

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

CASE NUMBER 21-2939-NMP

PETITION OF RANDOLPH DAVIS SOLAR LLC FOR A
CERTIFICATE OF PUBLIC GOOD, PURSUANT TO 30
V.S.A SECTIONS 248 AND 8010, AUTHORIZING THE
INSTALLATION AND OPERATION OF A 500 kW GROUP
NET-METERED SOLAR ELECTRIC GENERATION SYSTEM
IN RANDOLPH, VERMONT

June 18, 2024
11 a.m.

Oral Argument held before the Vermont Public
Utility Commission via Go To Meeting on June 18, 2024,
beginning at 11 a.m.

P R E S E N T

COMMISSION MEMBERS: Edward McNamara, Chairman
Margaret Cheney
Riley Allen

STAFF: Jake Marren

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1 CHAIRMAN McNAMARA: Good morning. We
2 are here for oral argument in Case Number 21-2939,
3 petition of Randolph Davis Solar LLC for a
4 Certificate of Public Good pursuant to 30 V.S.A.
5 Sections 248 and 8010, authorizing the installation
6 and operation of a 500 kW group net metering solar
7 electric generation system in Randolph, Vermont.

8 My name is Ed McNamara. I'm Chair of
9 the Public Utility Commission. With me are
10 Commissioners Margaret Cheney and Riley Allen. We
11 also have Commission staff Jake Marren participating
12 as well. I want to note for the record we are
13 conducting today's oral argument by video conference.
14 As a result we're going to need to have a couple of
15 ground rules to make sure we go about this
16 effectively.

17 First please no talking over each other.
18 It makes it incredibly difficult for the court
19 reporter, and if JoAnn indicates that we need to stop
20 and pause, that's what we're going to do.

21 Related to that please wait to be
22 acknowledged before speaking and then please state
23 your name each time you begin to speak so the court
24 reporter knows whose talking. If you want to be
25 recognized to speak, please wait a few seconds after

1 someone else speaks to be sure they are done. Ask to
2 be recognized, either raise your hand if you're on
3 video. I think that's it for the ground rules.
4 We'll start by taking appearances and we'll start
5 with the intervenors in the case. Ms. Dingledine.

6 MS. DINGLEDINE: Thank you, Your Honor.
7 I am Brooke Dingledine with the firm Valsangiacomo,
8 Detora & McQuesten in Barre, Vermont and I represent
9 Joan Allen, neighbor/intervenor in this oral
10 argument.

11 CHAIRMAN McNAMARA: Thank you. Mr.
12 Binder.

13 MR. BINDER: I am here and will
14 represent myself in these arguments.

15 CHAIRMAN McNAMARA: Great. Thank you.
16 Ms. Hayden.

17 MS. HAYDEN: Good morning. Kim Hayden,
18 Paul Frank + Collins for the petitioner.

19 CHAIRMAN McNAMARA: Great. Mr. Guzman.

20 MR. GUZMAN: Good morning. Eric Guzman
21 on behalf of the Department of Public Service.

22 CHAIRMAN McNAMARA: Mr. Smart.

23 MR. SMART: Good morning. Kane Smart.
24 I'm here on behalf of the Agency of Natural Resources
25 in the shoes of Aaron Kisicki who I understand is

1 normal counsel in this proceeding.

2 CHAIRMAN McNAMARA: Thank you. Is there
3 any other party that's on today? Any members of the
4 public that are in attendance?

5 MS. SMITH: This is Annette Smith for
6 Vermonters For a Clean Environment and I am audio
7 recording.

8 CHAIRMAN McNAMARA: Okay. Thank you.
9 Just a reminder that parties are the only ones
10 actively participating today so in terms of logistics
11 so we have a total of an hour, and for Ms. Dingledine
12 and Mr. Binder have you sorted out among yourselves
13 how you're going to present?

14 MS. DINGLEDINE: Yes, Your Honor. We
15 are splitting the time, but we would also like to
16 reserve time for rebuttal assuming that we are going
17 first.

18 CHAIRMAN McNAMARA: Yes. I apologize I
19 should have noted that. Yes you will be going first.
20 Thank you. About five minutes reserved between the
21 two of you.

22 MS. DINGLEDINE: That would be terrific,
23 thank you, and if we could have a warning of that.

24 CHAIRMAN McNAMARA: Great. All right.
25 Thank you. Ms. Hayden, just looking at splitting the

1 time about 20 minutes.

2 MS. HAYDEN: Yes. I think I did reach
3 out to counsel for -- to Attorney Guzman and to
4 Attorney Kane yesterday because at the last oral
5 argument we were requested to coordinate and I'll let
6 them speak for themselves, but we would take the
7 remaining time. Mine, I don't know, we don't have a
8 lot of points to make. We're relying primarily on
9 our written submissions and so I'm guesstimating 10
10 minutes, but if there is rebuttal, you know I would
11 reserve maybe 5 for that, and I believe did you say,
12 excuse me, Chairman, is it 20 minutes total for the
13 three -- for the petitioner and the two agencies or a
14 half an hour?

15 CHAIRMAN McNAMARA: Actually what I had
16 down was 20 minutes for the intervenors, 20 minutes
17 for petitioner, and 20 minutes for the state agencies
18 collectively.

19 MS. HAYDEN: Oh perfect. Okay. That
20 actually works better. Then I will take 10 minutes
21 and reserve the rest.

22 CHAIRMAN McNAMARA: Great. Thank you.

23 MS. DINGLEDINE: Excuse me, Your Honor.

24 CHAIRMAN McNAMARA: Yes.

25 MS. DINGLEDINE: I've never heard of a

1 surrebuttal or something in an oral argument. The
2 person -- the person who asked for it goes first and
3 can reserve rebuttal time. Whoever goes second goes
4 second period. They don't get to reserve extra time
5 to respond to our rebuttal. I've never heard of that
6 in a courtroom or in the PUC.

7 MS. HAYDEN: I defer to the Commission.

8 CHAIRMAN McNAMARA: I'm trying to
9 remember back to my law school days in moot court and
10 yeah that was my memory as well.

11 MS. DINGLEDINE: This is not a tennis
12 game. I know they want the last word, but I don't
13 think that's proper and we object.

14 CHAIRMAN McNAMARA: Understood.

15 MS. HAYDEN: I was not trying to do
16 something improper so I may take up the full 20
17 minutes. I don't think so, Chairman.

18 CHAIRMAN McNAMARA: Great. Thank you,
19 Ms. Hayden. Mr. Guzman, Mr. Smart, so between you
20 two you've got 20 minutes and I'll just have you sort
21 it out among yourselves how you're going to use that.

22 MR. GUZMAN: Yeah we did confer
23 yesterday and I had indicated to Attorney Hayden and
24 Attorney Smart that we don't intend on putting forth
25 any sort of lengthy argument today. We're generally

1 supportive -- well we are supportive of the hearing
2 officer's findings and conclusions and so at most
3 maybe a minute or two in response.

4 CHAIRMAN McNAMARA: Mr. Smart.

5 MR. SMART: Yes and similar to Attorney
6 Guzman the Agency didn't plan any prepared remarks in
7 connection with the arguments to be made. To the
8 extent the Commission has specific questions for the
9 Agency I will do my best to answer them with the
10 caveat that my knowledge of the record may not be as
11 deep as my co-counsel here, but I will do my best on
12 the fly without any prepared remarks.

13 CHAIRMAN McNAMARA: Thank you, Mr.
14 Smart. All right.

15 MR. BINDER: Question.

16 CHAIRMAN McNAMARA: Yes.

17 MR. BINDER: Are you saying that
18 Attorney Dingleline and I only get 20 minutes to
19 share, but the opposition gets 20 minutes plus 20
20 minutes for the Agency?

21 CHAIRMAN McNAMARA: I do note they are
22 separate parties here. I would not consider them
23 necessarily opposition. It is the Department of
24 Public Service representing -- are statutorily
25 required to represent public interest and the Agency

1 of Natural Resources is statutorily required to
2 address the criteria of Section 248(B)(5). So in my
3 mind this is not 20 minutes versus 40 minutes. It's
4 20 minutes for each interest.

5 MS. DINGLEDINE: So, Your Honor, are we
6 getting, Mr. Binder and I, are getting collectively
7 20 minutes of this to speak?

8 CHAIRMAN McNAMARA: Yes.

9 MS. DINGLEDINE: I wish I had known that
10 because I assumed and even contacted ANR when Mr.
11 Kane came in to see if we had to share our time with
12 anyone else. So Mr. Binder and I have prepared to
13 speak for a half an hour collectively not 20 minutes.
14 So I'm a little concerned because he has a
15 presentation to make that he has tried to keep, you
16 know, to the time frame we thought we were going to
17 be provided with. I'm sorry if I didn't ask
18 specifics, but I thought it was an hour and we got
19 half the time which is why I checked with ANR to make
20 sure they weren't on our side and sharing our time
21 with us.

22 CHAIRMAN McNAMARA: Okay. I have a
23 different view as I noted the parties, but I will
24 just ask if there's any objection. It looks like
25 we're not going to need the full hour. Mr. Smart.

1 MR. SMART: I was going to say I
2 completely defer to the Commission, but to the extent
3 the Agency was allocated 10 minutes of the 20
4 allocated to the State I would cede our time to
5 whomever party would benefit most from using that
6 time.

7 CHAIRMAN McNAMARA: Great. All right.
8 Thank you. Ms. Dingleline, does that address your
9 concern?

10 MS. DINGLELINE: That would be great. I
11 just don't want Mr. Binder, a pro se party, to be
12 bollixed up by having to rush through what he
13 prepared. I can certainly cut it down as much as I
14 can.

15 CHAIRMAN McNAMARA: Understood. Okay.
16 Sorry to cut you off.

17 MS. DINGLELINE: That's okay.

18 CHAIRMAN McNAMARA: All right.
19 Understood, but we're still going to reserve 5
20 minutes for rebuttal. So 25 minutes for initial and
21 then 5 minutes for rebuttal after petitioner, DPS and
22 ANR. Great. All right. Thank you for the patience
23 on the logistics. All right. Ms. Dingleline, Mr.
24 Binder, I'm not sure which one of you is going first,
25 but either one of you may proceed.

1 MS. DINGLEDINE: Thank you, Your Honor.
2 I will start off and my purpose is to come and talk
3 about orderly development because it's crystal clear
4 that there is a strict prohibition for energy
5 facility development, not the placement of solar
6 panels, but the development of a facility is
7 prohibited on areas of steep slopes in excess of 25
8 percent grade. That was recognized as a land
9 conservation measure correctly by the hearing
10 officer. The problem is then her continued analysis
11 is flawed, and what I want to focus on is the notion
12 that there is a difference between due consideration
13 and substantial deference that she seems to be
14 conflating that into her analysis. That's just a
15 standard of review, and there are three things that
16 are reviewed with due consideration when the town
17 plan is not energy enhanced, and in terms of due
18 consideration that was the exact standard that was
19 applied in the Bennington case of Apple Hill Solar
20 that ended up a denial of the CPG because it violated
21 the town plan, and the PUC after they decided it
22 violated the town plan they determined that that
23 violation had regional significance, but the problem
24 is that when the hearing officer looks at the
25 Randolph Town Plan and the Two Rivers Ottaquechee

1 Regional Plan she seems to suggest that somehow they
2 have to be identical for the regional plan has to
3 have a strict slope prohibition for energy
4 development facilities just like the town plan does,
5 and that is not correct.

6 If you look at the Bennington Apple Hill
7 case, it was the town plan that had a prominent hill
8 site prohibition. It didn't say anything about
9 gateway. It didn't say anything other than you can't
10 do it on these locations. Just like in Randolph.
11 You can't do it on a steep slope location and this
12 particular site has some slopes in excess of 40
13 percent grade where the -- for example, where the
14 road has to be built into the facility.

15 So the problem with the hearing officer
16 is that somehow she suggests that a steep slope
17 prohibition because it's not identical language in
18 the regional plan somehow has no legal effect and
19 does not thereby have an orderly development effect
20 on the region, and that's just plain wrong because
21 that does not recognize the entire process of when
22 town plans are put into place and approved by the
23 regional planners.

24 This town plan was actually written by
25 the regional planners and it was approved because the

1 approval of the town plan by the Regional Planning
2 Commission says it is consistent with our regional
3 plan. So in Bennington you didn't have a regional
4 plan that said there's a gateway you can't destroy it
5 or the prominent slopes on -- you know in this town
6 have any meaning whatsoever. That was not in the
7 regional plan, but the Public Utility Commission said
8 this is something in the town plan. It has regional
9 impact just like a steep slope prohibition does in
10 Randolph. I know the petitioner argues differently,
11 but in fact the purpose of a steep slopes prohibition
12 is to control development and land conservation
13 measure. If that is only done in one town and their
14 town plan is ignored even though the regional plan
15 acknowledges and has language that says steep slope
16 development is bad, that's why -- that's the issue of
17 regional import. If all of the town plans are
18 ignored that have steep slope prohibitions because
19 they have a problem in their town, how is that not a
20 regional impact if we just ignore those town plans.

21 Now the next issue that I'm concerned
22 about is this confusion about due consideration and
23 substantial deference. There seems to be some
24 confusion about well it's due consideration so we
25 don't really have to care about it. That's not true.

1 It was due consideration in Bennington and Apple
2 Hill.

3 The other issue that I'm very concerned
4 about is the recommendations of the selectboard and
5 the planning commission versus the actual language of
6 the town plan. She seems to think the language is
7 sort of an after thought and the recommendations mean
8 more. These recommendations yes you have to give due
9 consideration, but the most important thing is what
10 does the law say not what some pro se volunteer
11 person on a selectboard who may have an agenda like
12 they own the subject property like the selectboard
13 chair did in this subject property in this case, or
14 the planning commission could have the realtor who is
15 making the commission on the sale of the property
16 that is the subject property in this case. We don't
17 -- we are not married to what the recommendation is.
18 They are not lawyers. They are not engineers. Look
19 at the plain language of town plan. It's as plain as
20 the nose on your face.

21 So while we understand that there's this
22 land conservation measure it is not being recognized,
23 and instead of then making a determination of do we
24 trump this violation of a town plan that is not even
25 given the proper analysis either because the issue of

1 whether or not this should have -- this should be
2 unduly adverse to the orderly development of this
3 region, that's -- that's a question that is are there
4 benefits to the state, and that is not conflated into
5 the process of whether or not there's a clear
6 standard or whether or not it has regional impact.
7 That's a trump card that you use later and you say
8 okay here's the violation of the town plan, it has
9 regional impact because it's recognized in the
10 regional plan, and at the next stage is to say does
11 the State of Vermont -- the benefit to the State of
12 Vermont outweigh us violating a town plan prohibition
13 that has regional impact. Here the answer by the
14 Public Utility Commission should be no because as was
15 pointed out in the comments by the neighbors there is
16 actual language regarding the energy bills to the
17 town. The town plan states but we have sufficient
18 land that does not have natural resource constraints
19 nor is too steep to meet the goal nearly 45 times
20 over. They are talking about the goal of developing
21 renewable energy in Randolph. That's just like the
22 issue in Apple Hill. They said why here. There's no
23 benefit to putting this on Apple Hill. You can put
24 it other places in Bennington, therefore, there was
25 no concern and it did not result then in the trump

1 card being played. Here why are you playing a trump
2 card when it's a steep slope prohibition that is as
3 plain as the nose on your face.

4 The last thing I will say is you also
5 have to consider that the developer went to the town
6 pretending there was no steep slope prohibition, then
7 they made a tortured analysis that okay the
8 development average slope is not 25 percent, then
9 they went to this notion that somehow you put the
10 panel on a place where there isn't 25 percent slope.
11 That's absurd. It still has rain falling on the
12 panels, they are being diverted on these steep
13 slopes, and a torrent will result, and I will turn
14 the baton over now to Dr. Binder so that he can talk
15 about the science to this. Thank you very much for
16 your time.

17 MR. BINDER: I would like to cover three
18 points if I have time, and the first one to continue
19 with Attorney Dingledine would be to discuss why
20 Randolph has a slope prohibition and why even if they
21 didn't it's a problem to develop on slopes and the
22 Commission should have denied a project on slopes
23 regardless of the Town's language, and I would like
24 to share, if I can, an image. I think I have to ask
25 permission to do that and if I can't, I'll just

1 narrate so you can look at the exhibits on your own,
2 but if I could, I would like to.

3 CHAIRMAN McNAMARA: Mr. Marren.

4 MR. BINDER: Well there's a share
5 button, but it says ask the organizer to make you the
6 presenter so --

7 MR. MARREN: Bear with me for one
8 second. I have that power. I just need to find the
9 right button and how to do it.

10 MR. BINDER: Okay. Meanwhile maybe I can
11 keep talking. I'm referring to our exhibit MB 40
12 concentrated runoff, and --

13 MR. MARREN: Mr. Binder, you should have
14 the ability to share now.

15 MR. BINDER: Yeah it's asking me what
16 apps to record the contents of your screen. I'm not
17 sure what I'm supposed to say here. If I don't get
18 this in a minute, I will move on. I'm not sure what
19 I need to do here now. I may not be able to.

20 MR. MARREN: There is a button in the
21 center on the bottom row of your screen. It should
22 have a little projection screen on it, but arrow
23 through it, it says share beneath it.

24 MR. BINDER: Yeah and -- but it's
25 telling me I have to give permission to my computer

1 to share a particular application and --

2 MR. MARREN: Yes you should say yes and
3 then it should give you any open window you have in
4 your -- on your screen.

5 MR. BINDER: Okay. I'm going to skip
6 this. I have to go into my computer systems and give
7 permission. So let's -- I don't know are the
8 Commissioners able to look at an exhibit if I
9 narrate?

10 MR. MARREN: If you give us the number,
11 we will find it and they will see it.

12 MR. BINDER: MB 40. It was filed with
13 surrebuttal testimony and what it shows how solar
14 panels on slopes, especially when they are not
15 parallel to the contra lines, concentrate runoff, and
16 I should point out that in Maryland and New York and
17 Connecticut any time you do have these panels on
18 slopes greater than 5 percent, okay, it is necessary
19 to have level spreaders, terraces, berms, or some
20 other water management practice to prevent the
21 erosion that occurs.

22 Now in this case we've got panels on
23 greater than 25 percent slope and many of them are
24 perpendicular to the contra lines. In Pennsylvania
25 any panels on slopes greater than 10 percent are

1 considered impervious, and it says also in
2 Pennsylvania that solar panel farm projects completed
3 on slopes exceeding 15 percent can be permitted,
4 however, they would be pushing the threshold of
5 current constructibility.

6 In Rhode Island, this is all in exhibit
7 MB 40, the site plan must depict all areas of
8 moderate, which is 8 to 15 percent slope, and steep
9 slopes, which is greater than 15 percent, and it says
10 quote where panels are not oriented generally
11 parallel with the slope and/or where slopes are
12 moderate or steep greater than 8 percent runoff needs
13 to be either intercepted by stone trenches or
14 infiltration and/or directed non-erosively to an
15 infiltration practice, and I'll finish up by saying
16 on this subject in my surrebuttal I talked about what
17 happened in Virginia where on March 29th of 2022 the
18 Department of Environmental Quality under the
19 Youngkin Administration took out emergency
20 regulations that took effect immediately saying that
21 solar panels are now considered impervious. Now that
22 doesn't mean you can't develop on slopes. It just
23 means in that state that you have to show the
24 engineer. You can't just throw them on the ground
25 and let the runoff go down steep slopes. You

1 actually have to manage it with an engineered
2 product.

3 The Two Rivers Ottaquechee Regional
4 Commission talks about sites with solar potential
5 being gently sloping and facing east, south, or west,
6 and they also say lands with -- only lands with good
7 exposure and gentle slopes make sense for solar
8 development, and I think Vermont's rules for solar
9 development on slopes were based back in a time when
10 it was understood that only gentle slopes made sense
11 for solar development. There's been a precedent
12 creep and I think we saw the same thing happen with
13 significant deforestation where it kept getting worse
14 and worse and finally the Commission had to change
15 the rules and stop that, and I think you're going up
16 a slippery slope with slopes here if you don't put
17 some faith in the engineering that's required to
18 prevent the erosion as has been demonstrated in other
19 states and disasters that have occurred when they
20 don't regulate slopes, and all that one has to do to
21 regulate is just say the panels are impervious and
22 just engineer for them. Just plan to catch it. You
23 can put gutters on these panels. You can put these
24 panels on any slope at all. You would have to pipe
25 the water to an infiltration practice somewhere, but

1 that's what you can do.

2 The second thing I would like to talk
3 about, moving on, is primary ag soils, and if we
4 could turn to page 2 of that same exhibit MB 40,
5 you'll see how the solar panels on steep slopes
6 greater than 25 percent are perpendicular to the
7 contour lines and that will just wash out that scour,
8 be untenable on a situation like that.

9 Also in that same picture if you look at
10 it you realize that a significant portion of those
11 panels are on prime ag soil, and now I would like to
12 segue into prime ag soil because one of the
13 agreements that they have made, and it's in the CPG
14 on page 2, it says that prime ag soil cannot be
15 graded except under the road. Now the illustration
16 that you're hopefully looking at on MB 40 page 2 show
17 the panels up in the prime ag soil. That's pretty
18 rough area now. It's eight years of wooded growth.
19 It was gnarly to begin with and they want to clear it
20 and clear all the steeper slopes around it and that's
21 prime ag soil. How are they going to do that without
22 grading it and they couldn't put in level spreaders,
23 terrace or berms in that area because they would be
24 having to grade the soil in violation of their
25 condition that's recommended in the CPG. So that's

1 just one aspect of the solar event.

2 The next thing I would like to do on the
3 same subject of prime ag soil is just mention that in
4 the CPG on page 3 the petitioner agrees to or is
5 bound to decommissioning sequence the return of the
6 soils, and in order to sequence according to the
7 reclamation guidelines that AAFM has proposed you
8 have to have two sets of stockpiles so that each
9 layer of soil can be put back in the right sequence
10 and there's only one here.

11 Furthermore, as I pointed out in
12 rebuttal, and I would like to show on screen sharing
13 if I could but I'm not sure I can, they are only
14 stockpiling a negligible amount of prime ag soil.
15 They have a berm 40 some odd feet wide and 9 feet
16 tall of fill right on top of prime ag soil and that
17 prime ag soil is just buried. It's not lifted. It's
18 not put in a stockpile for reclamation. Furthermore,
19 the reclamation guidelines and what the petitioner
20 has agreed to do is put fabric between any gravel and
21 fill and prime ag soil and they have not done that.
22 They have put fabric -- the only fabric on the site
23 plan is in the staging area and under the gravel on
24 the roadbed, but they don't put any fabric between
25 the fill and the prime ag soil that they are putting

1 on the berm part of the road, and if you can get
2 yourself over to exhibit MB 50 and go over to page 5
3 I believe, you'll see a blown-up illustration of how
4 the prime ag soil under that berm is just left in
5 place and it shows two layers, the horizon A and B,
6 which are just ignored and buried. So -- and in my
7 comments I also have pointed out that they have
8 agreed to put the stockpile on slopes less than 15
9 percent, but in fact half of the stockpile, the
10 negligible stockpile, is on a greater than 15 percent
11 slope and one-quarter of it is on better than 25
12 percent slope. So I think the prime ag soil
13 criterion has not been met here.

14 And then the final thing I would like to
15 bring up in my time here is the business of exhibit
16 MB 39 and there's been some talk as to whether the
17 town plan refers only to the solar panels in terms of
18 the slope or whether it's the entire facility, and I
19 would like to make the point that even if the town
20 plan referred only to the panels themselves, there
21 are still panels on greater than 25 percent slope,
22 and in the absence of being able to screen share here
23 effectively I can only ask you to refer to exhibit MB
24 39 and take a look at the contour lines. The contour
25 lines are inadequate. They have -- in order to get a

1 10 foot resolution of the slopes in that site they
2 would have to have 1800 points taken on the ground of
3 elevations and that would give you a 10 foot
4 resolution, and in reality they took 76 points spread
5 out over 4 acres and that's averaging steep and
6 shallow slopes, and the contour lines as are shown in
7 that exhibit MB 39 are wrong. They are fake. They
8 are not accurate, and of course the slope layers that
9 derive from that are not either. It's garbage in
10 garbage out. Slope layer is as garbagey as the
11 contours that went into it, and that's well
12 illustrated in exhibit MB 39. I would encourage you
13 after this hearing to go through it. It's a
14 slideshow and I think it's self-explanatory. I would
15 like to make it appear, but I don't think I can.

16 And, finally, in discovery Stock
17 Homestead, the engineer who designed this plan who by
18 the way had never been on site, wrote in his rebuttal
19 testimony that, and I'm quoting, I'm using the
20 on-the-ground detailed survey prepared by Horizon's
21 engineer and we prepared a revised solar array layout
22 that avoids slopes of greater than 25 percent. I put
23 that in our discovery question and said admit that
24 the on-the-ground survey data used to determine slope
25 in the area near the array does not show areas of

1 greater than 25 percent slopes that would be seen on
2 a lidar and his answer was admitted. The
3 on-the-ground data has higher precision than the
4 lidar data. Well that's gas lighting. It doesn't
5 matter how precise the measurements are if you don't
6 have enough measurements. The lidar -- the
7 on-the-ground can get an elevation to about an inch,
8 lidar is about 3 or 4 inches, but like I said if you
9 take two points, if I measure the elevation of the
10 Atlantic coast and the Pacific coast and get them
11 very accurately sea level to sea level and connect
12 them, you end up with North America that has an
13 average slope of zero. There's no mountains.
14 There's no grand canyon. That's what they have done
15 here. They've just taken the points and put them too
16 far apart and made a contrived slope layer, and if
17 you look at MB 39, you will see bizarre angular
18 shapes that are absolutely not natural and that's
19 pointed out, and that's basically what I can say is
20 the petitioner has not presented any evidence or even
21 persuasive evidence that these panels are less than
22 25 percent slope at this time, and I think that's --
23 I'll yield my time now to the Agencies and the
24 petitioner and save whatever we have left for
25 rebuttal. Thank you.

1 CHAIRMAN McNAMARA: Thank you, Dr.
2 Binder.

3 MS. DINGLEDINE: Just to clear for the
4 record, Your Honor, this is Brooke, we're not
5 yielding any time to the other folks. Thank you.

6 CHAIRMAN McNAMARA: Understood. Thank
7 you. Ms. Hayden.

8 MS. HAYDEN: Good morning. I think I'm
9 going to start first responding to Mr. Binder, Mr.
10 Binder's comments, and then Attorney Dingleline
11 regarding her orderly development points. As far as
12 the lidar survey data, the lidar versus the survey
13 data, the town requested that the slopes be measured
14 based on survey data. As Mr. Binder has pointed out
15 those are two different methodologies, and in the
16 remand order of October 11, 2023 the PUC said at page
17 31 in our view the method of measuring slope is not
18 the issue. The issue is that the record -- the issue
19 was -- the question was whether or not the town that
20 their request that slopes be surveyed and that the
21 array be placed on slopes not greater than 25 percent
22 for this survey was in fact met, and so I think this
23 whole notion of going back and questioning how slopes
24 should be evaluated both Mr. Homestead and the civil
25 engineer or the surveyor, the certified surveyor that

1 did the survey work, their information is in the
2 record. It's in the evidence and we've fully briefed
3 it both with our findings and in our brief when we
4 filed our Proposal for Decision. So I would just
5 encourage the Commission to look at that, and again
6 the remand order very clearly said that the method --
7 this discussion about the method of surveying was not
8 the issue and it is not with respect to stormwater
9 either.

10 As far as the stormwater issue
11 impervious surfaces in Vermont do not include solar
12 panels. The Department of Environmental Conservation
13 of the Agency of Natural Resources is the body that's
14 been delegated by 10 V.S.A. Section 905(B) to protect
15 water quality of the state. The state has a
16 stormwater permitting program both for operational
17 permits and construction permits. In this case the
18 project has applied for and received and it's in the
19 record evidence the stormwater permit authorization
20 for construction, stormwater authorization as a low
21 risk site, and so the Agency has fully reviewed and
22 participated in this proceeding and fully briefed
23 that issue, and so I think the Commission correctly
24 so has given deference to that, the hearing officer
25 did, and as we stated in our brief there is precedent

1 where the Commission has in the past relied upon the
2 permitting program of the Agency of Natural Resources
3 and their determinations regarding whether stormwater
4 and erosion prevention measures are adequate to
5 protect natural resources and water quality and that
6 is the case here.

7 With respect to the orderly development
8 points that Attorney Dingledine has made we have
9 briefed these again very thoroughly in our -- both in
10 our original Proposal for Decision and brief and then
11 we also commented on the intervenors' comments with
12 respect to orderly development. We do take -- we
13 agree with the conclusions of the hearing officer on
14 orderly development, and importantly the legal
15 analysis was correct in terms of did this, in this
16 case, is the evidence demonstrating that there was
17 some kind of a regional impact that would require the
18 Commission to determine that the project will unduly
19 interfere with orderly development of the region, and
20 the Apple Hill case talked both to the due
21 consideration standard versus the substantial
22 deference as well as the regional impact component of
23 the 248(B)(1) criteria.

24 In this case, unlike Apple Hill, there
25 was no evidence of any regional impact whatsoever.

1 In Apple Hill there was reference to language in the
2 town plan that referenced the area of the
3 intersection of various interstates as being a
4 gateway. There was a lot of evidence in that case
5 about that as being a significant gateway area. It
6 was right near a welcome center on the interstate
7 highway intersections. It was above it. None of
8 those facts were presented here and intervenors have
9 not even submitted that there are. So we're missing
10 that regional impact element.

11 In addition, as we indicated in our
12 comments on the intervenors' comments in this case,
13 there is no violation of the town plan. It's a due
14 consideration standard that's appropriately applied
15 in this case and the town went through numerous
16 hearings, the selectboard and planning commission,
17 and specifically and squarely in front of them was
18 the issue as to whether or not the array or the array
19 plus any clearing and road work constituted energy
20 facility development, and there were deliberations
21 and the town determined that it was the placement of
22 the array itself that was what was addressed in the
23 town plan, and consistent with the Supreme Court's
24 prior ruling, which we cited to in our comments in
25 re: Kisel (phonetic), it's appropriate for this

1 Commission to give deference to the town's
2 interpretation of its own town plan.

3 I have only one other comment to make
4 and that's regarding there is a finding regarding
5 acceptable logging practices that appears in the
6 Proposal for Decision and suggesting that perhaps the
7 project would need to change its limits of
8 disturbance. We have looked at that. This is
9 acceptable management practices for maintaining water
10 quality on logging jobs in Vermont. I believe the
11 intervenors in their comments addressed that and it
12 was also in Attorney Dingleline's direct brief in
13 this case. That -- that document, which has been
14 adopted as a rule August 11, 2018, it was not really
15 addressed very much in the case other than in the
16 final brief by the intervenors, but in any event that
17 document deals with the distance for vegetation
18 buffers, and it's section 6.7 deals with the distance
19 between streams and logging and skid roads. In this
20 case the stream is located south of the array and
21 west of the access road. There is no issue in this
22 case with respect to the placement of the access road
23 up to the array and the stream that is located south
24 of the array, and I just wanted to state that for the
25 record. So there is no intention to change the limit

1 of disturbance, and to the extent that the Commission
2 would like us to make that statement in writing we're
3 certainly happy to do it, but I -- it's also our view
4 that the AMPs, or the acceptable management
5 practices, for logging likely do not apply in this
6 case. This project has a stormwater construction
7 permit period. The AMP supply and created exception
8 to the stormwater permitting regime for logging
9 activities the applicant has not requested nor is it
10 generally using this site for logging activities.
11 This project is being developed for a solar array and
12 the Agency has taken jurisdiction over stormwater
13 permitting and has not exempted the project from any
14 stormwater requirements. Thank you.

15 CHAIRMAN McNAMARA: Thank you, Ms.
16 Hayden. Mr. Guzman, Mr. Smart, why don't we start
17 with the Department. Any comments or responses?

18 MR. GUZMAN: Thank you, Mr. Chair. I
19 don't have any further comments at this time after
20 the intervenors' arguments. Thank you.

21 CHAIRMAN McNAMARA: Thank you. Mr.
22 Smart.

23 MR. SMART: Thank you. Nor does the
24 Agency have any comments in response to the arguments
25 that were made.

1 CHAIRMAN McNAMARA: Great. Thank you.

2 MR. MARREN: Mr. McNamara, Chair, may I
3 ask one question of the attorney for the Agency of
4 Natural Resources?

5 CHAIRMAN McNAMARA: Please.

6 MR. MARREN: We just heard a little bit
7 of discussion about the applicability of the AMP rule
8 to develop the construction of 248 facilities. The
9 Proposal for Decision has some discussion about the
10 potential applicability of that rule and based on --
11 I'm trying to pull up the document right now -- but
12 the preamble or the scope section of that rule said
13 something to the effect that it applies to utility
14 construction or development of utility facilities,
15 and so if the Agency of Natural Resources is able to
16 offer any clarity to the Commission here about
17 whether the AMP rule is superseded by a stormwater
18 permit entirely in this situation or whether they
19 both apply, that would be useful clarification for
20 the Commission to understand the interplay of those
21 two rules.

22 MR. SMART: I think I understand the
23 question. My answer is consistent with what Attorney
24 Hayden described as it relates to the AMPs. The AMPs
25 by definition are acceptable management practice for

1 logging activities. What they do is they set out
2 standards by which loggers can comply with and avoid
3 permitting requirements. On page 1 of that AMP
4 document that we've all been referring to it says
5 logging operations that are in compliance with the
6 AMPs are exempt from the discharge permit
7 requirements, stream alteration permit requirements,
8 and stormwater permit requirements, and so to the
9 extent the AMPs have any applicability its purpose is
10 to exempt them from other permitting requirements;
11 and so my understanding is here they are getting a
12 permit so there is no reason for the AMPs to apply in
13 this case.

14 Should a utility, and this is where I'm
15 speculating, should a utility in the future attempt
16 to use the AMPs to avoid stormwater or other
17 permitting requirements I think the question would be
18 is that appropriate, and I don't know off the top of
19 my head the provision you read about being applicable
20 to utilities invites that possibility, but my
21 understanding is that's not the case here either.
22 Here there has been a stormwater permit issued. No
23 stream alteration permit has been required and so
24 that's my understanding of the interaction of the AMP
25 rules as they relate to stormwater permitting and

1 conformance with the Section 248(B)(5) criteria.

2 MR. MARREN: Thank you. Just for
3 purposes of the transcript today the section of the
4 AMP rule that I was referring to is section 4 and it
5 states that the rule applies to quote all logging
6 operations on public and private land in Vermont
7 regardless of the purpose of the logging. For
8 example, logging may be conducted for forest
9 management purposes or logging may be conducted for
10 purpose of clearing land or some other type of land
11 use such as commercial, residential, or utility
12 development. I don't have any other questions, Mr.
13 Chair.

14 CHAIRMAN McNAMARA: Thank you. Thank
15 you, Mr. Smart. Ms. Dingleline, you still have some
16 time for rebuttal.

17 MS. DINGLELINE: Thank you. How much
18 time is left? About eight minutes?

19 CHAIRMAN McNAMARA: Yes.

20 MS. DINGLELINE: I will try to be brief
21 because I don't know if Mr. Binder has some
22 additional information he would like to discuss, but
23 I'm happy to finally hear Ms. Hayden agree with the
24 hearing officer on the decision on orderly
25 development with regard to the fact that this strict

1 steep slopes prohibition is in fact a land
2 conservation measure, but -- and the fact is that the
3 determination is that this project violates the town
4 plan because the facility is proposed for lands that
5 exceed 25 percent grade. That's the most important
6 finding that the hearing officer made and I'm glad to
7 hear that the petitioner agrees with that finding.

8 Now going back to Apple Hill, Apple Hill
9 is getting confused in terms of what evidence was
10 looked at and all that because Apple Hill, and
11 Commissioner Cheney will certainly recall this, was
12 aesthetics as well as orderly development, and so the
13 visibility from the visitor's center and from other
14 locations are -- were very important because of the
15 impact of the aesthetics of the area. They also
16 pertain to orderly development as well, but there is
17 in fact a violation of the town plan.

18 So Ms. Hayden just spoke out of both
19 sides of her mouth. One minute she says she agrees
20 with the hearing officer, but then she says but it's
21 not a violation of the town plan. Of course it's a
22 violation of the town plan. That's the whole point,
23 and the question is whether that violation of the
24 town plan has regional impact and then further
25 whether or not it's in the public benefit, the

1 benefit of the State of Vermont to allow this even
2 though it violates the town plan.

3 Now what I want to talk about just for a
4 minute are the facts of this to remind you. This
5 case started by the developer going to the planning
6 commission in Randolph and getting them to agree sure
7 we'll give you this as a preferred site. Nobody even
8 looked at the town plan. They admitted that at the
9 next meeting when Mr. Binder and Ms. Allen went and
10 questioned them about why this had happened. All
11 along the developer pretended that the steep slopes
12 prohibition was not in the town plan, did not
13 represent that and said don't worry we comply with
14 the town plan. When Mr. -- Dr. Allen -- when Ms.
15 Allen and Dr. Binder went to the meeting and drew it
16 to the planning commission's attention that there is
17 this strict prohibition, the answer was oh blank we
18 forgot to look at the town plan. We had no idea.

19 The following day an illegal decision
20 was made by e-mail to not rescind the preferred sites
21 letter. It was done illegally, and as I mentioned
22 before there were agendas present on both boards,
23 pecuniary interests in the CPG of this case being
24 issued. So in terms of the recommendations of these
25 people they are garbage. They need to be thrown in

1 the garbage. The only thing -- and that is the whole
2 point of the statute. The statute says you have to
3 give due consideration to the law. The town plan
4 that was created -- and it wasn't created by that
5 planning commission I'll tell you that. They asked
6 me to come and help write language for it along with
7 the regional planners. So that prohibition went in.
8 These people didn't even know it was there, and then
9 the tortured analyses of well this facility really
10 isn't on steep slopes, okay, because we're putting
11 the panels here, there, wherever, and in fact as Dr.
12 Binder explained even those are on steep slopes. So
13 that is very concerning and there was no credibility
14 with regard to any of the recommendations of the town
15 officials. Look at the town language -- the town
16 plan language. That is the law. That's what needs
17 to be given due consideration and ignore the
18 recommendations because they are not credible.

19 The other thing is they were threatened
20 with litigation. That is in the record. They were
21 afraid to pull it. They wanted to get legal advice
22 as to whether they would get sued and they made their
23 decision before they even got that legal advice.

24 So again this is -- the cookie cutter to
25 follow here is Apple Hill. The analysis of it is

1 perfect and the analogy to this case because there's
2 a regional impact when a town says don't build on
3 very steep slopes and here's the exact gradation, the
4 elevation, the contour, it's too steep when it's 25
5 percent or more, what part of that doesn't this
6 developer understand, and despite all of their
7 tortured analyses we ask you to give life and effect
8 to the Randolph Town Plan. It went through a very
9 long involved process to get to where it is
10 regardless of substantial deference or due
11 consideration. It's the law and if you choose to
12 violate it, then please find a reason because there
13 are all sorts of sites, as the town plan itself says,
14 there are places that are not too steep to meet the
15 goal of renewable energy facility development in
16 Randolph nearly 45 times over. Just like in Apple
17 Hill they said why here when it can be all sorts of
18 other places. Thank you very much for your time. I
19 don't know if Mr. Binder has anything additional.

20 CHAIRMAN McNAMARA: Thank you. Before
21 we turn to Dr. Binder, Ms. Hayden, you raised your
22 hand earlier. I don't know if you're raising
23 objection or --

24 MS. HAYDEN: Well I am and I was
25 instructed that we were not expected to interrupt and

1 so I didn't want to interrupt Attorney Dingledine,
2 but I do object to the characterizations. I think
3 they are inappropriate. We went through a lot of
4 this as far as what was presented to the town and the
5 preferred site -- the preferred sites briefing and
6 then oral argument already. All of the town
7 meetings, the minutes, and many of the videos the
8 intervenors have put into the record they were
9 briefed extensively. So the actual what was said and
10 what wasn't said is in the record. We've briefed it.
11 I think that personal attacks are inappropriate and
12 that's not -- you know we're here to discuss the
13 facts and the law, but that whole phase of this case
14 has been decided and determined, and reverting back
15 to that is not appropriate even in the context of
16 this orderly discussion -- orderly development
17 discussion. So I do object to the characterizations
18 because they are not based in the record.

19 CHAIRMAN McNAMARA: Ms. Dingledine.

20 MS. DINGLEDINE: I'm not sure what she's
21 talking about. All of this is in the record so if
22 she could specify what it is she's objecting to
23 instead of basically doing a surrebuttal, I would be
24 happy to respond.

25 What I am talking about is credibility

1 and you folks are the fact finders and the
2 determiners of the law here, how it's applied, and
3 people have pecuniary interests. There is a member
4 of each board that had a stake in the outcome of
5 this. At times they claimed they recused themselves
6 yet still participated. It is all in the record.
7 The fact that a decision, an illegal decision, was
8 made by e-mail and there was a vote taken by e-mail
9 nobody was told until the next month when Mr. Binder
10 and Ms. Allen showed up to the planning commission
11 meeting they are like why isn't this on the agenda,
12 what happened with your advice from the -- from
13 Tarrant's office about whether or not you're going to
14 get sued, and we were told oh we're not doing it, and
15 then eventually through a Freedom of Information Act
16 request we were able to get the emails that showed
17 that they were voting in secret by e-mail.

18 So that. The fact there were pecuniary
19 interests clearly bears on the credibility of the
20 people providing a recommendation who again are not
21 lawyers, are not engineers, did not even know the
22 strict slope prohibition existed in the town plan
23 when they gave the preferred sites letter approval.
24 That is totally appropriate to address, to argue, to
25 bring up to this Commission so that you can decide

1 when you have to give due consideration we are
2 suggesting you give due consideration to the law as
3 it's written and pay no attention to the
4 recommendations of the planning commission or the
5 selectboard because they are not credible, they are
6 agenda based, and people have pecuniary interests in
7 the outcome. So that is why the law says to follow
8 the language of the town plan and give it due
9 consideration or substantial deference. So we
10 suggest you disregard, if Ms. Hayden likes that
11 better, we think it is not worthy of being considered
12 as evidence in this matter.

13 CHAIRMAN McNAMARA: Thank you. So, Ms.
14 Dingledine, I believe all that information is in the
15 record and the Commission can decide for itself what
16 the appropriate characterization of that information
17 -- yeah we can decide on our own how to characterize
18 that.

19 MS. DINGLEDINE: And there are actual
20 transcripts of the meetings and all of that so I'm
21 trying to summarize it and get to the point because
22 we think it's terrible that this has been put forth
23 to you because we don't think it's honest information
24 that you should be considering, and if that's an ad
25 hominem attack oh well I don't know how else to

1 characterize it because what you have been told and
2 the process it went through was illegal and it was
3 for an agenda based purpose.

4 CHAIRMAN McNAMARA: And again
5 information is in the record. We can interpret that
6 how we would -- how we think appropriate. Dr.
7 Binder, was there anything -- any response? Ms.
8 Dingledine took up a large part of the 10 minutes.
9 We'll give you two or three minutes.

10 MR. BINDER: Without the ability to show
11 illustrations and use my cursor to point to things I
12 have nothing further to ask, although I do appreciate
13 Mr. Marren pointing out something that I would have
14 about the acceptable management processes --
15 practices which said that they apply for any logging
16 or any purpose including a change of use from
17 forestry to some other development. So I certainly
18 feel those are mandatory, and as I pointed out in our
19 comments on the second PFD, if they follow the AMPs
20 there's no reason to cut those woods at all because
21 they have to leave the canopy up to shade the panels
22 if they follow the AMPs. That's all I have to say
23 now. Thank you.

24 CHAIRMAN McNAMARA: Thank you and I will
25 just note that we do have all -- I do appreciate you

1 flagging the name and number for the exhibit. It
2 made it a lot easier for us to follow along here as
3 well. So despite the fact that the share function
4 did not work it still -- we're still able to follow
5 along with our own copies since those were already
6 previously admitted.

7 All right. I think that we are done for
8 today. I appreciate everyone's time and obviously
9 you'll be hearing from us in the form of a final
10 order at some point. Thank you very much.

11 (Adjourned at 12 p.m.)
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C E R T I F I C A T E

I, JoAnn Q. Carson, do hereby certify that
I recorded by stenographic means the Oral Argument re:
Case Number 21-2939-NMP via Go To Meeting on June 18,
2024, beginning at 11 a.m.

I further certify that the foregoing
testimony was taken by me stenographically and thereafter
reduced to typewriting, and the foregoing 43 pages are a
transcript of the stenograph notes taken by me of the
evidence and the proceedings, to the best of my ability.

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

Dated at Burlington, Vermont, this 19th day
of June, 2024.

JoAnn Q. Carson

Court Reporter

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