream on the site plan. Ms. Allen has testified¹⁶ that a stream is present in a swale on Mueller's property and that it flows into the wetlands along Davis Road. Intervenors' assertion that Ms. Barton "overlooked" this stream on both of her site visits is substantiated by Ms. Allen's testimony.

Petitioner writes:¹⁷

ANR agrees completely with Ms. Barton's delineations and determinations, which further bolsters the correctness of her work.

Petitioner writes:¹⁸

The fact that ANR agrees with Ms. Barton's assessments reinforces the accuracy of her work and export [sic] report.

ANR agreed completely with the delineations and determinations of Ms. Barton's June 2021 site visit. Ms. Barton conducted another site visit in May 2022 and found additional wetlands and a vernal pool that she overlooked in June 2021. ANR now agrees completely with Ms. Barton's amended delineations and determinations. ANR has been no more reliable in this case than Ms. Barton.

Conclusion

For all the above reasons, Neighbor Intervenors oppose the Petitioner's Motion to Strike Parts of Neighbor Intervenors' Brief.

Dated February 6, 2023

/s/ Joan Allen

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Dated February 6, 2023

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¹⁶ Allen PfT p. 12 and Allen SurT p. 5

¹⁷ Petitioner Reply Brief p. 2

¹⁸ Petitioner Reply Brief p. 4