

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Investigation pursuant to 30 V.S.A. §§ 30 and 209 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)	)))))	Case No. 20-1611-INV
---	-----------------------	-----------------------------

**RESPONDENTS' BRIEF RE: PENALTY RECOMMENDATIONS AND REQUEST FOR
DISCOVERY**

Filed by ePUC

TABLE OF CONTENTS

INTRODUCTION.....	1
FACTUAL BACKGROUND.....	3
I. A Penalty Is Not Authorized Under 30 V.S.A. §30.....	4
II. A Penalty Would Violate Respondents’ Constitutional Due Process Rights	4
III. The Penalty Recommendations Violate the Unconstitutional-Conditions Doctrine.....	6
IV. The Eight Factors of Section 30(c)	8
A. 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.....	8
(i) ANR’s Penalty Recommendation is Based on Purported Impacts to Plants that it has no Authority to Protect.....	8
(ii) ANR’s <i>Ultra Vires</i> Classification System.....	10
(iii) The Agency’s Penalty Recommendation is Based on Purported Impacts to Plants Without Any Factual Evidence of Actual Impact.....	13
(iv) Even if the PUC Finds that ANR has the Authority to Protect Asters and Evidence of the Destruction of Asters, By ANR’s Own Admission, its Own Guidance Documents and the ANR MOU, There Has Been No Harm to the Environment Through the Purported Impact of the Asters.....	14
(v) By ANR’s Own Admission, There Has Been No Harm to the Environment Through the Purported Impact of the Nimblewill.....	18
(vi) There Is No Harm to the Environment Through the Cutting of 3 Acres of Trees When Any Vermonter Can Clear Up to 40 Acres of Trees Without a Permit ..	19
B. Whether the respondent knew or had reason to know the violation existed and whether the violation was intentional	20
C. The economic benefit, if any, that could have been anticipated from an intentional or knowing violation.....	22
D. The length of time that the violation existed.....	22
E. The deterrent effect of the penalty	23
F. The economic resources of the respondent	23
G. The respondent’s record of compliance.....	23
H. Any other aggravating or mitigating circumstance	24

TABLE OF AUTHORITIES

CASES

<i>BMW of North America, Inc. v. Gore</i> , 517 U.S. 559 (1996)	5
<i>Cedar Point Nursery v. Hassid</i> , 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021)	1
<i>F.P. Dev., LLC v. Charter Twp. of Canton</i> , 16 F.4th 198 (6th Cir. 2021)	1, 2, 6-7
<i>In re 34 Fitzsimonds Rd 3-Lot Subdivision</i> , 2019 Vt. Super. LEXIS 38	7
<i>In re Petition of Stowe Cady Hill Solar, LLC</i> , 2018 VT 3, 182 A.3d 53	5
<i>In re Petition of Swanton Wind LLC</i> , 2018 VT 141, 204 A.3d 635	12
<i>Mira Mar Development Corp. v. City of Coppell</i> , 421 S.W.3d 74 (Tex. Ct. App. 2013)	7
<i>Petition of Monument Farms Three Gen, LLC</i> , Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010)	21, 23
<i>Otter Creek Solar LLC & PLH LLC v. Vt. Agency of Nat. Res.</i> , 2022 VT 60	9
<i>Perry v. Med. Practice Bd.</i> , 169 Vt. 399, 403, 737 A.2d 900, 903 (1999)	11
<i>Petition of Beaver Wood Energy Pownal, LLC</i> , Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011)	21, 23
<i>Petition of Georgia Mountain Community Wind, LLC</i> , Docket No 7508, Order of January 5, 2012	20, 23
<i>Town of Flower Mound v. Stafford Estates Ltd. P'ship</i> , 135 S.W.3d 620 (Tex. 2004)	8
<i>United States v. Batchelder</i> , 442 U.S. 114 (1979)	5

STATUTES

10 V.S.A. § 2625	19
10 V.S.A. § 5402	<i>passim</i>
30 V.S.A. § 30(a)(1)	<i>passim</i>
30 V.S.A. §248	<i>passim</i>

OTHER AUTHORITIES

- NatureServe, *Habitat-based Plant Element Occurrence Delimitation Guidance*, May 2020 https://www.natureserve.org/sites/default/files/eo_specs-habitat-based_plant_delimitation_guidance_may2020.pdf 16-18

INTRODUCTION

A penalty in this case would be entirely inappropriate, unlawful and violate Respondents' constitutional rights under the Vermont and United States Constitutions. First of all, there is no evidentiary basis on which to support a penalty. No evidentiary hearing has been held on factors related to the determination of a penalty. As the briefs of both the Department of Public Service ("DPS") and the Agency of Natural Resources ("ANR") concede, their penalty recommendations are simply based upon advocate speculation, not evidence. There is no evidence that any plants were destroyed. *See, e.g.*, the Affirmation of Jim McClammer, dated March 16, 2023 ("McClammer Aff." at ¶2. Even if some were, ANR concedes that even under its unsupported view of purported "environmental effects," the effects would be, at most, "minor." ANR Br. at 10.¹

But ANR's a minor effect would not serve ANR's purpose of retaliation at a developer that has challenged ANR and will continue to do so. Thus, ANR invents a new paradigm that harkens back to "pre-crime" from Tom Cruise's "Minority Report." Operating from flawed legal premises and without the citation of a single case, the agencies seek a penalty for damage that they concede *never occurred*, but that like "pre-crime," it concludes would have occurred. ANR needs the pre-crime aspect because without it ANR's must concede that there is no adverse effect, not even minor, under its view.

Making matters worse, the agencies seek a penalty for a plant—the Nimblewill—that ANR

¹ As a legal matter, there can be no adverse environmental effects because none of the plant species are protected under the Vermont Endangered Species Law and landowners have the absolute right in Vermont to clear up to 40 acres of trees without a permit and an absolute right to remove the asters (as the State of Vermont itself permits every year in the nearby VTRANS rail corridor) and the Nimblewill weed. "The Founders recognized that the protection of private property [would be] indispensable to the promotion of individual freedom." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071, 210 L. Ed. 2d 369 (2021). Neither agency makes any effort to show that the alleged tree or plant "removal effects a certain level of environmental degradation on the surrounding area," a requirement of the unconstitutional-conditions doctrine. *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 207 (6th Cir. 2021).

now concedes is entitled to no protection at all under any circumstance, and is simply an “uncommon” plant. Vermont has now joined the other 49 states and the federal government in acknowledging that the Nimblewill is a noxious weed. The Nimblewill is a poster-child for the lack of scientific basis for ANR’s unlawful plant classification system. Undaunted by the lack of legal support for its position, and ANR’s concession that the Nimblewill is not, and never was, entitled to any protection, the agencies still collectively seek a massive penalty, multiples of the value of the three acres of land that was cleared—three acres on which no solar facility was ever proposed for.

The agencies’ lack of legal support rivals their lack of factual support. First, there is no evidence that any Asters were destroyed. The agencies simply assume that occurred. Yet ANR knows from reports previously provided by the “developer,” that Asters get mowed down with annual regularity by Vermont rail on the nearby rail corridor, yet those Asters return and flourish. *See, e.g., McClammer Aff.* at ¶¶3.

Crucially from a legal standpoint, neither the agencies nor the PUC have any interest in trees, asters or nimblewill on the landowner’s property. Landowner’s have an absolute right in Vermont to clear 40 acres of land without a permit, regardless of whether their proposed use is agricultural. To be sure, section 248 proscribes site preparation of an electric generation facility without a CPG, and if the PUC believes site preparation occurred then it could impose conditions in a CPG, such as restoring the site to a condition that would satisfy the requirements for a CPG, but it cannot impose a penalty based upon the loss of plants and trees that all Vermonters have an absolute right to destroy. Federal courts have been particularly vigilant at checking the overzealous overreach of government action in circumstances such as presented here. *See, e.g., F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198, 207 (6th Cir. 2021)

FACTUAL BACKGROUND

The agencies misstate the facts, because the facts do not help them. 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. The proposed amendment was denied by the PUC on May 7, 2020. That denial was not, as the agencies argue, a prohibition on the clearing. Rather it was simply the PUC saying that it was not restarting the CPG process, because for among other things, it was poised to deny the CPG, which it did on that same day. Thus, as early as March 2020 the Developer disclosed its plans and none of the PUC, the agencies or anyone else sought a prohibition to prevent those plans.

Respondents' testimony and prior briefing establish that none of the Respondents knew or had any reason to know that the clearing for the proposed agricultural activity would be considered site preparation for an electric generation facility under section 248. Respondents' testimony and prior briefing establish that when the PUC issued the injunction near midnight on June 26, 2020, that none of the Respondents was given the required notice prior to the time the activity of the contractor ceased around noon on Saturday, June 27, 2020. In addition, Respondents' testimony and prior briefing establish that what the contractor did on the morning of June 27, 2020, was clean-up from activity that had already occurred. Respondents' testimony and prior briefing establish that even under ANR's pre-crime approach, the number of Asters that might have been impacted had all the clearing occurred is well under ANR's arbitrary 10% threshold for purported environmental effects. Respondents' testimony and prior briefing establish that there would have been no economic benefit to the Developer from the clearing vis-à-vis the section 248 process. In fact, there could have been an economic detriment if the CPG required certain screening that would have been provided by the trees. Respondents' testimony and prior briefing establish that the agencies oft-cited passage from the PUC's April 1, 2021, order referencing a "proposal to build an electric generation plant on a bulldozed site" is simply inapplicable here because the Developer submitted to the PUC and the agencies comprehensive

site condition evaluations from a host of experts prior to its clearing activity for an agricultural use.

I. A Penalty Is Not Authorized Under 30 V.S.A. § 30.

30 V.S.A. § 30(a)(1) authorizes the imposition of a penalty against a “person, company, or corporation subject to the supervision of the Commission or the Department of Public Service . . . who violates . . . a provision of section . . . 248 of this title, or a rule of the Commission.” None of the entities that the PUC collectively refers to as the “developer” (the “Developer”) are a person, company, or corporation subject to the supervision of the Commission or the Department of Public Service for the reasons the Respondents have previously stated.

II. A Penalty Would Violate Respondents' Constitutional Due Process Rights.

It is one thing for the PUC to issue the injunction it has issued, it is quite another to also impose a retroactive extraction from the Respondents. Respondents' testimony and prior briefing establish that what constitutes site preparation for an electric generation facility is vague and ambiguous. Respondents' testimony and prior briefing establish that all PUC precedent before this case, held that activity by a landowner for a separate lawful activity that might have some marginal benefits if a CPG were issued, held that such lawful activity did not constitute site preparation for an electric generation facility. A penalty would violate Respondents' rights to Due Process because of lack of fair notice.

“It is a fundamental tenet of due process that ‘[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.’” *United States v. Batchelder*, 442 U.S. 114, 123 (1979), quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (emphasis added). “[N]otions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996). Here those basic tenets of due process would be violated if a penalty were

imposed. First, the statute speaks of no criteria that provides clear standards as what would constitute site preparation for an electric generation facility. Second, the PUC's prior precedent makes it clear that a CPG petitioner may conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the PUC and here no CPG has been issued. Indeed, the PUC has denied the CPGs. The PUC would now seek to change its prior precedent and retroactively apply it, preventing the landowner from engaging in lawful farming activities, and impose a penalty to boot. A clearer case of lack of fair notice and a violation of due process is difficult to imagine.²

III. The Penalty Recommendations Violate the Unconstitutional-Conditions Doctrine.

Section 30(c), which itself is unconstitutionally vague because it does not provide fair notice of a penalty amount, identifies eight factors that the PUC may consider in determining the amount of a civil penalty. The agencies address each of these factors although neither agency attribute a dollar amount to any one factor, showing that there is a lack of evidentiary basis for a penalty, and making it impossible for Respondents to exercise their due process rights to confront the agencies position and calculations. It is impossible for Respondents to adequately address the

² On January 29, 2021, Respondents filed their post-hearing brief in which they argued that (I) the Commission lacks the authority to address the alleged violation, (II) the developer's site work does not constitute site clearing activities in violation of 30 V.S.A. Section 248(a)(2) because it was not done in preparation for an electric generation facility, (III) assuming *arguendo* that the developer's work constitutes site clearing in violation of 30 V.S.A. Section 248(a)(2), there has not been any (nor will there be) any irreparable harm suffered by any proponent of the injunction, (IV) the TRO should be dissolved on the grounds that (a) the restriction on site preparation is unconstitutionally vague, (b) the TRO violates the requirement of administrative consistency set forth in *In re Petition of Stowe Cady Hill Solar, LLC*, 2018 VT 3, 182 A.3d 53, (c) the TRO violates due process because of lack of fair notice, and (d) the TRO is based upon a rare plant classification system that is invalid, is beyond the Vermont Agency of Natural Resources' ("ANR") authority and is unscientific and (V) assuming *arguendo* that the Commission has the authority to issue an injunction, such injunctive relief could only ever be temporary in nature (i.e., preliminary and not permanent) and would not apply to the Horticultural Use Lot (as defined below) or any portion of the site where the Plants (as defined below) do not exist. Respondents' position concerning these arguments have not changed and as such are incorporated herein by reference.

appropriateness of the penalty recommendations without knowing how each penalty recommendation was calculated. For example, it is unknown how much of the proposed penalty is based upon ANR's pre-crime approach, the Nimblewilly noxious weed that ANR concedes is entitled to no consideration, ANR's incorrect calculation of Asters allegedly destroyed, the local Aster population, or how much is attributable to purported "harm to the regulatory oversight process," which itself is a made-up factor that is neither in the statute nor can satisfy proportionality requirements to pass constitutional muster. As such, Respondents are requesting discovery on all issues relevant to how DPS and ANR arrived at the penalty recommendations. The rationale provided by DPS and ANR for their penalty recommendations without any supporting numbers is too abstract and lacks an evidentiary basis.

The "unconstitutional conditions doctrine" protects private property owners from being forced to surrender their Fifth Amendment right to just compensation to obtain a building permit, a variance, or other government benefit related to their property. In the case of *F.P. Dev., LLC v. Charter Twp. of Canton*, 16 F.4th 198 (6th Cir. 2021) ("*Canton*")³, the Township of Canton, Michigan passed an ordinance addressing tree clearing requiring tree owners to get a permit before removing trees or undergrowth or face a penalty. The plaintiff real estate company contracted with a timber company to remove some trees and debris and they did not apply for a permit to do so. The Town then issued a "Stop Work" order and ordered the plaintiff to either replant 187 trees or deposit \$47,898 into Canton's tree fund. Rather, the plaintiff filed a lawsuit. The district court held that the ordinance and penalty was unconstitutional as a regulatory taking and as an unconstitutional taking. On appeal to the Court of Appeals for the Sixth Circuit, the Court affirmed holding that the ordinance and penalty were a taking under the unconstitutional-conditions

³ At the district court level, the developer in *Canton* challenged the exaction claiming that it constitutes (i) a taking of its property without just compensation, (ii) an unreasonable seizure, and (iii) an excessive fine. *F.P. Dev., LLC v. Charter Twp. of Canton*, 456 F. Supp. 3d 879, 2020 U.S. Dist. LEXIS 71509, 2020 WL 1952537 (E.D. Mich., Apr. 23, 2020). Given that no fine has been issued by the PUC in these proceedings yet, Respondents are only addressing item (i).

doctrine.

In reaching the holding, the court stated that the government may choose whether and how a permit applicant is required to mitigate the impact of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts. *Id.* at 206. *See also In re 34 Fitzsimonds Rd 3-Lot Subdivision*, 2019 Vt. Super. LEXIS 38 (“*Fitzsimonds*”) (Town of Jericho failed to show a rough proportionality between its exaction of a recreational easement and the requested subdivision). In addressing the “rough proportionality” prong, the Court held that Canton failed to carry its burden to show that it made the required individualized determination that the required exaction is related both in nature and extent to the impact. Canton had *provided nothing indicating that the developer’s tree removal effects a certain level of environmental degradation on the surrounding area*. *Id.* at 207. The Canton court also cited *Mira Mar Development Corp. v. City of Coppell*, 421 S.W.3d 74, 95-96 (Tex. Ct. App. 2013) that the constitutional requirement of demonstrated rough proportionality could simply not be met in a case, like here, where there is no evidence that “the removal of trees in the development would harm the air quality, increase noise and glare, remove ecosystems, bring down property values, or reduce the other benefits of trees described in the ordinance.” *Id.* at 96. *See also, e.g., Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 644-45 (Tex. 2004) (holding that the Town's monetary exaction was not roughly proportional because the rationale for it was too abstract and because the town provided no real evidence of impact).

Similar to the *Canton*, *Fitzsimonds* and *Mira Mar* cases, the agencies proposed monetary exaction in the form of a penalty is not roughly proportional to the impact because (i) the rationale presented is too abstract in that there is no way to tie the recommended penalty to purported impacts and (ii) neither agency have presented any adequate factual evidence of negative impact. All the agencies have put forward are advocate rationalizations.

IV. The Eight Factors of Section 30(c).

Although neither agency ties any of the vague eight factors to an actual dollar amount, Respondents will address each in turn.

A. 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.

(i) ANR's Penalty Recommendation is Based on Purported Impacts to Plants that it has no Authority to Protect.

ANR states that there was harm (or potential harm) to the environment because of purported impacts to (i) the white arrow-leaved aster plant (the "Aster"), (ii) the nimblewill muhly plant (the "Nimblewilly") and (iii) and an unspecified number of mature trees. With respect to items (i) and (ii), the ANR has no authority to regulate "rare" or "very rare" plants. Although the PUC in its April 1, 2021, order (the "TRO Order") determined that ANR's method of classifying plants was not "wholly irrational and unreasonable in relation to its intended purpose" (TRO Order at 28), that says nothing about ANR's lack of authority to regulate "rare" or "very rare" plants. The manner in which ANR seeks to regulate plants, whether rational or irrational, is irrelevant if the ANR does not have the authority to regulate the plants in the first place (which it does not).

In the Superior Court Civil Division for Chittenden Unit case of Otter Creek Solar LLC and *PLH LLC vs. Vermont Agency of Natural Resources et. al.* (Docket No. 169-2-20 Cncv), the Respondents challenged the Agency's authority to regulate "rare" and "very rare" plants in Vermont through a declaratory judgment action. In its Decision on Motions to Dismiss issued on November 16, 2021 (the "Superior Court Order"), the Superior Court held that the Agency's guidance documents and classification system were not rules and did not have the force of law, and that the proper forum to challenge the validity of the policies was before the PUC (*see* page 27 of the Superior Court Order). In reaching that conclusion, the Superior Court held that "the

exact statutory source for [ANR's] authority remains unclear,” (*see* page 27 of the Superior Court Order) and (2) “the State does not directly contest the merits of the assertion that ANR lacks statutory authority to regulate rare or very rare plant species.” (*Id.*). Despite being able to find no authority for ANR's classification or regulation of allegedly rare plants, the Superior Court still dismissed Respondents' case.

Respondents then appealed that decision to the Vermont Supreme Court and in Case No. 22-AP-048, and the Vermont Supreme Court affirmed the dismissal on December 2, 2022 (the “Supreme Court Order”) on procedural grounds and in doing so stated:

In affirming the dismissal, we take no position on the merits of plaintiffs' claim that ANR lacks the power to regulate plant species other than threatened or endangered species. Our decision in this case also does not leave plaintiffs without a remedy. **They can challenge the admissibility and weight of the ANR policies during the CPG process**, and they can appeal to this Court if they are unsatisfied with the PUC's rulings. See 30 V.S.A. § 12 (providing for review of PUC decisions by this Court). Plaintiffs can also ask ANR to adopt, amend, or repeal the guidance documents and classification system. 3 V.S.A. § 806. What they cannot do, at this late date, is attack ANR's policies in a declaratory-judgment action in the civil division.

See Supreme Court Order at ¶17 (emphasis added).

The Supreme Court has also stated that the Respondents can challenge ANR's rules in Washington County Superior Court. Thus, at this point, only the Superior Court has weighed in on ANR's authority to regulate “rare” and “very rare” plants in Vermont stating “the exact statutory source for [ANR's] authority remains unclear,” (*see* page 27 of the Superior Court Order) and (2) “the State does not directly contest the merits of the assertion that ANR lacks statutory authority to regulate rare or very rare plant species.” (*Id.*). Now, through the explicit instruction of the Vermont Supreme Court, Respondent is placing this issue (again) squarely before the PUC to make a determination as to ANR's authority to regulate “rare” and “very rare” plants in Vermont. Respondents have from the very beginning of these proceedings challenged (and continue to challenge) the admissibility of ANR's rare plant classification system. Now that the

ANR has issued a penalty recommendation that is based almost entirely on purported impacts to “rare” and “very rare” plants, it is time for the PUC to make an explicit ruling on ANR’s authority to make such plant classifications and penalty recommendations. If ANR has no authority to protect “rare” and “very rare” plants as Respondents have argued, then the Agency’s recommended penalty based on purported impacts to such plants must be reduced to \$0.

(ii) ANR’s *Ultra Vires* Classification System.

The Vermont Endangered Species Law (“ESL”) establishes statutory criteria for the protection of threatened and endangered species by the Secretary of ANR. Under the ESL, the Secretary of ANR is granted the authority to develop a State *endangered* species list and a State *threatened* species list. 10 V.S.A. § 5402(a). The ESL does not give ANR the authority to develop a “rare” or “very rare” species list. The statute prescribes the characteristics of endangered species to be a plant or animal species that “*normally occurs in the State* and its continued existence as a sustainable component of the State’s wildlife or wild plants is in jeopardy.” 10 V.S.A. § 5402(b) (emphasis added). A species may be listed as threatened only if the following are present: “(1) it is *a sustainable component of the State’s wildlife or wild plants*; (2) it is reasonable to conclude based on available information that its numbers are declining; and (3) unless protected, it will become an endangered species.” 10 V.S.A. § 5402(c) (emphasis added). Endangered and threatened species lists may be adopted only by administrative rulemaking. 10 V.S.A. § 5402(a).

In determining whether a species is threatened or endangered, the ANR Secretary must “use the best scientific, commercial, and other data available,” and “at least 30 days prior to commencement of rulemaking, notify and consult with appropriate officials in Canada, appropriate State and federal agencies, other states having a common interest in the species, affected landowners, and any interested persons”. 10 V.S.A. § 5402(e). The ESL directs the Secretary of ANR to issue general permits to utilities to conduct vegetation management in utility rights-of-way that authorize the taking of threatened or endangered species if such takings would not affect

the continued survival of the species. 10 V.S.A. § 5402(l)(1), (5). As used in the statute, the term “utility” “means an electric company, telecommunication company, pipeline operator, or railroad company.” 10 V.S.A. § 5402(l)(5). The ESL does not authorize the Secretary of ANR to list and protect *rare* species, by rule, guidance, or otherwise.

As an administrative body, ANR “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.” *Perry v. Med. Practice Bd.*, 169 Vt. 399, 403, 737 A.2d 900, 903 (1999) (quotations omitted). The ESL reflects the give and take of the political process. A result of that process was that ANR was not given any authority to classify species that were neither threatened nor endangered. Despite that lack of legislative authorization, ANR has created a plant classification system classifies plants as “very rare,” and “rare.”

As the Superior Court stated “the exact statutory source for [ANR’s] authority remains unclear,” (Superior Court Order at 27) and (2) “the State does not directly contest the merits of the assertion that ANR lacks statutory authority to regulate rare or very rare plant species.” (*Id.*). While it is true that “the Endangered Species Law requires ANR to make lists for endangered and threatened species, [and] does not preclude the Agency from doing the same for “rare” or “very rare” species,” (*Id.*) the logical conclusion of such reasoning is that ANR has unlimited authority to do whatever it wishes, except to the extent a statute expressly prohibits it from doing something. That approach turns on its head the fundamental administrative law principle that an agency’s “powers include only those expressly granted by the Legislature and such incidental powers as are necessarily implied to carry out its express grant.” *In re Petition of Swanton Wind LLC*, 2018 VT 141, P9, 204 A.3d 635 (internal quotations and citations omitted.)

The Legislature provided ANR the power to make classifications only with respect to threatened and endangered species. The ESL imposes specific criteria that ANR must meet in order to classify threatened or endangered species. In order to determine a “species to be

endangered [, it must] normally occur[] in the State and its continued existence as a sustainable component of the State's wildlife or wild plants [must be] in jeopardy.” In order to determine a “species to be threatened [it must be] a sustainable component of the State's wildlife or wild plants; [] it [must be] reasonable to conclude based on available information that its numbers are declining; and [] unless protected, it will become an endangered species.”

ANR wants us to believe that the Legislature imposed those requirements for classifications for purposes of determining what would have an adverse effect on property development, but when it came to “rare” plant species, the Legislature left the door wide open to whatever haphazard system ANR decided to devise for the same exact purpose of determining an adverse effect on property development. In this instance we are examining ANR’s *ultra vires* classification system in the context of Section 248 proceedings, however, this classification system was developed independent of section 248 proceedings. The Superior Court conflated the authority of ANR to make “rare” plant classifications that would include plants in no danger of ever becoming threatened or endangered, such as the Nimblewill and the Aster, with the separate authority in 30 V.S.A. §248(a)(4)(E), which provides that in any section 248 proceeding ANR shall appear as a party and provide evidence and recommendations concerning any findings to be made under section 248(b)(5), and may provide evidence and recommendations concerning any other matters to be determined by the PUC in such a proceeding.⁴ Without the unlawful plant classification system in place, however, ANR would not be able to provide evidence and/or recommendations regarding purportedly rare plant species. Through their *ultra vires* classification system, ANR has been permitted an end-around the ESL. Through the establishment of the “rare” plant classification system, ANR has been enabled to ignore the specific criteria that ANR must

⁴ See, 30 V.S.A. §248(a)(4)(E). “(E) The Agency of Natural Resources shall appear as a party in any proceedings held under this subsection, 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.”

meet in order to classify threatened or endangered species, yet the end result is the same, the protection of plants from property development.

(iii) The Agency's Penalty Recommendation is Based on Purported Impacts to Plants Without Any Factual Evidence of Actual Impact.

ANR offers no factual evidence of the destruction of any rare plants or that the local environment was harmed in any way. There is no testimony nor any exhibit demonstrating that any rare plants were actually destroyed or that the local environment was harmed in any way. The only evidence on record in these proceedings concerning the impact on the Asters from the clearing is in Exhibit PLH-TMM-2 which indicates that 12 Asters were impacted by the clearing and "impacted" does not equate to "destroyed" given what we know about the growing conditions of the Aster. *See* McClammer Aff. ¶¶2-4. The only way to determine if any of the Asters or Nimblewill on site have been destroyed is to perform a plant survey. *Id.* It is unlikely that the clearing destroyed those 12 Asters identified in Exhibit PLH-TMM-2 given what we know about the Aster. *Id.* Even if the 12 Asters were destroyed, such destruction would not constitute a harm to the environment under ANR's metrics given the size of the local population which is in the thousands. *Id.*

In addition to the discovery regarding the dollar amounts ascribed to each of the section 30(c), Respondents are also requesting discovery on ANR concerning (i) the purported destruction of the rare plants, (ii) how the destruction of the rare plants and trees negatively impacts the environment, (iii) the number of plants in the local population for purposes of the Guidance (defined below) and (iv) ANR's internal documents regarding de-listing of the Nimblewill.

(iv) Even if the PUC Finds that ANR has the Authority to Protect Asters and Evidence of the Destruction of Asters, By ANR's Own Admission, its Own Guidance Documents and the ANR MOU, There Has Been No Harm to the Environment Through the Purported Impact of the Asters.

Even if the PUC is somehow able to do what the Superior Court was unable to do and find the statutory authority that allows for ANR to protect plants outside of the ESL, using ANR's own "Guidance for Conducting Rare, Threatened, and Endangered Plant Inventories in Connection with Section 248 Projects" (the "Guidance") (*See* Exhibit PLH-6) as well as that certain First Amended Memorandum of Understanding (the "ANR MOU"), dated February 22, 2018 (which superseded an earlier Memorandum of Understanding dated June 29, 2015), it is easily determined that there has been no actual harm to the environment through the purported impact or potential impact of these plants.

To avoid an undue adverse effect under §248(b)(5) in Docket No. 8454, ANR and AHS entered into the ANR MOU. In the ANR MOU, the parties state that "The Project, subject to the compliance with the below conditions, will not result in an undue adverse effect of the natural environment." As demonstrated in the ANR MOU, ANR has already determined that the proposed impact on the Plants from the clearing will not result in any undue adverse effect if the conditions set forth in the ANR MOU related to the plants (collectively, the "RTE Provisions") are adhered to. To date, all of the RTE Provisions in the ANR MOU have been satisfied and no party argues otherwise. *See* Prefiled Direct Testimony of Jim McClammer, dated October 20, 2020, page 3, line 16. The Asters that were required to be transplanted have been transplanted by Arrowwood in accordance with the specifications in the ANR MOU.

In addition to ANR's admission in the ANR MOU concerning environmental impact of the Project, the Guidance states that ANR will not consider an impact to be unduly adverse if less than 10% of an S1 (very rare) plant population of the site is impacted (the "10% Rule") or less than 20% of an S2 (rare) plant population of the site is impacted (the "20% Rule"). Putting aside the admissibility and validity of (i) ANR's ranking system and (ii) the 10% Rule and 20% Rule (the validity of which is discussed further below), it is abundantly clear from the record that less than

10% of the Asters were impacted by the clearing or would be impacted by the continuance of the clearing.

ANR is arguing that a total of twenty-four (24) individuals of the Asters were impacted by the clearing that was performed to date and that a total of an additional seventy-three (73) individuals would be impacted if the clearing was to continue. ANR Br. at 8. Assuming *arguendo* that those numbers are correct, those numbers are exponentially less than 10% of the population. There are 583 Aster plants currently in the Apple Hill Conservation Area and 321 Asters currently in the Chelsea Conservation Area. *See* Exhibits PLH-TM-3 and PLH-TM-4. There are also a minimum of 53 plants identified that exist outside of the area to be cleared on the Apple Hill parcel. *See* Exhibit PLH-TM-5. Thus, the total number of Aster individuals at the Apple Hill site is 957 (the “Western Asters”). Even if you only count these 957 Asters, the *potential* impact from the clearing of 24 Asters is well below the 10% Rule. But the Aster “population” is, of course, much larger than the 957 Asters identified at the Apple Hill site. The Guidance defines “population” as all of the individuals of a given species that occur within one kilometer unless separated by an isolating barrier. The 967 Asters identified by Jim McClammer in Case No. 19-0516 (the “Eastern Asters”) are less than one kilometer away from the Site and are not separated by an isolating barrier. Thus, the number of *identified* Asters in the local population is 1,924. Mr. McClammer has testified, however, that the actual number of individuals in the local population may be as high as 5,000 to 9,000. *See* Exhibit PLH-JM-3.

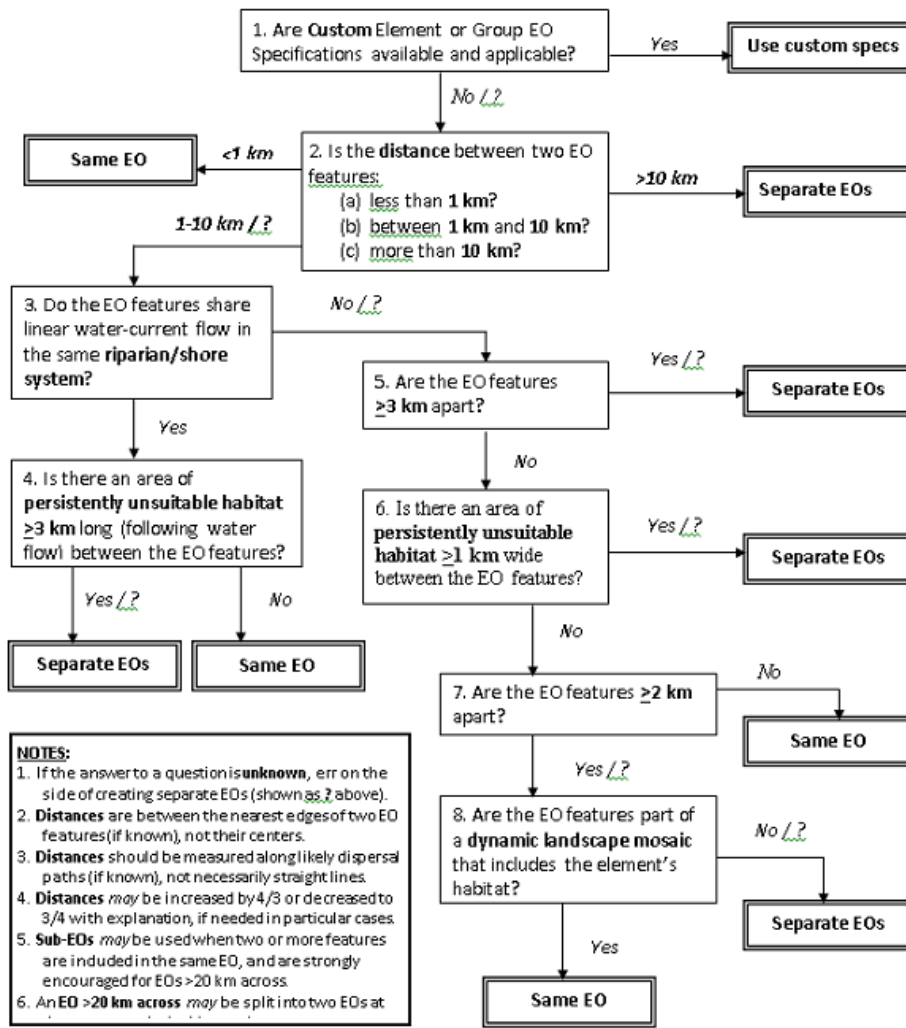
ANR’s expert witness, on the other hand, has incorrectly taken the position that Route 7 is an isolating barrier which separates the Eastern Asters from the Western Asters causing them to be two separate “populations” notwithstanding the fact that they are less than one kilometer apart. At the Hearing Mr. Popp testified that this is because an interstate highway is inconsistent with the habitat on either side of it and there is no possibility of a population starting in between the two existing populations. *See* Tr. at 180, lines 15-24. Mr. Popp ignores the evidence of the ability of

the Aster to occur along roadsides and these specific interchange ramps and highway right of ways. In any case, the ability of a plant to colonize in an intervening area is not the test to determine the existence of an isolating barrier. If it were, a mere sidewalk would be an isolating barrier. Mr. Popp testified that he was unaware of any specific standard for the width of an isolating barrier (*See* Tr. page 181-182) but there most certainly is. The specific standard is whether there is more than one kilometer of “persistently unsuitable habitat” between the occurrences and that standard comes from NatureServe, the exact same organization that Mr. Popp and ANR rely on to coordinate its rare plant ranking methodology. *See* Exhibit PLH-3, page 12, lines 2-4.

The internationally recognized methodology for determining whether the Eastern Asters and Western Asters are part of the same population is set forth in NatureServe’s Habitat-based Plant Element Occurrence Delimitation Guidance (May 2020) (the “2020 Delimitation Guidance”)⁵. The 2020 Delimitation Guidance informs us that the Eastern Asters and the Western Asters are part of the same population because they are less than 1 kilometer apart as demonstrated in their Plant Element Occurrence Decision Tree:

PLANT EO SPECIFICATIONS DECISION TREE

⁵ NatureServe, *Habitat-based Plant Element Occurrence Delimitation Guidance*, May 2020 https://www.natureserve.org/sites/default/files/eo_specs-habitat-based_plant_delimitation_guidance_may2020.pdf



See 2020 Delimitation Guide, Page 13.

The Eastern Aster and Western Asters are less than one kilometer away from each other, thus the fact that Route 7 sits between the two is irrelevant. NatureServe's "internationally accepted methodology" demonstrates unequivocally that the Eastern Asters and the Western Asters are part of the same population. This makes sense because the Eastern Asters and the Western Asters freely exchange genes because Route 7 is not wide enough to serve as a barrier to gene flow. In addition to dispersal by wind (See Tr. 158-159), the Aster pollen is dispersed by

bees (*See* Exhibit ANR-RP-5 at 3) and deer⁶, which are not restricted by Route 7. As mentioned, between the Eastern Asters and Western Asters a total of 1,923 Asters have been identified to date with the actual number likely ranging from roughly 5,000 to 9,000. *See* Exhibit PLH-JM-3. The 24 Asters that have been impacted or potentially impacted by the clearing fall well below the 10% Rule, even assuming the 10% rule was scientifically based (which it is not).

Lastly, the Aster plants have increased by 189% in the Apple Hill conservation area since transplantation and are easily replaced. Any Asters that might have been harmed by the clearing that took place have already been effectively replaced by the explosive growth of the asters that were transplanted in the Apple Hill conservation area. Even if some additional Asters would be impacted through tree-clearing outside of the conservation areas (if not identified and transplanted), the annual reports submitted to ANR show that the Aster is thriving in the Apple Hill Conservation Area. In any case, the PUC should not be left to guess as to the number of Asters impacted by the clearing and the number of Asters in the local population. As ANR states in its brief, the Apple Hill parcel has not been surveyed for very rare and rare plants since 2017 and it is possible that additional plants have germinated since then. ANR Brief at 9. Not only is it possible that there are additional Asters, but it is also quite possible that zero Asters were destroyed by the clearing. McClammer Aff. at ¶¶2-4. There is one way to determine the actual impact and the actual number of the local population and that is to conduct an RTE survey and present the findings at an evidentiary hearing. *Id.*

(v) By ANR's Own Admission, There Has Been No Harm to the Environment Through the Purported Impact of the Nimblewill.

⁶ Jonathan A. Myers, Mark Vellend, Sana Gardescu, P. L. Marks, *Seed dispersal by white-tailed deer: implications for long-distance dispersal, invasion, and migration of plants in eastern North America*, *Oecologia*, 139: 35–44 (2004). <https://pubmed.ncbi.nlm.nih.gov/14740288/>

As discussed above, all the RTE Provisions in the ANR MOU have been satisfied and no party argues otherwise. *See* Prefiled Direct Testimony of Jim McClammer, dated October 20, 2020, page 3, line 16. The only RTE Provision relating to the Nimblewill is that the population in the northeast corner be fenced off and avoided during construction and site preparation activities, which has been done. It was always contemplated that clearing would take place over the other parts of the site without any further conditions related to the Nimblewill. As such, the clearing that occurred had no negative impact on the environment through any purported impact on the Nimblewill. In addition, the Nimblewill is no longer classified as “rare” in Vermont, perhaps because ANR now recognizes the Nimblewill for what it is, a “noxious weed”.

<https://plants.usda.gov/core/profile?symbol=MUSC>.

(vi) There Is No Harm to the Environment Through the Cutting of 3 Acres of Trees When Any Vermonter Can Clear Up to 40 Acres of Trees Without a Permit.

ANR states that the actual harm to the environment which resulted from the clearing activities was at most minor, yet the degree of harm which would have resulted if the clearing continued would be moderate. ANR Br. at 10. ANR, however, offers zero explanation as to why they consider 27 acres of clearing to be a moderate harm to the environment. They offer no explanation because there is none. Under Vermont’s Heavy Cut Law, a permit is only required if a landowner plans to conduct a heavy cut of 40 acres or more. 10 V.S.A. § 2625. ANR has no basis to claim that the clearing of 27 acres of trees harms the environment when a Vermonter can clear up to 40 acres without a permit.

Tellingly, neither ANR nor its witness stated that removal of the trees in and of themselves would constitute harm. Rather, Mr. Popp testified that if all the white-arrow leaved asters have been transplanted to the conservation areas, then there would be no harm. *See*, Initial Hearing Tr. at 40 (Mr. Popp: “Assuming all the plants have been transplanted ..., then, if the conservation areas are retained, then those, then those plants would be protected, then, yeah, I’m assuming that

would be acceptable.”) There is no harm to the environment from the downing of these three acres of trees. McClammer Aff. at ¶7.

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

ANR states that the Respondent was aware that it did not have a CPG. ANR Brief at 10. This is accurate although irrelevant. ANR also states that the Respondent knew that it was not authorized to commence the clearing. ANR Br. at 8. That statement is categorically false. Respondents were aware that they could not engage in site clearing *to construct* a proposed electric generation facility, but as explained *ad nauseam* throughout the duration of these proceedings, that is not what the Respondents were doing when they commenced clearing. PLH's actions were specifically **not** part of a plan by anyone to sell renewable energy generated by the proposed facilities. The solar facilities may never be built but the sheep farm and hemp business (together, the “Horticultural and Farming Activities”) described in these proceedings will continue regardless of the existence of the solar facilities. The site work was not performed in anticipation for the construction of an electric generation facility, neither the Chelsea or Apple Hill facilities have been granted CPGs and it is unclear if they ever will receive CPGs. The site work was done in connection with the Horticultural and Farming Activities, two completely separate businesses of PLH. Respondents were relying on PUC precedent when they commenced clearing. Specifically, the PUC has stated that “a petition filed under 30 V.S.A. § 248 does not terminate the ability of the Petitioner to conduct otherwise lawful activities on its land, provided that these activities do not conflict with any requirements contained in a CPG issued by the Board.” *Petition of Georgia Mountain Community Wind, LLC*, Docket No 7508, Order of January 5, 2012 (“*Georgia Mountain*”). Yet in a clear uncompensated taking under the Fifth Amendment of the United States Constitution, the PUC has enjoined all activity on the 27-acre and 5-acre parcel since 2020. In addition, the PUC has recognized that section 248 was not intended to cover farming related or

otherwise lawful activities even though those activities may overlap with activities related to electric generation. *Petition of Beaver Wood Energy Pownal, LLC*, Docket Nos. 7678 and 7679, 2011 Vt. PUC LEXIS 169 (April 1, 2011) (“*Beaver Wood*”). Finally, the PUC has also recognized the rule prohibiting site preparation for, or construction of, an electric generating facility does not apply to activities or construction of facilities that could be used for other purposes, and thus not solely related to the electric generating facility, even when those were expressly incurred for federal and state tax purposes as part of construction of the electric generating facility. *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, 2010 Vt. PUC LEXIS 332 (October 22, 2010) (“*Monument Farms*”) at 6 (“the digester is but one component of the Project and not only serves the purpose of generating electricity but also provides material for the farming operation itself.”) Based on PUC precedent in *Georgia Mountain*, *Beaver Wood* and *Monument Farms*, there was no reason for Respondents to know or have reason to know that a violation existed, let alone a knowing and intentional one. ANR also argues that Respondents knew that site clearing without a CPG was a violation of Section 248 because it was clear by Respondents’ March 2020 attempt to amend it pending Section 248 petition to account for the site clearing. The opposite is true. The March 2020 amendment request (which was denied on procedural grounds) was not an application to clear trees but rather a reconfiguration of the solar project based on the changed conditions at the site that Respondents were entitled to make under Vermont law and PUC precedent. The simple truth is that the Respondents were acting within the confines of what was previously allowed for under *Georgia Mountain*, *Beaver Wood* and *Monument Farms* and should not be penalized for doing so.

ANR also makes the argument that Respondents knew that there were plants in the clearing area that ANR believes are “rare” and “very rare.” While that is true, it is also true that Respondents were aware of the existence of the ANR MOU which RTE Provisions it would continue to abide by should the solar projects proceed. All the RTE Provisions in the ANR MOU have been satisfied

and no party argues otherwise. See Prefiled Direct Testimony of Jim McClammer, dated October 20, 2020, page 3, line 16. In other words, the “rare” and “very rare” plants on the site would have continued to be protected to the same exact extent they would have been had the clearing been done in connection with the construction of a solar facility rather than the Horticultural and Farming Activities. Respondents did not impact any plants in any way that was not already contemplated by the ANR MOU.

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

The agencies state that they are unaware of any economic benefit that resulted from the violation but then states, without any evidentiary support, that if Respondent were successful in this endeavor the potential economic benefit could have been substantial due to the Developer avoiding the costs and limitations of environmental compliance. ANR provides no factual basis to demonstrate what that potential economic benefit could be and is simply wrong. Respondents' testimony and prior briefing establish that there would have been no economic benefit to the Developer from the clearing vis-à-vis the section 248 process. In fact, there could have been an economic detriment if the CPG required certain screening that would have been provided by the trees. No costs and limitations of environmental compliance would have been avoided by clearing the land in connection with the Horticultural and Farming Activities. In fact, the type of clearing required for the Horticultural and Farming Activities can be more than twice as expensive as the clearing involved for a solar facility. Melone PFT pp 9-10.

D. The length of time that the violation existed.

The agencies argue that the length of time that the violation existed was 12 days. DPS states that the length of time is not particularly significant in this context. What is particularly significant, however, is that the agencies are insinuating that Respondent continued the clearing activities intentionally on June 27, 2020, in direct contravention of the TRO issued the evening

before. That is false, the TRO issued at 10:31pm on Friday night and as soon as it was seen by Chris Little on Saturday it was communicated to Robert Kobelia to stop the clearing. See the Affidavit of Robert Kobelia dated December 8, 2020. Although the PUC announced it was issuing a TRO from the bench, the scope of what was to be included in that order remained to be seen, and Vermont's rules are clear that such an announcement has no legal effect. Moreover, and most importantly, Robert Kobelia's activities on Saturday morning, June 27, 2020, were removing brush from the already cleared area⁷.

E. The deterrent effect of the penalty.

As discussed above, the Respondents were acting within the confines of what was previously allowed for under *Georgia Mountain*, *Beaver Wood* and *Monument Farms* and should not be penalized for doing so. What the Department characterizes as a "knowing violation" and "persistent disregard for the Commission's orders" was the exact opposite. Respondents were relying on PUC precedent, not ignoring it, and announced its intentions months before starting.

F. The economic resources of the respondent.

The entire reason this proceeding exists is because PLH decided that the time had come to put both the Apple Hill parcel and the horticultural use parcel to productive use after nearly a decade of operating in the red. The ability to pay a potential penalty neither relates to purported environmental harm nor any other action related to the purported violation of section 248.

G. The respondent's record of compliance.

Neither agency is aware of any prior Section 248 violations involving the Respondents because none exist. Respondents have three operational solar facilities in Vermont and a CPG for a fourth and have never had an issue like this before. While it was clear to the Respondents based on PUC precedent that they would be permitted to clear the parcel in question for an activity

⁷ Hearing Transcript, Page 66, Lines 10-19.

unrelated to the electric generating facilities, the PUC has now made it clear that it is no longer abiding by its prior precedent.

H. Any other aggravating or mitigating circumstance.

In analyzing this factor ANR states that “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...” See ANR Br. at 14. As explained above, this is categorically false. The March 23, 2020, amendment request did not request to clear anything but rather demonstrated the changed conditions at the site that would have resulted from clearing that had already occurred. Also, in any case, the March 23, 2020, amendment was denied on procedural grounds rather than substantive. The PUC never said that the Respondent could not undertake the clearing contemplated as ANR has stated in its brief.

ANR is also focused on the absence of any protective measures concerning the “rare” and “very rare” plants in the area. However, as discussed above, the Respondents proceeded to clear the land so as not to run afoul of any of the protective measures in the ANR MOU, none of which were violated. Respondents did not impact any plants in any way that was not already contemplated by the ANR MOU. Both agencies state that Respondent’s continued clearing of the site after the issuance of the TRO is an aggravating factor. As discussed in Section (IV) above, Respondent was not intentionally ignoring the TRO and Robert Kobelia’s activities on Saturday morning, June 27, 2020, were simply removing brush from an already cleared area. The mitigating circumstances in this case should be the fact that Respondents believed (and continue to believe) that the actions they performed were permitted under Vermont and Commission precedent. For that reason alone, the penalty amount should be zero. An additional mitigating factor is that the Respondents have already been sufficiently penalized by the imposition of these proceedings. See Affirmation of Steve Broyer dated March 16, 2023, at ¶¶2-5.

Dated: March 16, 2023

Respectfully submitted,

/s/Michael Melone

Michael Melone

Bar No. 5455

Allco Renewable Energy Limited

157 Church St., 19th floor

New Haven, CT 06510

Phone: (212) 681-6974

Email: MJMelone@AllcoUS.com

Attorney for Respondents