

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NO. 20-1611-INV

INVESTIGATION PURSUANT TO 30 V.S.A. SECTIONS
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.
SECTION 248(a) (2)

July 20, 2023
2 p.m.

Via videoconference

Oral Argument held before the Vermont Public
Utility Commission, via GoToMeeting, on July 20, 2023,
beginning at 2 p.m.

P R E S E N T

COMMISSION MEMBERS: Anthony Z. Roisman, Chairman
Margaret Cheney

STAFF: Ann C. Bishop, Operations Director
Michael Tousley, Staff Attorney

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Annette Smith, Vermonters for a Clean Environment

Caroline Daniels, DPS

Jim McClammer

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1 CHAIR ROISMAN: Good afternoon. This
2 is a remote hearing in Case No. 20-1611-INV, which is
3 an investigation pursuant to 30 V.S.A. sections 30
4 and 209 into whether the Respondent initiated site
5 preparation of Apple Hill in Bennington, Vermont in
6 violation of 30 V.S.A. Section 248(a)(2) and whether
7 the commission should issue a civil penalty.

8 My name is Anthony Roisman. I'm the
9 Chair of the Vermont Public Utility Commission and
10 with me is Commissioner Margaret Cheney. Also with
11 us is Mike Tousley, Staff Attorney. Ann Bishop, the
12 Commission's Operations Director is serving as the
13 GoToMeeting platform manager for this hearing.

14 We will start with taking appearances
15 first from the Department of Public Service.

16 MR. CIVILETTI: Good afternoon. This
17 is Ben Civiletti with the Department.

18 CHAIR ROISMAN: And then the Agency of
19 Natural Resources.

20 MR. EINHORN: Don Einhorn with the
21 Agency.

22 CHAIR ROISMAN: And the Applicant?

23 MR. M. MELONE: Good afternoon. This
24 is Michael Melone on behalf of the Respondent. And
25 with me today I have Thomas Melone and Jim McClammer.

1 CHAIR ROISMAN: Okay. And Mr. Melone,
2 should you be testifying today, will Mr. Tom Melone
3 act as the attorney to put you on the stand, or do
4 you want to do it by yourself?

5 MR. M. MELONE: I believe if either of
6 the two of us are going to be testifying, it's going
7 to be Tom Melone.

8 CHAIR ROISMAN: Okay. All right. So
9 his appearance here today will be only as a witness.
10 Correct?

11 MR. M. MELONE: Correct.

12 CHAIR ROISMAN: Okay. Thank you. Are
13 there any other parties who I have not called upon?

14 (No response)

15 CHAIR ROISMAN: Okay. We are here to
16 further address whether a civil penalty should be
17 issued by the commission to Allco Renewable Energy
18 Limited, its affiliates which include Chelsea Solar
19 LLC, Apple Hill Solar LLC and PLH LLC. Collectively
20 we are going to refer to them as the developer for
21 today's proceeding and the developer's subsidiaries
22 and contractors.

23 On April 1, 2021 the commission issued
24 an order in this proceeding finding that the
25 developer had begun site preparation for a solar

1 project on Apple Hill without a CPG in violation of
2 30 V.S.A. Section 248(a)(2)(A). This proceeding
3 provides the parties with an opportunity to argue for
4 or against the civil penalty.

5 After we issued the notice for this
6 limited evidentiary hearing and oral argument the
7 developer filed a second motion requesting a third
8 evidentiary hearing with a broader scope than that
9 ordered by the commission. The commission had
10 ordered an evidentiary hearing limited to addressing
11 civil penalty factors under 30 V.S.A. section 30 that
12 had not been litigated in the two other evidentiary
13 hearings held in this case. The limited scope
14 included the issue of economic benefit, if any, of
15 the developer's unauthorized site clearing, and the
16 developer's ability to pay a civil penalty.

17 The developer also made testimonial
18 filings reflecting its request for an evidentiary
19 hearing with a scope broader than the issues of
20 economic benefit and ability to pay. The developer's
21 filings included affidavits from Jim McClammer, the
22 developer's natural resources consultant, and Thomas
23 Melone, the president and lead attorney for the
24 developer.

25 In our May 30, 2023 order, we issued an

1 order establishing some ground rules for today's
2 proceedings and denying the admission of the
3 testimony of Mr. McClammer and Mr. Broyer, but
4 allowing for the refiling of the corrected testimony
5 from Mr. Broyer. The developer's now withdrawn the
6 proposed testimony of Mr. Broyer.

7 The Vermont Agency of Natural Resources
8 and the Department of Public Service have objected to
9 our admission into evidence of the affidavits of Mr.
10 McClammer and to the admission of any portions of the
11 affidavit of Mr. Melone other than portions relevant
12 to the economic benefit and ability to pay issues.
13 They also recommend that we deny the developer a
14 second motion for a broadened third evidentiary
15 hearing.

16 The developer has not filed timely
17 responses to these objections and recommendations.

18 The commission is denying the
19 developer's second motion for a broadened third
20 evidentiary hearing and reaffirming the rejection of
21 the testimony of Mr. McClammer as untimely filed and
22 unrelated to the topic of this limited evidentiary
23 hearing. We are admitting discrete portions of the
24 affidavit of Mr. Melone that are arguably related to
25 either economic development or the ability of the

1 developer to pay a fine.

2 The remainder of Mr. Melone's
3 affidavit, which is primarily legal argument, for
4 belatedly seeking to present evidence on the issue of
5 whether developer's activities at the site without
6 possessing a CPG constitute a violation of relevant
7 statutes and regulations will be admitted to the
8 record of the case, but it's not admitted as
9 evidence.

10 For the purposes of the evidentiary
11 hearing today the commission has created commission
12 Exhibit 1 which is now visible on your screen to
13 identify the specific paragraphs of Mr. Melone's
14 testimony that are being admitted into evidence.
15 These paragraphs are -- and I will read them off.
16 Sections -- and these are the numbered paragraphs in
17 Mr. Melone's affidavit. 1 through 9. 12 through 21.
18 Paragraph 47. Paragraph 55. And paragraph 64. We
19 will deduce these determinations regarding
20 admissibility of evidence and rejection of Mr.
21 Melone's request for an expanded evidentiary hearing
22 when we issue the final order in this proceeding
23 today.

24 We will begin today's proceeding with
25 the evidentiary hearing by swearing in Mr. Thomas

1 Melone so he's available for cross examination by any
2 party or the commission limited to matters contained
3 in the portions of his affidavit that we have
4 admitted into evidence. When the evidentiary hearing
5 is completed we will take a short break and then
6 begin the oral argument portion of this proceeding.

7 The developer will have 30 minutes to
8 be divided between opening argument and rebuttal as
9 he wishes, and 30 minutes for ANR and the Department
10 to divide between them as they wish.

11 Does any party object to having a
12 remote hearing? If anyone no longer consents to
13 conducting this hearing remotely, you should speak up
14 now.

15 (No response)

16 CHAIR ROISMAN: Hearing none, we will
17 proceed. And we will start with the evidentiary
18 hearing portion of the proceeding. And Commissioner
19 Cheney, will you please administer the oath to Mr.
20 Thomas Melone.

21 COMMISSIONER CHENEY: Yes. Good
22 afternoon, Mr. Thomas Melone.
23
24
25

1 THOMAS MELONE

2 Having been duly sworn, testified
3 as follows:

4 THE WITNESS: Yes, I do.

5 COMMISSIONER CHENEY: Thank you.

6 CHAIR ROISMAN: Okay. We will start
7 with the Department. Does the Department have --
8 well first let me ask, now that you know which
9 portions of the affidavit will be admitted, do either
10 the Department or ANR feel that you need to take a
11 break just to define what your cross examination, if
12 any, will be? Or are you ready to go?

13 I'll start with you, Mr. Civiletti.

14 MR. CIVILETTI: Thank you. The
15 Department does not have any cross examination.

16 CHAIR ROISMAN: Okay. Thank you. Mr.
17 Einhorn? I'll ask you, do you wish to have a pause,
18 or do you want to proceed?

19 MR. EINHORN: We may proceed, and I do
20 not have any cross examination planned.

21 CHAIR ROISMAN: Okay. Commissioner
22 Cheney, do you have any questions for Mr. Thomas
23 Melone?

24 COMMISSIONER CHENEY: No. I do not.

25 CHAIR ROISMAN: Okay. And I do not

1 have any questions for Mr. Melone. Mr. Melone, thank
2 you for your appearance today. You are excused as a
3 witness.

4 MR. T. MELONE: Thank you, Mr.
5 Chairman. Thank you, Commissioner Cheney.

6 CHAIR ROISMAN: Okay. So that
7 concludes the evidentiary hearing in this proceeding,
8 and we can move to the oral argument. I had proposed
9 that we would take a break at this point, and I'm
10 perfectly willing to do that. But if the parties
11 want to proceed directly to the oral argument, I'm
12 more than happy to do that at this moment. And since
13 you, Mr. Michael Melone, would be the first at bat,
14 I'll ask you first. Are you ready to start oral
15 argument, or would you like a short break?

16 MR. M. MELONE: I'm ready to go.

17 CHAIR ROISMAN: Good. Thank you. All
18 right. Mr. Melone, you have 30 minutes. And do you
19 want to reserve any time for rebuttal? And if so,
20 how much time?

21 MR. M. MELONE: Yeah. I'll reserve 15
22 minutes.

23 CHAIR ROISMAN: Okay. All right. So
24 you can start now, and I'll let you know, do you have
25 your own time keeping, or do you want me to let you

1 know when you're 5 minutes away or whatever from your
2 deadline?

3 MR. M. MELONE: I have my own iPhone
4 here so I can start the timer. Thank you.

5 CHAIR ROISMAN: Okay. And I show it as
6 being 2:11. So you can run until 2:26, I think.

7 MR. M. MELONE: Sounds good.

8 CHAIR ROISMAN: All right. Thank you.

9 MR. M. MELONE: Good afternoon,
10 everyone. I wanted to first just speak to the fact
11 that it is exceedingly difficult to put together an
12 oral argument without knowing exactly what I'm
13 arguing against. We are told that ANR has a formula
14 for determining penalty amounts, yet we have had no
15 visibility into that formula.

16 Using the 8 factors in 30 V.S.A. 30(c)
17 ANR has suggested a penalty of approximately \$40,000.
18 Yet no actual dollar amounts are tied to any of those
19 8 factors. The same goes for DPS. There is no
20 visibility into how much weight in terms of actual
21 dollars each factor is given.

22 So let's say, hypothetically, that the
23 greatest harm here is the purported harm to the
24 regulatory process that we have been accused of, and
25 that harm accounts for \$35,000 out of that \$40,000

1 recommended penalty, then obviously our time would be
2 well spent this afternoon on addressing that
3 particular issue. However, we are operating in a
4 bubble here with no visibility into what's behind the
5 curtain at ANR or DPS.

6 What's more troubling is that these are
7 government agencies where there is supposed to be
8 full disclosure and accountability, yet we have none
9 here. I can't really think of a reason why the
10 penalty calculation formulas of ANR and DPS should
11 not be disclosed. And it would certainly make
12 everyone's job a lot simpler here today.

13 With that being said, I will address
14 all of the 8 factors of 30 V.S.A. 30(c). The first
15 factor is the extent to which the violation harmed or
16 might have harmed the environment. There is no
17 evidence of actual harm to the environment here.
18 There is no evidence that the asters were actually
19 impacted as we know from Mr. McClammer's testimony.
20 We know that VTrans brush hogs the railroad corridor
21 across the way on Route 7, across Route 7 in
22 Bennington, and that those asters continue to thrive
23 in that corridor notwithstanding such brush hogging.

24 As to the trees that were taken down,
25 they were mostly ash trees as Mr. Kobelia has

1 testified. And these ash trees were infected and
2 would likely be dead by now. So the focus has turned
3 away in these proceedings from proving actual harm to
4 demonstrating the potential of harm. We have
5 continuously made the point that even if the clearing
6 were to have continued, there was no potential for
7 harm to the environment. As I just said, the trees
8 that were taken down were infected as testified to by
9 Mr. Kobelia.

10 And with respect to the potential of
11 impacts to the aster, first we already know that the
12 aster thrives in disturbed areas in and around this
13 particular area in Bennington. Second, ANR's own
14 guidelines allow for impacts of up to 10 percent of
15 the local population without an undue adverse impact
16 on natural environment. Now ANR relies on an
17 organization called NatureServe to coordinate and
18 establish its rare plant ranking methodology. Using
19 NatureServe's methodology on identifying the number
20 of plants in a local population, Mr. McClammer's
21 testimony is clear that any purported impacts from
22 the activity in question wouldn't come close to that
23 10 percent threshold. So we are within ANR's own
24 guidelines as to what is allowable.

25 Now I understand that Mr. Popp's

1 testimony on what constitutes a local population of
2 this plant differs from Mr. McClammer's. But I am
3 also certain, as is Mr. McClammer, that Mr. Popp made
4 a mistake while testifying in these proceedings on
5 that particular point. Unfortunately, ANR has never
6 corrected that error and has objected each and every
7 time we try to put into evidence a single piece of
8 paper from NatureServe. It contains a flow chart
9 demonstrating how to determine the scope of the local
10 population of the aster. The single piece of paper
11 would put the issue to bed, yet no one wants to look
12 at it.

13 This same exact issue also arises in
14 another one of our cases which is the Warner Solar
15 case where the record is still open. So ultimately,
16 ANR will either have to admit that it has abandoned
17 its reliance on NatureServe's methodology as the
18 bedrock for its rare plant classification scheme or
19 admit that their witness simply made a mistake in
20 these proceedings. But the PUC shouldn't have to
21 wait to see how the issue is resolved in Warner when
22 it has the opportunity here to apply the correct
23 testimony in these proceedings.

24 Also with respect to the aster is the
25 still-open issue as to whether ANR has the authority

1 to regulate rare and very rare plants in Vermont.
2 ANR clearly has the authority to regulate endangered
3 species, but neither the PUC nor any other court in
4 this state that we have asked this question to has
5 given us an answer. The closest was the Superior
6 Court in Chittenden who stated that the exact
7 statutory source for ANR's authority remains unclear.

8 In the PUC's May 30, 2023, order in
9 this proceeding the commission acknowledges that we
10 are challenging ANR's jurisdiction over regulating
11 rare plants, yet the commission still hasn't answered
12 the question one way or another. So if the
13 commission is inclined to impose a penalty for
14 purported impacts to rare plants, it should answer
15 the question as to ANR's authority to protect those
16 plants. If there is no authority, there can be no
17 penalty tied to it.

18 Lastly, under this first factor, the
19 agencies, ANR, DPS, cite harm to the regulatory
20 process. If there is any harm to the regulatory
21 process here it's that the PUC and the agencies are
22 reading into Section 248(a)(2)(A) words that simply
23 are not there, which brings me directly to the second
24 factor.

25 The second factor is whether Respondent

1 knew or had reason to know that the violation
2 existed. The language of the statute in question
3 248(a)(2)(A) is as clear as it can be. And I'm
4 paraphrasing here, but it says: No company may begin
5 site preparation for construction of an electric
6 generation facility without first obtaining a CPG.
7 The activity that was done here was site preparation,
8 not for an electric generation facility, but for an
9 agricultural endeavor, one that we have now been
10 forced to take out of this great State of Vermont.

11 CHAIR ROISMAN: Excuse me, Mr. Melone.
12 Mr. Melone, I want to just ask you one question about
13 that. The developer has not withdrawn its desire to
14 put a solar unit at this site. In other words, this
15 site is now still a live applicant for a solar
16 project at this location; is that correct? Or has
17 that changed in some way?

18 MR. M. MELONE: That is correct.

19 CHAIR ROISMAN: Okay. Thank you.

20 MR. M. MELONE: So as I was saying, we
21 have been forced to move our planned sheep hub from
22 Vermont to Connecticut where as of today we have 137
23 sheep and three employees that currently service our
24 solar projects throughout New England.

25 Now the commission -- neither the

1 commission nor the agencies thankfully have doubted
2 the veracity of our agricultural endeavors. There's
3 never been a point in these proceedings that I can
4 recall where anyone has said we simply don't believe
5 you. Rather what the commission has done is
6 effectively revised the language of 248(a)(2)(A) so
7 that it now reads: No company may begin site
8 preparation for or construction of an electric
9 generation facility or any other land use if the site
10 preparation for such other land use would overlap
11 with the site preparation of the electric generation
12 facility.

13 That is what the PUC and the state
14 agencies would like 248(a)(2)(A) to read. But that's
15 not what it says. And the Petitioner was relying on
16 what the statute says, not what the PUC and the state
17 agencies think it should say. The Petitioner should
18 not be penalized for working within the confines of
19 the statute as written.

20 The third factor is the economic
21 benefit that could have been anticipated. Neither
22 DPS nor ANR identify any economic benefit because
23 there isn't any. It costs more to clear land in
24 anticipation of an agricultural endeavor than it does
25 a solar farm. Therefore, there is no economic

1 benefit.

2 The fourth factor is the length of time
3 that the violation existed. Again, the Petitioner is
4 working within the confines of 248(a)(2)(A) as
5 written when it commenced the clearing for the sheep
6 farm. When news of the TRO reached Chris Little,
7 Saturday morning after it was issued late Friday
8 night, it was immediately relayed to Bob Kobelia in
9 the field, despite the agency's insinuation that the
10 Petitioner was potentially ignoring the TRO, that was
11 simply not the case.

12 The fifth factor is the deterrent
13 effect of the penalty. And again, I want to
14 reiterate that the Petitioner was acting within the
15 confines of 248(a)(2)(A) as written, not as the PUC
16 and the state agencies would like to see it read.
17 Therefore, a penalty would have no deterrent effect
18 here. Petitioner will continue to interpret statutes
19 as they are written unless and until the legislature
20 deems that such language needs to be changed.

21 The sixth factor is the economic
22 resources of the Respondent. The Respondent -- the
23 specific Respondents here are Apple Hill and Chelsea
24 Solar neither of which have any cash or assets to pay
25 a penalty.

1 The seventh factor is Respondent's
2 record of compliance. Neither agency, DPS or ANR, is
3 aware of any Section 248 violations and that's
4 because none exist.

5 This brings me to the last and eighth
6 factor which is other aggravating or mitigating
7 circumstances. I've already spoken about what the
8 agencies' view as the aggravating circumstances of us
9 supposedly knowingly violating the prohibition
10 against site preparation. And at the risk of
11 sounding like a broken record, we were operating
12 within the confines of the statute as written, not
13 how the PUC and the agencies would like to see it
14 written.

15 I understand the desire of wanting to
16 prevent developers from clearing their land in
17 advance of commencing 248 proceedings. But first,
18 that is not what happened here. Second, if there is
19 a concern that the way that the statute is drafted
20 leaves open that possibility that the developers will
21 simply clear-cut their land in advance of a section
22 248 petition, then it's up to the legislature to fix
23 that statute and add in the words that the PUC has
24 effectively added here.

25 When we consider harm to the regulatory

1 process, as we have been accused of here, did we harm
2 the regulatory process when we challenged the PUC's
3 initial take on the single plant issue involving
4 these same projects back in 2013 and 2014? When we
5 presented these collocated facilities in Bennington
6 and the PUC responded by saying the statute does not
7 allow for that, and we challenged that
8 interpretation, the direct result of that challenge
9 was the legislature updating the statute in question
10 to alleviate the commission's concerns.

11 Was the process in in re: programmatic
12 changes harmful to the regulatory process, or did it
13 result in an improvement to that process? Same
14 question holds true here. Just because we believe we
15 were acting within our rights under the statute, and
16 you disagree with that interpretation, that doesn't
17 mean we are harming the process. In fact, I believe
18 the opposite is true.

19 Thank you. I'll reserve the rest of my
20 time.

21 CHAIR ROISMAN: Thank you, Mr. Melone.
22 Mr. Civiletti, have you or Mr. Einhorn decided how to
23 divide up the 30 minutes that you have to respond?

24 MR. CIVILETTI: I don't believe we have
25 actually discussed it, but I would be perfectly happy

1 to split it down the middle or -- if that works for
2 ANR.

3 CHAIR ROISMAN: Well at the risk of
4 turning into a mediator here, Mr. Einhorn, are you
5 okay with splitting this baby?

6 MR. EINHORN: That's fine with me. I
7 will not need 15 minutes.

8 CHAIR ROISMAN: Okay. And is it okay
9 if Mr. Civiletti begins, or would you like to begin,
10 Mr. Einhorn?

11 MR. EINHORN: No. Absolutely. The
12 Department may begin.

13 CHAIR ROISMAN: Okay. Mr. Civiletti,
14 you have 15 minutes. Do you have your own clock, or
15 would you like me to let you know when you're close
16 to it?

17 MR. CIVILETTI: I can keep track. I
18 anticipate being very brief. Thank you.

19 Thank you for the opportunity to
20 provide a little oral argument here. I would just
21 like to briefly go over some of the key points of the
22 Department's recommendation which is an assessment of
23 \$5,000 for regulatory harm.

24 CHAIR ROISMAN: And Mr. Civiletti, let
25 me interrupt you. I want to be clear. So the total

1 penalty that the Department is now recommending is
2 \$5,000 and that it be tied to the regulatory harm
3 component of the factors that the commission is
4 authorized to consider if it wishes. Is that true?

5 MR. CIVILETTI: I believe that's right.
6 Let me just try to clarify. The Department defers to
7 ANR as to the issue of any potential or actual harms
8 under the environmental criteria. And certainly,
9 yeah, I guess supports that recommendation. But for
10 our purposes, we are looking at regulatory harm, the
11 integrity of the Title 30 process. And it's a \$5,000
12 recommendation. That's correct.

13 CHAIR ROISMAN: Okay. Thank you, Mr.
14 Civiletti. Go ahead.

15 MR. CIVILETTI: So the commission has
16 held on numerous occasions that failure to comply
17 with regulatory obligations which exist to protect
18 both the utility customers and the public from harm
19 harms the integrity and the credibility of that
20 process. That conclusion follows from the principle
21 that the regulatory process cannot function when
22 regulated entities ignore their obligations. Harm to
23 the regulatory process weighs in favor of a penalty.

24 In this case the commission has
25 determined that Respondents violated Section 248 by

1 initiating site preparation without a Certificate of
2 Public Good. Findings of the commission and the
3 record established to date indicate that the
4 Respondents understood they needed approval prior to
5 beginning site clearing work, and they began the work
6 prior to receiving that approval. This speaks to a
7 knowing violation by an entity familiar with their
8 obligations and weighs in favor of a substantial
9 penalty.

10 The other key factors weighing in favor
11 of a substantial penalty include the need to deter
12 this type of activity in the future both from
13 Respondents and other entities and the aggravating
14 circumstances most clearly represented by
15 Respondent's failure to ensure that site clearing
16 activities ceased following the evidentiary hearing
17 and the issuance of a TRO on June 26, 2020.

18 The Department's recommendation would
19 have been higher if there was evidence of an economic
20 benefit to the Respondents, if the length of time of
21 the violation was longer, and if -- excuse me, and if
22 there was a record of prior violations from the
23 Respondents. That's not the case here.

24 But after considering prior penalty
25 assessments, looking at similar considerations, the

1 Department concludes that \$5,000 is an appropriate
2 penalty in this case. Thank you.

3 CHAIR ROISMAN: Thank you, Mr.
4 Civiletti. Mr. Einhorn.

5 MR. EINHORN: Thank you, Mr. Roisman.
6 The agencies and we -- we addressed this in our reply
7 where the developer did raise the issue of which
8 penalty maximum amount applies in this proceeding.
9 Because apparently the statute section 30 -- at the
10 time this site clearing took place the penalty
11 maximum was \$40,000. And today that has changed
12 upwards to the amount of \$85,000.

13 The Agency's initial penalty
14 recommendation was \$39,125, and that was based on the
15 \$85,000 statutory maximum. The Agency has no -- is
16 not taking a position on which one of those applies
17 and would defer to the commission obviously to make
18 that determination. If it's the 40,000 max which was
19 in effect at the time the clearing occurred, then the
20 Agency's recommendation is 29,000.

21 The Agency's March 2 brief and
22 recommendation lays out in a discussion narrative
23 form how the Agency looked at and effectively weighed
24 the various factors. The Agency's not aware of any
25 requirement that we need to essentially break out a

1 penalty into various components. And ultimately it's
2 not the Agency's penalty. It's simply a
3 recommendation to the commission, and it's the
4 commission that imposes the penalty.

5 That said, I think, you know, we laid
6 out very clearly in discussing the factors that the
7 harm to the environment -- the actual harm was in a
8 sense minor. The potential harm was more of a
9 moderate nature. Had the clearing continued, more
10 plants were in harm's way.

11 The hearings that took place did
12 establish that plants were destroyed. The
13 substantial consideration from the Agency's
14 perspective in this penalty is both the need for
15 deterrence, because if a developer gets out ahead of
16 the process and clears a site before a CPG is issued,
17 before it can even be evaluated for resources, the
18 Agency does not have the ability to do its job and
19 review what the potential impacts should be in
20 connection with a Section 248 proceeding which is
21 where all of this starts. And we do that on behalf
22 of the State of Vermont, on behalf of Vermont's
23 public. We represent the public's interest in
24 natural resources. And we would not be able to do
25 our job if developers got out ahead of that process.

1 And along those same lines, we
2 appreciate when developers do not get out ahead of
3 that process. And when they do, when they follow it,
4 and they do things the correct way, and that levels
5 the playing field if everybody is doing this the
6 right way.

7 The other factor that, I think, weighed
8 heavily in the Agency's determination here was the
9 aggravating circumstances. You know, we have a
10 sophisticated developer. There are years of records
11 of evidence of the existence of the rare plants at
12 this site. Evidence that -- developer's own
13 evidence. They knew they couldn't clear before
14 getting a Certificate of Public Good. They didn't
15 require their logger with the bulldozer to avoid the
16 plants. And the investigation, I have to say, has
17 been fairly bumpy. It hasn't been a real orderly
18 process because of multiple motions, late filings,
19 filings that at times contradict one another. The
20 Agency has had to spend a lot of -- expend a lot of
21 resources, and those are the public resources, in
22 dealing with these issues. So they are aggravating
23 factors from the Agency's perspective. All of that
24 goes into what our recommendation is. Again, that's
25 laid out in the brief, and I won't repeat that in any

1 more detail.

2 With regard to Mr. Melone's argument
3 earlier that Mr. Popp made a mistake in this
4 proceeding, he did not make any mistake. His
5 testimony is very clear. There is written testimony
6 from him. He was cross examined. The developer had
7 every opportunity to cross examine him on these
8 issues they now raise. Mr. Popp's opinions are not
9 inconsistent with NatureServe.

10 Beyond that, the Agency does not
11 regulate rare plants. The commission regulates
12 impacts to the natural environment in Section 248.
13 The Agency is a statutory party in those proceedings.
14 And it presents evidence and it makes recommendations
15 to the commission. But it's ultimately the
16 commission that decides when the harm to the
17 environment is undue.

18 Again, that's the 248 standard. That's
19 not the standard for a penalty. But again, just
20 getting to this argument of the Agency regulating
21 plants, that's not the case. And to demonstrate
22 that, there is longstanding commission precedent
23 where the commission typically looks at impacts to
24 rare species in Section 248 proceedings, whether they
25 be plants, animals, birds, you name it; fish, natural

1 communities. There is longstanding precedent going
2 back for many, many years where the commission has
3 looked at impacts on all those sorts of things and
4 other resources, other features of the natural
5 environment.

6 So this isn't about the Agency
7 regulating plants. This is more about following the
8 248 process. And then when that isn't followed, what
9 happens, the commission can impose a penalty. The
10 Agency has evaluated the circumstances here and
11 stands by its recommendation. Thank you.

12 CHAIR ROISMAN: Thank you, Mr. Einhorn.
13 Mr. Melone, you actually have 17 minutes left. If
14 you would like to use them all, you're welcome to do
15 so.

16 MR. M. MELONE: No. I won't be taking
17 more than maybe 5 minutes. To respond specifically
18 to DPS's statement that they're tying the \$5,000
19 number to the regulatory harm aspect, it's -- I'm
20 glad to see that this is a number tied to one of
21 these components. So I appreciate that. Or one of
22 these factors.

23 DPS has, as ANR, has characterized this
24 again as a knowing violation of the site preparation
25 statute. And again, I need to strongly disagree as

1 to that characterization. We have had this
2 particular site in Bennington sitting idle for close
3 to a decade. And we had the very real need to
4 establish a sheep hub in the proper location in New
5 England. We made the decision as a company probably
6 three or four years ago, to switch over from
7 traditional mowing to using sheep for landscape
8 mitigation within the solar panels. And this
9 particular site in southern Vermont is the perfect
10 location to service not just our facilities in
11 Vermont but in Connecticut and Massachusetts as well
12 just given the location. We have since established a
13 separate facility in Connecticut, but at the time it
14 was our intent to have this in Bennington.

15 And that is why we chose to do what we
16 did. It wasn't taking a look at the statute and
17 saying how can we get around this. This is something
18 that we looked long and hard at and said: Okay, we
19 are allowed to do this. And just because the
20 agencies and the commission disagree with our
21 interpretation, I don't think that rises to the level
22 of a knowing violation or harm to the regulatory
23 process.

24 To address ANR's point that there was
25 actual harm to the aster plants and the aster plants

1 were destroyed, given the nature of this particular
2 plant and what we know about it and how it really
3 does thrive in previously disturbed areas, I don't
4 think we can know that anything was actually harmed
5 until we get out there and do an RTE survey.

6 To address Mr. Einhorn's point about
7 it's not ANR who is regulating the plants in these --
8 the rare plants or very rare plants in these
9 proceedings, I don't know how else you would
10 characterize it. They are making recommendations to
11 the PUC, but these recommendations are based on their
12 internal documents which are designed specifically to
13 regulate these plants. And the authority for ANR to
14 do that with plants that are endangered is very
15 clear. And to somehow suggest that just because
16 you're now within the scope of 248 and you're making
17 recommendations regarding natural environment, so you
18 can make those recommendations based on anything that
19 you want, it doesn't make a lot of sense to me.

20 Because what ends up happening is you
21 have a more rigorous or a more controlling set of
22 parameters and rules in the 248 proceedings than you
23 do with regulations of plants under the endangered
24 species law, which doesn't make a lot of sense to me.
25 And that's all I had.

1 CHAIR ROISMAN: All right. Thank you,
2 Mr. Melone. Just to make sure the record is clear, I
3 just want to mention the commission Exhibit 1 was
4 admitted into evidence. So there is no question that
5 that exhibit is accepted.

6 (Exhibit Commission 1 was
7 admitted into the record.)

8

9 Commission 1

10 <http://epuc.vermont.gov/?q=downloadfile/676988/150086>

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1 CHAIR ROISMAN: With regard to the oral
2 argument, thank you all very much for your thoughtful
3 comments and argument. We will take this matter
4 under advisement, and we should be issuing an order
5 in the near future.

6 Is there anything else that we need to
7 discuss here today that we have not already
8 discussed?

9 (No response)

10 CHAIR ROISMAN: If not, we are
11 adjourned. Thank you again. Stay safe, everyone.
12 More rain tomorrow.

13 (Whereupon, the proceeding was
14 adjourned at 2:42 p.m.)
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C E R T I F I C A T E

I, Kim U. Sears, do hereby certify that I recorded by stenographic means the Oral Argument re: Case No. 20-1611-INV, via videoconference, on July 20, 2023, beginning at 2 p.m.

I further certify that the foregoing testimony was taken by me stenographically and thereafter reduced to typewriting and the foregoing 33 pages are a transcript of the stenograph notes taken by me of the evidence and the proceedings to the best of my ability.

I further certify that I am not related to any of the parties thereto or their counsel, and I am in no way interested in the outcome of said cause.

Dated at Williston, Vermont, this 22nd day of July, 2023.

A rectangular box containing a handwritten signature in cursive script that reads "Kim U. Sears".

\$ \$35,000 - 12:25 \$39,125 - 25:14 \$40,000 [3] 12:17, 12:25, 25:11 \$5,000 [5] 22:23, 23:2, 23:11, 25:1, 29:18 \$85,000 [2] 25:12, 25:15 0 05402-0329 - 1:23 05620-2601 - 2:4 05620-3901 - 2:10 06510 - 2:7 1 1 [7] 3:9, 5:23, 8:12, 8:17, 32:3, 32:6, 32:9 10 [3] 3:5, 14:14, 14:23 112 - 2:3 12 - 8:17 137 - 17:22 15 [3] 11:21, 22:7, 22:14 157 - 2:7 17 - 29:13 19th - 2:7 2 2 [5] 1:8, 1:12, 2:10, 25:21, 34:6 20 [3] 1:7, 1:11, 34:5 20-1611-INV [3] 1:2, 4:2, 34:5 2013 - 21:4 2014 - 21:4 2020 - 24:17 2021 - 5:23 2023 [6] 1:7, 1:11, 6:25, 16:8, 34:5, 34:16 209 [2] 1:4, 4:4 21 - 8:17 22nd - 34:15 248 [11] 20:3, 20:17, 20:22, 23:25, 26:20, 28:12, 28:18, 28:24, 29:8, 31:16, 31:22 248(a)(2 [2]) 1:6, 4:6 248(a)(2)(a [7]) 6:2, 16:22, 17:3, 18:6, 18:14, 19:4, 19:15 26 - 24:17	29,000 - 25:20 2:11 - 12:6 2:26 - 12:6 2:42 - 33:14 3 30 [19] 1:4, 1:4, 1:6, 4:3, 4:3, 4:6, 6:2, 6:11, 6:11, 6:25, 9:7, 9:9, 11:18, 12:16, 13:14, 16:8, 21:23, 23:11, 25:9 30(c [2]) 12:16, 13:14 32 - 3:9 329 - 1:23 33 - 34:9 4 40,000 - 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