STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the Respondents initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	Evidentiary hearings conducted June 26, 2020, December 4, 2020, and July 20, 2023

Order entered: 09/19/2023

FINAL ORDER IMPOSING CIVIL PENALTY

I. INTRODUCTION

Pursuant to 30 V.S.A. §§ 30, 209, and 248(a)(2), in this order the Vermont Public Utility Commission ("Commission") imposes a civil penalty of $5,000 on Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates and subsidiaries (collectively, the "Developer" or "Respondents") for conducting unauthorized site preparation for an electric generation facility without a certificate of public good ("CPG") on Apple Hill in Bennington, Vermont, in June 2020.

II. BACKGROUND

This case arises out of the Developer's efforts to construct two solar facilities on Apple Hill in Bennington, Vermont. A detailed history of those efforts and the resulting Commission proceedings can be found in our previous orders.[1] It is relevant to this Order that on April 1, 2021, after two evidentiary hearings, the Commission issued an order finding that the Developer had violated Section 248(a)(2)(A) by beginning site preparation without a CPG and ordered additional proceedings to determine the amount of a penalty pursuant to 30 V.S.A. § 30.[2]

The Commission also enjoined the Developer from engaging in any further site preparation without a CPG, including tree clearing for proposed solar facilities on Apple Hill (the "Injunction Order"). The Injunction Order was to remain in place only until one of the

[1] Case No. 20-1611-INV, Order of 4/1/21 at 3-9.

[2] *Id*. at 3 ("We also direct that [the Developer] communicate with the other parties and file a schedule for the next phase of this proceeding. This next phase of the proceeding will determine the civil penalty Allco must pay under Section 30 of Title 30 for violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.")

following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on the site, or (2) final orders are issued by the Vermont Supreme Court denying both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished. Neither of these conditions has been fully satisfied and the Injunction Order remains in place.

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

On April 16, 2021, the Developer filed a motion requesting that the Commission stay the penalty phase of these proceedings because, according to the Developer, the Commission had been divested of all matters relating to the scope of the appeal. The Commission denied the Developer's stay request on June 11, 2021.

On December 3, 2021, the Vermont Supreme Court dismissed the Developer's appeal of the Injunction Order because it was not a final appealable order from the Commission.

On November 4, 2022, the Developer filed a second motion to stay the proceedings. This motion was denied on December 14, 2022, in an order that requested that the Vermont Agency of Natural Resources ("ANR") confer with the other parties and file a schedule for the remainder of the case.

On January 13, 2023, ANR filed a proposed one-month schedule for the penalty phase of this proceeding. The Developer responded with a year-long schedule proposal.

On January 30, 2023, the Commission rejected the Developer's proposed schedule and adopted a schedule for briefs.

On March 2, 2023, ANR and the Vermont Department of Public Service ("Department") each filed briefs with penalty recommendations.

On March 16, 2023, the Developer filed its response to the penalty recommendations and a motion for a third evidentiary hearing. The Developer also filed the affirmations of Steve Broyer, the Developer's project manager, and Jim McClammer, its natural resources consultant.

On May 30, 2023, the Commission granted the Developer's motion for a third evidentiary hearing in part, limiting the scope of the hearing to the criteria of 30 V.S.A. §§ 30(c)(3) ("the economic benefit, if any, that could have been anticipated from an intentional or

knowing violation") and (6) ("economic resources of the respondent"). The Commission also scheduled an oral argument so the parties could address the agencies' penalty recommendations.

On June 14, 2023, the Developer filed a second motion for a third evidentiary hearing (the "Second Motion"), requesting that the Commission broaden the scope of the limited evidentiary hearing granted in the May 30, 2023, Order to address "all relevant evidence that Respondents seek to introduce."[3] Specifically, the Developer requested an opportunity to provide evidence that no environmental harm had, or could have, occurred due to the Developer's activities. The Developer also requested an opportunity to present evidence challenging ANR's system of classifying rare and very rare plant species. The Developer withdrew the Broyer affirmation and filed the affirmations of Thomas Melone and Jim McClammer.

On June 28, 2023, the Department and ANR filed responses recommending that the Commission deny the Developer's second motion for a third evidentiary hearing.

On July 20, 2023, the Commission held a limited evidentiary hearing and an oral argument. At the evidentiary hearing the Commission denied the Developer's Second Motion and admitted elements of the Melone testimony into evidence as discussed further below.

III. DEVELOPER'S SECOND MOTION FOR A THIRD EVIDENTIARY HEARING

At the beginning of the July 20, 2023, limited evidentiary hearing, Chairman Roisman denied the Developer's Second Motion, stating:

> The Commission is denying the Developer's second motion for a broadened third evidentiary hearing and reaffirming the rejection of the testimony of Mr. McClammer as untimely filed and unrelated to the topic of this limited evidentiary hearing. We are admitting discrete portions of the affidavit of Mr. Melone that are arguably related to either economic development or the ability of the developer to pay a fine.
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> The remainder of Mr. Melone's affidavit, which is primarily legal argument, for belatedly seeking to present evidence on the issue of whether developer's activities at the site without possessing a CPG constitute a violation of relevant statutes and regulations will be admitted to the record of the case, but it's not admitted as evidence.

[3] Second Motion at 5.

> For the purposes of the evidentiary hearing today the Commission has created Commission Exhibit 1, which is now visible on your screen, to identify the specific paragraphs of Mr. Melone's testimony that are being admitted into evidence. These paragraphs are -- and I will read them off. Sections -- and these are the numbered paragraphs in Mr. Melone's affidavit: 1 through 9, 12 through 21, paragraph 47, paragraph 55, and paragraph 64. We will reduce these determinations regarding admissibility of evidence and rejection of Mr. Melone's request for an expanded evidentiary hearing when we issue the final order in this proceeding today.[4]

What follows is further discussion of our denial of the Developer's second motion for a third evidentiary hearing.

A. Positions of the Parties

1. Developer

The Developer requests to broaden the scope of the hearing to address the amount of the penalty, the constitutional requirement of rough proportionality, the eight factors enumerated in Section 30(c), and ANR's classification system for rare and very rare plant species. According to the Developer, due process and 30 V.S.A. §30(a)(1) require an opportunity for hearing on these issues. The Developer argues that while hearings were held in connection with the temporary restraining order ("TRO") and whether a violation occurred, neither hearing was the one required by 30 V.S.A. §30(a) because the Commission bifurcated this proceeding into two phases.

2. Department

The Department recommends that the Commission deny the Developer's motion. The Department contends that this investigation was conducted pursuant to Section 30 from the outset and that the Developer has already been afforded two evidentiary hearings. The Department argues that the existing record provides an adequate basis to impose a penalty for regulatory harm and there is no need to reopen the record to relitigate aspects of the violation itself. The Department asserts that the process provided by the Commission, including an opportunity to submit evidence on the two penalty factors and oral argument on the penalty assessment more broadly, is sufficient and appropriate.

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[4] Tr. 7/20/23 at 7-8 (Roisman).

The Department recommends that the Commission admit the new Melone testimony that addresses the economic benefit and financial resources criteria and objects to all other portions of the Melone testimony as "outside the scope of the limited hearing." The Department does not object to the portions of the Developer's testimony that were not admitted as evidence being considered as a legal brief.

3. **ANR**

ANR objects to the motion, arguing that "[t]he Developer, once again, seeks to reopen the record to relitigate issues that have been fully litigated, and for which the Public Utility Commission has made findings and conclusions in this proceeding."[5] ANR further argues that "[t]he Developer has persistently and repeatedly exhibited disregard for orderly process" and that "[s]uch actions have resulted in an inefficient use of [ANR]'s, and the public's, resources as ANR has had to repeatedly address filings which ignore Commission orders, filings which are duplicative, late filings, and incoherent filings."[6] Finally, ANR recommends that the Commission "deny the Developer's June 14, 2023, Second Re-Hearing Motion; deny admission of the McClammer affidavit; and deny admission of the Melone affidavit in its present form."[7]

B. Discussion of the Developer's Second Motion

The Developer argues that due process and Section 30(a)(1) require a third hearing to give the Developer an opportunity to present all relevant evidence on the amount of the penalty, the constitutional requirement of rough proportionality, the eight factors enumerated in Section 30(c), and ANR's classification system for rare and very rare plant species. Having reviewed the affidavits offered by the Developer on June 14, 2023, and considering the three evidentiary hearings and oral argument conducted in the course of this proceeding, the Commission concludes that the requirements of due process and Section 30(a)(1) have been met. The Commission further concludes that an evidentiary hearing addressing ANR's classification system for rare and very rare plant species is unnecessary because ANR's system has not been given any weight in determining the amount of a penalty under Section 30(c).

[5] ANR's Response to the Developer's Second Motion for a Third Evidentiary Hearing, filed 6/28/23, at 1 and 4.
[6] *Id*. at 2-3 (citations omitted).
[7] *Id*. at 4.

Section 30(a)(1) provides that the Commission may assess a penalty "after notice and opportunity for hearing." On June 24, 2020, the Commission issued an order titled Order Opening Investigation and Notice of Hearing.[8] The order's caption stated that the matter was "an investigation pursuant to 30 V.S.A. § 30" and requested that "the parties be prepared to address with affidavits (filed before the hearing begins) or live testimony whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30." This notice and the hearing that followed on July 6, 2020, satisfied the basic requirements of procedural fairness and Section 30(a)(1) with respect to whether that violation occurred and resulted in factual findings relevant to this penalty determination.

At the outset of the July 6, 2020, evidentiary hearing, the Commission explicitly stated that the matter being heard was an investigation that was being conducted pursuant to Section 30 and that the purpose of the hearing was, among other things, to determine whether a violation of Section 248(a)(2) had occurred.[9] At the evidentiary hearing ANR presented evidence with the express purpose of addressing the criteria the Commission considers in determining the amount of a penalty.[10] Significant portions of the hearing were devoted to whether any harm to the environment had or could have occurred.

The Commission held a second evidentiary hearing on December 4, 2020, again for the purpose of addressing "whether the Developer's site work to date constitutes site clearing activities without a certificate of public good in violation of 30 V.S.A. Section 248(a)(2)."[11] The Developer presented testimony and documentary evidence addressing its intent to conduct clearing on the site, which is relevant to the penalty factor contained in Section 30(c)(2).[12]

On April 1, 2021, the Commission made a finding of violation but deferred its ultimate determination of the penalty amount until after an opportunity for parties to recommend

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[8] Case No. 20-1611-INV, Order of 6/24/2020.

[9] Tr. 6/26/2020 at 4 (Roisman) (this emergency hearing [is being held] to address whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30.").

[10] *Id*. at 16 (Einhorn) ("The second issue is, what is the harm? What is the harm of the clearing that's taking place? . . . the degree of harm will, will naturally be factored into what an ultimate penalty is.").

[11] Tr. 12/04/2020 at 4 (Roisman).

[12] *See Id*. at 54-55 (Kobelia), 60-63 (Kobelia), 65-66 (Kobelia), 118-119 (Melone), 130-132 (Melone), and 134-138 (Melone). *See also* Tr. 6/26/2020 at 22-24 (Lowkes), 41-42 (Popp), 50-51 (Popp), 63-68 (Melone), and 88-90 (Melone). Further, the prefiled testimony and documentary evidence relied upon in our findings and in our penalty conclusion here was entered into evidence at the evidentiary hearings.

additional process.[13] After reviewing the parties' penalty recommendations, the Commission granted the Developer a third opportunity to present evidence on two penalty factors that had not been addressed at the previous hearings.[14]

We deny the Developer's Second Motion to expand the scope of the hearing because the Developer has had an opportunity to present its case through the three evidentiary hearings described above. Any evidence developed in the first two evidentiary hearings was available to support a penalty determination.[15] Contrary to the Developer's assertion, the Commission's determination that additional process was necessary to determine the amount of a penalty did not automatically trigger a new requirement to hold another evidentiary hearing explicitly addressing each of the factors in Section 30(c). The Commission was within its discretion to limit the scope of the additional process to those subjects that had not been previously addressed in the first two evidentiary hearings. We also find that an opportunity to challenge ANR's assertions concerning actual or potential harm to rare and very rare plants and ANR's system of classification for rare plants is unnecessary because our determination of the penalty in this case is not based on any actual harm to rare plants.

IV. ADDITIONAL FINDINGS RE CIVIL PENALTY

In addition to the findings made by the Commission in its previous orders in this proceeding, the Commission makes the following additional findings based on the testimony and exhibits admitted into the record at the third evidentiary hearing held on June 14, 2023.

1. The Developer lost $2,200 in fees paid to the Vermont Agency of Agriculture Food and Markets for hemp growing licenses. During the time of the Commission's injunction the Developer has also incurred carrying costs such as taxes for both the 27-acre and a neighboring 5-acre parcel in the amount of $10,506 in property taxes. Melone pf. 6/14/23 at 18, ¶ 64.

2. The Developer has continued to pursue the construction of solar facilities on Apple Hill, and the Commission's injunction has stopped the Developer from commencing site

[13] Case No. 20-1611-INV, Order of 4/1/21 at 25.
[14] Case No. 20-1611-INV, Order of 5/30/23.
[15] *See In re SolarCity Corp.*, 2019 VT 23, at ¶ 33 ("The evidence supporting the Commission's finding that petitioner committed a violation also provides an evidentiary basis to find liability and to support the imposition of a penalty.").

preparation activities on its land since the TRO was issued on June 26, 2020. Melone pf. 6/14/23 at 2, ¶ 9.

V. LEGAL STANDARD: CIVIL PENALTY CRITERIA OF 30 V.S.A. § 30

Section 30(a)(1) of Title 30 of the Vermont Statues provides that:

> A person, company, or corporation subject to the supervision of the Commission or the Department of Public Service. . . who violates a provision of chapter 2, 7, 75, or 89 of this title, or a provision of section 231 or 248 of this title . . . shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing.

Before July 1, 2021, and applicable in this case, Subsection (b) provided: [16]

> The Commission may impose a civil penalty under subsection (a) of this section of not more than $40,000.00. In the case of a continuing violation, an additional fine of not more than $10,000.00 per day may be imposed. In no event shall the total fine exceed the larger of: (1) $100,000.00; or (2) one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company, or corporation in the preceding year.

Subsection 30(c) identifies eight factors the Commission may consider in determining the amount of a civil penalty:

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

[16] The penalty amounts authorized by Section 30 were amended upward effective July 1, 2021. However, because the violation discussed in this decision occurred before the amendments to Section 30 became effective, the older, lower penalty amounts stated above apply in this case.

(8) any other aggravating or mitigating circumstance.

The Department's recommends a $5,000 civil penalty assessment for regulatory harm.[17] ANR recommends a civil penalty of $29,000.00 for regulatory harm and harm to the natural environment.[18]

Based on our consideration of these factors, and the recommendations of the parties, the Commission determines that a civil penalty of $5,000 is appropriate.

VI. CIVIL PENALTY DISCUSSION

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.

By engaging in site clearing at the Apple Hill parcel without a CPG, the Developer violated Section 248(a)(2)(A). The purpose of the blanket statutory prohibition on site preparation without a CPG is to allow time for the Section 248 review process to occur. In this case, the prohibited activity consisted of site clearing and its attendant potential to harm the natural environment. The Commission, ANR, and the Department needed the time created by the statutory prohibition against site preparation without a CPG to assess the potential impact of the proposed project on the natural environment before site clearing began, and to propose measures that could mitigate those impacts, so that any undue adverse impact on the natural environment would be avoided. The Developer's violation of § 248(a)(2(A) created harm to the statutory scheme and had the potential to harm the natural environment.

The Developer disputes whether any harm to the environment occurred or might have occurred due to the violation. The Developer specifically challenges ANR's position that there was harm to rare plants and mature trees.[19] More generally, the Developer attacks ANR's system of regulation for rare and very rare plants.[20] However, these arguments miss the mark because ANR has conceded that "the degree of actual harm to the environment which resulted

[17] Department's Response to Developer's Second Motion for a Third Evidentiary Hearing, 6/28/23, at 4.
[18] ANR's Response to Developer's Second Motion for a Third Evidentiary Hearing, 6/28/23, at 3-4.
[19] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 8.
[20] *Id*.

from the clearing activities on the Apple Hill parcel was minor."[21] Therefore, the validity of ANR's classification system is of no significance because the Commission is not basing its penalty assessment on actual harm to rare plants.

The Developer questions whether there was harm to the regulatory process.[22] As explained in the Department's penalty recommendation, the Commission has held that failure to comply with regulatory obligations "harms the integrity and credibility of the regulatory process."[23] The finding of a violation itself provides the basis for the harm. This notion is well-established and follows from the principle that the process "cannot function when regulated entities ignore their obligations."[24] The regulatory harm is an extension of the harm and potential harm to (1) public safety and welfare, (2) the environment, and (3) utility customers. The § 248 process aims to protect these interests by preventing undue adverse impacts to the resources protected by § 248. "When an entity acts within the Commission's jurisdiction but without the Commission's approval, such conduct undermines the integrity of the regulatory review process, which exists to protect the public from harm."[25]

This factor strongly weighs in favor of a significant penalty.

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

The Developer knew that it did not have a CPG. It was aware that it was statutorily required to have a CPG before engaging in site clearing to construct its proposed electric generation facilities. The Developer also acknowledged that it needed to clear trees to construct its solar electric generation facilities at the Apple Hill parcel.[26] The clearing performed by the

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[21] ANR's Brief and Penalty Recommendation, 3/2/23, at 10.

[22] *See* Respondents' Brief Re: Penalty Recommendations, 3/16/23, at 6.

[23] *See, e.g., Investigation into potential violations of the Public Utility Commission's March 23, 2021, Order in Case No. 20-2570-PET*, Case No. 21-2501-INV, Order of 10/07/21 at 5.

[24] *See Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Otter Creek Solar, LLC's certificates of public good issued in Cases 8797 and 8798*, Case No. 19-1596-INV, Order of 4/1/21 at 4–5; *see also, e.g., Investigation pursuant to 30 V.S.A. §§ 30, 209, and 248 regarding the 2.2 MW solar plant owned by Charlotte Solar, LLC in Charlotte, Vermont*, Case No. 8636, order of 10/23/17; *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into potential violations of Coolidge Solar I, LLC's certificate of public good issued in Docket 8685*, Case No. 19-3671-INV, Order of 7/24/20.

[25] *See* Case No. 19-3671-INV, order of 7/24/20 at 8 (quotation omitted); *see also Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Newbury GLC Solar, LLC's certificate of public good issued in Case No. 17- 4721-NMP*, Case No. 19-0734-INV, Order of 8/1/19 at 7–8.

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

Developer in June 2020 was the very same clearing that the Commission told the Developer it could not undertake when, on May 7, 2020, the Commission denied the Developer's March 23, 2020, request to amend the Apple Hill solar project's Section 248 petition in Docket 8454.[27]

The Developer acknowledged that it knew that "they could not engage in site clearing to construct a proposed electric generation facility" and that the clearing of trees was necessary to build a solar facility on Apple Hill.[28] The Developer argues that these facts are irrelevant because "[t]he site work was done in connection with the Horticultural and Farming Activities, two completely separate businesses of Respondent."[29]

The Developer asserts that:

> Based on [Commission] 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.[30]
>
> While it was clear to the [Developer] based on [Commission] precedent that they would be permitted to clear the parcel in question for an activity unrelated to the electric generating facilities, the [Commission] has now made it clear that it is no longer abiding by its prior precedent.[31]
>
> Here, even if clearing for a farming use and agricultural structures could be considered (as the [Commission] concludes) as bearing a reasonable relationship to the proposed solar facility and as a precursor, neither the clearing nor the structures are "part of an electric transmission or generation facility," Op. Vt. Att'y Gen., No. 715 (Aug. 5, 1971) at 172, and those activities are being done specifically for

[27] Order of 4/1/21 at 29. On March 23, 2020, the Developer filed a motion to amend its Section 248 petition in Docket 8454, indicating that one of the changes to its Apple Hill solar facility would involve the clearing of trees for hemp and sheep operations which would occur quite some time before the solar facility would be constructed. *See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Developer's Second Proposed Amendment, filed 3/23/20, at 1 n.1. The proposed amendment was denied as untimely by the Commission by order dated May 7, 2020, in Docket 8454.

[28] Respondents' Brief Re: Penalty Recommendation, 3/16/23, at 20; Case No. 20-1611-INV, Order of 4/1/21 at 12 ("Site clearing for a solar facility requires clearing trees.").

[29] Respondents' Brief Re: Penalty Recommendation, 3/16/23, at 20.

[30] *Id*. at 21, citing *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, order of 1/5/12; *Petition of Beaver Wood Energy Pownal, LLC*, Dockets 7678 and 7679, Order of 4/1/11; and *Petition of Monument Farms Three Gen, LLC*, Docket 7592, Order of 10/22/23 (October 22, 2010). *See* Case No. 20-1611-INV, Order of 4/1/21, at 23-24 ("We are not persuaded by [the Developer's] arguments that these activities are not site preparation, and that 'incidental overlap' is inapposite. The cases [the Developer] references are all readily distinguishable factually and procedurally.")

[31] Melone pf. 6/14/23 at 16.

> another purpose—farming, and not in preparation for the construction of an electric facility." [32]

The Commission has already distinguished this case from the cases cited by the Developer in its Order of April 1, 2021, and rejects the Developer's assertion that its violation was unintentional for the same reasons. The Developer intentionally cleared the property based on its erroneous interpretation of the law and did so without first seeking explicit acceptance of its novel interpretation from the Commission.

This factor strongly weighs in favor of a significant penalty.

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

The record in this case contains no evidence of any economic benefit that the Developer could have anticipated from intentional or knowing violations.

The Department did not consider this factor to be significant in rendering a civil penalty recommendation.[33] ANR contends it is not aware of any economic benefit that resulted from the violation by the Developer in this matter but that "[i]f the Developer 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."[34] The Developer argues that "[t]he third factor weighs heavily in favor of no penalty."[35]

The Developer further argues that:

> [T]here 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.[36]

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[32] *Id*. at 17.

[33] *See* Department's Recommendation of Penalty Assessment, filed 3/2/23, at 3-4 (noting that "this factor is assigned a neutral weight").

[34] ANR Brief and Penalty Recommendation, 3/2/23, at 11-12.

[35] Melone pf. 6/14/23 at 14.

[36] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 22.

We find that this factor has no weight in determining the amount of any civil penalty.

D. The length of time that the violation existed.

Though the record does not reflect precisely when the site preparations began, the contract for the Developer's forester was dated June 8, 2020.[37] Site clearing work was underway by June 16, 2020, and by June 26 approximately three acres had been cleared.[38] A representative of ANR visited the Apple Hill parcel on June 16, 2020, and observed that site clearing was being done by the Developer at that time. Subsequently, the Commission was notified of the clearing activities and opened an investigation into the matter because the parcel was the subject of solar electric generation facility petitions filed by the Developer and, after appeals, no final CPGs authorizing clearing have been issued by the Commission. The Commission then conducted an evidentiary hearing on June 26, 2020, and on that same date issued a TRO prohibiting the Developer from continuing site clearing. Despite this, the Developer continued with the site clearing on the morning of June 27 until around mid-day, at which time site clearing stopped.[39]

Thus, the unlawful site clearing took place from at least June 16 through June 27, a period of 12 days.

The length of time is not fully established or particularly significant in this context, and therefore is a neutral factor in the Department's analysis. ANR considers 12 days to be a moderate length of time and relevant to determining an appropriate penalty amount. The Developer argues that that the Commission's bench order had no effect and the "fourth factor does not weigh in favor of a penalty."[40] We disagree with the Developer's arguments.

The record shows that the TRO was issued from the bench on the afternoon of June 26, 2020, and reiterated in a written order issued at 10:31 P.M. that night. The Developer's forester, who participated in the TRO hearing, was not informed of the order until the next day at noon. He had begun working early that morning. No effort was made by the Developer to otherwise contact the forester before he continued site clearing activity on the morning of June 27, 2020.[41]

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[37] Tr. 06/26/20 at 127 (Kobelia).

[38] *See* Case No. 20-1611-INV, Order of 4/1/21 at findings 1, 11; Tr. 6/26/20 at 121 (Kobelia); and Case No. 20-1611-INV, Order of 4/1/21 at findings 15–16; see also Tr. 12/4/20 at 39-44 (Kobelia).

[39] Case No. 20-1611-INV, Order of 4/1/21 at finding 15; Tr. 12/4/20 at 41-44 (Kobelia).

[40] Melone pf. 6/14/23 at 14-15.

[41] This fact also supports the conclusion that the Developer committed a knowing violation, above.

This factor has limited weight in determining the appropriate civil penalty.

E. The deterrent effect of the penalty.

The Developer asserts that its unauthorized site clearing in violation of 30 V.S.A. § 248(a)(2)(A) is the result of its interpretation of Commission precedent addressing that rule. As discussed in our Order of April 1, 2021, the Developer's interpretation of the Commission precedent addressing the blanket statutory prohibition on site preparation is mistaken. The Developer could have resolved this interpretative error prior to investing in an unauthorized activity by seeking a declaratory judgment from the Commission pursuant to Commission Rule 2.403. Had the Developer sought a ruling regarding the applicability of 30 V.S.A. § 248(a)(2)(A) to the Developer's proposed site clearing for sheep grazing on Apple Hill, the Commission would have made a determination before the Developer began a three-year litigation process involving three state agencies and including two Vermont Supreme Court dismissal rulings, the hiring and restraining of a forester for cutting down trees, and the continued limitations on the Developer's use of its property. Any penalty imposed in this case must specifically deter the Developer from making the same mistake again, and also generally deter any other developers of Section 248 projects from making the same error.[42]

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

> [A] proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent.[43]

The Department asserts that a $5,000 civil penalty will:

> [D]iscourage [the Developer] from committing this type of violation in the future, as well as deter others from following suit, by attaching meaningful consequences.

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[42] *See e.g.*, *Investigation Pursuant to 30 V.S.A. §§ 30, 247 & 248 into Possible Violations of Section 248 by Roderick & Irene Ames*., Docket 7896, Order of 12/20/12 at 1 (Respondent misunderstood Commission rules and procedure and mistakenly conducted site preparation without a CPG); and *Investigation Pursuant to 30 V.S.A. Ss 30 & 209 Regarding the Alleged Taking of Harsh Sunflower Plants by Vermont Gas Sys., Inc. in Monkton, Vermont*, Docket 8791, Order of 5/25/17, at 8 ("Imposing a higher civil penalty would have a specific deterrent effect on the Company. … and a general deterrent effect here, placing the Company and other CPG holders on notice that they are responsible for ensuring that their contractors are in strict compliance, not only with state environmental laws, but also with applicable [Commission] Orders, CPGs, and MOUs.").

[43] Case No. 20-1611-INV, Order of 4/1/21, at 1-2.

> The circumstances of the Developer's violation and the importance of deterring this type of activity, which undermines the foundational elements of Title 30, weigh strongly in favor of a substantial penalty.[44]

The legislature has assigned to ANR the role of representing the interests of the people of Vermont in protecting Vermont's natural environment in the context of energy siting proceedings before the Commission.[45] ANR contends that it would be unable to perform this role, and carry out the legislative intent, if site clearing takes place before an area that is cleared can be adequately assessed to determine the presence, extent, and significance of any natural resources that exist in the area at the time the clearing is proposed.[46]

ANR argues that:

> In the context of Section 248, and its standard of no undue adverse effect on the natural environment, the relationship between the prohibition on site preparation or construction without a CPG and ANR's assigned role in representing the interests of the people of Vermont in protecting Vermont's natural environment, are inseparable. One cannot function effectively without the other. The need to deter violations of the site clearing prohibition must be great if ANR's ability to perform its work is to be preserved. As such, the penalty imposed in this case, must be substantial enough to deter not only this Developer from repeating its behavior but to also deter others who are required to meet the Section 248(b)(5) standard of no undue adverse impact on the natural environment and obtain a CPG before commencing their projects. ANR recommends a $29,000 penalty and contends that this factor weighs heavily in support of a substantial penalty amount in this case.[47]

The Developer addresses the deterrent effect of the penalty by asserting that its approach to this case relies on Commission precedent, implying that the Commission has altered that precedent in rendering its determinations in this case.[48] The Developer concludes that: "The fifth factor does not weigh in favor of a penalty."[49] The Developer argues that:

> A penalty in this case will not act as a deterrent. Respondents have already borne a significant financial impact. The [Developer] has suffered a financial impact from the inability to use its property, from the loss of fees paid for hemp-grow licenses, from the need to re-work cleared areas, and from the payment of taxes on land it cannot now use for any purpose. Importantly, a penalty here would only impact

[44] Department's Recommendation of Penalty Assessment, filed 3/2/23, at 4.
[45] 30 V.S.A. § 248(a)(4)(E).
[46] ANR's Brief and Penalty Recommendation, filed 3/2/23, at 13.
[47] *Id*.
[48] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.
[49] Melone pf. 6/14/23 at 15.

> future activity on the [Developer]'s land. It would not have any deterrent effect beyond the unique facts here.[50]

We disagree. While we are cognizant of some of the costs incurred by the Developer as it has continued over a ten-year period to litigate the use of its land on Apple Hill for solar development, we believe a $5,000 penalty on top of these costs serves as an important specific and general deterrent. Moreover, the deterrent effect of this Order is not only focused on this Developer, but on future developers who will think twice before applying novel interpretations to clear Commission rules and precedents without first seeking guidance from the Commission on the correctness of their interpretation.

F. The economic resources of the Developer

ANR asserts that:

> The Developer appears to have substantial financial resources. The Developer owns the 27-acre Apple Hill parcel, having acquired it to construct solar facilities. The Developer paid Green Mountain Power $850,000 to upgrade and extend a distribution line to the Apple Hill parcel for the purpose of connecting its proposed solar electric generation facilities to the grid. In addition, the Developer has proposed or already developed at least nine utility scale solar electric generation facilities in Vermont.[51]

Based on the same evidence, "the Department finds it reasonable to conclude that [the Developer] has adequate resources to pay a substantial penalty."[52]

The Developer's entities include a private corporation with multiple affiliated entities operating in Vermont.[53] The Developer argues that this proceeding is the product of a business decision by its property-owning subsidiary: "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."[54]

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[50] Melone pf. 6/14/23 at 15.

[51] ANR's Brief and Penalty Recommendation, filed 3/2/23, at 13. *See also* Case No. 20-1611-INV, Order of 4/1/21 at findings 9 and 23.

[52] Department's Recommendation of Penalty Assessment, filed 3/2/23, at 5.

[53] *Id*. and Case No. 20-1611-INV, Order of 4/1/21 at 2.

[54] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.

The Developer further asserts that "the actual Respondents, Apple Hill Solar LLC and Chelsea Solar LLC, in this proceeding have no cash or assets to pay a penalty from unless and until a CPG is granted."[55]

We do not find the Developer's assertion that it has no cash or assets to pay a penalty to be credible and find that the Developer, a collective entity including Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates, and subsidiaries, has sufficient assets to pay a $5,000 civil penalty in this case.

G. The Developer's record of compliance.

ANR and the Department state that they are not aware of prior penalties issued to Allco Renewable Energy Limited or its affiliates or subsidiaries for violations of Title 30 in Vermont.[56] The Developer concurs with this summary.[57]

We conclude that this factor weighs against a significant penalty.

H. Any other aggravating or mitigating circumstances

The Department argues:

> A lower penalty may be appropriate when there are mitigating circumstances, such as when the respondent self-reports the violation in a timely manner or initiates corrective steps. There are no mitigating circumstances here, however, as [the Developer] did not report the violation nor engage in any other behavior that could be reasonably found to weigh against the severity of the violation.
>
> To the contrary: beyond its failure to report the violation, [the Developer] has demonstrated conscious disregard for its obligations while actively resisting compliance with the regulatory scheme and the Commission's efforts to enforce it. This uncooperative and unrepentant approach is most clearly seen in [the Developer]'s failure to ensure that site-clearing work ceased following the [temporary restraining order] that the Commission issued from the bench in the early afternoon of June 26, 2020. The Department considers this conduct, particularly the violation of the Commission's TRO, to be an aggravating factor weighing in favor of a substantial penalty.[58]

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[55] Melone pf. 6/14/23 at 16.

[56] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.; Department's Recommendation of Penalty Assessment, filed 3/2/23, at 5.

[57] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23-24.

[58] Department's Recommendation of Penalty Assessment, filed 3/2/23 at 5 (citation omitted).

The Developer asserts that "[t]he 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."[59] The Developer further contends that "[a]n additional mitigating factor is that the Respondents have already been sufficiently penalized by the imposition of these proceedings."[60]

As discussed above, we are not persuaded by the Developer's argument that its unauthorized action was permitted. Section 248(a)(2)(A) prohibits all site preparation before the issuance of a CPG.

The statute on its face disallows beginning site preparation for any electric generation facility without issuance of a CPG. In June 2020, the Developer began site preparation for a solar electric generation facility on Apple Hill without the authority of a CPG. There is no exception for a facility with a lengthy review or for new agricultural activity that would be part of the operation of the electric generation facility.

We are not persuaded by the Developer's arguments that Commission precedent would allow for its violation of this blanket prohibition so integral to the Section 248 review process. We are cognizant of some of the Developer's continued costs in attempting to build a facility on Apple Hill, and the costs to the state agencies responding to this extended effort, but we do not believe that the Developer's misinterpretation of the statute mitigates its violation of that statute.

I. Determination of Penalty Amount

We have considered the parties' filings and arguments addressing the factors identified in Section 30. While the Developer's unauthorized activity did not have a significant impact on the natural environment, it was an intentional violation of the statute that undermined the effectiveness of the regulatory process. Therefore, the Commission is imposing a penalty of $5,000 on the Developer for its violation of Section 248(a)(2).

VII. OTHER ISSUES

The Developer raises several other arguments against imposing a penalty in this matter. We address each of these briefly. First, the Developer argues that it is not a person, company, or

[59] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 24.
[60] *Id.*

corporation subject to the supervision of the Commission or the Department of Public Service and, therefore, is not subject to a penalty under Section 30. This Commission rejected this argument in its April 1, 2021, Order and does so again here for the same reasons.[61]

Second, the Developer argues that a penalty is a "retroactive extraction" that "would violate [the Developer's] rights to Due Process because of lack of fair notice." This argument has already been rejected by the Commission previously. The prior cases involving ongoing agricultural activity cited by the Developer are readily distinguishable from this case.[62] Therefore, there are no issues with a lack of notice in this case because there has been no departure from precedent by the Commission.

Third, the Developer argues that Section 30(c) is unconstitutionally vague because it does not provide notice of penalty amounts. This argument ignores the fact that the statute includes a specific dollar limit on the amount of a penalty the Commission can assess. The Developer is on fair notice that it can be penalized any amount up to the maximum provided in the statute.

The Developer further argues that the recommendations of the Department and ANR violate the "unconstitutional conditions doctrine."[63] This argument is inapposite because the recommendations of the Department and ANR are not the sort of condition or extraction that would implicate the constitutional limits cited by the Developer. The penalty imposed by the Commission is the result of the Developer's violation of a state statute and is not imposed as a condition of any approval sought by the Developer.

VIII. CONCLUSION

Based on our consideration of the factors in Section 30(c), the Commission imposes a $5,000 penalty on the Developer for commencing site preparation of an electric generation facility without a CPG, in violation of Section 248(a)(2).

[61] 20-1611-INV, Order of 4/1/21 at 17.
[62] *Id*. at 23-24.
[63] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 5.

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Service Commission ("Commission") that:

1. Pursuant to 30 V.S.A. § 30, Allco Renewable Energy Limited, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates, and subsidiaries, must pay a penalty of $5,000 by sending to the Commission at 112 State Street, Montpelier, VT 05620-2701, a check in that amount made payable to the State of Vermont within 30 days of the date of this Order.

Dated at Montpelier, Vermont, this 19th day of September, 2023.

Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	COMMISSION
	)	
	)	OF VERMONT
Margaret Cheney	)	

OFFICE OF THE CLERK

Filed: September 19, 2023

Attest: _____
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 20-1611-INV - SERVICE LIST

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