

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Petition of Randolph Davis Road Solar LLC for a
Certificate of public good, pursuant to 30
V.S.A. §§ 248 and 8010, authorizing the
Installation and operation of a 500kW group
Net-metered solar electric generation system in
Randolph, Vermont

Case No. 21-2939-NMP

NEIGHBOR INTERVENORS' COMMENTS ON THE 2nd PROPOSAL FOR DECISION
and
REQUEST FOR ORAL ARGUMENTS
and
REQUEST FOR SITE VISIT

May 17, 2024

Now come Neighbor Intervenors Michael Binder and Joan Allen, *pro se*, and submit Comments in Opposition to the second [or revised] Proposal for Decision (PFD), which PFD was produced in response to the Commission's Oct. 11, 2023 Remand Order which rejected the original PFD. Neighbor Intervenors also respectfully request an opportunity to present Oral Arguments before the Commission, and respectfully request the full Commission make an initial Site Visit.

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Exhibits

NI JA-MB-9	Public Records Request OCR version
NI JA-MB-10	emails between Michael Binder and Town
NI JA-MB-11	Objection to Evidence (RDS MS-26)

ORDERLY DEVELOPMENT

From the Energy Chapter of the Randolph Town Plan:¹ [**Bold** emphasis in the original]

For all energy generation facilities, the following policies apply:

3. [sic] **Preferred Locations:** The Town supports the placement of new generation and transmission facilities on top of existing buildings, on landfills, on brownfields outside of the village center, on reclaimed quarries or gravel pits, on a site that was previously covered by a structure or impervious cover in compliance with setbacks. Additionally, the Town, by joint letter of the Planning Commission and Selectboard, may designate a site as preferred if the total project area of panels encompasses 10 acres or less and if the project, as designed, will not be visible in the growing season from town or state highways.
1. **Prohibited Locations:** Energy facility development shall have to meet principal structure setback for the relevant area in the town zoning, and shall be prohibited in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, lands over 25% slope.
2. All energy projects will be required to meet lot coverage and screening requirements found under site plan and conditional use approval processes in the respective zoning district, except solar arrays shall not be counted as lot coverage in the Industrial District.
3. Commercial- or industrial-scale renewable energy projects shall only be permitted and approved where (a) the project will not have an adverse impact on the aesthetics, scenic and natural beauty, historic significance or natural resources of the areas, and (b) where the proposed project will be substantially screened from view from I-89, state highways, ...
4. Commercial- or industrial-scale solar and wind energy projects, as well as all other permitted and conditional uses shall not be constructed on greater than 10 acres of agricultural or forest lands with soils that are designated as being "prime agricultural soils" or of "statewide or local significance."

¹ Exh. NI MB-5 Randolph Town Plan page 29

Intervenor's agree with and support these conclusions in the PFD:

- *“Energy facility development shall have to meet principal structure setback for the relevant area in the town zoning, and shall be prohibited in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, **lands over 25% slope.**”* is a land conservation measure in Randolph's Town Plan.
- The project does NOT comply with the land conservation measure prohibiting energy facility development on “lands over 25% slope”.
- The land conservation measure will receive Due Consideration by the Commission.

The PFD points out that:

even a clear, written land-conservation measure in a municipal land-use plan does not present an insurmountable obstacle to approval of a certificate of public good under § 248.

While the obstacle may not be insurmountable, it is still an obstacle and it deserves to be addressed. Precedent in the Apple Hill Solar case is applicable to the present case.

From the Commission's Apple Hill Solar Order: ²

The potential benefits from the Facility do not outweigh the interference it would cause with orderly development because denial of the Petition does not foreclose the State and its residents from realizing similar benefits from other solar projects sited in locations that would not run afoul of a specific land conservation measure.

The PFD completely fails to consider whether there are viable alternative locations for this project. Also from the same Order: ³

It is important to note that the Commission's discussion of societal benefits in the Northwest Reliability Project emphasized that the original proposed location would only be approved as a result of societal benefits if there were no viable alternative locations.

The PFD completely fails to consider (assuming the PFD had found that there were no viable alternative locations) whether the societal benefits of this project outweigh the harm in running afoul of a Land Conservation measure with Regional impact.

² Apple Hill Docket 8454 Final Order on Second Remand... May 16, 2022 Page 13

³ Apple Hill Docket 8454 Final Order on Second Remand... May 16, 2022 Page 20

The residents of Randolph, the Region, and the State do have viable alternative locations that can be developed to realize the societal benefits of a 500 kw solar project. Regarding the Energy Goals of the Town, the Randolph Town Plan states: ⁴

*To meet this demand, we will need generation from 26,825 -32,786 MWhs of electricity each year. We currently only generate about 9% of that. This will require a massive increase in generation, primarily from solar PV arrays. While the numbers are large, the amount of land needed is comparatively small. Assuming we meet this need only with solar, we could generate only another 9% if we were able to use all of the roofs. **But we have sufficient land that does not have natural resources constraints, nor is too steep, to meet the goal nearly 45 times over.*** [emphasis added]

Inasmuch as there are viable alternative locations available in the Town, Region and State, the Apple Hill Solar precedent holds that the benefits of this project do not outweigh the interference with Orderly Development caused by running afoul of a Land Conservation Measure.

The Commission should reject the PFD conclusion that running afoul of Randolph's slope prohibition will not cause undue adverse interference with orderly development. The next section of these comments will show that the project's undue adverse interference with orderly development is **of the region**.

⁴ exh. NI MB-5 Randolph Town Plan Page 70

REGIONAL IMPACT

From the PFD page 18:

If the Randolph Town Plan had received a determination of energy compliance, the Regional Plan would incorporate the Town's land conservation measures—such as the prohibition of siting an energy facility on slopes of greater than 25%—and the Commission would be required by statute to give substantial deference to this policy. However, the Randolph Town Plan has not received a determination of energy compliance and therefore, slopes of greater than 25% are not an unsuitable location for renewable energy facilities as a regional matter.

This statement in the PFD is wrong and reveals a fundamental misunderstanding of the interplay between Municipal Plans and Regional Plans which are stand-alone legal documents. A determination of energy compliance does not cause the Town's land conservation measures to be "incorporated" into the Regional Plan. Regardless of whether a Town's Land Conservation Measure is given due consideration or substantial deference, its Land Conservation Measure must be independently examined, not dismissed as unimportant because it is not entitled to substantial deference.

The Town and Regional Plan get due consideration unless they are energy compliant, in which case they receive substantial deference. However, the Town Plan remains a stand-alone legal document, regardless of whether it is energy compliant. The Town Plan is to be examined independently to determine whether there is a violation. In this case, the violation of the Town Plan's steep (greater than 25%) slopes prohibition must be given due consideration by the Commission.

It is noteworthy that in the Apple Hill Solar case:

- Bennington (like Randolph in the present case) did not have an enhanced energy plan, and the Town's land conservation measure received Due Consideration.
- Bennington's Regional Plan (like Randolph's Regional Plan in the present case) did NOT mirror the language of the Town's Land Conservation measure, but WAS consistent with the language in the Town Plan.
- The Commission determined that the Town Plan violation had regional impact and would unduly interfere with Orderly Development, not that it violated an identical language provision in the Regional Plan.

The Randolph Town Plan was approved by the Two Rivers Ottauquechee Regional Commission (TRORC) which means it was deemed consistent with the Regional Plan. Moreover, the Town Plan's slope prohibition for energy facility development is consistent with the Regional Plan's provisions regarding the avoidance of solar development on steep slopes, demonstrating its regional impact. In particular:

- TRORC Regional Plan Chapter 11 (Energy) Solar Siting⁵ [emphasis added]

*Sites with raw solar potential are **flat to gently sloping** and face east, south, or west.*

- TRORC Regional Plan Chapter 11 (Energy) Hierarchy of Suitability⁶ [emphasis added]

*As mentioned earlier, only lands with good exposure and **gentle slopes** make sense for solar development.*

The criteria for what constitutes Regional Impact are enumerated in the TRORC Regional Plan in the section Determination of Substantial Regional Impact.⁷ Accordingly, if there is a substantial impact of this project on either a Source Water Protection Zone or the nearby White River, then there is a substantial Regional Impact. Any erosion on the project site, **even if confined to the project site**, is a Regional Impact because the site itself is in a Source Water Protection Zone.

From the PFD page 19: [emphasis added]

*The character and severity of the Facility's noncompliance with the Randolph Town Plan do not support a finding of an undue **regional** impact.*

This project will cause unreasonable erosion (see next section) and will therefore have a Regional impact. The Commission should reject the PFD conclusion that this project will not have an undue adverse impact on multiple § 248 criteria including Orderly Development of the Region.

⁵ Exhibit NI MB-3 page 256 = TRORC Regional Plan page 241

⁶ Exhibit NI MB-3 page 257 = TRORC Regional Plan page 242

⁷ Exhibit NI MB-3 page 292 = TRORC Regional Plan page 277

EROSION

An Applicant must show the Commission persuasive evidence that the project will not cause unreasonable erosion. The Applicant has done the opposite and has provided remarkably persuasive evidence that the project will cause unreasonable and catastrophic erosion.

Intervenor's Brief identifies several aspects of this project that fail the erosion criteria.⁸

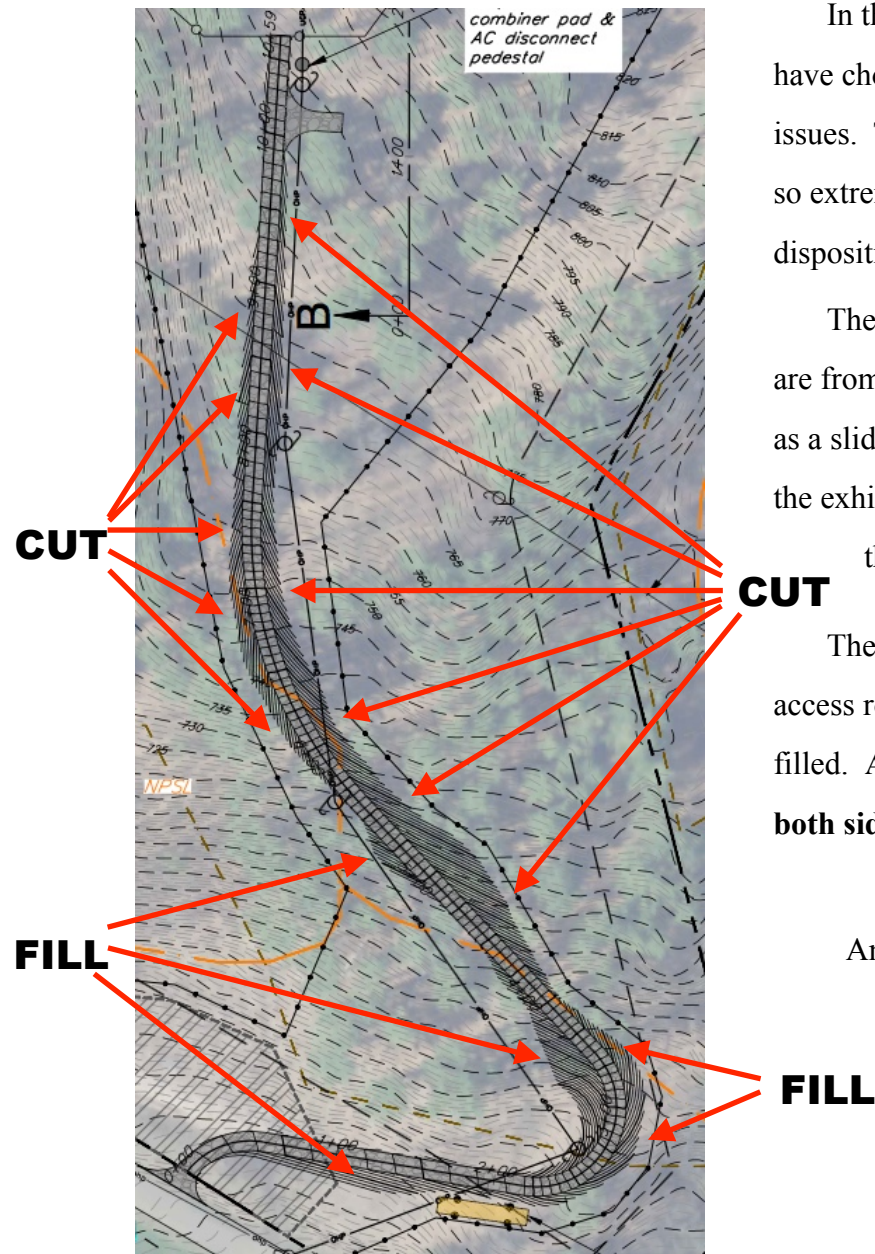
In these Comments on the PFD, Intervenor's have chosen to emphasize only one of the erosion issues. The issue involves an erosion hazard that is so extreme and so certain to occur that it is dispositive on the erosion criteria.

The illustrations on this page and the next page are from exhibit NI MB-50 which may be viewed as a slide show. The reader is encouraged to look at the exhibit and see a more complete accounting of this debacle.

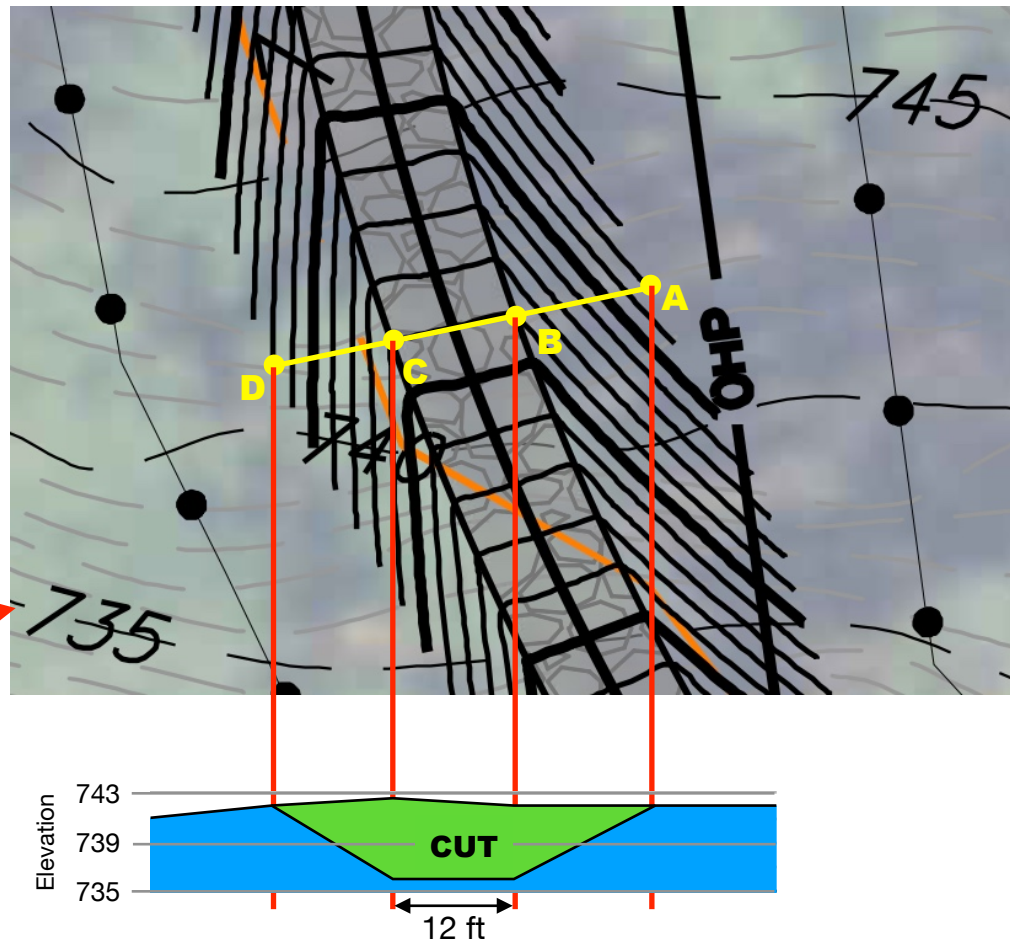
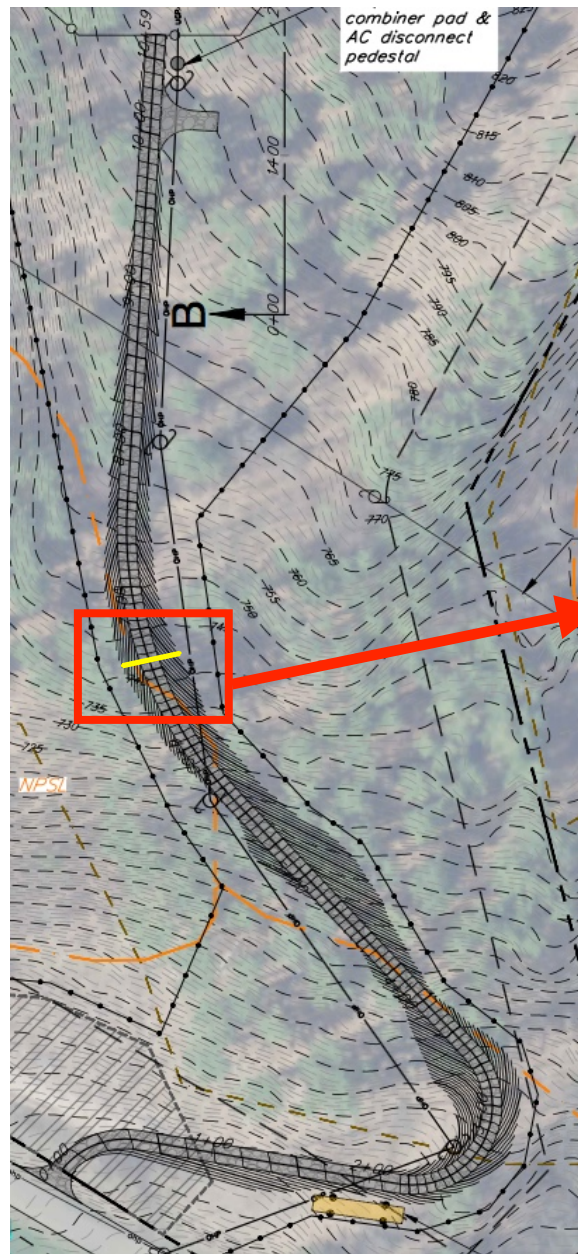
The grading diagram (on this page) of the access road shows the areas where soil is cut and filled. **A trench is created when soil is cut from both sides of the road.**

On the Next Page:

An elevation drawing of the road in a trench.



⁸ NI Brief pages 10-13



The road at this location is going directly uphill, and the roadbed is set in the bottom of a 6 foot deep trench.

There is no ditch on either side of the roadbed, and there are no culverts or other drainage structures on this road.

This cross sectional profile more resembles an aqueduct than a road. Obviously the road will wash out, and it will do so catastrophically. The concentrated runoff⁹ from the solar array (which is uphill from the road) will exacerbate the catastrophic failure of the road. The eroded sediments will be carried through steep headwater streams into the White River corridor which is 450 feet from the project site. Once in the corridor, the sediment will be carried another 50 feet into the White River.

⁹ exh. NI MB-40

ANR has required that this project obtain a construction stormwater permit and follow procedures to limit erosion during construction. ANR fails to see that regardless of what procedures are followed during construction, this road will wash out after construction.

From the PFD page 29: [emphasis added]

*I recommend that the Commission find that the Facility's **compliance with ANR's permitting requirements for stormwater control is sufficient** to ensure that the Facility will not cause undue [sic¹⁰] soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.*

The failure of ANR to recognize that the access road will wash out catastrophically demonstrates that ANR's permitting requirements are NOT sufficient to ensure the Facility will not cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.

The PFD conclusion that compliance with ANR's permitting requirements is adequate to prevent unreasonable erosion should be rejected by the Commission, and the Commission should deny this project a CPG on the basis of both unreasonable erosion and the consequent undue adverse effect on water purity, streams, and wetlands.

It is ironic that the Hearing Officer in her June 23, 2022 Procedural Order wrote: ¹¹

Nothing in the text of Section 6086(a)(1)(4) or the Commission's precedent holds that the Commission's consideration of the soil erosion criterion is limited solely to whether a facility will comply with Vermont's stormwater regulations.

¹⁰ Section 6086(a)(4) refers to "unreasonable" erosion, not "undue" erosion.

¹¹ Procedural Order June 23, 2022 page 5

AAFM CONDITIONS

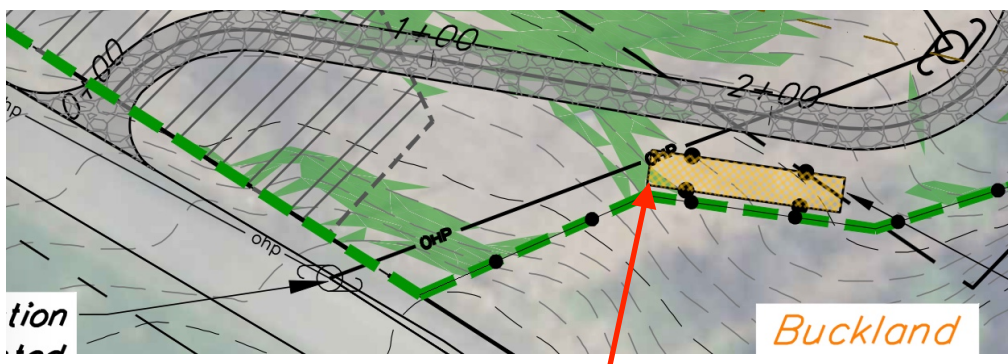
From the PFD page 36:

I recommend that the Commission condition the CPG on the measures proposed by AAFM to protect the primary agricultural soils [PAS] on the Facility site and find that, with these conditions, there will be no undue adverse effects on primary agricultural soils.

Intervenors agree that the measures proposed by AAFM are satisfactory to protect PAS. The Applicant has testified that they will comply with AAFM's proposed conditions. The site plan demonstrates clearly that the Applicant will NOT comply with the proposed conditions.

Intervenors' Brief describes several important violations of AAFM's proposed conditions that were revealed by Discovery served on the Applicant's engineer and by analysis of the site plan.¹² In these Comments on the PFD, Intervenors present just one violation. It is chosen not because it is the most egregious or severe, but because it is just so easy to see: AAFM has proposed that the CPG be conditioned on the PAS stockpile being located on slopes less than 15%. On the site plans, the western half of the stockpile is on slopes greater than 15%.¹³

Below is a clipping of the Applicant's site plan (as shown in Exhibit NI MB-41) that graphically and unequivocally shows the southwest corner of the stockpile is not only on greater than a 15% slope, it's on greater than a 25% slope! **Minor contours are 2 ft. Slopes greater**



than 25% are Green. Corner of PAS Stockpile is on greater than 25% slope

AAFM's requested conditions are necessary to protect PAS. The Applicants failure to comply with AAFM's conditions will cause undue adverse effects on PAS. The Commission should reject the PFD conclusion that this project will cause no undue adverse effects on PAS.

¹² NI Brief pages 19-21

¹³ Exhibit NI MB-41

JUDICIAL NOTICE

The PFD addresses the Intervenor's request that the Commission take Judicial Notice of the Commission's May 17, 2023 Order ¹⁴ which states: [emphasis added]

*In recent years, the Commission has been concerned about the amount of forest that has been cleared to make space for certain large net-metering projects on "preferred sites". When it originally adopted the "preferred site" incentive framework, the Commission intended to ensure that the very largest ground-mounted net-metering systems – between 150 kW and 500 kW – were sited so as to have minimal environmental impacts. However, because the "preferred site" definition lacked a standard addressing forest clearing, **projects involving as many as nine acres of forest clearing** have received certificates of public good and the attendant "preferred site" financial subsidies.*

and the Order also states:

*The Commission maintains that greater carbon reductions are achieved by developing solar projects with minimal forest clearing, and that **it is counter-productive to clear a forested area to build a solar project.***

From the PFD page 6:

The Landowners allege that granting a CPG in this case is inconsistent with the revised Commission Rule 5.100 because the revised rule prohibits a facility from receiving a preferred-site designation if significant forest clearing is required to construct the facility

The above statement in the PFD has a footnote: [emphasis added]

*Although the Landowners have characterized this as a request to take judicial notice of the new Rule 5.100, **the request in essence seeks to apply the recently adopted rule revisions to the application.** This would be inconsistent with Vermont's vested rights doctrine, ...*

The PFD completely misunderstands the purpose of the Intervenor's request that the Commission take Judicial Notice of the Order. Intervenor has only ONE purpose in requesting Judicial Notice: to establish that today the Commission recognizes that 11.6 acres of deforestation in pursuit of a solar project does not promote the general good of the State of Vermont. Intervenor has not suggested the Commission should or could retroactively apply the new Rules and reject the Preferred Sites Letter on the basis of significant deforestation.

¹⁴ Case No. 19-0855-RULE May 17, 2023 Order page 3-4. Note that 9 acres of deforestation is mentioned. 11.6 acres of deforestation in the present project is unprecedented.

Intervenor's did explain in their motion for Judicial Notice: [emphasis added]

*Awarding a CPG for this project **today** is inconsistent with the Commission's understanding **today** that 11.6 acres of deforestation is counter-productive and does not promote the general good of the State of Vermont.*

There is no requirement, or even the possibility, that the Commission could explicitly enumerate in the Rules every possible circumstance that does not promote the general good of the State of Vermont. The 2017 version of Rule 5.100 has no explicit prohibition against 11.6 acres of deforestation, any more than it has an explicit prohibition against locating a roadbed without any drainage on the bottom of a trench going uphill on a steep slope.

After all is said and done, the general good of the State of Vermont is the bottom line and it would be unseemly (at any time, under any Rules) for the Commission to grant a CPG for a project that it knows does not promote the general good of the State of Vermont.

The Commission should deny this project a CPG simply because the Commission knows that 11.6 acres of deforestation in pursuit of a solar project is unprecedented and does not promote the general good of the State of Vermont.

EXTRAORDINARY CIRCUMSTANCES

From the Commission's October 11, 2023 Remand Order: [emphasis added]

*Absent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred. That said, the record shows, and the Applicant does not dispute, that the Applicant made factually incorrect verbal statements to the Planning Commission and Selectboard and that these statements were never explicitly corrected. The Applicant's defense that it contemporaneously supplied accurate information in its paper submissions hardly inspires confidence. **The Commission expects companies seeking a preferred-site letter to take more care when presenting the facts to a municipality.***

The Intervenor's find it to be an extraordinary circumstance that after the above admonition, the Applicant went back to the Town (December 2023 and January 2024) and continued to misrepresent material facts.

The Town's recent Letter of Support [RDS MS-26] is based upon the Applicant's misrepresentation of the project and even more importantly, the Applicant's misrepresentation of the Commission's role in enforcing the Town's slope requirements for a Preferred Sites Letter.

Intervenor's objections to the Town's Letter of Support [RDS MS-26] were originally filed January 23, 2024 and are included as exhibits with these Comments on the PFD. Exhibit NI JA-MB-11 is the Intervenor's objections [including transcriptions of the December 2023 Selectboard meeting] and exhibits NI JA-MB-9 and NI JA-MB-10 are supporting exhibits. These exhibits contain evidence of events that occurred after the Commission's October 11, 2023 Remand Order, and the evidence is material to the present matter before the Commission. Intervenor's respectfully request the Commission enter these three exhibits into the evidentiary record.

The sections titled Mendacity and To Whom the Order Applies in exhibit NI JA-MB-11 will expose the Commission to some of the Applicant's most egregious recent misrepresentations to the Town of Randolph.

Intervenor's find three of the most alarming misrepresentations to be:

- 1) The Commission will determine whether the Town's slope requirements for a preferred sites letter have been satisfied. [will the Commission really look at the evidence and reject the Preferred Sites Letter if it believes solar panels remain on slopes greater than 25%?]
- 2) The Commission affirms the veracity of the contrived slope layer that the Applicant showed the Town in December 2023 and January 2024. [does it?]
- 3) The contrived slope layer under and around the array indicates that no solar panels are on slopes greater than 25%. [the problem here is that averaging of steep and shallow slopes in the contrived slope layer hides some slopes greater than 25%]

Regarding the third misrepresentation, the evidentiary record is clear that the Randolph Planning Commission discussed "average slope" and determined that averaging of slopes for the purpose of siting solar panels does NOT pass muster: Planning Commission member Hooper, bringing the discussion back to average slopes at the December 7, 2021 Randolph Planning Commission meeting, stated: ¹⁵ [emphasis added]

*so it actually sounds to me like Norwich technologies is in fact disputing the claim that they're [pause] they're maintaining that the ave [pause] they're going with the average and we're talking about specific areas where panels are to be installed cannot exceed over 25%. **No averages. Averages do not apply. If it's over 25% grade it can't go there, right?***

A week later, during the [illegal] email deliberations of the Planning Commission between December 7 and 14 of 2021, Chair Sonny Holt wrote to the other members of the Planning Commission:¹⁶ [emphasis added]

Before giving Allen and Binder a response we need to respond to Norwich Solar Technologies on their response to us stating how they intend to assure us that no solar panels will be mounted on slopes greater than 25%.

*I have reviewed their response and **although they still make mention of "average slopes" which we no longer agree with**, I am encouraged by their bottom line which reads:*

¹⁵ exh NI MB-30 transcription on page 9

¹⁶ exh. NI MB-27 pages 27-28, exh. NI MB-28 pages 4-6

While we all are concerned with the potential erosion from installation of solar panels on slopes greater than 25% slopes, all data presented to date is not site specific. Therefore, prior to installation of the panels, Norwich Technologies will confirm the grade slopes in the area of the solar panels by having a Vermont licensed surveyor set grade stakes for the solar array rows location ...

The Planning Commission accepted the Applicant's offer to rearrange the panels with conditions [RDS MS-14]. The Planning Commission did not ever ask to see a slope layer. Two years later (December, 2023) in response to the the Commission's Oct. 11, 2023 Remand Order, the Applicant presented to the Town a contrived slope layer the Town had never seen (the 3rd of the six site plans) and asked the Town to confirm that none of the panels overlapped with the yellow slope layer that the Applicant chose to show the Town.

The slope layer has a sordid history. Just before the Scheduling Conference, the Applicant submitted a second site plan with the panels rearranged into two groups. At the Scheduling Conference, the Hearing Officer requested the Applicant produce a 25% slope layer on the new site plan. The Hearing Officer did not specify that the slope layer must be LiDAR, which is the type of slope layer that is typically and customarily used.¹⁷ What the Commission got was a contrived slope layer covering 4 acres of the [then] 11.9 acre limits of disturbance. When the Hearing Officer asked for a more complete slope layer to cover the entire limits of disturbance, the Applicant fulfilled that request with a LiDAR slope layer adjacent to the contrived slope layer.¹⁸ This resulted in a hybrid slope layer that is worthy of ridicule.¹⁹

When the Applicant created the second site plan with the rearranged panels, the Applicant did not anticipate that the Hearing Officer would request a slope layer.²⁰ In order to hide the greater than 25% slopes that would be seen with a LiDAR slope layer, the Applicant

¹⁷ Exh. NI MB-39 page 22

¹⁸ Exh. NI MB-39 page 24-26

¹⁹ Exh. NI JA-MB-11 page 7

²⁰ Exh. NI MB-39 page 17

contrived a non-LiDAR slope layer.²¹ The contrived slope layer hides steep slopes by averaging them with shallower slopes.²²

This averaging of shallow and steep slopes in the contrived slope layer circumvents the Town's intended condition for a preferred sites letter (no averaging of slopes, and no panels on slopes greater than 25%). The Town failed to specify in their conditions (RDS MS-14) what horizontal resolution would be required of the survey to avoid averaging steep and shallow slopes, and the Applicant took advantage of that.

The transcriptions in exhibit NI JA-MB-11 show that the Town believed that the Commission stood behind the veracity of the [contrived] slope layer.²³ For example, Jim Merriam, CEO of Norwich Solar, told the Randolph Selectboard:²⁴

*All I am trying to do is meet the request of the Public Utilities Commission which has asked the applicant to come and simply show you the drawing, independent 3rd party survey drawing, **that has not been discredited by the Public Utilities Commission. If the drawing is incorrect, that can be taken up with the Public Utilities Commission in the manner that they have expressed, in the order it should be done.** [emphasis added]*

In summary, the Town signed the conditional letter of support RDS MS-14 in December 2021 and the letter of support RDS MS-26 in January 2024 with the expectation that the Commission would enforce the Preferred Site requirement that no panels remain on greater than 25% slopes.²⁵ The Town signed the letter RDS MS-26 under the belief that the Commission endorsed the veracity of the [contrived] slope layer²⁶ that the Applicant chose to show to the Town.

²¹ Exh. NI MB-39 page 19

²² Exh. NI MB-39 page 19 Exh. NI MB-53 page 1

²³ Exh. NI JA-MB-11 pages 4-6, page 9

²⁴ Exh. NI JA-MB-11 page 5

²⁵ Exh. NI MB-12 page 1; exh. NI MB-22 at 0:51:09; exh. NI JA-MB-11 pages 5-6

²⁶ Exh. NI JA-MB-11 pages 4-6, page 9

Three days ago the Department of Public Service (DPS) wrote about the Commission's appropriate scope of review for a Preferred Sites Letter: ²⁷ [emphasis added]

*The Department suggests that an appropriate scope of review could still include determinations as to whether the record reflects (1) any defect or ambiguity in the form of the preferred site letter under the requirements of Rule 5.103, (2) **evidence of specific misrepresentations or material misstatements of fact**, (3) **evidence that the town did not receive notice of subsequent project changes**, and (4) any actions or filings by the town in the Commission proceeding, among other things.*

In light of the Applicant's continued mendacity in their representations to the Town, the Intervenor's continue to support the conclusion in the original PFD that the Preferred Sites Letters deserve no weight.

The Commission should reject the PFD's conclusion that the Applicant has satisfied the requirements in the Commission's October 11, 2023 Remand Order. There is no absence of extraordinary circumstance, and there have been specific misrepresentations and material misstatements of fact.

In the alternative (to rejecting RDS MS-26 and denying a CPG), the Commission should issue an Order for Additional Information and request the Applicant place a LiDAR slope layer over the entire site plan. The Applicant should then be ordered to show that slope layer to the Town, either alone or along with the contrived slope layer, so that the Town can make an informed and credible determination that the site is or is not a Preferred Site.²⁸

²⁷ Case 21-3587-NMP Response to Motion for Relief from Judgment May 14, 2024

²⁸ Exh. NI JA-MB-11 pages 10-11

LOGGING AMPs

Intervenor's evidence and testimony points out that this project, if developed as shown on the site plan, will be in violation of mandatory AMP rules for logging.

From the PFD page 23:

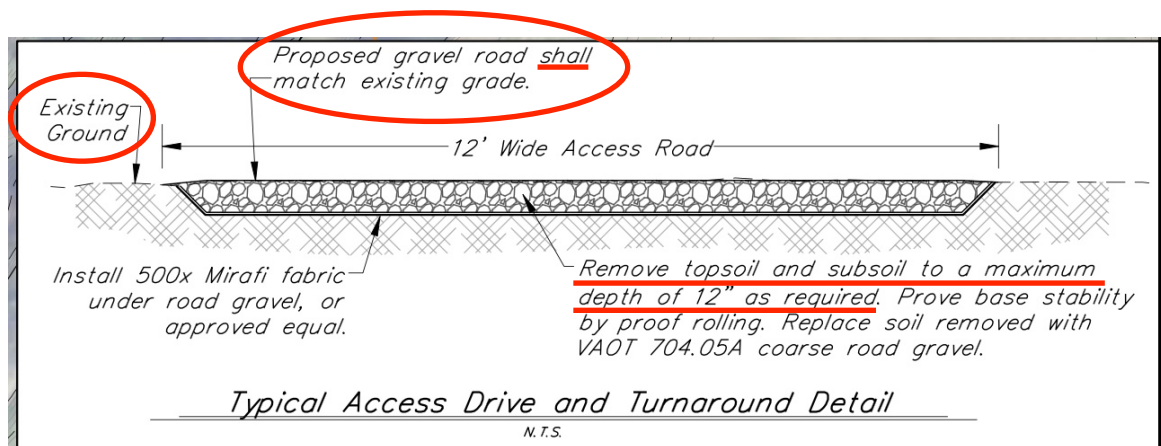
In the context of the AMP Rule, a forest buffer means "only partial cutting can occur such that openings in the forest canopy are minimal and continuous forest cover is maintained".

The applicant has testified that all trees within the limits of disturbance (which includes most of the mandatory forest buffer) will be cleared. The applicant's reason for logging and clearing within the mandatory forest buffer is to eliminate shading of the array. If the applicant follows the mandatory AMP rules, the forest in the buffer zone will continue to shade the array. Therefore, it makes sense to do no logging at all in the buffer zone, and the limits of disturbance should be moved to outside of the buffer zone.

BURDEN OF PERSUASION

As shown in the Erosion section of these Comments, portions of the access road are set in a trench. Other portions of the road are on a 9 foot high, 48 foot wide berm built with soil excavated from the "trench" part of the road.²⁹

The cross section of the road, on the front page of all six site plans, is deceptive and inaccurate:³⁰



²⁹ Binder SurT pages 6-7; Exh. NI MB-50 page 6

³⁰ Exh. NI MB-50 pages 2-6

The cross section states: *remove soil to a maximum depth of 12" as required*, but a long stretch of the road will end up at the bottom of a 6 foot deep trench. On PAS (which is supposed to be stockpiled for decommissioning), removing soil "as required" means not removing it, but instead burying it up to 9 feet deep under a berm of non-PAS fill.³¹

The cross section states: "proposed gravel road **shall** match existing grade", but those stretches of the road at the bottom of a 6 foot deep trench, and those stretches of the road on top of a 9 foot high berm, obviously do NOT match the existing grade.

The road cross section, which is on the front page of the site plan, was viewed and discussed at the December 2021 Planning Commission meeting and the January and February 2022 Selectboard meetings. It was part of the Applicant's misrepresentation of facts to the Town that resulted in denial of a CPG in the original PFD.

Early in their intervention, the Intervenor's filed motions to dismiss the case because of the deceptive road cross section (among other defects in the site plan) that does not fully³² comply with Rule 5.107(C)(5)(e)(g). The Hearing Officer wrote:³³

*Rule 5.107(C)(5)(g) requires the plans of the proposed access road, including a cross section and other details. The Project's site plan contains a set of plans, including a cross section, for the proposed access. **It is clear from the Intervenor's numerous filings that the Intervenor's believe these plans are inaccurate.** However, for purposes of Rule 5.107(B)(4), the Commission's determination that the application was complete is sufficient. **If, after the evidentiary hearing, the Commission determines that the Petitioner's filings are so inaccurate as to be unreliable, then the Petitioner faces the risk that they will not carry their burden of persuasion.** [emphasis added]*

The Applicant's filings are so inaccurate as to be unreliable, and the Applicant has failed to carry their burden of persuasion.

³¹ Binder SurT. page 6-7; Exh. NI MB-50 pages 2-6

³² Rule 5.107(B)(4) requires a site plan that "**fully complies**" with the filing requirements

³³ Order Adjusting Schedule and Denying Intervenor's Motions to Dismiss or Stay 4/15/22

CONCLUSION

The Commission should reject the conclusion in the PFD that the Facility will promote the general good of the State of Vermont. The Applicant's specific misrepresentations and material misstatements of fact to the Town fail to satisfy the spirit and intent of the Remand Order. Furthermore, the project unduly interferes with Orderly Development of the Region, and will cause unreasonable erosion and undue adverse effects on water purity and the natural environment.

The Intervenor respectfully request the opportunity to present Oral Arguments before the Commission, and also respectfully request that the full Commission make an Initial Site Visit to see the project site firsthand.

Dated at Randolph, Vermont this
17th day of May, 2024

/s/ Joan Allen

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Dated at Randolph, Vermont this
17th day of May, 2024

/s/ Michael Binder

Michael Binder, *pro se*

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