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State of Vermont
Public Utility Commission
October 27, 2023

Gerrie Denison, Docket Clerk
Vermont Supreme Court
111 State Street - Drawer 9
Montpelier, VT 05609

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

Dear Ms. Denison:

In accordance with V.R.A.P. 11(b), we are enclosing the certified docket entries (register of actions) and the Notice of Appeal filed on October 17, 2023, by Thomas Melone on behalf of Allco Renewable Energy Limited, PLH Vineyard Sky LLC, Apple Hill Solar LLC, and Chelsea Solar LLC, with respect to the Vermont Public Utility Commission's June 26, 2020 *Order Granting Temporary Restraining Order and Notice of Preliminary Injunction Hearing*; August 26, 2020, *Order Denying Developer's Motion to Vacate Preliminary Injunction Hearing and Notice of Rescheduled Preliminary Injunction Hearing;* April 1, 2021, *Order Maintaining Injunction Prohibiting Further Site Preparation, Ruling on Motions, and Directing Scheduling Proposal*; May 30, 2023, *Notice of Limited Hearing and Order on the Developer's Motion for a Hearing*; June 13, 2023, *Order Rescheduling Limited Hearing and Oral Argument*; and the September 19, 2023, *Final Order Imposing Civil Penalty* in the above-referenced proceedings. The six orders are also enclosed as well as the current service list for the matter.

Please note that this case is currently being processed through ePUC. All non-confidential documents in the case can be found online by creating an account in ePUC (at epuc.vermont.gov) and searching for Case No. 20-1611-INV. If the Court would like any assistance with regard to accessing the case documents, please let me know.

Thank you.

Sincerely,

Holly R. Anderson
Clerk of the Commission

Enclosures (9)
cc: Parties in Case No. 20-1611-INV

STATE OF VERMONT
BEFORE THE
PUBLIC UTILITY COMMISSION

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

NOTICE OF APPEAL
TO THE VERMONT SUPREME COURT

Notice is hereby given that Allco Renewable Energy Limited, PLH Vineyard Sky LLC, Apple Hill Solar LLC, and Chelsea Solar LLC, and their respective affiliates, subsidiaries, and contractors who are aggrieved by orders of the Vermont Public Utility Commission ("PUC") in the above-captioned proceedings, appeal and seek relief from any disobedience of or noncompliance with such orders or decrees pursuant to 3 V.S.A. § 815, 30 V.S.A. §§ 12, 15, 234 and Vt. R. App. P. 3 to the Supreme Court from the orders of the PUC dated June 26, 2020, August 26, 2020, April 1, 2021, May 30, 2023, June 13, 2023 and September 19, 2023, in Commission case no. 20-1611-INV.

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Attorney for Appellants

Dated: October 17, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon the following:

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Clerk of the VPUC
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Thomas Melone

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	

Order entered: 06/26/2020

ORDER GRANTING TEMPORARY RESTRAINING ORDER AND NOTICE OF PRELIMINARY INJUNCTION HEARING

I. INTRODUCTION

In this order, pursuant to 30 V.S.A. §§ 8, 10, 30, 203, 209, and 248(a)(2), and Commission Rule 2.406, the Vermont Public Utility Commission ("Commission") issues a temporary restraining order against Allco Renewable Energy Limited, PLH Apple Hill Solar LLC, and PLH Chelsea Solar LLC, and its affiliates, subsidiaries, and contractors (collectively, "Allco" or "petitioner") from any further tree clearing on any of the property for the proposed projects identified in any Certificate of Public Good ("CPG") applications and any property identified in those applications as intended to be part of the projects, including any amendments to those applications that have been approved by the Commission, in the Apple Hill area in Bennington, Vermont ("the Apple Hill site").

II. BACKGROUND

On June 19, 2020, public comments were filed by Annette Smith of Vermonters for a Clean Environment alleging that tree clearing was occurring on Apple Hill on the sites of two proposed 2.0 MW solar electric generation facilities. Ms. Smith also alleged that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity.

Also on June 19, 2020, Thomas Melone of Allco, PLH Apple Hill Solar LLC, and Chelsea Solar LLC filed a response to Ms. Smith's comments. Mr. Melone states that:

> It is my understanding that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Environmental Enforcement Officer Patrick

> Lowkes at the request of Don Einhorn. While [the Vermont Agency of Natural Resources ("ANR")] can certainly make its own comments, Officer Lowkes' inspection confirmed that NO [rare, threatened, or endangered species] area was being disturbed and that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion.[1]

On June 23, 2020, ANR filed preliminary comments in response to Ms. Smith's public comments. ANR stated that it "has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed."[2]

ANR stated that the tree-clearing activity raises two concerns. The first concern is that the petitioner is conducting site preparation without a CPG. The second concern is that the site clearing has not been reviewed to ensure that it does not have an undue adverse effect on the environment.

Specifically, ANR is concerned that the site clearing presents a substantial and immediate harm to "very rare" and "rare" plants at the site. ANR believes that a cease-and-desist order may be necessary to prevent irreparable harm to the plants. ANR stated that it would file more comprehensive comments on Friday, June 26, 2020.

On June 24, 2020, the Vermont Department of Public Service ("Department") also filed comments stating:

> In this case, based on the Agency of Natural Resources Environmental Enforcement Officer's initial findings regarding the site clearing activity, cause appears to exist meriting further investigation into whether petitioner initiated preparing the Apple Hill site for electric generation in violation of 30 V.S.A. § 248(a)(2).[3]

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors") filed comments in response to Ms. Smith's public comments. The Intervenors assert that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission, and (2) the petitioner has engaged in site preparation in violation of 30 V.S.A.

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[1] Email from Thomas Melone to the PUC Clerk, at 7:07 P.M. on June 19, 2020.
[2] ANR Comments at 2.
[3] Department Comments at 2.

§ 248 and the Commission should declare the petitions for those facilities to be withdrawn or abandoned.

On June 25, 2020, ANR filed additional comments with supporting affidavits and exhibits and requested that the Commission issue a temporary restraining order pursuant to Commission Rule 2.406.

Also on June 25, 2020, Allco filed comments with supporting affidavits and exhibits and requested that the Commission deny the request for a temporary restraining order.

On June 26, 2020, the Commission held an evidentiary hearing to hear argument and admit evidence. The hearing addressed whether a temporary restraining order should or should not be issued to stop Allco from conducting site preparation in violation of Section 248(a)(2) and to prevent Allco's ongoing site clearing from having an undue adverse effect on "rare" and "very rare" plants on the 27-acre Apple Hill site.

III. FINDINGS

At the evidentiary hearing on June 26, 2020, the Commission admitted those exhibits listed in the transcript from that proceeding, including Commission Exhibit 1, ANR Exhibits 1-9, PLH Exhibits 1 and 2 and their attachments, and Intervenors Exhibit 1. That list of exhibits and the transcript of that proceeding will be available in ePUC shortly. Based on the exhibits admitted in the record and the testimony provided in today's hearing (not all of which can be cited, given the timing of this proceeding), the Commission makes the following findings.

1. On June 16, 2020, the Apple Hill site was visited by Vermont Environmental Enforcement Officer Patrick Lowkes, who observed that site-clearing activity was occurring on Apple Hill on the 27-acre parcel on which the Apple Hill and Willow Road solar facilities are proposed to be constructed. Thomas Melone email of June 19, 2020; preliminary comments by the Vermont Agency of Natural Resources ("ANR").

2. Allco's forester has carved out a truck turnaround spot at the end of Willow Road on the Apple Hill site and cleared a path around the site to install soil-erosion fencing. This work has cleared approximately 3 of the 27 acres. Allco's forester anticipates completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020. Kobelier Testimony of June 26, 2020.

3. Allco had previously surveyed the site for rare, threatened, and endangered plants and located both rare and very rare species, most recently updated in 2018. Some of the very rare plants were relocated to conservation areas set aside on the 27-acre site. These conservation areas were marked by Allco and enclosed with soil-erosion fencing. The rare plants were not relocated. Popp testimony of June 26, 2020 and ANR Exhibits.

4. There are several areas outside the conservation areas where the rare plant species are located. These would be harmed by the proposed site-clearing activities. Popp testimony of June 26, 2020 and ANR Exhibits.

5. Although Allco states that it is clearing the site to allow for grazing sheep and growing hemp, those activities would not begin until the 2021 growing season. Melone Affidavit and Melone Testimony of June 26, 2020.

6. The petitioner still plans to build a combined 4.0 MW of solar generation at this site.

7. The sheep grazing is being done "primarily" to control vegetative growth at the petitioner's planned solar projects at the site. Melone Testimony of June 26, 2020.

IV. DISCUSSION

The petitioner's activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The petitioner's claim in his affidavit that his activities are solely for farming purposes is not credible. The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is "devoted *primarily* to farming."[4] The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location "primarily" to serve the proposed solar projects. This does not qualify as farming. Further, the petitioner testified that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. This violates 30 V.S.A. § 248(a)(2).

A substantial immediate and irreparable injury is all that is required under Commission Rule 2.406 to warrant the issuance of a temporary restraining order. However, all of the factors that apply to a preliminary injunction also weigh in favor of granting preliminary relief here.

[4] Vermont Agency of Agriculture, Food and Markets, *Farm Definitions and Determination*s, https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations.

The Vermont Supreme Court has held that four factors must be considered in determining whether to grant a preliminary injunction: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest."[5]

First, for the reasons noted in detail below, ANR and the Intervenors have established a threat of irreparable harm. In fact, they have established a substantial immediate and irreparable injury.

Second, the record demonstrates that there is little, if any, harm to the petitioner from being enjoined at this time. The only possible harm to the petitioner is a delay in his site-clearing activities, if he is ultimately allowed to undertake those activities. But there would not appear to be even a delay here, as the petitioner testified that he is unlikely to do any sheep farming or hemp growing in 2020. Further, even if there were a delay, other courts have held that when the "anticipated revenues from the logging" are "delay[ed]" due to an injunction, the harm is "at most the time value of the profit component of that revenue, a value which no one has bothered to quantify and which probably is trivial."[6] The same could be said here.

Third, regarding the likelihood of success on the merits, we find that 30 V.S.A. § 248(a)(2) precludes the petitioner from site-clearing activities while he is still pursuing CPGs and has certainly not received them. As explained above, Vermont law explicitly prohibits site preparation for electric generation without a CPG, and the petitioner admits that he continues to seek to place electric generation at this site.

Fourth, the public interest favors a preliminary injunction here. As other courts have noted, there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury."[7] Further, "once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost."[8] Additionally, as counsel for ANR noted in oral argument, the petitioner's activities challenge the integrity of the Section 248 permitting process. The Commission issued an order on May 7, 2020, explicitly

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[5] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596, 178 A.3d 313, 319 (2017).

[6] *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

[7] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quotation omitted); *see also, e.g.*, *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (finding a public interest in "the need to preserve meaningful relief" throughout all stages of the litigation).

[8] *Id.* at 1137.

denying the petitioner's request to amend a pending application for a certificate of public good.[9] Although the petitioner seeks reconsideration of that order, that order remains binding on the petitioner unless and until the Commission grants his request for reconsideration. Yet, the petitioner has gone ahead with making the very same permanent changes to the landscape that we told him he could not make when we denied his amendment request. As ANR correctly notes, this is an affront to the Section 248 permitting process. It creates a significant risk that undue adverse effects to the environment will occur before the Commission has had a chance to review the proposed project. This does not comply with the applicable statutes or serve the public interest.

Substantial Immediate and Irreparable Harm Under Commission Rule 2.406

The Vermont Supreme Court has recognized that preliminary relief is appropriate to avoid "irreparable damage during the pendency of the action" where "the injunction is required to preserve [the] status quo."[10] A temporary restraining order or preliminary injunction "preserves the status quo."[11] This type of relief is particularly appropriate to prevent actions that "cannot be undone through monetary remedies."[12] The Vermont Supreme Court has thus denied preliminary relief when the challenged action "can be 'undone.'"[13] On the other hand, when there is no way to undo something at a later time, a stay is necessary to avoid irreparable harm.

Here, substantial immediate and irreparable harm exists for at least two reasons. First, the proposed clearing of more than 20 acres of trees constitutes substantial immediate and irreparable harm. Second, the proposed site activity threatens one very rare and will negatively impact one rare plant species that have been documented to exist at this site.

The proposed tree clearing constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored. Thus, courts routinely hold that the logging of trees constitutes irreparable harm: "The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of

[9] Docket 8454, Order of 5/7/2020 at 23-25.
[10] *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450, 365 A.2d 243, 247 (1976).
[11] *Bank of New York Co. v. Ne. Bancorp, Inc.*, 9 F.3d 1065, 1067 (2d Cir. 1993).
[12] *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).
[13] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 42, 205 Vt. 586, 606, 178 A.3d 313, 326.

money damages can normally remedy such damage."[14] Consequently, the logging of trees "is irreparable for the purposes of the preliminary injunction analysis."[15]

As for harm to rare plant species, ANR has established that rare species are found in areas on the site that are currently slated for clearing. In particular, at least three locations contain nimblewill muhly. Yet the petitioner's forester stated that he plans to avoid only two locations on these 27 acres. This means that at least one location of nimblewill muhly will likely be destroyed if the clearing goes forward. Further, one of ANR's witnesses testified that plants often move to new locations. The petitioner's forester admitted that he is relying on a 2018 survey and that, although he and others visited the site in 2020 to look at the flagging that is currently in place, that visit did not include walking the 27 acres to look for new locations of rare plants. It is therefore likely that rare plants will be destroyed if this area is cleared. This constitutes substantial immediate and irreparable harm.

V. ORDER

Based on the foregoing, the Commission, pursuant to Board Rule 2.406, issues the following temporary restraining order and notice of hearing:

1. Allco and its affiliates and contractors shall immediately cease all tree clearing on the Apple Hill site;

2. Allco shall be prepared to show cause during this investigation why the tree-clearing activity shall not be considered site preparation as defined in Title 30; and

3. Allco shall cooperate fully with the Commission in its further investigation of this matter.

4. Pursuant to 30 V.S.A. §§ 8, 10, 203, and 209, and Commission Rule 2.406, an evidentiary hearing on whether to grant a preliminary injunction will be held by videoconference before the Public Utility Commission on July 9, 2020, at 9:30 A.M. This hearing will address whether the restraining order should be lifted and whether Allco's tree-clearing activities were

[14] *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

[15] *Id.*; *see also, e.g.*, *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that the logging of trees "satisfies the 'likelihood of irreparable injury' requirement"); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that "trees cut down this fall will not have grown back to their present height" during the lifetime of most of the plaintiffs).

site-clearing operations without a certificate of public good in violation of 30 V.S.A. § 248(a)(2). A pre-meeting to address videoconferencing procedures will take place before the hearing at 9:15 A.M. The evidentiary hearing will be held remotely using a web-based online platform, GoToMeeting.[16] Participants and members of the public may access the hearing online at https://global.gotomeeting.com/join/134692885, or call in using the following information: Phone number: +1 (646) 749-3112; access code: 276-668-837. Participants may wish to download the GoToMeeting software application in advance of the hearing at https://global.gotomeeting.com/install/134692885. Guidance on how to join the meeting and system requirements may be found at https://www.gotomeeting.com/meeting/online-meeting-support.

[16] Pursuant to V.R.C.P. 43.1(c)(5), because of the COVID-19 pandemic, the Commission is waiving the 28-day requirement for notice of video hearings contained in V.R.C.P. 43.1(c)(3). Any party that objects to the evidentiary hearing being held remotely shall file its objection by July 2, 2020.

Dated at Montpelier, Vermont, this 26th day of June, 2020.

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

OFFICE OF THE CLERK

Filed: June 26, 2020

Attest: Acting 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)

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

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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	

Order entered: 08/26/2020

ORDER DENYING DEVELOPER'S MOTION TO VACATE PRELIMINARY INJUNCTION HEARING AND NOTICE OF RESCHEDULED PRELIMINARY INJUNCTION HEARING

I. INTRODUCTION

On July 1, 2020, Apple Hill Solar LLC, with related entities Allco Renewable Energy Limited, and its affiliates, which include Chelsea Solar LLC, Apple Hill Solar LLC, and PLH LLC (collectively, the "Developer") filed a motion with the Vermont Public Utility Commission ("Commission") to vacate the injunction hearing scheduled for July 9, 2020. We had scheduled that hearing following our issuance of a temporary restraining order ("TRO") on June 26, 2020, to provide the Developer with the earliest opportunity to challenge the TRO.

On July 2, 2020, in response to the Developer's motion, the Commission postponed the injunction hearing and set a briefing schedule on the Developer's motion.

On August 17, 2020, the Developer submitted a motion to dissolve the TRO.

In today's Order, we deny the Developer's motion to vacate and provide notice to the parties that an oral argument and evidentiary hearing to address whether to grant an injunction or dissolve the TRO will be held by videoconference on September 8, 2020, at 1 P.M. The hearing will be before all three members of the Commission. Comments in response to the Developer's motion to dissolve the TRO are due by noon on August 31, 2020. A status conference in preparation for the September 8, 2020, evidentiary hearing will be conducted by videoconference at 3:00 P.M on August 31, 2020, with the Commission staff.

II. BACKGROUND

On May 16, 2013, the Commission approved the Developer's petition for a standard-offer contract for the electrical energy to be generated by the "Bennington" facility, which is one of two proposed 2.0 MW solar electric generation facilities to be located on a 27-acre parcel on Apple Hill in Bennington, Vermont. The Commission also denied the Developer's request for a standard-offer contract for the second proposed facility, the adjacent Apple Hill facility.

On June 20, 2013, the Developer executed a standard-offer contract for the Bennington facility. Paragraph 7 of that contract contained development milestones, including a requirement that the Petitioner commission the project by no later than June 19, 2015.[1] In later orders, the Commission extended the deadlines for these development milestones.[2]

After the Commission's denial of a standard-offer contract for the Apple Hill facility, the Developer successfully appealed that determination to the Vermont Supreme Court, which reversed the Commission's determination.[3]

On May 13, 2014, Apple Hill Solar LLC, on behalf of the Developer, was awarded a standard-offer contract for the electrical energy to be generated by the second of the two solar facilities proposed for the Apple Hill site. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than May 12, 2016. In later orders, the Commission extended the deadlines for these development milestones.[4]

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[1] The Vermont Standard Offer Purchase Power Agreement is between Ecos Energy, LLC and VEPP Inc., a Vermont nonprofit corporation.

[2] *In re request of Sudbury Solar, LLC and Chelsea Solar, LLC for an extension of time to commission their respective solar electric generating projects*, Order of 1/8/15; ***Error! Main Document Only.*** *In re request of Chelsea Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*, Order of 3/31/16; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 17-4695-PET, Order of 3/15/18; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[3] *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29.

[4] ***Error! Main Document Only.****In re request of Apple Hill Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*; Order of 3/31/16; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 18-3727-PET, Order of 12/27/18; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

On February 16, 2016, in Docket 8302, the Commission denied the Developer's request for a certificate of public good ("CPG") for the Chelsea Solar facility located on the site of the Bennington facility for which a standard-offer contract was executed on June 20, 2013.[5]

On September 26, 2018, in Docket 8454, the Commission approved the Developer's request for a CPG for the Apple Hill solar facility for which a standard-offer contract was issued on May 13, 2014.[6] Neighbors appealed the Commission's approval of the Apple Hill facility. The Vermont Supreme Court then reversed the Commission's approval determination in part and remanded the case to the Commission for further action consistent with its remand.[7]

On December 27, 2018, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the proposed Apple Hill facility a second time.[8] The commissioning deadline in the Developer's May 13, 2014, standard-offer contract for Apple Hill was extended to twelve months after the date the Vermont Supreme Court issues a mandate letter for any appeal taken with respect to the Commission's final order in Docket 8454.

On June 12, 2019, in Case No. 17-5024-PET, the Commission denied an amended petition for the Bennington facility, now referred to as the Willow Road facility, for which a standard-offer contract was executed on June 20, 2013.[9] The Willow Road determination has been appealed to the Vermont Supreme Court, where that matter is still pending.

On August 20, 2019, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the Bennington/Chelsea/Willow Road facility a fourth time.[10] In this fourth extension, the commissioning deadline in the Developer's June 20, 2013, standard-offer contract was extended to twelve months after the date the Vermont Supreme

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[5] *Petition of Chelsea 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 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, filed 6/19/14.

[6] *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.

[7] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

[8] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 18-3727-PET, Order of 12/27/18.

[9] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024.

[10] *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

Court issues a mandate letter for an appeal taken with respect to the Commission's final order in Case No. 17-5024-PET.

On March 12, 2020, the Commission issued an order extending the commissioning deadline for the proposed Apple Hill facility a third time to twelve months after the Commission issued its decision on remand in Docket 8454.[11]

On May 7, 2020, the Commission issued a final order on remand denying a CPG for the proposed Apple Hill facility in Docket 8454.

On Friday, June 26, 2020, in this proceeding (Case No. 20-1611-INV), the Commission conducted an evidentiary hearing into whether the Developer initiated site preparation for electric generation in violation of 30 V.S.A. § 248(a)(2) at Apple Hill in Bennington, Vermont. During the hearing the Developer testified that it still plans to build a combined 4.0 MW of solar electric generation at the Apple Hill site using two facilities, that it had engaged a forester to clear-cut trees at the Apple Hill site that is the subject of the two standard-offer contracts, and that the clear-cutting was occurring.[12]

On the same day as the hearing, the Commission issued the TRO against the Developer and the Developer's subsidiaries and contractors. The TRO prohibited any further tree clearing at the Apple Hill site. This includes the proposed sites of the Bennington and Apple Hill facilities that are the subject of the Developer's two standard-offer contracts, as well as the proposed Chelsea, Apple Hill, and Willow Road facilities, including any and all property identified in the applications for those facilities as being part of the proposed project. The Commission scheduled a hearing on July 9, 2020, into whether to issue a preliminary or permanent injunction under Commission Rule 2.406, and whether an injunction is necessary to avoid irreparable harm.[13]

On July 1, 2020, the Developer filed the motion to vacate the injunction hearing scheduled for July 9, 2020 (the "Developer's Motion").

On July 2, 2020, the Commission issued an order postponing the injunction hearing. The Commission interpreted the Developer's Motion as indicating that the Developer did not object

[11] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[12] Tr. 6/26/20, at 11, 64-70, 81, 82, 89, 90 (Melone).

[13] TRO at 1 and 7.

to a later scheduling of the injunction hearing in this matter so that the Commission could rule upon the Developer's pending motion. The Commission set a deadline of July 15, 2020, for the parties to respond to the Developer's Motion.

On July 15, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors"), the Vermont Department of Public Service ("Department"), and the Vermont Agency of Natural Resources ("ANR") filed comments opposing the Developer's Motion (the "Intervenors' Comments," the "Department's Comments," and "ANR's Comments," respectively).

On July 16, 2020, the Developer filed a reply to the parties' comments (the "Developer's Reply"). The Developer did not challenge the Commission's July 2, 2020, conclusion that the Developer did not object to a later scheduling of the injunction hearing in this matter so that the Commission could rule upon the Developer's pending motion.

III. POSITIONS OF THE PARTIES

The Developer

In the Developer's Motion, the Developer contends that "the Commission has no authority to issue preliminary or permanent injunctive relief in this matter."[14] The Developer argues that the Commission's statutory authority is limited and that it may not issue a temporary restraining order in this circumstance because the Developer is not a "company" as defined under Title 30.[15]

The Developer asserts that, if it were a company, Title 30 only allows for the Department to seek injunctive relief "in Superior Court, not before the Commission."[16] The Developer contends that if the Developer were "some entity that violated section 248's prohibition on site preparation," such an allegation "would fall squarely with within 30 V.S.A. § 30(h)," which does not allow the Department to seek injunctive relief.[17]

Finally, in its motion the Developer argues, without support, that the "Commission only attains jurisdiction over the operation of those facilities and the petitioners once the CPG is

[14] Developer's Motion at 1.
[15] *Id.* at 5.
[16] *Id*.
[17] *Id.* at 6.

issued" and that, because no CPG has been issued, the Commission has no jurisdiction over the Developer.[18]

In the Developer's Reply, the Developer responds to the parties' comments by reiterating the arguments made in the Developer's Motion. The Developer also asserts that the parties do not "explain how their view is remotely consistent with section 7061, which is the only provision of Title 30 that authorizes the Commission to take action to pursue injunctive relief."[19] The Developer argues that its clear-cutting activities on Apple Hill are being done to allow for sheep grazing incidental to solar electric generation and concludes with the assertion that:

> The filing of [a] section 248 application does not provide the Commission general jurisdiction over either the applicant, connected persons, or the land. The Commission's jurisdiction is limited to making a decision on the application itself. Only if a CPG is issued might there attach conditions to the use of the land on which the solar facility sits, but until then the Commission has no jurisdiction and no authority to issue an injunction to prevent a landowner from using its land for farming.[20]

The Department

In its comments, the Department argues that "the Commission has the authority to grant injunctive relief where such an extraordinary measure is merited" because the Commission is a court of record under 30 V.S.A. § 9 and because the procedure for the Commission to issue a TRO is stated in Commission Rule 2.406, which is "analogous" to Vermont Rule of Civil Procedure 65.[21] The Department contends that the Commission's ability to issue a TRO has been reviewed and recognized by the federal district court for the District of Vermont.[22]

The Department asserts that the Developer's argument provides an incomplete picture because the authority referenced by the Developer applies only when the Department is seeking injunctive relief, not when other parties seek that relief. The Department observes that the

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[18] *Id.* at 7.

[19] Developer's Reply at 6.

[20] Developer's Reply at 8-9 (citing 10 V.S.A. 6081(s)(1) ("No permit amendment is required for farming that: (A) will occur on primary agricultural soils preserved in accordance with section 6093 of this title; or (B) will not conflict with any permit condition issued pursuant to this chapter. (2) Permits shall include a statement that farming is permitted on lands exempt from amendment jurisdiction under this subsection.")).

[21] Department's Comments at 1-2.

[22] *Id.* at 3 (citing *Global NAPS, Inc*., No. 2:09-CV-292, 2010 WL 11537869).

Commission has a long history of relying on different statutory authority to provide injunctive relief.[23]

The Department argues that the Developer made itself subject to the jurisdiction of the Commission when it filed its petition for a CPG because that action made the Developer a "company" along with its affiliates and subordinate entities doing business at the Apple Hill site.[24] The Department therefore recommends that the Commission amend the TRO to accurately reflect the respondent's parent company name of Allco Renewable Energy Limited "over which the Commission has regulatory authority."[25]

ANR

ANR agrees with the Department's position that the Commission has jurisdiction to issue a TRO in this matter. ANR asserts that "the Commission's jurisdiction in this matter extends to the entire 27-acre parcel on which the Apple Hill and Willow Road (formerly Chelsea) solar projects have been proposed, and to all entities affiliated with the petitioners for those two projects."[26] ANR recommends that the "TRO be amended to reflect that the Commission has

[23] *Id*. (citing *Application of Green Mountain Power Corp. for A Certificate of Pub. Good for an Interconnected Grp. Net-Metered Wind Turbine.,* No. NM-1646, Order of 7/11/13 (where petitioners requesting preliminary injunction were adjacent landowners); *Vermont Legal Aid Request for Moratorium on Util. & Telecommunications Shutoffs During State of Emergency,* Case No. 20-0703-PET, Order of 3/18/20 (where petitioner requesting temporary relief under Commission Rule 2.406 was Vermont Legal Aid)). The Department also noted that where circumstances call for it, the Commission has waived the procedural requirements of Rule 2.406. *Id.* (citing NM-1646, Order of 7/11/13 at 11. ("While they have not termed it as such, the Mammolitis' request is properly treated as a motion for preliminary injunction pursuant to [Commission] Rule 2.406(A)(2)"); Case No. 20-0703-PET, Order of 3/18/20 at 2 ("While Rule 2.406(B) ordinarily requires affidavits or a verified petition, we waive this requirement in light of the emergency situation presented to us today.")).

[24] *Id*. at 4. The Department asserts that PLH LLC as the parcel landowner submitted itself to the jurisdiction of the Commission upon the filing of its sister company Apple Hill's petition for a certificate of public good to install and operate a solar facility on the same parcel. *Id.* (citing 30 V.S.A. § 201(a) ("[T]he word "company" or "companies" means and includes individuals, partnerships, associations, corporations, and municipalities *owning or conducting any public service business or property* used in connection therewith and covered by the provisions of this chapter.") (emphasis added); 10 V.S.A. § 6001(14)(A)(iii) (""Person"…includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land…")).

[25] Department Comments at 5 (citing *Petition of Chelsea Solar LLC*, Case No. 17-5024-PET, Order of 6/12/19 at 56 nn.70, 71).

[26] ANR Comments at 1.

regulatory jurisdiction over PLH LLC, PLH Vineyard Sky, LLC, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC."[27]

The Intervenors

The Intervenors assert that the Commission has the authority to issue injunctive relief because it is a court of record under 30 V.S.A. § 9 and can issue orders under Commission Rule 2.406, which "clarifies that the Commission has the authority to issue injunctions and provide procedural direction on the decision-making process."[28] The Intervenors also argue that "the notion that Apple Hill Solar LLC is not subject to the jurisdiction of the [Commission] when they are a party in interest seeking the CPG is totally without merit."[29]

IV. DISCUSSION

We are not persuaded by the Developer's arguments that the Commission does not have jurisdiction over the Developer and its associated entities.[30] We have the authority to provide injunctive relief in this matter to address any violations of the prohibition in 30 V.S.A. § 248(a)(2)(A) against site preparation without a certificate of public good.

The Commission has Jurisdiction over the Developer

We have jurisdiction over the Developer pursuant to 30 V.S.A. §§ 209(a)(8) and 248(a)(2)(A). The Developer has two standard-offer contracts and it is in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts. Having submitted two petitions for CPGs for the proposed Chelsea Solar/Willow Road facilities and an original petition that was later amended for the proposed Apple Hill facility, the Developer has been continuously engaged in seeking CPG authorization to build these facilities since it acquired the standard-offer contracts in 2013 and 2014. The Developer's actions on Apple Hill continue to be

[27] *Id*. at 2.
[28] Intervenors' Comments at 4.
[29] *Id*.
[30] The respondents in this investigation include PLH LLC, PLH Vineyard Sky, LLC, Allco Renewable Energy Limited, Chelsea Solar LLC and Apple Hill Solar LLC.

part of the Developer's plan to develop the site for the two facilities that are the subject of its standard-offer contracts.

Section 209 of Title 30 addresses the Commission's jurisdiction, in part, as follows:

> (a) General jurisdiction. On due notice, the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, *or property subject to supervision under this chapter*, and shall have like jurisdiction in all matters respecting:
>
> (8) the sale to electric companies of electricity generated by facilities:
>
> (A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and
> (B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8).[31]

In 2013 and 2014, the Developer signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont. By doing so, the Developer became subject to the Commission's jurisdiction. As long as the Developer does not relinquish the two standard-offer contracts at the Apple Hill site and abandon development of the facilities to be located there, the Developer is subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 209(a)(8).

The Developer is incorrect in its unsupported argument that the Commission's jurisdiction over the Apple Hill site would only arise after a CPG is issued. As long as the Developer's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, the Developer is subject to the Commission's jurisdiction. Such actions by the Developer include both the filing and amendment of any CPG petitions for the Apple Hill facilities, the clear-cutting activities that the Developer was engaging

[31] 30 V.S.A. § 209 (emphasis added); *see also, Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248 authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont*, Docket 7970, Order of 8/4/14 at 3 (Commission temporarily halted all soil-disturbing activity of pipeline project pending completion of soil management plan pursuant to its general supervisory jurisdiction as a precautionary measure to protect public health and safety).

in here and that would have an impact on rare plants on the site, and any other acts in preparation of the site for electric generation.

Additionally, Section 248(a)(2)(A) provides the Commission with the authority to oversee and limit preparation of the Apple Hill site by the Developer:

> (A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.

The Developer is a "person" as defined in 10 V.S.A. § 6001(14):

> "Person":
> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; …
> (iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.

If 30 V.S.A. § 248(a)(2)(A)'s prohibition on site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission's jurisdiction over a "proposed site" attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a "proposed site" remains within the Commission's jurisdiction until there is a "ceasing and abandoning" of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review.[32] The general jurisdiction conferred under Section 209 over "property subject to supervision under this chapter" further enhances the Commission's particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, such as those proposed by the Developer here.

Otherwise, developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval, thereby mooting out ANR, the Agency of Agriculture Foods & Markets, and other agencies' review of such facilities under the Section 248 criteria. Agency-proposed conditions or objections would be meaningless and facilities that would otherwise present an undue impact under the Section 248 criteria could

[32] *In re Audet,* 2004 VT 30, ¶ 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (providing analysis of abandonment in Act 250 context).

perform the work that creates that impact before approval. Contrary to statute, the Commission would then be reviewing the site for a proposed facility not at the time it is filed, but instead, at the moment before the CPG is issued. Thus, jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.

Further, the denial of the Chelsea Solar, Apple Hill Solar, and Willow Road Solar facilities by the Commission is not evidence of ceasing and abandoning those projects. In addition, in this instance, there is sufficient evidence to demonstrate a commitment to proceed, including the following: the Developer still has standard-offer contracts for two 2.0 MW solar electric generation facilities on Apple Hill, the Developer is actively pursuing reconsideration and appeal of denials of its petitions, and clearing the trees from the 27-acre plot would serve to prepare the site for development of the proposed solar electric generation facilities.

The Developer admitted at the hearing that it intends to pursue these electric generation facilities and has not abandoned those proposals. The Developer acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility. The Developer also states that it plans to build solar facilities on the Apple Hill site in order that it may sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts. Therefore, the Commission has the jurisdiction to oversee the Developer and has the jurisdiction to take the extraordinary step of providing injunctive relief pursuant to Commission Rule 2.406, if appropriate.

The Commission has the Authority to Grant Injunctive Relief

As discussed by the parties, pursuant to 30 V.S.A. § 9:

> The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.

As observed by the Department and ANR, Commission Rule 2.406 has long been used by the Commission to address requests by parties for injunctive relief, like the case here.

The Developer's arguments that Section 30(h) and Section 7061 of Title 30 limit the Commission's authority are wholly misplaced. That statutory guidance in Title 30 is

inapplicable to the Commission but instead applies to the Department and the Enhanced E911 Board, respectively.

Section 7061 is in Chapter 87 of Title 30, which applies to Enhanced 911; Emergency Services. The Developer refers to Section 7061(a), which states: "The Board may file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter. The court shall award the Board its costs and reasonable attorney's fees in the event that the Board prevails in an action under this subsection." Under Chapter 87 of Title 30, the "Board" means the Vermont Enhanced 911 Board established under section 7053 of Title 30.[33] Contrary to the Developer's arguments, this reference to the "Board" is not a reference to the Public Utility Commission.

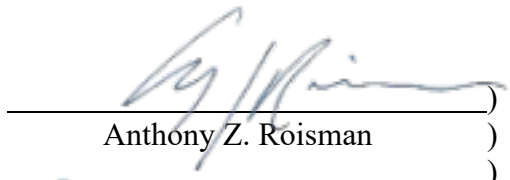
V. CONCLUSION

We are not persuaded by the Developer's arguments and deny its motion to vacate the order scheduling an injunction hearing. An oral argument and evidentiary hearing to address whether to grant an injunction or dissolve the TRO will be held by videoconference before the Commission on September 8, 2020, at 1 P.M. The hearing will be before all three members of the Commission. Comments in response to the Developer's motion to dissolve the TRO are due by noon on August 31, 2020. A status conference in preparation for the September 8, 2020, evidentiary hearing will be conducted by videoconference at 3:00 P.M on August 31, 2020, with the Commission staff. With the exception of the time and date, the guidance for the injunction hearing provided in our procedural order of July 1, 2020, remains applicable.

SO ORDERED.

[33] *See* 30 V.S.A. § 7051 Definitions at (4).

Dated at Montpelier, Vermont, this 26th day of August, 2020.



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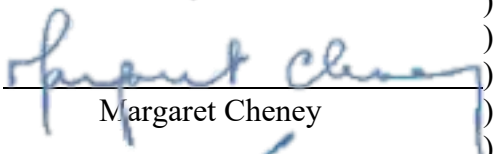
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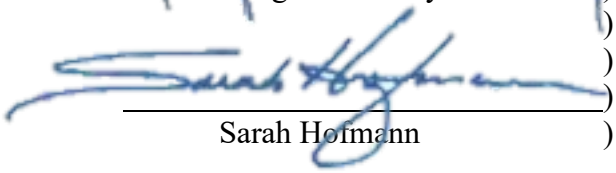
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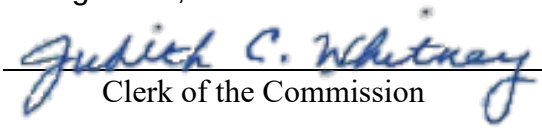
OFFICE OF THE CLERK

Filed: August 26, 2020

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)

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

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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

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

Order entered: 04/01/2021

ORDER MAINTAINING INJUNCTION PROHIBITING FURTHER SITE PREPARATION, RULING ON MOTIONS, AND DIRECTING SCHEDULING PROPOSAL

I. INTRODUCTION

This case raises the fundamental question of whether the Vermont Public Utility Commission ("Commission") can enforce the statutory prohibition against any company or person "begin[ning] site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage."[1] We conclude that the Vermont Legislature has granted us this authority.

As the Vermont Department of Public Service ("Department") correctly notes, the developer's activities here "challenge the integrity of the Section 248 permitting process."[2] If we did not have authority to enjoin illegal site preparation, then every applicant for a certificate of public good ("CPG") would have an incentive to bulldoze its proposed project site before submitting an application, even if it meant the permanent destruction of trees, rare plants, and very rare plants, as well as other environmental degradation. After all, a proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental

[1] 30 V.S.A. § 248(a)(2)(A).
[2] Department Brief at 5.

impacts, which is directly contrary to legislative intent. This is why the Vermont Legislature has placed a blanket prohibition on even "begin[ning]" site preparation without a CPG.[3]

In this Order, we find that the petitioner has begun site preparation without a CPG, and we enjoin any further site preparation without a CPG. Because an evidentiary hearing addressing an injunction has been conducted, this injunction is permanent.[4] But, as discussed further below, this injunction is temporally limited. We also rule on pending motions regarding the admission of other filings into evidence.

On June 24, 2020, we opened an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors (collectively, "Allco" or "petitioner" or "Developer") were conducting site clearing on Apple Hill in Bennington, Vermont, in violation of Section 248(a)(2) of Title 30.[5]

On June 26, 2020, we conducted an evidentiary hearing and issued a temporary restraining order ("TRO") against Allco prohibiting any further tree clearing or other site preparation on any property for the facilities proposed by Allco in its petitions in Docket 8454 and Case No. 17-5024-PET.[6]

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[3] 30 V.S.A. § 248(a)(2)(A).

[4] *See Committee to Save the Bishop's House*, 136 Vt. 213, 218 (1978) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2942, at 368 (1973)); *see also* Commission Rule 2.406(A)(3) (noting that the Environmental Board may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

[5] Allco is the respondent in this investigation. Allco is referred to as the petitioner in the case caption because it has petitioned the Commission for two standard-offer contracts and for three certificates of public good ("CPGs") for proposed solar electric generation facilities on Apple Hill in Bennington, Vermont. The standard-offer contracts were executed in 2013 and 2014 and have been amended several times at Allco's request to extend the contracts' operational deadlines. *See Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 20-0185-PET, Order of 3/12/20 (granting a fourth extension of the operational deadline for the Apple Hill facility contract); *and Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET (granting a fourth extension to the operational deadline for the neighboring Chelsea Solar/Willow Road facility); *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a Certificate of Public Good authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont*, Docket 8302, Order of 2/6/16 (denying petition for CPG); *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, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending); and *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-PET, Order of 6/12/19 (denying petition for CPG) (appeal pending).

[6] Case No. 20-1611-INV, Order of 6/26/20.

In this Order we enjoin Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities on Apple Hill in Bennington, Vermont. This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny 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. In other words, this injunction will remain in place until we know whether the Developer will or will not build solar facilities on this site.

In this Order we conclude that Allco's preparation of the Apple Hill site for solar development without a CPG violated 30 V.S.A.§ 248(a)(2)(A), which requires a CPG before site preparation may begin, and warrants a proceeding to address the issuance of a civil penalty for that violation of Section 30, pursuant to 30 V.S.A. § 30.

We also direct that Allco 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.

II. BACKGROUND

On May 16, 2013, the Commission approved Allco's petition for a standard-offer contract for the electrical energy to be generated by the "Bennington" facility, which was one of two then-proposed 2.0 MW solar electric generation facilities to be located on a 27-acre parcel on Apple Hill in Bennington, Vermont. The Commission also denied Allco's request for a standard-offer contract for the second proposed facility, the adjacent Apple Hill facility.

On June 20, 2013, Allco executed a standard-offer contract for the Bennington facility, also referred to as the Chelsea Solar facility in Docket 8302 and then later with a different footprint as the Willow Road facility in Case No. 17-5024-PET. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the

project by no later than June 19, 2015.[7] In later orders, the Commission extended the deadlines for these development milestones.[8]

After the Commission's denial of a standard-offer contract for the Apple Hill facility, Allco successfully appealed that ruling to the Vermont Supreme Court, which reversed the Commission's determination.[9]

On May 13, 2014, Apple Hill Solar LLC, on behalf of Allco, was awarded a standard-offer contract for the electrical energy to be generated by the second of the two solar facilities proposed for the Apple Hill site. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than May 12, 2016. In later orders, the Commission extended the deadlines for these development milestones.[10]

On February 16, 2016, in Docket 8302, the Commission denied Allco's request for a CPG for the Chelsea Solar facility located on the site of the Bennington facility for which a standard-offer contract was executed on June 20, 2013.[11]

On September 26, 2018, in Docket 8454, the Commission approved Allco's request for a CPG for the Apple Hill solar facility for which a standard-offer contract was issued on May 13, 2014.[12] Neighbors appealed the Commission's approval of the Apple Hill facility. The Vermont

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[7] The Vermont Standard Offer Purchase Power Agreement is between Ecos Energy, LLC (an Allco subsidiary) and VEPP Inc., a Vermont nonprofit corporation.

[8] *In re request of Sudbury Solar, LLC and Chelsea Solar, LLC for an extension of time to commission their respective solar electric generating projects*, Order of 1/8/15; I*n re request of Chelsea Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*, Order of 3/31/16; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone,* Case No. 17-4695-PET, Order of 3/15/18; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[9] I*n re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29.

[10] *In re request of Apple Hill Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*; Order of 3/31/16; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 18-3727-PET, Order of 12/27/18; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[11] *Petition of Chelsea 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 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, filed 6/19/14.

[12] P*etition 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.

Supreme Court then reversed the Commission's approval in part and remanded the case to the Commission for further action consistent with its remand.[13]

On December 27, 2018, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the proposed Apple Hill facility a second time.[14] The commissioning deadline in Allco's May 13, 2014, standard-offer contract for Apple Hill was extended to twelve months after the date the Vermont Supreme Court issued a mandate letter for any appeal taken with respect to the Commission's final order in Docket 8454.

On June 12, 2019, in Case No. 17-5024-PET, the Commission denied an amended petition for the Bennington facility, now referred to as the Willow Road facility, for which a standard-offer contract was executed on June 20, 2013.[15] Allco has appealed our decision in the *Willow Road* case to the Vermont Supreme Court, where that matter is pending.

On August 20, 2019, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the Bennington/Chelsea/Willow Road facility a fourth time.[16] In this fourth extension, the commissioning deadline in Allco's June 20, 2013, standard-offer contract was extended to twelve months after the date the Vermont Supreme Court issues a mandate letter for an appeal taken with respect to the Commission's final order in Case No. 17-5024-PET.

On March 12, 2020, the Commission issued an order extending the commissioning deadline for the proposed Apple Hill facility a third time to twelve months after the Commission issued its decision on remand in Docket 8454.[17]

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition for the Apple Hill facility to reflect its intention to graze sheep at the site and to grow hemp on the neighboring 5-acre Orchard Lot.[18]

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[13] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

[14] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 18-3727-PET, Order of 12/27/18.

[15] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024.

[16] *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[17] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[18] Amendment to Petition for Certificate of Public Good of Apple Hill Solar LLC, filed 3/23/20.

On May 7, 2020, the Commission issued a final order on remand denying a CPG for the proposed Apple Hill facility in Docket 8454 and denying the motion to amend the petition to reflect grazing sheep at the project site.[19]

On June 19, 2020, public comments were filed by Annette Smith alleging that tree clearing was occurring on Apple Hill on the sites of the two proposed 2.0 MW solar electric generation facilities. Ms. Smith also alleged that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity.

Also on June 19, 2020, Allco filed a response to Ms. Smith's comments, alleging that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Agency of Natural Resources ("ANR") Environmental Enforcement Officer Patrick Lowkes, who "confirmed that NO [rare, threatened, or endangered species] area was being disturbed and that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion."[20]

On June 23, 2020, ANR filed preliminary comments in response to Ms. Smith's public comments. ANR stated that it "has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed."[21]

ANR also noted that the tree-clearing activity raised two concerns. The first concern is that Allco is conducting site preparation without a CPG. The second concern is that the site clearing has not been reviewed to ensure that it does not have an undue adverse effect on the environment. Specifically, ANR was concerned that the site clearing presented a substantial and immediate harm to "very rare" and "rare" plants at the site. ANR requested a cease-and-desist order to prevent irreparable harm to the plants.

On June 24, 2020, the Department also filed comments stating:

> In this case, based on the Agency of Natural Resources Environmental Enforcement Officer's initial findings regarding the site clearing activity, cause appears to exist

[19] *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, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

[20] Email from Thomas Melone to the PUC Clerk, at 7:07 P.M. on June 19, 2020.

[21] ANR Comments at 2.

> meriting further investigation into whether petitioner initiated preparing the Apple Hill site for electric generation in violation of 30 V.S.A. § 248(a)(2).[22]

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors") filed comments in response to Ms. Smith's public comments. The Intervenors assert that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission; and (2) the Developer has engaged in site preparation in violation of 30 V.S.A. § 248 and the Commission should declare the petitions for those facilities to be withdrawn or abandoned.

On June 24, 2020, the Commission initiated this investigation.

On June 26, 2020, the Commission held the first of two evidentiary hearings in this proceeding and issued the TRO restraining Allco from further site-preparation activity on Apple Hill. The Commission also scheduled a second evidentiary hearing for July 9, 2020, to address whether the TRO should be lifted and whether Allco's tree-clearing activities were site-clearing operations in violation of 30 V.S.A. § 248(a)(2).

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

On July 1, 2020, the Commission issued a procedural order providing guidance for the July 9, 2020, injunction hearing.

Also on July 1, 2020, Allco filed a motion to vacate the injunction hearing.

On July 2, 2020, the Commission issued an order postponing the July 9 evidentiary hearing until after the Commission ruled on Allco's July 1 motion.

On August 26, 2020, the Commission issued an order denying Allco's July 1 motion and rescheduling the injunction hearing to September 8, 2020 (the "Jurisdiction Order").

On August 31, 2020, Commission staff conducted a status conference with the parties, and Allco requested that the injunction hearing be further postponed to allow Allco additional time to conduct discovery on the rare plant issue.

[22] Department Comments at 2.

On September 1, 2020, the Developer filed a notice of appeal to the Vermont Supreme Court seeking relief from the Commission's TRO and Jurisdiction Order. Also on September 1, 2020, the Commission cancelled the September 8, 2020, hearing.

On November 5, 2020, the Vermont Supreme Court dismissed Allco's appeal without prejudice to refiling it if an injunction is granted.

On November 13, 2020, the Commission provided the parties notice of a rescheduled injunction hearing and advised the parties of the procedures that would be used in that evidentiary hearing scheduled for Friday, December 4, 2020.

On December 4, 2020, the Commission conducted the second evidentiary hearing during which Allco requested that it be permitted to conduct additional limited discovery on ANR.

On December 8, 2020, the Commission issued an order establishing a briefing schedule and limiting the scope of additional discovery to four specific areas.

On December 17, 2020, ANR filed a motion on behalf of all the parties requesting a change to the post-hearing schedule.

On December 18, 2020, the Commission granted the parties' motion to alter the post-hearing schedule and set aside the previous post-hearing schedule. This revised schedule included a January 8, 2021, deadline for ANR to respond to additional discovery questions requested by Allco as well as a January 29 deadline for initial briefs and a February 12, 2021, deadline for reply briefs.

On January 26, 2021, Allco filed two motions and the supplemental prefiled testimony of Thomas Melone. We respond to these motions below.

On January 29, 2021, Allco, ANR, and DPS each filed post-hearing briefs.

On February 1, 2021, the Intervenors filed their post-hearing brief.

On February 8, 2020, ANR responded to Allco's motion for administrative notice. ANR requests that the Commission deny the motion because: (1) the documents are not "facts" as contemplated by V.R.E. 201(b); (2) the evidentiary record is already closed; and (3) the documents are irrelevant.

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

On February 16, 2021, Allco replied to ANR's February 8 response to the motion for administrative notice asserting that the documents contain relevant facts and that the evidentiary

record is not closed. Allco also filed the supplemental prefiled testimony of Jim McClammer with six exhibits.

On February 23, 2021, ANR objected to the Commission's consideration of Allco's supplemental filings of February 16 because the evidentiary record is closed.

No other comments have been filed by the parties.

III. RULING ON EVIDENTIARY MOTIONS

The record in this proceeding was closed at the end of the second hearing on December 4, 2020. However, the Commission made a limited exception for parties to introduce new information that would address four specific factual concerns that had arisen in that hearing, and the evidentiary record was therefore kept open to address those—and only those—issues, including any relevant responses to the Intervenors' request for information from Allco and Allco's remaining discovery requests of ANR.[23]

In a December 8, 2020, order, the Commission reiterated the limited scope of evidence that may be submitted into the record. Specifically, based on Allco's representations during the hearing, Allco was to: (1) file a correction to the website link addressed in a footnote in its recent filings and queried by the parties during the hearing; (2) file the total number of rare plant populations inventoried by Arrowwood Environmental as shown in Figure 1 of its 2019 Apple Hill Solar Rare Plant Monitoring Report, exhibit ANR-14; (3) develop with ANR a reasonable and timely schedule for ANR to respond to the Developer's pending discovery requests on ANR; and (4) respond in a reasonable and timely fashion to the discovery request filed by the Intervenors on December 7, 2020.

On December 8, 2020, Allco filed an affidavit and exhibit from Robert Kobelia. This was directly responsive to the Commission's request that Allco respond to the Intervenors' discovery request. The Commission's December 8, 2020, Order allowed this filing. Further, this filing provides relevant information, and no one objects to it. For these reasons, the December 8, 2020, affidavit and exhibit of Robert Kobelia are admitted into the record.

[23] "The record is not open for new witnesses, new exhibits, new testimony, other than whatever responses you get from these discovery requests." Tr. 12/4/20 at 221 (Roisman).

On January 25, 2021, Allco filed supplemental prefiled testimony of Thomas Melone and three related exhibits. This filing addressed (1) the website link issue, and (2) the rare plant inventories of Arrowwood Environmental. These are both topics that the Commission said it would allow into the record in our December 8, 2020, Order. Again, this filing is relevant, and no party has objected to it. For these reasons, the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5) are admitted into the record.

On January 26, 2021, Allco filed two motions to supplement the record. The first Allco motion was a request that the Commission take administrative notice of six documents, marked as exhibits A through F, addressing rare plants by different declarants who have not been made available for cross-examination. The second Allco motion requested that the Commission further supplement the evidentiary record by admitting three additional exhibits (AH-JM-4, 5, and 6) that had been inadvertently omitted from Allco's response to discovery questions answered by Jim McClammer in his testimony of December 3, 2020. These documents address the presence of rare plants in the vicinity of Apple Hill.

On February 16, 2021, Allco filed another round of supplemental prefiled testimony from Mr. McClammer, along with six additional exhibits (AH-JM-7, 8, 9, 10, 11, and 12).

ANR objected to the admission of Exhibits A through F and the February 16, 2021, supplemental prefiled testimony and exhibits because they are late, irrelevant, and do not meet the requirements for administrative notice. ANR further requested that the Commission admonish Allco for ignoring Commission orders and directives.

We deny both of Allco's January 26, 2021, motions to supplement the record. We also deny Allco's attempt to place additional documents into the record on February 16, 2021—documents that cannot possibly be put into the record at this late date because they were not accompanied by any motion requesting their admittance into the record.

We deny Allco's motions for two reasons.

First, the information Allco seeks to admit into evidence, including the testimony of Mr. McClammer, is untimely and outside the scope of the limited information that we said could be submitted for the record. While Allco claims that the Commission left the door open to any evidence that is related in any way to ANR's answers to Allco's discovery questions, that is

incorrect. There have been two evidentiary hearings in this proceeding. And now, two months after the record was closed with the exception of specific limited items, and eight months after Allco requested discovery, Allco seeks to file new testimony and six articles totaling more than 400 pages. None of this new information was discussed or addressed in the second evidentiary hearing, nor was ANR or any other party given an opportunity to cross-examine Mr. McClammer on any of this information.

Second, even if the record remained open to the testimony and documents filed by Allco, administrative notice does not apply here. The testimony and attached documents are not the type of irrefutable information that might be given administrative notice and entered into the record. Mr. McClammer makes numerous assertions that are in dispute. Had this testimony or these documents been presented before or during the hearing, ANR could have cross-examined Mr. McClammer on these matters.

IV. FINDINGS

At the evidentiary hearing on June 26, 2020, the Commission admitted those exhibits listed in the transcript from that proceeding, including Commission Exhibit 1, ANR Exhibits 1-9, PLH Exhibits 1 and 2 and their attachments, and Intervenors Exhibit 1. The Commission provided an opportunity for parties to object to those exhibits remaining part of the record for future stages of this proceeding, and no party objected. Therefore, the transcript and exhibits admitted as part of the June 26, 2020, hearing remain part of the record. At the evidentiary hearing on December 4, 2020, the Commission admitted the additional exhibits listed in the transcript from that proceeding. As noted earlier in today's Order, the Commission is also admitting the December 8, 2020, affidavit and exhibit of Robert Kobelia, as well as the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5). Based on the exhibits admitted in the record and the testimony provided in the two evidentiary hearings, the Commission makes the following findings.

1. On June 16, 2020, the Apple Hill site was visited by ANR Environmental Enforcement Officer Patrick Lowkes, who observed that site-clearing activity was occurring on Apple Hill on the 27-acre parcel on which the Apple Hill and Willow Road solar facilities are proposed to be constructed. Tr. 6/26/20 at 22, 24 (Lowkes); Lowkes affidavit 6/24/20 at ¶ 5.

2. Allco's forester has cleared part of the site on Apple Hill by carving out a truck turnaround spot at the end of Willow Road on the Apple Hill site and clearing a path around the site to install soil-erosion fencing. This work cleared approximately 3 of the 27 acres. Allco's forester had anticipated completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020. Tr. 6/26/20 at 126-127 (Kobelia).

3. As part of its CPG petitions in Dockets 8302 and 8454 and Case No. 17-5024-PET, Allco had previously surveyed the site for rare, threatened, and endangered plants and located both rare (nimblewill muhly, *Muhlenbergia schreberi*) and very rare species (white arrow-leaved asters, *Symphyotrichum urophyllum*). Some of the very rare plants, the white arrow-leaved asters, were relocated to conservation areas set aside on the 27-acre site. These conservation areas were marked by Allco and enclosed with soil-erosion fencing. The rare plants were not relocated. Tr. 6/26/20 at 40 (Popp); tr. 6/26/20 at 114 (Kobelia); exh. ANR-10 through 15.

4. There are several areas outside the conservation areas where the rare plant species are located. These would be harmed by the proposed site-clearing activities. Tr. 6/26/20 at 40, 43, 46, 49, and 51 (Popp); exh. ANR-10 through 15.

5. Although Allco states that it is clearing the site to allow for grazing sheep and growing hemp, those activities would not begin until the 2021 growing season. Tr. 6/26/20 at 73 and 87 (Melone); Melone Affirmation 6/25/20 at 2.

6. Allco plans to build two facilities with a combined 4.0 MW of solar generation at this site. Tr. 6/26/20 at 63, 67, 70, and 81 (Melone).

7. Site clearing for a solar facility requires clearing trees. Tr. 6/26/20 at 65-66 and 88-90 (Melone); exh. ANR-10 at 10.

8. Sheep grazing is compatible with a ground-mounted solar facility, and in this case Allco plans to use sheep as part of its solar development. Sheep are used primarily to control vegetative growth at a solar site. Sheep and solar go together as part of Allco's business plan. Tr. 6/26/20 at 64-65, 92, 93 (Melone); tr. 12/4/20 at 129-130 and 137 (Melone).

9. Allco has paid $850,000.00 for Green Mountain Power Corporation to construct a line extension to Apple Hill that would serve the two solar facilities that have been proposed there. Tr. 6/26/20 at 69-70 (Melone).

10. Allco does not have binding contractual arrangements with any expert entities to begin sheep and hemp production on Apple Hill. Tr. 6/26/20 at 71 (Melone).

11. Allco's forester had conducted approximately three acres of clearing, laying out the boundary of the area to be clear-cut and installing a silt fence on Apple Hill before June 26, 2020. Tr. 6/26/20 at 121, 126 (Kobelia).

12. On June 26, 2020, Allco's forester participated as a remote witness in the Commission's TRO hearing and sent texts that afternoon asking Allco's Project Manager Chris Little about the "cease and desist potential" and whether he would be "ok for tomorrow" to do additional site-clearing work. Kobelia affidavit 12/8/20 at 2.

13. Around 1:30 P.M. on June 26, 2020, the Commission announced from the bench that it was issuing a temporary restraining order: "We've decided to issue a TRO. We will issue an order to explain our reasoning later today." The Commission then issued a written order around 10:30 P.M. that same day. Tr. 6/26/20 at 146 (Roisman); Order of 6/26/20.

14. Around 8:30 P.M. on June 26, 2020, after the Commission had issued its ruling from the bench, but before a written order was issued, Allco's Project Manager told Allco's forester that he had "not received a TRO yet, so unless we receive one tonight or tomorrow morning we're good to go. You will hear from me the moment I see it hit my inbox." Kobelia affidavit 12/8/20 at 2.

15. Allco's forester continued site-clearing work on June 27, 2020, at 7 A.M. having not been informed by Allco that the Commission had issued a temporary restraining order halting site-clearing work at the Apple Hill site by order on June 26, 2020. The forester's work on Apple Hill ended shortly after 1 P.M. on June 27, 2020, when he received a text from Allco informing him of the TRO at the same time that the sheriff arrived at the site and informed the forester of the order to cease and desist from work at the site. Tr. 12/4/20 at 41-44 (Kobelia).

16. Between 7 A.M. and 1 P.M. on June 27, 2020, the forester used a bulldozer to continue clearing a 100-foot-by-250-foot area of the Apple Hill site of vegetation after the TRO hearing. The forester bulldozed the area so that it could serve as a place where a truck could turn around. Tr. 12/4/20 at 49-53, 66 (Kobelia).

17. The forester was not contractually required to avoid rare plants while clearing the Apple Hill site. Tr. 12/4/20 at 53-55 (Kobelia).

18. During the site-clearing work done by Allco's forester before June 27, 2020, several white arrow-leaved aster plants and nimblewill plants were destroyed. The total number of plants destroyed and the number of plants that might be destroyed if the work continues remain uncertain in the absence of a seasonally appropriate survey for rare and endangered plant species at the site. Tr. 12/4/20 at 153-155, and 194-195; exhs. AH-RK-2, PLH-TMM-5, and AH-JM-6.

19. White arrow-leaved asters were present at the site of the vegetation cleared by the forester on June 27, 2020. Tr. 12/4/20 at 77, 79 (McClammer); exh. ANR-10 at 5; exh. ANR-14.

20. White arrow-leaved asters present on June 27, 2020, would have been difficult to locate and identify because at this time of year they would be diminutive and likely obscured by the foliage of other plants present at the Apple Hill site. Tr. 12/4/20 at 90-91 (McClammer).

21. ANR's system for the classification of rare, threatened, and endangered species, like the white arrow-leaved aster, is a rational technique for addressing those species. Tr. 12/4/20 at 85 (McClammer).

22. Cutting and skidding trees at the Apple Hill site would tear the aboveground portions of the white arrow-leaved asters and the nimblewill plants from their roots. In addition, the heavy equipment used to do the site clearing would compact the soil and crush any plant over which it is driven. Exh. ANR-10 at 9-10.

23. Thomas Melone is the sole owner of Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates. Tr. 12/4/20 at 98-101 (Melone).

24. Allco agreed not to develop the 5-acre parcel—referred to variously as Lot Number 1, the Orchard Lot, and the horticultural lot—in a settlement agreement with the Town of Bennington on September 14, 2018. Tr. 12/4/20 at 102-103; Intervenors Exh. 4 at ¶ 7.

25. This 5-acre parcel is adjacent to the 27-acre parcel hosting the proposed Apple Hill and Chelsea/Willow Road solar facilities. In Docket 8454, Allco filed exhibit AHS-MK-12, proposing that it would plant a row of trees at the northern edge of this parcel, which is owned by Allco, as part of the facility's landscaping plan as the "Hill Road Planting" to shield views of the solar facility from a neighboring property. The 5-acre parcel is part of the Apple Hill site where site-clearing activity is enjoined by this Order. Tr. 12/4/20 at 124 (Melone); Intervenors exh. 4 at exh. B.

V. DISCUSSION

Introduction

In 2013, Allco petitioned the Commission to construct two solar facilities on Apple Hill in Bennington using standard-offer contracts authorized by the Commission. The current form of those proposed solar facilities is reflected in petitions filed in Docket 8454 and Case No. 17-5024-PET. The Commission has denied CPGs to Allco based on those petitions, and those denials are currently under review by the Vermont Supreme Court. Allco has amended or sought to amend each of these proposed facilities significantly, altering their proposed footprints, solar technology, access routes, access to the distribution grid, and aesthetic and natural resources impacts.[24] The proposed facilities currently under review by the Vermont Supreme Court differ significantly from the facilities proposed by Allco in 2013 in the standard-offer petitions.

On January 6, 2020, the hearing officer in Docket 8454 issued a proposal for decision on remand in the Apple Hill case recommending that we deny the petition.

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition a second time.[25] This second amendment reflected a plan by Allco to use the neighboring Orchard Lot and the facility site for agricultural purposes accommodating sheep grazing and hemp production. Among the specific changes to the petition, Allco proposed clearing the facility site because "[b]y the time construction might commence on the solar project, the hemp and sheep operations would be established for quite some time (as the litigation over the project is likely to continue for at least a couple more years)."[26]

On May 7, 2020, the Commission issued an Order adopting the hearing officer's proposal for decision on remand that we deny the petition in Docket 8454. We also denied the second proposed amendment because we had no jurisdiction on remand to reopen the original petition and because it was untimely. We concluded that Allco's interpretation of the Commission's

[24] We denied two requests to amend the Chelsea Solar petition in Docket 8302 in Orders of 4/14/17 and 10/12/17. These denials were followed by Allco filing a new petition further revising the proposed facility as the *Willow Road* case in Case No. 17-5024-PET. As explained in more detail below, we also denied Allco's March 23, 2020, proposed amendment to the Apple Hill project in Docket 8454. Docket 8454, Order of 5/7/20, at 24-25.

[25] Allco's first amendment request in Docket 8454 was made on April 4, 2016, before a proposal for decision or final order had issued. The first request reflected technological changes that reduced the proposed facility's footprint. The hearing officer approved that amendment request, and we approved the petition as amended. The Vermont Supreme Court reversed our decision and remanded the case.

[26] Docket 8454, Second Proposed Amendment, filed March 23, 2020, at 1 n.1.

amendment rule "would lead to the absurd result of allowing amendments that would give a project proposal a potentially unlimited lifespan."[27] We required that "new projects be filed as new projects."[28]

Then in June 2020, Allco began to clear-cut the site of the neighboring proposed solar facilities on Apple Hill without a CPG. Allco claims that this was farming activity unrelated to the solar facilities and outside the Commission's jurisdiction. By their comments of June 23, 2020, ANR requested that the Commission declare that Allco was violating Section 248.[29] Later comments by ANR, as well as by the Department and the Intervenors, requested that we order Allco to stop clear-cutting its property on Apple Hill.

We initiated this investigation and learned that Allco was cutting down trees and doing other site preparation work on Apple Hill at the site of the two proposed solar facilities. Based on those facts and pursuant to our jurisdiction under 30 V.S.A. §§ 9, 10, 30, 209, 203, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65, we ordered Allco to stop clearing trees on the parcel because that action is harmful to the natural environment and the orderly regulation of the generation of electricity in Vermont.

The potential for harm remains, and we maintain that injunctive order. As discussed below, we also now declare that Allco's clearing activity is site preparation in violation of 30 V.S.A. § 248(a)(2)(A). We direct the parties to propose a schedule for the proceeding to address an appropriate civil penalty to be issued against Allco pursuant to 30 V.S.A. § 30.

A. The Commission has Jurisdiction to Oversee, Enjoin, and Penalize Allco

The Commission Has Jurisdiction over Allco

We have jurisdiction over Allco pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Allco has two standard-offer contracts, and it is in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts. Having submitted two petitions for CPGs for the proposed

[27] Docket 8454, Order of 5/7/20, at 24-25.
[28] *Id.* at 25.
[29] ANR Comments at 2-3; *see also* Commission Rule 2.403 (noting that the Commission may issue declaratory rulings).

Chelsea Solar/Willow Road facilities and an original petition that was later amended for the proposed Apple Hill facility, Allco has been continuously engaged in seeking CPG authorization to build these facilities since it acquired the standard-offer contracts in 2013 and 2014. Allco's actions on Apple Hill continue to be part of Allco's plan to develop the site for the two facilities that are the subject of its standard-offer contracts.

> Section 209 of Title 30 addresses the Commission's jurisdiction, in part, as follows:
>
> (a) General jurisdiction. On due notice, the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of *any corporation owning or operating* any plant, line, *or property subject to supervision under this chapter*, and shall have like jurisdiction in all matters respecting:
>
> (8) the sale to electric companies of electricity generated by facilities:
>
> (A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and
> (B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8).[30]

Because Allco is a "corporation owning or operating . . . property subject to supervision under this chapter," the Commission has jurisdiction over Allco and its activities at the sites where it seeks to build solar facilities.

In 2013 and 2014, Allco signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont. By doing so, Allco became subject to the Commission's jurisdiction. Because Allco has not relinquished or let expire the two standard-offer contracts at the Apple Hill site—in fact, Allco has repeatedly sought and obtained extensions of the expiration dates of those contracts—and has not abandoned development of the facilities to be located there, Allco is subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 209(a)(8).

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[30] 30 V.S.A. § 209 (emphasis added); *see also, Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248 authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont*, Docket 7970, Order of 8/4/14 at 3 (Commission temporarily halted all soil-disturbing activity of pipeline project pending completion of soil management plan pursuant to its general supervisory jurisdiction as a precautionary measure to protect public health and safety).

Under Section 248 of Title 30, electric generation facilities in Vermont must obtain construction and siting approval from the Commission. This approval is known as a certificate of public good, or CPG. Before the Commission may issue a CPG, it must make findings under various statutory criteria supporting that the proposed project is in the public good—the Section 248 criteria. In addition to the CPG-permitting process, the Commission also oversees Vermont's standard-offer program, pursuant to 30 V.S.A. § 8005a. Under this incentive program, renewable energy plants of 2.2 MW capacity or less may receive long-term contracts with stable pricing. Allco has standard-offer contracts for two 2.0 MW solar facilities on Apple Hill in Bennington.

Allco is incorrect in its unsupported argument that the Commission's jurisdiction over the Apple Hill site would only arise after a CPG is issued. As long as Allco's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, Allco is subject to the Commission's jurisdiction. Such actions by Allco include the filing and amendment of any CPG petitions for the Apple Hill facilities, and the clear-cutting activities that Allco was engaged in here, and any other acts in preparation of the site for electric generation.

Additionally, Section 248(a)(2)(A) provides the Commission with the authority to oversee and limit preparation of the Apple Hill site by the Developer:

> (A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.

There is no doubt that this applies to the Developer because, regardless of whether the Developer also qualifies as a company, the Developer is a "person" as defined in 10 V.S.A. § 6001(14):

> "Person":
> (i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; …
> (iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.

We are not persuaded by Allco's argument that it is not a "collective person" as addressed in *In re Mountain Top Inn & Resort* because that case is factually different from and

irrelevant to these circumstances.[31] The legal and commercial entities embodied in the Allco corporate scheme are companies and "persons" in their own right as defined by 10 V.S.A. § 6001(14) and hence are subject to Commission oversight and jurisdiction.

If 30 V.S.A. § 248(a)(2)(A)'s prohibition of site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission's jurisdiction over a "proposed site" attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a "proposed site" remains within the Commission's jurisdiction until there is a "ceasing and abandoning" of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review.[32] The general jurisdiction conferred under Section 209 over "property subject to supervision under this chapter" further enhances the Commission's particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, including the site preparation proposed for solar facilities here.

Otherwise, developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval, thereby mooting out all review under the Section 248 criteria by the Department, ANR, the Agency of Agriculture Foods & Markets, the Division for Historic Preservation, and other agencies, interested parties, and the Commission. Agency-proposed conditions or objections would be meaningless, and facilities that would otherwise present an undue impact under the Section 248 criteria could perform the work that creates that impact before approval. Contrary to statute, the Commission would then be reviewing the site for a proposed facility not at the time it is filed, but instead at the moment before the CPG is issued. Thus, jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.

The denial of CPGs for the Chelsea Solar, Apple Hill Solar, and Willow Road Solar facilities by the Commission is not sufficient evidence of ceasing and abandoning those projects because Allco has appealed those decisions and continues to actively seek approval to build these facilities. In addition to actively pursuing reconsideration and appeal of denials of its CPG

[31] *In re Mountain Top Inn & Resort*, 2020 VT 57, 238 A.3d 637 (2020) (renters of resort homes not a "collective person" subject to Act 250 jurisdiction).

[32] *In re Audet,* 2004 VT 30, ¶ 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (providing analysis of abandonment in Act 250 context).

petitions, Allco still has standard-offer contracts for two 2.0 MW solar electric generation facilities on Apple Hill. Further, Allco has invested $850,000.00 to pay for GMP to upgrade the distribution line connecting the electric grid to the Apple Hill site and both proposed solar facilities, and Allco's clearing of trees from the 27-acre plot helps prepare the site for development of the proposed solar electric generation facilities.

Allco has admitted that it intends to pursue these electric generation facilities and has not abandoned those proposals.[33] Allco acknowledges that the act of clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility.[34] Allco also states that it plans to build solar facilities on the Apple Hill site in order to sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts. Therefore, the Commission has jurisdiction to oversee Allco and has the jurisdiction to take the extraordinary step of providing injunctive relief pursuant to Commission Rule 2.406.

The Commission Has the Authority to Grant Injunctive Relief

We have jurisdiction to grant injunctive relief pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209 and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Section 9 of Title 30 provides the Commission with authority to enjoin those subject to the Commission's jurisdiction from violating Section 248 of Title 30:

> The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State.[35]

As observed by the Department and ANR, Commission Rule 2.406 has long been used by the Commission to address requests by parties for injunctive relief, like the case here. The Commission did not exceed its authority when it issued the TRO on June 26, 2020. By this Order, having conducted an evidentiary hearing, we determine to maintain that injunction as a

[33] Finding 6, above. Further, with regard to the Apple Hill facility, Allco has made clear that at the Vermont Supreme Court it seeks approval of the project as Allco has proposed to amend it, but it also has not abandoned the alternative argument that the original proposal for this facility should be approved. Tr. 12/4/20 at 133 (Melone).

[34] Finding 7, above.

[35] 30 V.S.A. § 9.

permanent injunction as allowed under Commission Rule 2.406.[36] This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny 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.

Along with having the powers of a court of record under Section 9 of Title 30, other authorities support the Commission's ability to issue orders to restrain activities under its jurisdiction. These authorities include:

- 30 V.S.A. § 10(e), which states that "the Commission or a single member may grant temporary restraining orders";
- 30 V.S.A. § 209(a)(6), which allows the Commission to "restrain any company subject to supervision under this chapter from violations of law";
- 30 V.S.A. § 248(a)(2)(A), which specifically prohibits site preparation without a CPG;
- Commission Rule 2.406, which provides for temporary restraining orders, preliminary injunction, and permanent injunctions;[37]
- Vermont Rules of Civil Procedure Rule 65, which governs the granting of injunctions; and
- the precedent from cases such as *Petition of Vt. Elec. Power Producers, Inc.*, where the Vermont Supreme Court noted that the Commission "has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction."[38]

[36] Commission Rule 2.406(A)(3) (noting that the Commission may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

[37] Commission Rule 2.406 is similar to Vermont Rule of Civil Procedure 65. It promulgates the Commission's authority and the process for issuing TROs and injunctions—a process that the Commission observed in this proceeding. Further, the Legislature has declared that validly promulgated rules, such as Rule 2.406, "shall be valid and binding on persons they affect and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise." 3 V.S.A. § 845(a). No court has amended or revised Rule 2.406.

[38] *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996).

Further, as addressed above, approving site-preparation activities for electric generation facilities would occur with the approval of a CPG and is within the Commission's jurisdiction pursuant to 30 V.S.A. § 248(a)(2)(A). Section 203 of Title 30 also provides that the Commission has jurisdiction over companies or persons that manufacture electricity for the public "so far as may be necessary to enable [it] to perform the duties and exercise the powers conferred upon [it] by law."

Allco asserts that the Commission does not have any jurisdiction over the 5-acre "horticultural use" parcel that is adjacent to the 27 acres dedicated to the two solar facilities. We disagree. As we conclude in Findings 24 and 25, above, and as we previously stated in our Order of July 1, 2020,[39] this lot is subject to our jurisdiction because it was identified as a location for mitigation plantings in Docket 8454 and was admitted into evidence in Case No. 17-5024-PET as an element of the settlement agreement with the Town of Bennington that we adopted in that case. We observed in our July 1 Order that the TRO restricted site-preparation activities in the 5-acre parcel, and we reiterate that conclusion here. Because the 5-acre parcel is part of the project petitions in each of the two CPG cases, Allco also shall not engage in site-preparation activities on what it refers to as its "horticultural use" parcel.

Allco also argues that Section 30(h) and Section 7061 of Title 30 limit the Commission's authority. This argument is wholly misplaced. That statutory guidance in Title 30 is inapplicable to the Commission but instead applies to the Department and the Enhanced E911 Board, respectively.

Section 7061 is in Chapter 87 of Title 30, which applies to Enhanced 911; Emergency Services. The Developer refers to Section 7061(a), which states: "The Board may file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter. The court shall award the Board its costs and reasonable attorney's fees in the event that the Board prevails in an action under this subsection." Under Chapter 87 of Title 30, the "Board" means the Vermont Enhanced 911 Board established under section 7053 of Title 30.[40] Contrary to the Developer's arguments, this reference to the "Board" is not a reference to the Public Utility Commission.

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[39] Case No. 20-1611-INV, Order of 7/1/20, at 3, n.4.
[40] *See* 30 V.S.A. § 7051 Definitions at (4).

B. The Injunction Shall Remain in Place

Section 248(a)(2)(A) specifically prohibits site preparation without a CPG. The clearcutting of trees and other site work that Allco has already performed—and seeks to continue to perform—at this site constitutes site preparation without a CPG. An injunction remains necessary to prohibit this unlawful conduct.

Allco asserts that the site work does not constitute site-clearing activities in violation of 30 V.S.A. § 248(a)(2)(A), which requires a CPG before site preparation for the construction of an electric generation facility. Allco's claim that its activities are solely for farming does not alter our jurisdiction over its site-clearing activities on Apple Hill.[41] Allco acknowledges that tree clearing is an essential element of preparing a solar electric generation site and that the location it is clearing is the site of a proposed solar facility. In fact, Allco's proposed amendment of the Apple Hill petition filed on March 23, 2020, specifically acknowledges this by seeking to remove tree clearing from the amended petition because the site would already be cleared to accommodate farming activity. We are not persuaded that clearing a site for farming—when that site is already proposed for a solar project—provides a legitimate end-run around the clear statutory prohibition on site clearing for an electric generation facility before obtaining a CPG. As Mr. Melone stated as a witness under oath: "If there are trees on the site, you need to clear the trees to put solar."[42]

We are not persuaded by Allco's arguments that these activities are not site preparation and that "incidental overlap" is inapposite. The cases Allco references are all readily distinguishable factually and procedurally.[43]

In *Georgia Mountain*, the Commission responded to complaints of logging activities that had not been approved in a CPG.[44] However, in *Georgia Mountain* the landowner's logging was a preexisting activity and occurred in an unrelated location away from the approved electrical

[41] *See J.P. Carrara & Sons, Inc.*, #1R0589-ER (Vt. Envtl. Bd. Order issued 2/17/88), 1988 WL 220545 (Environmental Board had jurisdiction over tree clearing at proposed quarry site before filing of Act 250 permit because it was site preparation); and *Luce Hill Partnership*, #5L1055-EB (Vt. Envtl Bd. Order issued 7/7/92), 1992 WL 18664 (site of proposed residential subdivision was cleared before Act 250 review determined to be site preparation under Environmental Board jurisdiction).

[42] Tr. 6/26/20 at 89 (Melone).

[43] *See* Department's Reply Brief at 7-8 and ANR Reply Brief at 4-6.

[44] *Petition of Georgia Mountain Community Wind*, Docket 7508, Memorandum of 1/5/12 at 3.

generation construction.[45] Here, by contrast, the Developer's site-clearing activities are located at the precise location of Allco's two proposed solar facilities, including the location of the footprint of those facilities and the location of proposed solar facility aesthetic mitigation, and the Developer's site-clearing activities were not pre-existing uses of the land.

In *Beaver Wood*, the Commission did not exercise jurisdiction over the building of a wood pellet facility that we found to be distinct and independent of the electric generation facility.[46] The Commission limited its jurisdiction to activities related to the construction and operation of an electrical generation facility related to the wood pellet facility. Here, Allco has explicitly linked the clearing activity to its ultimate plan to construct the electric generation facilities, and we are similarly limiting Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties specifically identified in the standard-offer contracts and CPG petitions for its two proposed solar facilities on Apple Hill.

Finally, in *Monument Farms*, the Commission responded to a petition from a CPG holder to begin construction early while the CPG holder was still seeking an amendment to the CPG.[47] Here, by contrast, Allco is not a CPG holder but has nonetheless begun site-clearing activities in violation of Section 248(a)(2)(A). The cases Allco cites simply do not support its argument that the Commission does not have jurisdiction to enjoin its site-clearing activities on Apple Hill.

Our determination that Allco's activities are site clearing has not been altered since we issued the TRO on June 26, 2020, when we stated:

> The petitioner's activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The petitioner's claim in his affidavit that his activities are solely for farming purposes is not credible. The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is "devoted *primarily* to farming." The petitioner testified in this proceeding that, although the sheep may end up being used for some farming purposes, he was putting the sheep in this location "primarily" to serve the proposed solar projects. This does not qualify as farming. Further, the petitioner testified that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. This violates 30 V.S.A. § 248(a)(2).[48]

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[45] *See, e.g.*, *Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/2010 at Finding 39 (noting that the "existing uses" of Georgia Mountain included "active logging on portions of the mountain").

[46] *Petition of Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven*, Dockets 7678 and 7679.

[47] *Petition of Monument Farms Three Gen LLC*, Docket 7592, Order of 10/22/10.

[48] Case No. 20-1611-INV, Order of 6/26/20 at 4 (citing Vermont Agency of Agriculture, Food and Markets, Farm Definitions and Determinations, https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations).

In multiple filings and during the December 4, 2020, hearing, Allco has argued that we were incorrect to conclude that it planned to use sheep in this location "primarily" to serve the proposed solar projects. According to Allco, the sheep would also serve other solar facilities.[49] However, even if we accept Allco's assertion that these sheep would serve other facilities, this distinction is irrelevant. We still find that the primary purpose of placing sheep *at this location* is to keep down vegetative growth around the proposed solar facilities *at this location*, regardless of whether the sheep may also be used elsewhere.[50]

Allco also asserts that § 248(a)(2)(A) is unconstitutionally vague. It argues that the language "site preparation for an electric generation facility" provides "no standard for ordinary people to understand." Nonetheless, Allco, has shown that it knows what site preparation is. Specifically, Allco's witness and sole owner, Mr. Melone, stated: "If there are trees on the site, you need to clear the trees to put solar."[51] With the plain language of this testimony, Allco affirms its understanding of the clear language of the statute. Further, even if there were ambiguity, Mr. Melone has admitted that he is aware of the Commission's process for hearing petitions for declaratory relief, which could have resolved any alleged ambiguity before Allco went ahead with its site-clearing activities.[52]

We agree with the Department's reasoning and conclusion that Allco's constitutional arguments continue to fail on the merits. "The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for adjudication."[53]

Allco understands that tree-clearing is necessary site preparation for a solar facility. In its second motion to amend the petition in Docket 8454 to reflect the fact that the site would be cleared for agricultural use, Allco showed that it understands that clearing the trees for

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[49] Tr. 12/4/20 at 129-130 (Melone).

[50] Tr. 12/4/20 at 130 (Melone) ("[T]he primary motivation for getting into the business was the fact that we basically have this . . . captive revenue stream, because we have to maintain all these sites anyway . . . .").

[51] Tr. 6/26/20 at 89 (Melone).

[52] Tr. 12/4/20 at 131 (Melone); *see, e.g.*, *Agency of Nat. Res. v. Persons*, 2013 VT 46, ¶ 19, 194 Vt. 87, 94, 75 A.3d 582, 588 ("Based on the totality of facts, defendants had sufficient reason to know that the excavation work was prohibited without a permit or a conditional use determination. At the very least, defendants should have sought the advice of [a state agency] before commencing work."); *see also, e.g.*, *id.* at ¶ 17 (holding that due process requires less precision in delineating what is prohibited when a matter involves civil penalties rather than criminal penalties).

[53] Department's Reply Brief at 9-10.

agricultural purposes would prepare the site for a solar facility. Allco has further shown that it understands that it needs a CPG to clear trees by claiming, after Allco was denied a CPG for the Apple Hill solar facility, that PLH Vineyard Sky LLC is clearing trees for solely farming activity, albeit farming related to a future when the site will be used for a solar facility. Having been denied a CPG and an amendment to a CPG that would reflect farming activity, Allco began clearing trees and conducting site preparation without a CPG.

We are not persuaded by Allco's constitutional argument because the statute is clear, and Allco itself is acting in willful violation of the statute it claims is unconstitutionally vague.

The Vermont Supreme Court has held that, in general, when a municipality or state agency seeks "compliance with a local ordinance or state statute," as ANR and the Department seek here, the agency need not demonstrate "irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance."[54] As noted above, ANR and the Department have made that showing here by demonstrating Allco's failure to comply with 30 V.S.A. § 248(a)(2). Further, the clearcutting of 27 acres or more of trees—in an area that contains rare and very rare plant species—is a "substantial" violation.[55] It also demonstrates "conscious wrongdoing."[56] Allco was aware of the fact that it needed approval from the Commission before it could undertake site preparation, and Allco in fact sought approval for the very work it began undertaking here, but the Commission denied that approval on May 7, 2020, when we issued a final order that denied the motion to amend the petition to reflect grazing sheep at the project site.[57] Allco nevertheless went forward with that work. Further, Allco continued to do site preparation on the morning of June 27, 2021, a day after the Commission issued a TRO explicitly prohibiting that work, because, at best, Allco failed to communicate the TRO to its contractor before that work began.[58]

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[54] *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129, 582 A.2d 145, 148 (1990); *see also, e.g.*, *City of St. Albans v. Hayford*, 2008 VT 26, ¶ 12 183 Vt. 596, 599, 949 A.2d 1058, 1062 (holding that the failure to get a land-use permit cannot generally be considered so insubstantial that it would be inequitable to foreclose the unpermitted use).

[55] *Carpenter*, 155 Vt. 126, 131, 582 A.2d 145, 149 (1990).

[56] *Id.*

[57] *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, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

[58] *See* Findings 12-16 (explaining that the TRO was issued from the bench at 1:30 PM on June 26, 2021, with a written order following that evening, and yet Allco did not tell its contractor until the afternoon of June 27, 2021).

Even applying the more stringent standard of Commission Rule 2.406, the likelihood that a substantial immediate and irreparable injury will result is all that is required under Commission Rule 2.406 to warrant the issuance of a temporary restraining order or a preliminary or permanent injunction. And that harm exists here in the form of the harm to the regulatory process by violating 30 V.S.A. § 248(a)(2), the harm to the rare and very rare plants, and the harm to the trees that would be cleared.

Furthermore, even if we were to also look at all of the factors that apply to an injunction under Vermont Rules of Civil Procedure Rule 65, those factors also weigh in favor of granting injunctive relief here. The Vermont Supreme Court has held that four factors are considered in determining whether to grant injunctive relief after an evidentiary hearing: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest."[59]

First, ANR and the Intervenors have established a threat of irreparable harm. In fact, they have established a substantial immediate and irreparable injury. This is the immediate harm to the regulatory oversight process and the public trust reflected in Allco's conducting site clearing without a CPG, an immediate harm to the rare and very rare plants on the site, and an immediate harm to the trees that would be cleared.

As for harm to rare plant species, rare and very rare species are found in areas on the site that are currently slated for clearing.[60] Allco's forester admitted that he is not contracted to avoid rare species and is relying on a 2018 survey and on his untrained understanding of the appearance of these rare plants, and that, although he and others visited the site in 2020 to look at the flagging that is currently in place, that visit did not include walking the 27 acres to look for new locations of rare plants. It is therefore likely that rare plants will be destroyed if this area is cleared. This creates the likelihood that a substantial immediate and irreparable harm will result.

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[59] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, 205 Vt. 586, 596, 178 A.3d 313, 319 (2017). The U.S. Supreme Court has held that these same factors "are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008); *see also Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.").

[60] Findings 3, 4, and 15-22, above.

Allco has sought to challenge ANR's classification system for rare and threatened plant species. However, this classification system involves the application of complex methodologies, and the Vermont Supreme Court requires deference to ANR's "determinations regarding complex methodologies."[61] The only exception is when the agency decision is "wholly irrational and unreasonable in relation to its intended purpose."[62] While Allco's own natural resources consultant disagreed with ANR's species expert as to his conclusions, he acknowledged that ANR's system was a rational way of classifying these plants.[63] We therefore must defer to ANR's classification system, and we find that Allco's activities have caused—and would continue to cause—substantial and immediate irreparable harm to rare and very rare species.

The proposed tree clearing also constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored. Thus, courts routinely hold that the logging of trees constitutes irreparable harm: "The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage."[64] Consequently, the logging of trees "is irreparable for the purposes of the preliminary injunction analysis."[65]

Second, the record demonstrates that there is little, if any, harm to Allco from being enjoined at this time. The only possible harm to Allco is a delay in its site-clearing activities, if it is ultimately allowed to undertake those activities. Further, even if there were a delay, other courts have held that when the "anticipated revenues from the logging" are "delay[ed]" due to an injunction, the harm is "at most the time value of the profit component of that revenue, a value which no one has bothered to quantify and which probably is trivial."[66] The same could be said here.

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[61] *In re Korrow Real Est., LLC Act 250 Permit Amend. Application*, 2018 VT 39, ¶ 21, 207 Vt. 274, 284, 187 A.3d 1125, 1132 (2018) (quoting *Plum Creek Me. Timberlands, LLC*, 2016 VT 103, ¶ 28, 203 Vt. 197, 155 A.3d 694).

[62] *Id.*

[63] Finding 21, above.

[64] *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

[65] *Id.*; *see also, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that the logging of trees "satisfies the 'likelihood of irreparable injury' requirement"); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that "trees cut down this fall will not have grown back to their present height" during the lifetime of most of the plaintiffs).

[66] *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

Third, regarding the merits of the underlying claim, we find that 30 V.S.A. § 248(a)(2) precludes Allco from site-clearing activities while it is still pursuing—and has not yet received—CPGs. As explained above, Vermont law explicitly prohibits site preparation for electric generation without a CPG, there are no CPGs for this site, and Allco admits that it continues to seek to place electric generation facilities at this site.

Fourth, the public interest favors an injunction here. As other courts have noted, there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury."[67] Further, "once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost."[68]

Additionally, Allco's activities challenge the integrity of the Section 248 permitting process. The Commission issued an order on May 7, 2020, denying Allco's request to amend a pending application for a certificate of public good.[69] Although Allco sought reconsideration of that order, we denied that motion for reconsideration, and although Allco has appealed our rulings to the Vermont Supreme Court, Allco has not obtained a stay of our orders. Thus, our decisions remain binding on Allco unless and until the Vermont Supreme Court overrules them. Yet, Allco has gone ahead with making the very same permanent changes to the landscape that we told it not to make when we denied its amendment request. And Allco continued making those changes even after the TRO issued. As ANR correctly notes, this is an affront to the Section 248 permitting process.[70] It creates a significant risk that undue adverse effects on the environment will occur before the Commission has had a chance to review the proposed project. This does not comply with the applicable statutes or serve the public interest.

The Vermont Supreme Court has recognized that injunctive relief is appropriate to avoid "irreparable damage during the pendency of the action" where "the injunction is required to preserve [the] status quo."[71] A temporary restraining order or injunction "preserves the status

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[67] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quotation omitted); *see also, e.g.*, *F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (finding a public interest in "the need to preserve meaningful relief" throughout all stages of the litigation).

[68] *Id.* at 1137.

[69] Docket 8454, Order of 5/7/2020 at 23-25.

[70] ANR Reply Brief at 7-8.

[71] *State v. Glens Falls Ins. Co*., 134 Vt. 443, 450, 365 A.2d 243, 247 (1976).

quo."[72] This type of relief is particularly appropriate to prevent actions that "cannot be undone through monetary remedies."[73] The Vermont Supreme Court has thus denied injunctive relief when the challenged action "can be 'undone.'"[74] On the other hand, when there is no way to undo something at a later time, a stay is necessary to avoid irreparable harm.[75]

* * *

We have reviewed Allco's remaining arguments and, to the extent those arguments have not already been addressed in this or related dockets, we find them either outside the scope of this proceeding or without merit.

Conclusion

In this Order we restate our conclusion that Allco's site-clearing activity without a CPG is a violation of 30 V.S.A. § 248(a)(2)(A), and we enjoin any further site-clearing activity at this time. In our findings, we establish a factual basis for issuing a civil penalty for that violation. To further substantiate the extent of that civil penalty, additional proceedings are required to document the factual basis for the amount of that penalty using the criteria addressed in 30 V.S.A. § 30. The parties are therefore directed to confer and Allco is directed to propose a schedule for the penalty phase of this proceeding by no later than the close of business on Friday, April 16, 2021.

VI. ORDER

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

1. Allco initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)(A).

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[72] *Bank of New York Co. v. Ne. Bancorp, Inc*., 9 F.3d 1065, 1067 (2d Cir. 1993).
[73] *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).
[74] *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 42, 205 Vt. 586, 606, 178 A.3d 313, 326.
[75] We observe here that the penalty phase of these proceedings, pursuant to 30 V.S.A. § 30, that will punish Allco for violating Section 30 is not designed to result in a damages fund that can be used to remediate the harm caused by Allco's unpermitted site clearing. The Commission has no jurisdiction to order damages.

2. The Commission extends its Order of June 26, 2020, enjoining Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors from conducting site preparation on the parcels on Apple Hill in Bennington, Vermont, identified in Docket 8454 and Case No. 17-5024-PET, including both the 27-acre site of the two solar facilities and the adjacent 5-acre site indentified in both petitions as mitigating the aesthetic impacts of those proposed facilities. This permanent injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny 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.

3. The parties are directed to confer and Allco is directed to file a proposed schedule for the penalty phase of this investigation by no later than the close of business on Friday, April 16, 2021.

Dated at Montpelier, Vermont, this 1st day of April, 2021.

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

OFFICE OF THE CLERK

Filed: April 1, 2021

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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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	

Order entered: 05/30/2023

NOTICE OF LIMITED HEARING AND ORDER ON THE DEVELOPER'S MOTION FOR A HEARING

I. INTRODUCTION

On March 16, 2023, Allco Renewable Energy Limited and its affiliates (collectively, the "Developer") filed a motion with the Vermont Public Utility Commission ("Commission") to reopen the record for new evidence in a third evidentiary hearing ("Developer's Motion"). In this order, we deny in part the Developer's Motion. We nonetheless provide notice to the parties of a limited evidentiary hearing to provide the Developer with the opportunity to seek to admit into evidence, with live testimony, the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. The Commission also provides notice to the parties of their opportunity to present oral argument after the limited evidentiary hearing. Oral argument will be limited to addressing the appropriate amount of a civil penalty, including addressing the penalty amounts proposed by the Vermont Agency of Natural Resources ("ANR") and the Vermont Department of Public Service ("Department"). This limited hearing will be conducted by video teleconference on Thursday, June 29, 2023, at 9:30 A.M. Further guidance on the procedure to be observed at this limited hearing is provided below.

II. BACKGROUND

On June 24, 2020, the Commission opened this investigation, pursuant to 30 V.S.A. §§ 30 and 209, into whether the Developer was conducting site clearing on Apple Hill without a certificate of public good ("CPG") in violation of Section 248(a)(2) of Title 30 of the Vermont Statutes Annotated.

On June 26, 2020, the Commission held an evidentiary hearing and issued an order temporarily restraining the Developer from any further tree clearing on any of the property identified in applications for two solar projects in the Apple Hill area in Bennington, Vermont.[1]

On September 8, 2020, the Developer appealed the Commission's temporary restraining order to the Vermont Supreme Court.

On November 5, 2020, the Vermont Supreme Court dismissed the Developer's appeal "without prejudice to refiling if a preliminary injunction is granted."[2]

December 4, 2020, the Commission held a second evidentiary hearing.

On April 1, 2021, the Commission issued an order in this proceeding finding that the Developer had begun site preparation without a CPG, and we enjoined the Developer from any further site preparation without a CPG (the "Injunction Order"). We also directed the parties to confer and file a proposed schedule for the penalty phase of this proceeding by no later than April 16, 2021.

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

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

On October 3, 2022, the Commission directed the Developer to file a proposed schedule for the penalty phase of this proceeding by October 21, 2022.

On October 20, 2022, the Developer requested an extension to that deadline. On October 21, 2022, the Commission extended the deadline for the Developer to file a proposed schedule for the penalty phase of this proceeding to November 4, 2022.

On December 14, 2022, the Commission requested that ANR confer with the other parties and file a proposed schedule for the penalty phase of this proceeding by January 13, 2023.

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

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[1] Those applications are in Docket 8454 and Case No. 17-5024-PET.

[2] *In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al.)*, Supreme Court Docket No. 2020-242, November Term, Entry Order of 11/5/20 at 2.

[3] *See In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into whether Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al.*), 2021 VT 92, ¶ 1.

On January 30, 2023, the Commission requested that the parties file briefs with penalty recommendations by March 2, 2023.

On March 2, 2023, ANR and the Department each filed briefs with penalty recommendations.

On March 16, 2023, the Developer replied to the two agency briefs and filed the Developer's 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 March 30, 2023, ANR and the Department filed responses to the Developer's reply brief and to the Developer's Motion.

III. POSITIONS OF THE PARTIES

A. The Developer

The Developer denies that it began site preparation without a CPG, and the Developer requests another evidentiary hearing. The Developer asserts that there is no evidence to support the agencies' penalty recommendations.[4] The Developer requests the opportunity to provide the Commission with a rare plant inventory to demonstrate that no actual harm was done.[5] The Developer seeks to supplement the evidentiary record with new testimony on environmental harm:

> [The Developer] propose[s] 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 [not] been nor could there have been any economic benefit from the clearing.[6]

> If the [Commission] 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.[7]

---

[4] Developer's Motion at 1 ("Neither [the Department] nor ANR have presented any evidence of actual environmental harm or harm to the regulatory process.").

[5] *Id*. at 2-3 ("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.").

[6] *Id.* at 3-4.

[7] Developer's Motion at 10.

B. ANR

It is ANR's position that no further evidence is needed and that this matter should proceed to oral argument:

> [The Developer] now seeks to relitigate issues [i.e. harm to the environment] that it has already litigated, and which the [Commission] has already resolved, in this proceeding. [The Developer's] request should be denied.[8]

> The Agency does not oppose [the Developer] being heard on the issue of harm to the regulatory process. Oral argument before the Commission should sufficiently address this factor as there already is an extensive evidentiary record and Commission findings concerning [the Developer's] activities and their effect on the regulatory process.[9]

> The Agency does not oppose [the Developer] being heard on the issue of economic benefit. Oral argument before the Commission should sufficiently address this factor as there already is an extensive evidentiary record and Commission findings. As stated in the Agency's initial brief, the Agency is unaware of any economic benefit that resulted from [the Developer's] actions.[10]

C. The Department

It is the Department's position that "the existing record provides an adequate basis to impose a penalty and ample information for the Commission to use in evaluating the factors under 30 V.S.A. § 30." The Department further notes the following:

> [The Developer] appears to suggest that additional evidence is needed regarding (1) harm to the regulatory process and (2) the economic benefit that could have been anticipated from a knowing or intentional violation. It's true that economic benefit, if any, has not been established – yet this factor was not an integral part of the Department's recommendation. Nor is it a key consideration for the Commission in this case, where the evaluation of other factors yields far more insight [into] the nature and severity of the violation. As to regulatory harm: the Commission has concluded after two evidentiary hearings that [the Developer] commenced site preparations without a Certificate of Public Good in violation of 30 V.S.A. § 248(a)(2)(A). This conclusion, along with its evidentiary underpinnings, provides the basis for finding harm to the integrity of the

[8] ANR's Reply Brief at 1.
[9] *Id.* at 5.
[10] *Id.*

> regulatory process. Therefore, the Commission is not obligated to reopen the record.[11]
>
> If [the Developer] wishes to be heard prior to the imposition of a penalty, the Department does not object to an appropriately limited hearing on the existing record.[12]

As to the record, the Department argues that no further evidence is needed for the Commission to issue a ruling assessing a civil penalty in this matter:

> The materials in the record and the findings and conclusions of the Commission in its earlier orders provide ample support for the imposition of a civil penalty. In the April 1 Order, issued after the second evidentiary hearing in this investigation, the Commission concluded that [the Developer] commenced site preparations at Apple Hill in Bennington, Vermont, without a CPG in violation of 30 V.S.A. § 248(a)(2)(A). As the Commission noted, the findings underpinning the decision "establish a factual basis for issuing a civil penalty" for the violation.[13]
>
> The Vermont Supreme Court has endorsed the principle that "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." That principle applies with equal force here.[14]

IV. DISCUSSION

The Developer's Motion is granted insofar as the Developer may have a limited evidentiary hearing at which it may seek the admission into evidence of the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. Mr. Broyer's additional testimony could be useful because it may provide evidence related to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer's ability to pay a civil penalty. Unlike the other evidence the Developer seeks to admit (discussed below), the matters raised by Mr. Broyer's affirmation have not yet been litigated in these proceedings. Thus, a limited evidentiary hearing on these matters is appropriate.

That said, we are not going to admit Mr. Broyer's affirmation at this time because we have questions about the credibility and reliability of Mr. Broyer's testimony in its present form. In particular, Mr. Broyer claims that, due to our injunction, the Developer has not had "the

[11] Department's Response to the Developer's Motion at 1-2.
[12] *Id.* at 2.
[13] *Id.* (citing Case No. 20-1611-INV, Order of 4/1/21 at 30).
[14] *Id.* (citing *In re SolarCity Corp*., 2019 VT 23, at ¶ 33).

ability to use its land for any purpose."[15] This broad statement cannot be squared with the limited nature of the injunction that we granted, which only prohibited site-preparation activities, not the use of the land for any other purposes. Mr. Broyer is reminded that testimony filed with the Commission must be truthful and not misleading. In advance of the upcoming evidentiary hearing, we encourage Mr. Broyer to review his testimony and consider whether it must be revised so as to be truthful. We will take up the admission of Mr. Broyer's testimony at the time of the evidentiary hearing.

The Commission denies the rest of the Developer's Motion, including the proffered supplemental affirmation of Mr. McClammer and the request for a third evidentiary hearing on the matters Mr. McClammer addresses, for three reasons.

First, the specific evidence that the Developer proffers regarding the actual harm created by its unauthorized site preparation is untimely and unnecessary.[16] The Developer seeks to establish that no actual environmental harm occurred as the result of its actions, but there is no requirement for the Commission to determine that there was actual harm to the environment. Rather, in determining the amount of a fine pursuant to 30 V.S.A. § 30(c)(1), the Commission "*may* consider 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."[17] The Developer's proffer of evidence of actual harm is not a genuine issue of material fact requiring a third evidentiary hearing. The applicable penalty factor provides the Commission with discretion to take into account whether the Developer's actions "might have harmed . . . the environment" regardless of whether there was any actual harm.[18]

Further, the Developer is untimely in its request that we reopen the record to allow for the admission of new evidence that will challenge the penalty recommendations of ANR and the Department. The injunction proceeding looked specifically at whether the Developer's actions harmed or potentially harmed the environment. The proffer of evidence of a rare plant survey is untimely and should have been provided, if at all, by the Developer by conducting a survey in

[15] Broyer Affirmation at ¶ 5.
[16] *See, e.g.*, Vt. Rules Evid. 403 (allowing for the exclusion of evidence that is of limited relevance, cumulative, or leads to undue delay).
[17] 30 V.S.A. § 30(c)(1) (emphasis added).
[18] *Id.*

the summer of 2020 when the event occurred, or at the latest at the time of the evidentiary hearing on whether to grant an injunction. Such a rare plant survey is of questionable relevance at this point in the proceedings.

The Developer acknowledges that "it was clear from these proceedings to date that some of these plants *may* have been impacted by the clearing."[19] The evidence upon which this statement is based is sufficient to address the "harm" criterion of 30 V.S.A. § 30(c)(1). Now the Developer argues that evidence of actual harm is required to issue a civil penalty. We disagree.

The Commission's conclusion that the Developer violated 30 V.S.A. § 248(a)(2)(A) was based on the results of two previous evidentiary hearings in which the Developer was a central and active participant. Evidence has been admitted sufficient both to support the injunction of the Developer's unauthorized site preparation and to consider the weight and admissibility of evidence that might support a civil penalty. The Developer had two opportunities to be heard and now seeks a third. After we decided that the Developer had violated 30 V.S.A. § 248(a)(2)(A), the Developer requested that the Commission reopen the record so that it might relitigate the entire incident. We see no reason to do so.

Second, the Developer effectively wants us to reconsider our previous conclusion that the Developer has violated 30 V.S.A. § 248(a)(2)(A) and issue an order saying that ANR's guidance on rare, threatened, and endangered species was misapplied and is unauthorized. We decline to do so because the Developer has not met the high standard for reconsideration.[20] It may have been a tactical error by the Developer not to do more to shape the findings at the first two evidentiary hearings. But the Commission has not erred. There is no need to develop additional evidence to challenge the agencies' penalty recommendations or to weigh the existing evidence and consider an appropriate civil penalty.

Third, further delay in concluding this investigation is not in the public interest. Consistent with its request for additional discovery and a third evidentiary hearing, the

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[19] Developer's Motion at 2-3.

[20] *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 to be located at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 7/31/20 at 2 ("Reconsideration . . . is appropriate only to avoid an unjust result 'due to mistake or inadvertence of the Commission, as opposed to that of a party.' The disposition of a reconsideration motion rests with the discretion of the Commission. . . . [Reconsideration] does not permit parties to relitigate issues or correct previous tactical decisions." (citations omitted)).

Developer proposed a schedule that would further delay this proceeding by another year. The penalty phase of this proceeding has already been substantially delayed. We have not yet issued a final order addressing the appropriate civil penalty to be issued against the Developer for its unpermitted site-preparation activity on Apple Hill in the summer of 2020. Any further delay in doing so would delay the ultimate resolution of this matter.

Continued delay in this proceeding harms the parties because the delay also interferes with the integrity of the Section 248 review process. Further delay thus does not serve the interest of the public. Rather, the public interest is served by bringing this matter to a conclusion. We are not persuaded that a further delay here would be reasonable. Rather, we conclude that a further delay only creates additional harm.

V. CONCLUSION

While we deny in part the Developer's Motion as discussed above, we also provide notice of the opportunity for the Developer to seek the admission into evidence in a limited evidentiary hearing of the affirmation of Steve Broyer filed by the Developer with its motion on March 16, 2023. If the Developer elects to file a revised version of Mr. Broyer's affirmation as suggested above and seeks its admission or seeks the admission of the affirmation previously filed on March 16, 2023, it must do so by June 14, 2023. Consistent with Commission Rule 2.216(D)(2), any objections to its admission would be due by June 22, 2023. The scope of the evidentiary hearing will be limited to the economic benefit, if any, of the violation of 30 V.S.A. § 248(a)(2)(A), as well as the Developer's ability to pay a civil penalty. Mr. Broyer will not be permitted to offer live direct testimony at the hearing unless a timely filed motion requesting the opportunity for direct examination to support its admission has been granted. Should the Developer have Mr. Broyer offer an affirmation for admission, Mr. Broyer will then be available for cross-examination by ANR, the Department, and the Commission.

In addition, we agree that the parties should be provided with the opportunity to address the agencies' penalty recommendations at oral argument, and we provide notice here of that event. This part of the limited hearing event will be allocated one hour. The Developer will have 30 minutes to make oral argument including any time reserved for rebuttal, and ANR and the Department will have a combined 30 minutes (divided however they choose) to make oral

argument, including any time reserved for rebuttal. The Developer will begin, followed by ANR and the Department.

If the Developer seeks to enter an affirmation by Mr. Broyer into evidence, the limited evidentiary hearing followed by oral argument, will be held, pursuant to 3 V.S.A. § 811 and 30 V.S.A. §§ 10, 30, 248, and 209 on Thursday, June 29, 2023, beginning at 9:30 A.M. via Go To Meeting videoconference. If only an oral argument is to be conducted it will begin at 9:30. Participants and members of the public may access the hearing online at https://meet.goto.com/629357589or call in by telephone using the following information: phone number: +1 (571) 317-3116; access code: 629-357-589. Participants may wish to download the GoToMeeting software application in advance of the hearing at https://meet.goto.com/install. Guidance on how to join the meeting and system requirements may be found at https://www.gotomeeting.com/online-meeting-support.

Pursuant to 30 V.S.A. §§ 20 and 21, the Developer will be responsible for court reporter costs incurred by the Commission as a result of this evidentiary hearing and oral argument. Invoices for these costs will be mailed to the attorney(s) of record or the official representative(s) for the Developer.

SO ORDERED.

Dated at Montpelier, Vermont, this 30th day of May, 2023.

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

OFFICE OF THE CLERK

Filed: May 30, 2023

Attest: _____
Clerk of the Commission

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

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STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	

Order entered: 06/13/2023

ORDER RESCHEDULING LIMITED HEARING AND ORAL ARGUMENT

On May 30, 2023, the Vermont Public Utility Commission ("Commission") issued an order providing notice to the parties of a limited evidentiary hearing and oral argument to be conducted in this case on June 29, 2023. On June 7, 2023, the Vermont Department of Public Service ("Department") filed a motion requesting that this event be rescheduled because of its unavailability on June 29. The Department provided alternative dates and noted that Allco Renewable Energy Limited (the "Developer") and the Vermont Agency of Natural Resources did not object to rescheduling the event.

In this Order, the Commission reschedules the limited evidentiary hearing and oral argument as requested to Thursday, July 20, 2023, at 2:00 PM. The event will be conducted via a GoToMeeting videoconference as described in the notice provided in the Commission's order of May 30, 2023.

As was noted in the Commission's May 30 order, if the Developer elects to file a revised version of Steve Broyer's affirmation and seeks its admission or seeks the admission of the affirmation previously filed on March 16, 2023, it must do so by June 14, 2023.[1] Pursuant to Commission Rule 2.216(D)(2), any objections to admission of any affirmation will now be due by July 6, 2023.

SO ORDERED.

[1] No party has requested an extension of that deadline.

Dated at Montpelier, Vermont, this 13th day of June, 2023.

Michael E. Tousley, Esq.
Hearing Officer

OFFICE OF THE CLERK

Filed: June 13, 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)

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

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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.
>
> 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;
>
> (2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;
>
> (3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;
>
> (4) the length of time that the violation existed;
>
> (5) the deterrent effect of the penalty;
>
> (6) the economic resources of the respondent;
>
> (7) the respondent's record of compliance; and

[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.

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