

The Agency 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. The Department incorporates ANR’s accusations regarding harm to the environment in the DPS Brief and defers to ANR on such topic. DPS Brief at fn. 2. The Respondents respectfully disagree with ANR’s conclusory assumptions regarding harm to the environment and wish to present evidence on the topic. Specifically, Respondents need the opportunity to provide the PUC with a rare plant inventory to demonstrate that no actual harm was done by the activity in question. Additionally, the ANR Brief includes statements regarding the percentages of the known population of the Aster plant (see ANR Brief at 9) which are wildly inaccurate because they are based on an incorrect methodology for determining the number of plants in a local population. The Respondent needs the opportunity to provide additional evidence concerning the actual number of individual Asters in the known population based on the correct methodology. It would be clear error for the Commission to issue a penalty based on purported harm to the local population of a plant when the methodology employed by ANR to identify the population is also based on a clear error.

The decision to reopen the record is generally reserved to the discretion of the PUC, although Respondents do not agree that is the standard when, as here, Respondents have been ambushed by the false assumptions regarding environmental harm contained in the Agency Brief. Respondents have not been provided with advance notice and an opportunity to present evidence with respect to the purported destruction of the Aster or the Nimblewilly nor how the agencies have arrived at their proposed penalties. Although it was clear from these proceedings to date that some of these plants *may* have been impacted by the clearing (see Exhibit PLH-TMM-2), there is nothing in the

record to demonstrate that the plants were actually destroyed or negatively impacted by the clearing. In fact, with respect to the Aster, the opposite may be true and this plant may be continuing to thrive on the site. See Affirmation of Jim McClammer, dated March 16, 2023 (“McClammer Affirmation”). See, *Hudson River Fishermen's Ass'n v. Federal Power Comm'n.*, 498 F.2d 827 (2d Cir. 1974) (stating “there has not been ‘an adequate opportunity to litigate’ [] because the dispute[] was presented to the Commission after the hearings were closed.”) Simply put, the distribution of the rare plants on the site cannot and should not be assumed. The PUC should not be left to guess as the impact the clearing had on the rare plants, that impact can be clearly assessed by conducting a rare plant inventory on the site, something that has not been done since 2017.

But assuming the applicability of the discretion standard, the PUC has addressed the threshold for whether to reopen the record in terms of whether the information is relevant or highly material, and it is an abuse of discretion, arbitrary and capricious, and a violation of due process to retroactively change its threshold. Respondents satisfy both the “relevant” and “highly material” criteria used by the PUC in other cases. At a minimum, there remain genuine issues of material fact raised by the DPS Brief and the Agency Brief concerning (i) actual environmental harm, (ii) harm to the regulatory process and (iii) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation.

If the evidence is relevant or highly relevant, which it is given that these factors are an integral component of the penalty recommendations of the DPS and ANR, then Respondents should be permitted the opportunity to introduce it. Respondents propose to introduce evidence that shows

(i) there has been no actual environmental harm, (ii) there has been no harm to the regulatory process and (iii) there has been nor could there have been any economic benefit from the clearing.

For example, in *Petition of Alpine Haven Water Co., Inc. and AHA Water Cooperative, Inc.*, Docket 5947, *Order on Motion to Alter, Correct, and Reconsider Final Order and Revised Final Order* of August 31, 2000 at 2, the PUC stated that it would open a closed record for the admission of late material *if such material appeared highly material*. Respondents meets that factual standard. Another example is found in *In re Investigation into Regulation of Voice Over Internet Protocol*, 2013 VT 23 (2013) where the hearing officer had denied a request to reopen the record based upon the conclusion that the proffered evidence was *not relevant*. The Supreme Court reversed the PUC on different grounds and in doing so stated that

Comcast also urges us to vacate the PUC's exclusion of Comcast's supplemental post-hearing testimony. The PUC denied this motion on the grounds that the information related to the federal classification question and was not necessary to decide the case. In light of our decision that the PUC must reach the classification question, on remand, the PUC should reconsider whether to grant Comcast's motion to supplement the evidentiary record.
Id. at P33.

Another example is *Investigation into the appointment of an entity to provide natural-gas efficiency services*, Docket No. 7676, *Order Re: DPS Motion to Reopen the Record and Subsequent Schedule*, 2013 Vt. PUC LEXIS 184 (May 14, 2013), in which the Department sought to reopen the record based upon the threshold that the evidence was “relevant to the ultimate issue in this docket,” and was “important to ensure that the [PUC] has an opportunity to consider all relevant existing data when making its determination.” The hearing officer admitted the evidence. So too here, the evidence is relevant and highly material to the ultimate issue in this docket, and Respondents should be permitted to introduce it and a new hearing should be scheduled.

The PUC's prior orders discussed above are all grounded in the well-established rule of administrative law that an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). The failure to do so is arbitrary and capricious and an abuse of discretion. Thus an agency decision is arbitrary and capricious and an abuse of discretion if it "entirely failed to consider an important aspect of the problem". *Motor Vehicle Mfrs.*, 463 U.S. at 43. The PUC has implicitly followed that standard as shown in the orders discussed above because it has reopened the proceedings when relevant or highly material information is sought to be introduced. This case is no different. See, *In re Central Vt. Pub. Serv. Corp.*, 141 Vt. 284 (Vt. 1982) ("The exclusion of relevant evidence in an administrative proceeding is presumptively invalid").

The Supreme Court has recognized that the exclusion of relevant evidence ran counter to the purpose of the regulatory system and the public interest in arriving at just and reasonable rates. *Id.* at 293 ("In the end, all parties to the ratemaking process will be harmed if decisions are based upon conjecture rather than fact.") The same is true here. The PUC may only issue a penalty after considering several statutory criteria, including environmental harm. If the PUC refuses to consider Respondent's proffered evidence regarding environmental harm, the PUC will be basing its decision on conjecture rather than facts and the 248 regulatory system and the public interest which it protects will be improperly harmed.

Nor is the request to reopen discovery and for a supplemental hearing a complete re-litigation of issues. A supplemental hearing would be at most ½ of a day. The extra process requested by Respondent would not be burdensome. At bottom, the recommended penalties cannot be sustained

because they are each based upon something other than “a full evidentiary record concerning material issues, [which is] an abuse of discretion.” *Pham v. United States*, 317 F.3d 178, 186 (2d Cir. 2003) (Sotomayor, J. concurring).

(a) Purported Environmental Harm

If the PUC is inclined to issue a penalty based wholly or in part on purported environmental harm, then such harm should be clearly identified and not left to the conjecture and falsities introduced by ANR. That 24 Aster plants were destroyed by the clearing is conjecture. *See generally* the McClammer Affirmation ¶¶2-3. That the known population of the Aster plant consists of 561 individual plants is based on a falsity.

(i) The Known Population of Aster is not what ANR Says it is.

Using the Agency’s own “Guidance for Conducting Rare, Threatened, and Endangered Plant Inventories in Connection with Section 248 Projects” (the “Guidance”) (*See* Exhibit PLH-6) it is easily determined that there has been no actual harm to the environment through the purported impact or potential impact of these plants. 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”). 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.

The Agency is arguing that a total of 24 individuals of the Asters were impacted by the clearing that was performed to date and that a total of an additional 73 individuals would be impacted if the clearing was to continue. ANR Brief 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 solar parcel (the “Solar Parcel”). *See* Exhibit PLH-TM-5. Thus, the total number of Aster individuals at the Solar Parcel 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 Solar Parcel. 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.

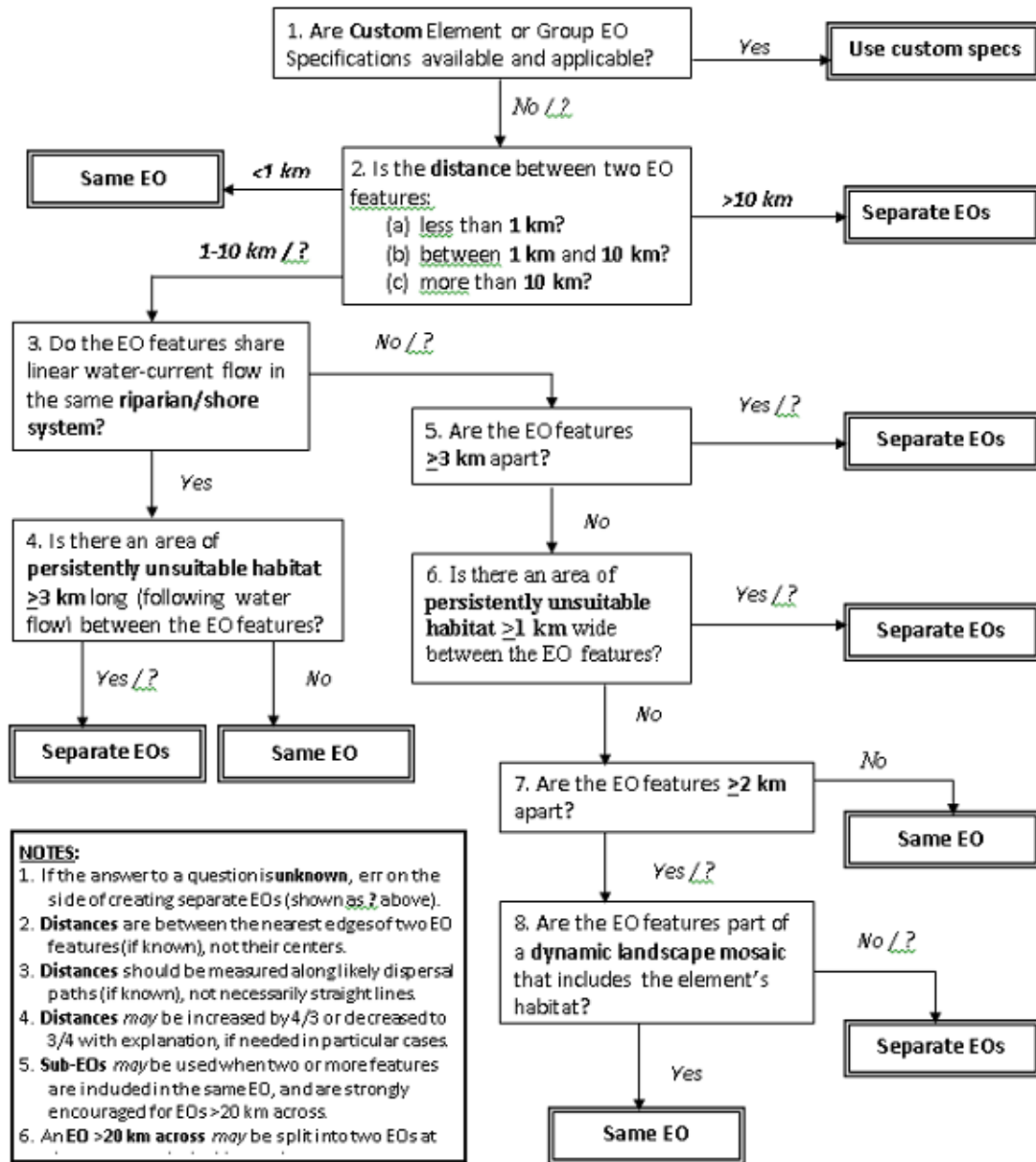
ANR’s expert witness, on the other hand, has incorrectly taken the position that Route 7 is an isolating barrier which separates the Eastern Asters from the Western Asters causing them to be two separate “populations” notwithstanding the fact that they are less than one kilometer apart. At the Hearing 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”)¹. 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

¹ 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.

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.

At a bare minimum, if the PUC is not inclined to conduct a hearing on impacts to the Asters population, the Respondents (or the PUC) should be allowed to question Mr. Popp as to why he chose not to use the Delimitation Guide in identifying the local population of the Aster. If ANR is using a methodology other than NaturServe's to determine what constitutes the local population, then Respondents (and the PUC) should be informed of such methodology. If the PUC is inclined to issue a penalty based in whole or in part on purported impacts to the Aster population, it would be arbitrary and capricious and an abuse of discretion to do so based on the incorrect standard of measuring such population. It is clear to the Respondents' consultant that Mr. Popp made an error in identifying Route 7 as an isolating barrier. *See McClammer Affirmation ¶5.* Mr. Popp should be afforded the opportunity to correct his mistake or explain why ANR is employing a standard other than NaturServe's.

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Respectfully submitted,

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