

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209)	Case No. 20-1611-INV
into whether the petitioner initiated site)	
preparation at Apple Hill in Bennington, Vermont,)	
for electric generation in violation of 30 V.S.A. §)	
248(a)(2))	

**VERMONT AGENCY OF NATURAL RESOURCES BRIEF AND PENALTY
RECOMMENDATION**

On January 30, 2023, the Vermont Public Utility Commission (“Commission”) issued an order establishing a schedule for the penalty phase of this investigation proceeding, beginning with March 2, 2023, as the date by which the state parties, the Department of Public Service (“Department”) and the Vermont Agency of Natural Resources (“Agency”), “file briefs with penalty recommendations.”¹

The Agency now submits the following brief and penalty recommendation for the Commission’s consideration.²

BACKGROUND

The following represents a summary of the background in this matter.³

On June 16, 2020, an employee of the Agency visited the 27- acre “Apple Hill” parcel in Bennington, Vermont, and observed that site clearing was occurring on the parcel.

¹ Case No. 20-1611-INV, Order of 1/30/23 at 2.

² The Agency understands that the Department will be filing its own separate brief and recommendation.

³ See *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation*, Case No. 20-1611-INV, Order of 4/1/21 at 2-9 for a more comprehensive background narrative.

On June 19, 2020, public comments were filed by Annette Smith alleging that tree clearing was occurring on the 27-acre Apple Hill parcel where Allco Renewable Energy Limited has proposed to construct two 2.0 MW solar electric generation facilities.

On June 23, 2020, the Agency filed preliminary comments in response to Ms. Smith's public comments, confirming that site clearing activity was occurring on the Apple Hill parcel.

On June 26, 2020, the Commission held the first of two evidentiary hearings in this proceeding and issued a TRO restraining Allco Renewable Energy Limited, PLH Apple Hill Solar LLC, and PLH Chelsea Solar LLC, and its affiliates, subsidiaries, and contractors (collectively, the "Developer" or "petitioner") from further site-preparation activity on Apple Hill. The Commission also scheduled a second evidentiary hearing for July 9, 2020, to address whether the TRO should be lifted and whether the Developer's tree-clearing activities were site-clearing operations in violation of 30 V.S.A. § 248(a)(2).

On June 27, 2020, the Developer conducted additional site-clearing work at the Apple Hill site.

On December 4, 2020, the Commission conducted the second evidentiary hearing.

On December 8, 2020, the Commission issued an order establishing a briefing schedule.

On January 29, 2021, the Developer, Agency, and Department each filed post-hearing briefs.

On February 12, 2021, the parties each filed post-hearing reply briefs.

On April 1, 2021, the Commission issued an order finding that the Developer had begun site preparation without a certificate of public good (CPG) and enjoining any further site preparation without a CPG.

On April 2, 2021, the Developer filed notice that it was appealing the Injunction Order to the Vermont Supreme Court.

On December 3, 2021, the Vermont Supreme Court dismissed the Developer's appeal because there was not yet a final appealable order from the Commission in this case.

On October 3, 2022, the Commission issued an order requesting that the Developer confer with the parties and file a proposed schedule for the penalty phase of this case. The parties were unable to agree on a schedule.

On January 13, 2023, the Agency filed a proposed schedule on behalf of itself and the Department. The Agency's filing requested that this case proceed directly to briefing.⁴ The Developer filed its own proposed schedule that same day. The Developer's schedule proposed an additional twelve months of litigation. The Commission agreed with the Agency that briefing is the next step for this case and issued its January 30, 2023, order establishing the briefing schedule.

FINDINGS

1. The Developer, as part of its CPG petitions in Dockets 8302 and 8454 and Case No. 17-5024-PET, had previously surveyed the 27-acre Apple Hill

⁴ The Agency is relying on the extensive record which has been established in this proceeding and the Commission's prior findings and orders. It is the Agency's position that there is adequate evidence in the record in this matter for the Commission to evaluate the factors under 30 V.S.A. § 30(c) and assess a penalty under 30 V.S.A. § 30(a)(1).

- parcel for rare, threatened, and endangered plants and located both rare (nimblewill muhly, *Muhlenbergia schreberi*) and very rare (white arrow-leaved asters, *Symphyotrichum urophyllum*) plant species.⁵
2. Some of the very rare and rare plants were relocated to conservation areas set aside by the Developer on the parcel and the Developer's environmental consultant monitored the conservation areas annually based on an agreement between the Developer and the Agency.⁶
 3. On March 23, 2020, the Developer filed a motion to amend its Section 248 petition in Docket 8454, indicating that one of the changes to its Apple Hill solar facility would involve the clearing of trees for hemp and sheep operations which would occur quite some time before the solar facility (if approved) would be constructed.⁷
 4. The proposed amendment was denied by the Commission by order dated May 7, 2020, in Docket 8454.⁸
 5. On June 16, 2020, a representative of the Agency visited the 27-acre Apple Hill parcel and observed that site clearing was taking place.⁹
 6. The Developer's contractor cleared approximately 3 of the 27 acres at the parcel and anticipated clearing 26 of the 27 acres by September 2020.¹⁰

⁵ See Dockets 8302, 8454, and Case No. 17-5024-PET for RTE plant surveys and reports prepared by Arrowwood Environmental on behalf of the Developer in connection with the Developer's Section 248 petitions for 2.0 MW solar electric generation facilities at the Apple Hill parcel.

⁶ Exhs. ANR-11; ANR-12; ANR-13; ANR-14; ANR-15.

⁷ Docket 8454, Second Proposed Amendment, filed March 23, 2020, at 1 n.1.

⁸ Docket 8454, Order dated 5/7/20 at 23.

⁹ Tr. 6/26/20 at 22, 24 (Lowkes); Lowkes affidavit 6/24/20 at ¶ 5.

¹⁰ Tr. 6/26/20 at 126-127 (Kobelia).

7. The clearing activities resulted in the destruction of a number of the very rare asters as well as rare nimblewill plants. More of both the aster and nimblewill plants would have also been destroyed if the clearing continued as the Developer intended.¹¹
8. The Developer's site clearing contractor was not contractually required to avoid very rare and rare plants while clearing the Apple Hill parcel.¹²
9. Caution ribbon that had previously been installed by the Developer's environmental consultant to mark the locations of the rare nimblewill was removed by another one of the Developer's consultants sometime prior to commencement of the site clearing which took place in June 2020.¹³
10. The clearing activities also destroyed trees.¹⁴

LEGAL REQUIRMENTS

30 V.S.A. § 248

Subsection 248(a)(2)(A) of Title 30 prohibits site preparation of an electric generation facility without a CPG.

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage . . . unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.

¹¹ Exh. ANR-10, Popp supp. aff. 11/25/20 ¶¶ 18-23; Tr. 12/4/20 at 184-191 and 193-195 (Popp); exhs. ANR-11; ANR-12; ANR-13; ANR-14; ANR-15; Exhibit RK-2 (showing that the area cleared by the Developer in June overlaps with the area where rare plants had been documented as depicted in ANR-14); *see also*, Exhibit PLH-TMM-5 (confirming additional asters would have been destroyed had the clearing resumed).

¹² Tr. 12/4/20 at 53-55 (Kobelia).

¹³ Tr. 6/26/20 at 115-117 (Kobelia); exh. ANR-10 at 7-8.

¹⁴ Tr. 12/4/20 at 48-52, 66 (Kobelia); Exhibit AH-RK-2; Exhibits ANR-2 and ANR-4.

Subsection 248(b)(5) of Title 30 requires a finding by the Commission that a proposed facility will not result in an undue adverse effect on the natural environment.

Before the Public Utility Commission issues a certificate of public good as required under subsection (a) of this section, it shall find that the . . . construction: With respect to an in-state facility, will not have an undue adverse effect on . . . the natural environment.

Subsection 248(a)(4)(E) of Title 30 assigns to the Agency the role of representing the interests of the people of Vermont in protecting Vermont's natural environment in the context of energy siting proceedings before the Commission.

The Agency of Natural Resources shall appear as a party in any proceedings held under [Section 248(a)], shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding.

30 V.S.A. § 30

Subsection 30(a)(1) of Title 30 provides that: "A person, company or corporation subject to the supervision of the Commission . . . who violates a provision of section 231 or 248 of this title . . . shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing."

Subsection (b) provides the following with respect to a civil penalty which may be imposed by the Commission.

(b) The Commission may impose a civil penalty under subsection (a) of this section of not more than \$85,000.00, in addition to any financial benefit to the violator resulting from the violation. In the case of a continuing violation, an additional fine of not more than \$42,500.00 per day may be imposed.

Subsection (c) of Title 30 identifies the factors that the Commission may consider in determining the amount of a civil penalty.

- (1) the extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers;
- (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
- (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
- (4) the length of time that the violation existed;
- (5) the deterrent effect of the penalty;
- (6) the economic resources of the respondent;
- (7) the respondent's record of compliance; and
- (8) any other aggravating or mitigating circumstance.

DISCUSSION

The Commission has determined that the Developer's site clearing activities at the Apple Hill parcel violated the Section 248(a)(2)(A) prohibition on beginning site preparation for or construction of an electric generation facility without a CPG.¹⁵

The Commission succinctly illustrated the risks attendant with any failure to enjoin such activities and recognized the broader implications of the Developer's actions on the Commission's and the Agency's abilities to perform their statutorily mandated functions, explaining:

If we did not have authority to enjoin illegal site preparation, then every applicant for a certificate of public good ("CPG") would have an incentive to bulldoze its proposed project site before submitting an application, even if it meant the permanent destruction of trees, rare plants, and very rare plants, as well as other environmental degradation. After all, a proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent. This is why the Vermont Legislature has placed a blanket prohibition on even "begin[ning]" site preparation without a CPG.¹⁶

¹⁵ Order of 4/1/21 at 3.

¹⁶ *Id.* at 1-2.

The facts established in this proceeding are that: very rare plants were destroyed, rare plants were destroyed, and trees were destroyed because of the Developer's unauthorized site clearing activities at the Apple Hill parcel. Further, the Developer knew that very rare and rare plants were present in the area where it intentionally engaged in clearing and where it intended to continue the clearing until 26 of the 27 acres were cleared. The Developer knew that it was not authorized to commence the clearing. The Developer failed to take measures to avoid the destruction of very rare and rare plants that it knew were present. It then failed to notify the Commission or the Agency that it had engaged in unauthorized clearing of very rare plants, rare plants, and trees. And, finally, the Developer continued its clearing activities even after the Commission ordered it to stop.

For these reasons, the Agency recommends that the Commission impose a civil penalty of \$39,125.00. The Agency's recommendation is based on consideration of the 30 V.S.A. § 30 factors discussed below.

(1) The extent that the violation harmed or might have harmed the public health, safety, or welfare, the environment, the reliability of utility service, or the other interests of utility customers.

By engaging in site clearing at the Apple Hill parcel without a CPG, the Developer violated Section 248(a)(1)(A). This violation resulted in the destruction of at least 24 very rare white arrow-leaved aster plants and, had the clearing continued, would have destroyed at least 97 of the very rare plants.¹⁷ These numbers give the Developer the benefit of assuming that the actual clearing itself and equipment used to perform it

¹⁷ Tr. 12/4/21 at 185 (Popp); exh. 1ANR-10 ¶ 18; exh. PLH-TMM-5.

did not encroach, or would not have encroached had the clearing continued, into any of the conservation areas or into the two polygons (which contain a total of at least 30 rare asters) located just south of the proposed clearing area near the terminus of Willow Road as depicted in Exhibit PLH-TMM-5. The white arrow-leaved aster is classified as a very rare plant in Vermont. At the time of the clearing, the known population of the asters at the Apple Hill parcel was 561 individual plants.¹⁸ The destruction of 24 individuals represents 4.4% of the known population. The destruction of 97 individuals represents 17.3% of the known population at the Apple Hill parcel.

The unauthorized site clearing also resulted in the destruction of an unspecified number of rare nimblewill muhly¹⁹ plants which existed in the area that was cleared adjacent to and immediately to the north of the southeastern conservation area on the parcel.²⁰ In addition, had the site clearing continued as intended, a substantial number of nimblewill plants that existed in the area of the old logging road would have also been destroyed. This is where the caution ribbon that had previously been installed by the Developer's environmental consultant to mark locations of the plants was removed by another one of the Developer's consultants prior to commencement of the site clearing.²¹

¹⁸ Exhs. PLH-TMM-3, PLH-TMM-4, and PLH-TMM-5. The actual number of individual plants that were destroyed at the Apple Hill parcel may be higher. This is because the entire Apple Hill parcel has not been surveyed for very rare and rare plants since 2017 and it is possible that additional plants have germinated between then and the time clearing occurred. *See* exh. ANR-10 at 8-9.

¹⁹ The nimblewill muhly, at the time the clearing took place, was classified as a rare plant in Vermont. In May 2022, the Agency revised the plant's classification to uncommon in Vermont. The Agency typically does not recommend protection for uncommon plants. For purposes of evaluating actual and potential harm to natural resources in this proceeding, the Agency is utilizing the rare classification. This is consistent with the Agency's approach of utilizing the classification which exists at the time an activity is proposed or undertaken. For example, had the nimblewill been classified as uncommon when the unauthorized site clearing occurred and then later had its classification changed to rare, the Agency would have based any evaluation of harm on the plant's uncommon status.

²⁰ Exh. ANR-10 ¶ 19; tr. 12/4/21 at 194-195 (Popp); exhs. PLH-TMM-3 and PLH-TMM-5.

²¹ Exh. PLH-TMM-3; tr. 6/26/20 at 115-117 (Kobelia); exh. ANR-10 ¶ 19.

Finally, approximately 3 acres of clearing, including forested area, occurred and an unspecified number of mature trees were destroyed.

While the degree of actual harm to the environment which resulted from the clearing activities on the Apple Hill parcel was minor, the Agency considers the degree of harm which would have resulted if the clearing continued to be moderate. The Agency has considered both the actual and potential degrees of harm to the natural resources existing at the Apple Hill parcel in arriving at its recommended penalty amount.

(2) Whether the respondent knew or had reason to know the violation existed and whether the violation was intentional.

As indicated above, the Developer was aware that it did not have a CPG. It was aware that it was statutorily required to have a CPG before engaging in site clearing to construct its proposed electric generation facilities. The Developer also acknowledged that it needed to clear trees to construct its solar electric generation facilities at the Apple Hill parcel.²² The clearing performed by the Developer in June 2020 was the very same clearing that the Commission said the Developer could not undertake when, on May 7, 2020, the Commission denied the Developer's March 23, 2020 request to amend the Apple Hill solar project's Section 248 petition in Docket 8454.²³

In June 2020, the Developer knew that very rare and rare plants were present at the Apple Hill parcel, including within the area the Developer began to unlawfully clear at that time. The plant surveys that the Developer had performed in connection with its

²² Tr. 6/26/20 at 65-66 and 88-90 (Melone); exh. ANR-10 at 10.

²³ Order of 4/1/21 at 29. On March 23, 2020, the Developer filed a motion to amend its Section 248 petition in Docket 8454, indicating that one of the changes to its Apple Hill solar facility would involve the clearing of trees for hemp and sheep operations which would occur quite some time before the solar facility would be constructed. See Docket 8454, Second Proposed Amendment, filed March 23, 2020, at 1 n.1. The proposed amendment was denied by the Commission by order dated May 7, 2020, in Docket 8454.

Section 248 petitions to construct solar electric generation facilities at the Apple Hill parcel documented the existence and the locations of the plants. The Developer had even established plant conservation areas on the Apple Hill parcel and previously transplanted a number of both very rare and rare plants to those conservation areas. However, numerous plants remained outside of those conservation areas.

The Developer's actions in commencing site clearing without a CPG, including within the area where very rare plants, rare plants, and mature trees were present, were knowing and intentional. The Developer knew that site clearing without a CPG was a violation of Section 248, a fact made very clear by the Developer's March 2020, attempt to amend its pending Section 248 petition to account for the site clearing that it ultimately performed that June.²⁴ The Agency considers the knowing and intentional nature of the Developer's actions to be relevant to determining an appropriate penalty amount and weigh heavily in favor of a substantial penalty.

(3) The economic benefit, if any, that could have been anticipated from an intentional or knowing violation.

The Agency is not aware of any economic benefit that resulted from the violation by the Developer in this matter. Note however, that the evidence shows that the Developer intended to proceed with site clearing and to eventually construct a solar project on the site. If the Developer were successful in this endeavor the potential

²⁴ The Agency also notes that the Developer is very familiar with the Section 248 process and statutory requirements. The Developer has proposed, and constructed, several similar solar electric generation facilities beyond the Developer's three solar electric generation facility proposals associated with the Apple Hill parcel in Dockets 8302 and 8454, and Case No. 17-5024. *See, for example*, Dockets 8225, 8797, 8798, and Case Nos. 17-3727, 19-0516, and 19-3236.

economic benefit could have been substantial due to the Developer avoiding the costs and limitations of environmental compliance.

(4) The length of time that the violation existed.

A representative of the Agency visited the Apple Hill parcel on June 16, 2020, and observed that site clearing was occurring by the Developer at that time. Subsequently, the Commission was notified of the clearing activities and opened an investigation into the matter since the parcel was the subject of solar electric generation facility petitions proposed by the Developer (as well as two standard offer contracts) and no CPG's authorizing clearing had been issued by the Commission. The Commission then conducted an evidentiary hearing on June 26, 2020, and on that same date issued a TRO prohibiting the Developer from continuing site clearing. Despite this, the Developer continued with the site clearing on the morning of June 27, until around mid-day at which time site clearing stopped.²⁵

Thus, the unlawful site clearing took place from at least June 16 through June 27, a period of twelve days. The Agency considers this to be a moderate length of time and relevant to determining an appropriate penalty amount.

(5) The deterrent effect of the penalty.

As the Commission recognized in its April 1, 2021, order:

[A] proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent.²⁶

²⁵ Tr. 12/4/20 at 41-44 (Kobelia).

²⁶ Order of 4/1/21 at 1-2.

The legislature has assigned to the Agency the role of representing the interests of the people of Vermont in protecting Vermont's natural environment in the context of energy siting proceedings before the Commission.²⁷ The Agency would be unable to perform this role, and carry out the legislative intent, if site clearing takes place before an area that is cleared can be adequately assessed to determine the presence, extent, and significance of any natural resources which exist in that area at the time the clearing is proposed.

In the context of Section 248, and its standard of no undue adverse effect on the natural environment, the relationship between the prohibition on site preparation or construction without a CPG and the Agency's assigned role in representing the interests of the people of Vermont in protecting Vermont's natural environment, are inseparable. One cannot function effectively without the other. The need to deter violations of the site clearing prohibition must be great if the Agency's ability to perform its work is to be preserved. As such, the penalty imposed in this case, must be substantial enough to deter not only this Developer from repeating its behavior but to also deter others who are required to meet the Section 248(b)(5) standard of no undue adverse impact on the natural environment and obtain a CPG before commencing their projects. This factor weighs heavily in support of a substantial penalty amount in this case.

(6) The economic resources of the respondent.

The Developer appears to have substantial financial resources. The Developer owns the 27-acre Apple Hill parcel, having acquired it to construct solar facilities. The

²⁷ 30 V.S.A. § 248(a)(4)(E).

Developer paid Green Mountain Power \$850,000 to upgrade and extend a distribution line to the Apple Hill parcel for the purpose of connecting its proposed solar electric generation facilities to the grid.²⁸ In addition, the Developer has proposed or already developed at least nine utility scale solar electric generation facilities in Vermont.

(7) The respondent's record of compliance.

The Agency is not aware of any prior Section 248 violations involving the Developer.

(8) Any other aggravating or mitigating circumstance.

As discussed above, the clearing performed by the Developer in June 2020 was the very same clearing that the Commission said the Developer could not undertake when, on May 7, 2020, the Commission denied the Developer's March 23, 2020, request to amend the Developer's Section 248 petition for the Apple Hill solar facility. The Developer knew that very rare and rare plants were present at the Apple Hill parcel outside of the plant conservation areas the Developer had established during the proceedings associated with its three separate Section 248 petitions involving the Apple Hill parcel. The Developer also knew these plants were located within the area that the Developer unlawfully began clearing in June 2020. While the clearing appears to have been designed to avoid the established plant conservation areas, the Developer did not require its contractor to avoid destroying very rare or rare plants that existed within the area to be cleared. In fact, prior to commencing with the clearing, a different contractor working for the Developer removed flagging that had been placed in the areas where a

²⁸ Tr. 6/26/20 at 69-70 (Melone).

substantial number of these plants were located. The Developer did not have an environmental consultant present at the site during the clearing activities or install any markings or barriers to ensure that the clearing contractor avoided destroying very rare and rare plants, a practice which is typically utilized in connection with Section 248 projects.²⁹

The Developer neither self-reported its site clearing violation nor worked with the Agency to institute protective measures to avoid further harm to the plants. It has been the Agency's experience in other Section 248 matters that violations are often self-reported by the violator and that the violator works cooperatively with the Agency to implement measures to prevent further harm and mitigate any harm that was caused by the violation.³⁰ Here, the opposite has occurred. Not only did the Developer continue its unlawful site clearing even after the Commission had issued a TRO prohibiting further clearing, but it apparently did so without implementing any measures to protect very rare and rare plants from further harm.³¹

The Agency believes these factors are relevant and weigh heavily in support of a substantial penalty amount in this case.

²⁹ Tr. 6/26/20 at 42-43 (Popp).

³⁰ See, for example, Docket 8791, *Investigation pursuant to 30 V.S.A. §§ 30 and 209 regarding the alleged taking of harsh sunflower plants by Vermont Gas Systems, Inc.*, Order of 5/25/17; Case No. 18-0332-INV, *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of GSSP Gilman, LLC's certificate of public good issued in Docket 8725*; Case No. 19-4929-PET, *Green Mountain Power Corporation's request for approval of a stipulated Memorandum of Understanding regarding the certificate of public good issued in Docket 8322*; and Case No. 21-3392-INV, *Investigation pursuant to 30 V.S.A. §§ 30 and 247 into alleged violations by ER Billings Road Solar, LLC, of a certificate of public good, issued in Case No. 19-4533-PET*.

³¹ Tr. 12/4/20 at 41-44 (Kobelia).

CONCLUSION

For the reasons discussed above, the Agency respectfully recommends that the Commission impose a civil penalty in the amount of \$39,125.00 on the Developer in this matter.

Dated March 2, 2023, at Waterbury, Vermont.

Respectfully submitted,
State of Vermont
Agency of Natural Resources



By: _____

Donald J. Einhorn, Esq.
Senior Litigation Attorney
Enforcement and Litigation Section
Office of General Counsel
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05602-3901
Phone: (802) 249-1720
Email: donald.einhorn@vermont.gov