STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-2939-NMP

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

Order entered: 08/12/2024

FINAL ORDER GRANTING NET-METERING CERTIFICATE OF PUBLIC GOOD

I. BACKGROUND AND INTRODUCTION

This case involves an application filed by Randolph Davis Solar LLC ("Applicant") with the Vermont Public Utility Commission ("Commission") for a certificate of public good ("CPG"), pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW solar group net-metering system at 0 Davis Road in Randolph, Vermont (the proposed "Facility"). This case is before the Commission after a second proposal for decision circulated to the parties following a remand to the hearing officer. The issue prolonging the Commission's review of this case has been whether the Facility will be located on a "preferred site" as required by Commission Rule 5.103.

In this Order, the Commission adopts the second proposal for decision, subject to modifications described in the Commission discussion.

II. PROCEDURAL HISTORY POST-PROPOSAL FOR DECISION

On May 3, 2024, the second proposal for decision was circulated for comment.[1]

[1] The full procedural history leading up to the proposal for decision, including the evidentiary hearings held before the hearing officer in this case, can be found in the procedural history section of the second proposal for decision. As of the date of today's order there is one pending motion in this case. On July 7, 2022, the Landowners filed a motion to withdraw their July 6, 2022, discovery requests on the Vermont Agency of Natural Resources and the Vermont Agency of Agriculture, Food & Markets. The motion is granted.

On May 17, 2024, adjoining landowners Joan Allen and Michael Binder (the "Landowners") filed comments on the second proposal for decision, a request for oral argument, and a request for another site visit with the Commissioners. The Landowners oppose the Facility and urge the Commission to deny the Applicant's request for a CPG. Specifically, the Landowners challenge the hearing officer's findings and conclusions regarding the following criteria of Section 248: (1) the orderly development of the region, (2) soil erosion, and (3) primary agricultural soils. The Landowners also contend that the Commission should find that the Facility is not in the general good of the State because the Facility would be inconsistent with the Commission's recently adopted rule on forest clearing for net-metering projects. The Landowners further argue that the Commission should rule that the Applicant has not complied with the requirements of the remand to the hearing officer, or, alternatively, direct the Applicant to provide to the Town of Randolph an amended site plan with a LiDAR data layer.

On May 21, 2024, the Applicant filed a response to the Landowners' comments on the second proposal for decision and opposing the request for a site visit.

On May 22, 2024, the Landowners filed a motion to strike the Applicant's response.

On June 10, 2024, the Commission issued an order denying the request for an additional site visit and granting the request for an oral argument. We also struck the portion of the Applicant's May 21 filing that responded to the Landowners' comments on the second proposal for decision.[2]

On June 18, 2024, the Commissioners held an oral argument. At the oral argument, the Landowners were given an opportunity to present factual or legal challenges to the hearing officer's recommendations in the second proposal for decision. The Applicant, the Vermont Department of Public Service ("Department"), and the Vermont Agency of Natural Resources ("ANR") were given an opportunity to present their positions in support of the second proposal for decision.

III. Commission Discussion

In the second proposal for decision, the hearing officer recommended that the Commission conclude that the Facility complies with the requirements of Commission Rule

[2] Case No. 21-2939-NMP, Order of 6/10/24 at 1 n.1.

5.100, the application does not raise a significant issue with respect to the applicable criteria of 30 V.S.A. §§ 248 and 8010, and the Facility will promote the general good of the State of Vermont. For the reasons discussed below, we agree with the hearing officer's legal reasoning in support of granting a CPG. However, after reviewing the written comments and positions advanced at oral argument, we determine that the recommended condition for compliance with the Acceptable Management Practices for Logging Professionals Rule ("AMP Rule") is unnecessary and we decline to include that condition in the CPG.

This discussion addresses the arguments filed in response to the second proposal for decision and at oral argument. The hearing officer's second proposal for decision is appended after today's Commission decision.

Orderly Development

The Landowners contend that the Commission should find the Facility will unduly interfere with the orderly development of the region in violation of Section 248(b)(1). Section 248(b)(1) of Title 30 of the Vermont Statutes Annotated requires that before the Commission issues a CPG, it must find that the construction of a generation facility will not unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. In this case, the Town of Randolph Town Plan ("Town Plan") and Two Rivers-Ottauquechee Regional Commission ("TRORC") Regional Plan ("Regional Plan") are the relevant documents for consideration of the orderly development criterion.

The Landowners argue that the hearing officer's conclusion that the Facility will not have a regional impact is based on a fundamental misunderstanding of the interplay between municipal and regional plans and that the Town of Randolph's land conservation measures must be given due consideration.[3] The Landowners assert that the Facility will have a regional impact because the Facility is inconsistent with the Regional Plan's guidance that "[s]ites with raw solar potential are flat to gently sloping and face east, south, or west" and "only lands with good

[3] Landowners' Comments on 2d PFD at 5.

exposure and gentle slopes make sense for solar."[4] The Landowners further argue that under the criteria enumerated in the Regional Plan, the Facility will have a substantial regional impact because the Facility will cause unreasonable soil erosion in a surface water source protection area. Finally, the Landowners assert that the proposal for decision does not consider Commission precedent holding that if there are viable alternative locations available in the town, region, and state, then the benefits of a proposed facility do not outweigh the facility's interference with the orderly development of the region that is caused by running afoul of a land conservation measure contained in a municipal plan.[5]

Having considered these arguments, we agree with the hearing officer that the Facility will not have a regional impact. The hearing officer set out the correct standard for evaluating a regional impact; appropriately recognized that even small facilities can have a regional impact based on their character and nature; and gave due consideration to the Town of Randolph's land conservation measure prohibiting energy facility development on slopes greater than 25% -- but, finally, properly concluded that the Facility's impacts were localized and adequately controlled by ANR's regulations. Therefore, we do not agree with the Landowners' argument that the hearing officer failed to give due consideration to the land conservation measure contained in the Town Plan.

The Landowners conflate the Regional Plan's definition of "substantial regional impact" with the Commission's determination of whether a facility will interfere with the orderly development of the region (*i.e.*, have a regional impact). The Regional Plan defines any electric generation and transmission facilities requiring Commission approval as having a substantial regional impact.[6] However, the Regional Plan also explains that "the 'substantial regional impact' threshold does not mean that a project is not desirable; it simply acknowledges that a proposed development may have an effect that will be felt in a wider area."[7] Therefore, even if a facility falls within the Regional Plan's definition of substantial regional impact, the Commission

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[4] Landowners' Comments on 2d PFD at 6.
[5] Landowners' Comments on 2d PFD at 3 (citing Docket 8454, Order of 5/16/22 at 13).
[6] Exh. MB-3 at 294.
[7] Exh. MB-3 at 292.

must not automatically conclude that the facility is inconsistent with the orderly development of the region.[8]

Turning to the Landowners' argument that the hearing officer misunderstood the interplay between municipal and regional plans, the Landowners state that "[a] determination of energy compliance does not cause the Town's land conservation measures to be 'incorporated' into the Regional Plan."[9] This statement mischaracterizes the proposal for decision and ignores the text of the Regional Plan. In the proposal for decision, the hearing officer correctly observed that the Regional Plan identifies locations "considered regionally unsuitable for renewable energy generation facilities."[10] The hearing officer correctly found that one example of a regionally unsuitable location is "any unsuitable areas as identified in a duly adopted municipal plan that has received a determination of energy compliance from the Department of Public Service or TRORC."[11] The hearing officer concluded that the Regional Plan did not prohibit the development of renewable energy facilities on slopes greater than 25% because the Randolph Town Plan has not received a determination of energy compliance and, therefore, is not able to identify regionally unsuitable locations pursuant to the language of the Regional Plan. Thus, the hearing officer was not making a generalized statement about the interplay between municipal and regional plans. The hearing officer accurately described the applicable portions of the Regional Plan and correctly concluded that the Regional Plan does not prohibit the development of renewable energy facilities on slopes greater than 25%.

The Landowners argue that the Facility's location within a surface water source protection area is evidence of a regional impact. However, the Regional Plan does not prohibit energy facility development within source protection areas and states only that "development within existing or planned Source Protection Areas that poses a reasonable threat of contamination to public water supplies is not compatible with this Plan."[12] As discussed further below, we agree with the hearing officer and ANR that the requirements of ANR's stormwater permitting regulations are sufficient to protect surface waters. Therefore, we do not accept the

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[8] Additionally, TRORC signed a letter designating the Facility location as a preferred site for solar development. Exh. RDS-MS-5.

[9] Landowners' Comments on 2d PFD at 5.

[10] Proposal for Decision at 18, below. Exh. MB-3 at 260.

[11] Exh. MB-3 at 260.

[12] Exh. MB-3 at 201 and 258.

Landowners' argument that the Facility will unduly interfere with the orderly development of the region because it is within a surface water source protection area.

The Landowners misconstrue reference to alternative locations from another Commission siting case. The Commission referenced alternative locations in that case because the petitioner had advanced an argument that the Commission should approve the proposed solar facility because solar development carries societal benefits, regardless of whether the proposed facility violates a Section 248 criterion. The Commission explained that those societal benefits can be achieved by any solar facility sited in the state, so approval of the particular solar facility proposed by the petitioner in that case was not needed to achieve the offered societal benefits. This analysis was part of the Commission's discussion of the aesthetic impact of the proposed facility in that case. The Commission was not inserting an alternative-sites consideration into the standard aesthetic analysis and was certainly not doing so in the context of orderly development.

For these reasons and those advanced in the second proposal for decision, we conclude that the Facility will not unduly interfere with the orderly development of the region.

Soil Erosion

The Landowners urge the Commission to find that the Facility does not satisfy the Section 248(b)(5) criterion regarding soil erosion. Section 248(b)(5) requires that before the Commission grants a CPG, it must find that a proposed electric generation facility will not have an undue adverse effect on "air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8)." Relevant to this discussion, the Commission must consider "the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable Health and Environmental Conservation Department regulations." More specifically, the Commission must consider whether the energy facility will "cause unreasonable soil erosion or [a] reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result."[13]

[13] 10 V.S.A. § 6086(a)(4).

The Landowners argue that the Facility "will cause unreasonable and catastrophic erosion" and that ANR's permitting requirements are not adequate because the access road "will wash out."[14] According to the Landowners, sediments will be carried through steep headwater streams into the White River corridor, which is 450 feet from the Facility site, and then into the White River. The Landowners argue that the site plan is inaccurate because the cross section of the proposed road shows the road at "existing grade" while the road actually will be "at the bottom of a 6-foot-deep trench." Therefore, the Landowners argue that the Applicant has not carried its burden of persuasion because the site plan is too unreliable to use in making findings on soil erosion.

In turn, the Applicant has identified an "extensive variety of [Erosion Prevention and Sediment Control ("EPSC")] measure options available to be employed throughout the [Facility] area during construction to prevent erosion and keep sediment from leaving the site and reaching receiving waters."[15] These measures include utilizing perimeter controls such as "silt fence" and "Silt Soxx," applying mulching materials to temporarily stabilize the ground until vegetation is established, and incorporating a gravel staging area to prevent construction vehicles from tracking sediment onto nearby roads. The Applicant's testimony states that all disturbed areas will be temporarily stabilized with mulch within 14 days of initial ground disturbance and that these areas will be "aggressively seeded" to "ensure a permanent vegetative cover."[16] The Applicant's witness goes on to explain that all disturbed areas "must be completely stabilized with vegetation, stone, mulch, stump grindings, or gravel prior to completion of the [Facility]." The Applicant's witness states that these practices conform with Vermont's regulatory standards for controlling erosion.

The Landowners argue that the Facility's "access road will wash out catastrophically" because "[t]here is no ditch on either side of the roadbed, and there are no culverts or other drainage structures on this road."[17] The Landowners' witness states that the access road will "require at least some ditching and/or water bars and/or culverts."[18] The Landowners allege that

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[14] Landowners' Comments on 2d PFD at 7, 8.
[15] Homsted reb. pf. at 2.
[16] Homsted reb. pf. at 5.
[17] Landowners' Comments on 2nd PFD at 8-9.
[18] Binder pf. at 17.

ANR's failure "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."[19]

ANR conducted a risk evaluation of the Facility site, considered that there are slopes greater than 25% at the site, and determined that the Applicant's compliance with General Permit 3-9020 is sufficient for stormwater control.[20] ANR's permit requires compliance with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control ("EPSC") and the Low-Risk Site Handbook for Erosion Prevention and Sediment Control ("Low-Risk Handbook"). ANR explains that the Low-Risk Handbook addresses construction on slopes greater than 25% and that "33% slopes are classified as 'moderate' and 50-100% slopes as 'very steep.'"[21] The Low-Risk Handbook requires the implementation of a variety of EPSC measures to control the risks associated with construction-related and permanent stormwater runoff, including development on moderate slopes such as at the Facility site. These measures include stabilization of graded surfaces, the use of upland runoff diversion measures in disturbed areas with an average slope of 20% or more, the use of perimeter controls, and the use of specific slope protection practices on slopes greater than 33%.[22] The Applicant has testified that it will comply with the Low-Risk Handbook.[23]

We have considered the Landowners' concerns related to the potential for soil erosion at the Facility site. ANR's regulations specifically contemplate development on moderate slopes in the range of the slopes on the land at the Facility site, and the Applicant has agreed to comply with the direction provided in the Low-Risk Handbook.

In its brief, ANR states that "Mr. Binder has not identified a single instance in Vermont where a solar facility constructed in accordance with submitted site plans with EPSC measures required by an applicable Agency stormwater permit has experienced undue soil erosion, much less an ill-defined 'environmental catastrophe' that his testimony warns of."[24] The Landowners

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[19] Landowners' Comments on 2nd PFD at 9.
[20] ANR Brief at 5.
[21] ANR Brief at 6.
[22] ANR Brief at 5-6.
[23] Staskus pf. at 19.
[24] ANR Brief at 6.

have not presented any evidence that would lead us to conclude that the use of EPSC measures is insufficient to prevent environmental damage due to soil erosion. We are satisfied that the Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site.

Primary Agricultural Soils

The Commission is required to give due consideration to impacts on primary agricultural soils when determining whether a facility will have an undue adverse effect on the natural environment and the use of natural resources.[25] The Landowners agree that the conditions proposed by the Vermont Agency of Agriculture, Food & Markets ("AAFM") are satisfactory to protect agricultural soils. However, the Landowners argue that the Applicant will not be able to comply with AAFM's conditions because the soil stockpile will be located on slopes greater than 15%.[26]

This argument is not convincing because the Landowners have not demonstrated that the proposed stockpile cannot be located within the approved limits of disturbance on a slope that meets the AAFM conditions. AAFM, the agency charged with protecting primary agricultural soils, offered conditions that it found would protect those soils. Based on AAFM's review and the evidence in this case, we conclude that the Facility will not have an undue adverse impact on primary agriculture soils. Should the Applicant need to relocate the soils stockpile on the Facility site to comply with AAFM's conditions, the Commission's rules permit applicants to make non-substantial modifications to their plans after approval.[27] The Applicant will need to seek additional approval from the Commission if compliance with AAFM's conditions require substantial changes to the Facility's plans.[28] Accordingly, the Commission agrees with the hearing officer's determination that the Applicant should be granted a CPG subject to compliance with AAFM's conditions related to primary agricultural soils.

[25] 30 V.S.A. § 248(b)(5).
[26] Landowners' Comments on 2d PFD at 10.
[27] Commission Rule 5.109.
[28] *Id*.

AMP Rule

The second proposal for decision recommends a condition requiring that the Applicant conduct any logging activity at the site in accordance with the AMP Rule to protect streams, pursuant to 30 V.S.A. § 248(b)(5). In determining whether a proposed facility will have an undue adverse effect on the natural environment, the Commission must give due consideration to whether the facility "will maintain the natural condition of all streams and will not endanger the health, safety, or welfare of the public or adjoining landowners."[29]

The Landowners assert that "the forest in the buffer zone [required by the AMP Rule] will continue to shade the array."[30] Therefore, the Landowners contend that "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."[31]

At the oral argument, ANR clarified the relationship between its AMP Rule and the stormwater rule.[32] The AMP Rule provides compliance standards for logging jobs that are exempt from Vermont's stormwater and stream alteration permit requirements.[33] In this case, the Applicant has received authorization to discharge under ANR's construction general permit for low-risk sites. Therefore, the Facility is not exempt from Vermont's stormwater and stream alteration permit requirements. The Landowners have not demonstrated that this case presents a situation where the Commission should require compliance with the AMP Rule in addition to ANR's permit requirements, particularly when ANR does not contend that both are necessary. We decline to adopt the hearing officer's proposed condition requiring the Applicant to comply with the AMP Rule because the Applicant's compliance with ANR's stormwater permitting requirements is sufficient to protect the environment. Because we decline to impose the requirements of the AMP Rule, the Landowners' contention about the AMP-Rule buffer zone does not pertain.

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[29] 30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)(E).
[30] Landowners' Comments on 2d PFD at 18.
[31] Landowners' Comments on 2d PFD at 18.
[32] Tr. 6/18/24 at 33 (Smart).
[33] AMP Rule Section 1.

General Good of the State and Forest Clearing

The Landowners also contend that the Commission should conclude that the Facility is not in the general good of the State because the Facility would be inconsistent with the Commission's recently adopted rule on forest clearing for net-metering facilities.[34] The Commission has indeed determined, through the rulemaking process, that a site that requires the clearing of more than three acres of forest does not qualify as a preferred site.[35] The rule for preferred sites reflects the Commission's judgment concerning the appropriate balance of benefits and burdens of net-metering systems.[36] However, this definition of "preferred site" applies to applications for facilities filed on or after March 1, 2024, when the new Rule 5.100 went into effect.

We must fairly administer our application process for net-metering facilities. Our review of an application is governed by the rules in effect at the time a complete application is filed. The restriction on forest clearing was not in effect at the time the application was filed in this case. Applying the new rule in this case would be inconsistent with Vermont's vested rights doctrine, which holds that an applicant is entitled to have its application reviewed under the rules in effect when a proper application is filed.[37] Therefore, the version of Rule 5.100 that was in effect on August 11, 2022, must be applied.

Before the Commission adopted the definition of "preferred site" that excludes proposed facilities that clear more than three acres of forest, the Commission assessed tree clearing in the context of its Section 248(b)(5) review regarding natural resources. The Commission considers ANR's proposed conditions to protect the natural environment when conducting this review. In this case, we determine that the recommended findings, conclusions, and conditions proposed by the hearing officer are sufficient to protect the natural environment, pursuant to Section 248(b)(5), under the applicable standards in place for review of net-metering facilities at the time the application for the Facility was filed.

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[34] Commission Rule 5.103, effective March 1, 2024, defines "Significant Forest Clearing" as clearing more than three acres of forest.

[35] Commission Rule 5.103, effective March 1, 2024, describes the types of sites that qualify as a "Preferred Site." A preferred site cannot require Significant Forest Clearing.

[36] 30 V.S.A. 8010(c)(1)(A)-(G).

[37] *In re Times & Seasons, LLC*, 2011 VT 76, ¶¶ 13-14,

Compliance with the October 11, 2023, Remand Order

Last, the Landowners argue that the Commission should reject the hearing officer's determination that the Applicant satisfied the requirements of the Remand Order. The Town of Randolph's initial preferred-site letter was conditioned on the Applicant moving the proposed panels from areas where slopes exceed 25% and providing supporting survey data to the Town. In the Remand Order, the Commission gave the Applicant 90 days to file evidence demonstrating that the Town's conditions had been met. The Applicant filed the Second Letter of Support from the Town stating that "the site plan submitted to the Commission (Exh. RDS-MS-2A) shows that the condition of the Town's December 2021 letter (Exh. RDS-MS-14) has been satisfied."

The Landowners assert that the Town's preferred-site letter filed in response to the Remand Order ("Second Letter of Support") "is based upon the [Applicant's] misrepresentation of the [Facility] 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."[38] The Landowners assert that their claims of misrepresentation are supported by exhibits attached to their comments, which they request be admitted to the evidentiary record. Alternatively, the Landowners request that the Commission order the Applicant to provide a site plan to the Town containing a slope layer using LiDAR data.

The Landowners continue to question the Applicant's methodology for measuring slope. However, in the Remand Order, we did not consider the method of measuring the slope to be an issue for the Commission to resolve. It is the Town that must determine whether the conditions in its initial preferred-site letter have been met. Here, the Town has stated in the Second Letter of Support that the conditions have been met. Therefore, we accept the Town's designation of the site as a preferred one. Accordingly, it is not necessary for the Applicant to provide another site plan with LiDAR data because the Town was satisfied with the survey data presented by the Applicant.

With respect to the Landowners' allegation that the Applicant misrepresented the Facility and the Commission's role in enforcing the Town's slope conditions, we find these arguments to

[38] Landowners' Comments on 2d PFD at 13.

be unpersuasive. The Landowners' allegations are based on inadmissible evidence in the form of emails between the Applicant, Town officials, and Mr. Binder.[39] Even if the Landowners' exhibits were admissible, our understanding is that the Landowners made their views about slope known to the Town and the Town did not rescind its letter of support. The Landowners' disagreement with the Town's decision does not mean the decision is attributable to alleged misconduct by the Applicant.

IV. Conclusion

In conclusion, we adopt the hearing officer's proposal for decision except that we decline to adopt the hearing officer's proposed condition requiring the Applicant to comply with ANR's AMP Rule. Accordingly, the Applicant's request for a CPG is granted, subject to the conditions stated in the CPG issued in conjunction with this Order.

V. Order

It is Hereby Ordered, Adjudged, and Decreed by the Public Utility Commission ("Commission") of the State of Vermont that:

1. The findings, conclusions, and recommendations of the hearing officer are adopted, except as modified above. All other findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.

2. In accordance with the evidence and plans submitted in this proceeding, the 500 kW AC solar group net-metering system proposed for construction and operation by Randolph Davis Solar LLC ("CPG Holder") at 0 Davis Road in Randolph, Vermont, will promote the general good of the State of Vermont pursuant to 30 V.S.A. §§ 248 and 8010, and a certificate of public good ("CPG") to that effect will be issued in this matter.

3. As a condition of this Order, the CPG Holder must comply with all terms and conditions set out in the CPG issued in conjunction with this Order.

[39] Specifically, the Landowners' request to admit Exhibits JA-MB-9 through 11 is denied because the Landowners have not provided sufficient foundation to authenticate the emails, the emails are hearsay, and the Applicant has not had an opportunity to review these documents.

Dated at Montpelier, Vermont, this 12th day of August, 2024.

Edward McNamara	PUBLIC UTILITY
Margaret Cheney	COMMISSION
J. Riley Allen	OF VERMONT

OFFICE OF THE CLERK

Filed: August 12, 2024

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.

PROPOSAL FOR DECISION

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I. INTRODUCTION

This case involves an application filed by Randolph Davis Solar LLC ("Applicant") with the Commission for a certificate of public good ("CPG"), pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW solar group net-metering system at 0 Davis Road in Randolph, Vermont (the proposed "Facility"). In a previous proposal for decision, I recommended that the Commission deny the application because the Facility was not located on a preferred site and thus did not qualify for the net-metering program.

On October 11, 2023, the Commission found that there was insufficient evidence to determine whether the Facility is on a "preferred site" under Rule 5.103.[40] The Commission gave the Applicant additional time to file evidence addressing this issue. The Commission remanded this case to me to "to evaluate any evidence supplied by the Applicant and to render proposed findings regarding the Section 248 criteria, if appropriate."[41] Having reviewed the supplemental evidence provided by the Applicant, I find that the Facility is on a preferred site identified in a joint letter of support from the municipal legislative body and municipal and regional planning commissions because the Town of Randolph has indicated that it is satisfied that the conditions necessary for its support have been fulfilled.

Based on the below findings and subject to conditions, I recommend that the Commission conclude that the Facility complies with the requirements of Commission Rule 5.100, the application does not raise a significant issue with respect to the applicable criteria of 30 V.S.A. §§ 248 and 8010, and the Facility will promote the general good of the State of Vermont.

II. PROCEDURAL HISTORY

On August 11, 2021, the Applicant filed an application for the Facility with the Commission.

On August 18, 2021, the Commission granted a waiver of Commission Rule 5.107(C)(10)(a) determining that the Application was administratively complete as of August 11, 2021. The Commission also stayed the 30-day period for public comment, notices of

[40] Order of 10/11/2023 at 31.
[41] *Id*.

intervention, motions to intervene, and requests for hearing until the information required by Commission Rule 5.107(C)(10)(a) was filed.

On September 22, 2021, the Applicant filed a completed Feasibility Study for the Facility.

On September 23, 2021, the Commission lifted the stay and set a deadline of October 25, 2021, for filing comments or requesting a hearing in this matter.

On October 20, 2021, the Vermont Agency of Natural Resources ("ANR") filed comments on the Facility. ANR recommended that any CPG for the Facility include proposed conditions to address wetlands, deer wintering habitat, and water source protection. ANR also requested an additional CPG condition requiring that the Applicant maintain a 50-foot riparian buffer around the stream located south of the Facility.

On October 21, 2021, the Vermont Division for Historic Preservation ("DHP") filed comments stating that the Facility would have no effect on historic sites.

On October 25, 2021, the Vermont Agency of Agriculture, Food & Markets ("AAFM") filed comments proposing certain conditions to mitigate impacts on primary agricultural soils. AAFM concluded that, with these conditions, the Facility would not have an undue adverse effect on primary agricultural soils.

Also on October 25, 2021, the Vermont Department of Public Service ("Department") filed comments on the Facility. The Department supported the comments made by the other state agencies and requested a CPG condition requiring the Applicant to notify the Commission, before commissioning the plant, of the actual method used to protect public safety with respect to securing the Facility's electrical equipment.

Also on October 25, 2021, adjoining landowners Joan Allen and Michael Binder (the "Landowners") filed a motion to intervene. The Landowners raised concerns related to the Facility's conformance with the Randolph Town Plan and natural resources.

On November 8, 2021, the Department filed comments recommending that the Commission treat the Landowners' motion to intervene as a notice of intervention under Commission Rule 5.117(B).

On November 30, 2021, I issued a procedural order requesting the Landowners to clarify whether they were requesting a hearing.

On December 14, 2021, the Landowners filed a request for evidentiary hearing and moved to stay the proceeding, stating that they had requested the Randolph Planning Commission to revoke its preferred-site designation because portions of the Facility would be located on slopes greater than 25%.

During the period from December 2021 through November 2022, the parties filed testimony and exhibits, and I ruled on several procedural and evidentiary motions in preparation for the requested evidentiary hearing. A detailed description of this procedural history can be found in the proposal for decision issued on June 5, 2023.[42]

In anticipation of the evidentiary hearing, on November 7, 2022, the Applicant filed a list of all parties' prefiled testimony and exhibits, as well as the comments from the Department, ANR, and AAFM. This list was corrected on November 16, 2022. There were no objections filed as to the accuracy of this list, and this document was admitted as Exhibit Commission-1.[43]

On November 14, 2022, the Landowners filed a motion to withdraw their request for an evidentiary hearing. The Landowners stated that the evidence in the record was sufficient and that further cross-examination of the Applicant's witnesses would not materially add to the evidentiary record.

Between November 2022 and February 2023, the parties filed legal briefs and additional motions. Some of these motions were addressed in a procedural order issued on January 9, 2023. Other issues were deferred until after briefing was completed.

On June 5, 2023, I issued a proposal for decision recommending that the application be denied pursuant to Commission Rule 5.104 because the Facility is greater than 150 kW in capacity and is not proposed on a preferred site.[44]

On June 20, 2023, the Applicant, the Landowners, and the Department filed comments on the proposal for decision. The Landowners requested an opportunity to present oral argument before the Commission.

On August 23, 2023, the Commission held an oral argument.

[42] Order of 6/5/23 at 2-6.

[43] *Id.* at 6.

[44] In the proposal for decision issued on June 5, 2023, I denied the Applicant's motion to strike filed on February 6, 2023.

On October 11, 2023, the Commission issued an order (the "Remand Order") finding that the preferred-site letter did not conform to the requirements of Commission Rule 5.103.[45] In a letter dated December 14, 2021, the Town of Randolph conditioned its support of the Facility on the Applicant moving the panels from areas where slopes exceed 25% and providing supporting survey data to the Town. The Commission found that there was insufficient information in the record to demonstrate that the Town's conditions had been met, and gave the Applicant 90 days to file evidence demonstrating that the Town of Randolph Planning Commission and Selectboard were satisfied that they had been met. The Commission remanded this case to me to evaluate any evidence supplied by the Applicant and to render proposed findings regarding Section 248 criteria, if appropriate.

On January 9, 2024, the Applicant filed a letter dated January 4, 2024, from the Town of Randolph Planning Commission and Selectboard verifying that the conditions stated in the Town's December 14, 2021, letter had been satisfied (Exh. RDS-MS-26).

On January 23, 2024, the Landowners filed an objection to the public comment and evidence submitted by the Applicant on January 9, 2024.[46] The Landowners also filed Exhibits NI-JA-MB-9 and NI-JA-MB-10. The Landowners did not move to admit the exhibits attached to their brief. Accordingly, these exhibits are not part of the evidentiary record.

Also on January 23, 2024, the Landowners requested that the Commission take judicial notice of an order issued by the Commission in Case. No. 19-0855-RULE on May 17, 2023.[47] This case concerns recent revisions to Commission Rule 5.100, which governs the construction and operation of net-metering systems. 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.[48]

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[45] In the order issued on October 11, 2023, the Commission denied the Applicant's request for judicial notice of Exh. RDS Judicial Notice-1. The Commission admitted Exh. RDS Judicial Notice-2 into the record. Order of 10/11/23 at 29.

[46] The Town of Randolph is not a party and filed the January 4, 2024, letter as a public comment in this case. Public comments are not part of the evidentiary record and therefore, the Landowners' objection is moot.

[47] The Applicant did not file a response to the Landowners' request for judicial notice.

[48] 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, which holds that an applicant is entitled to have its application

On February 2, 2024, the Applicant filed a response to the Landowners' objection to the evidence submitted on January 9, 2024.

No other filings were received.

No party has requested an evidentiary hearing. Accordingly, consistent with the previous evidentiary rulings made in this proceeding, the following documents are admitted as if offered at hearing: Exh. Commission-1 and all prefiled testimony, affidavits, exhibits, and comments included on that list; Proposed CPG; exhs. ANR-Attachment-1, -2, and -3; exh. RDS Judicial Notice-2; and exh. RDS-MS-26. The Landowner's objections to Exh. RDS-MS-26 are discussed in Section IV, below.

III. Conditional Waiver of Review Under Certain Criteria for Net-Metering Facilities

Pursuant to 30 V.S.A. § 8010 and Commission Rule 5.111, the Commission has conditionally waived review of the following criteria, and no party presented any testimony that warrants rescinding any part of that waiver in this proceeding:

- 30 V.S.A. § 248(b)(2) (need);
- 30 V.S.A. § 248(b)(4) (economic benefit);
- 30 V.S.A. § 248(b)(6) (integrated plan);
- 30 V.S.A. § 248(b)(7) (electric energy plan);
- 30 V.S.A. § 248(b)(9) (waste-to-energy facilities); and
- 30 V.S.A. § 248(b)(10) (transmission facilities).

Therefore, only the criteria applicable to the system under Rule 5.111 are addressed in this Order.

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reviewed under the rules in effect when a proper application is filed. *In re Times & Seasons, LLC*, 2011 VT 76, ¶¶ 13-14, . Therefore, I have reviewed the Facility in this case using the version of Rule 5.100 that was in effect on August 11, 2022, and I recommend that the Commission deny the Landowners' request for judicial notice because the revisions to Rule 5.100 adopted in Case No. 19-0855-RULE are not relevant to the Commission's review of the Facility.

IV. FINDINGS

Based on the application and its accompanying documents and the other evidence admitted into the record as noted above, I recommend that the Commission make the following findings in this matter.

Description of the Facility

1. The Facility will consist of a solar electric system with a total capacity of 500 kW AC on a 20.7-acre parcel located approximately 1,500 feet north of the intersection of Davis Road and Rt. 14 in Randolph, Vermont. Martha Staskus, Applicant ("Staskus") pf. at 4; exh. RDS-MS-2 (rev. 7/13/22).

2. The Facility will be interconnected with Green Mountain Power Corporation's ("GMP") electric distribution system. Staskus pf. at 6.

3. The Facility will occupy approximately 11.6 acres of the larger 20.7-acre parcel. Staskus pf. at 5; Staskus affidavit dated 4/19/22; exh. RDS-MS-2 (rev. 7/13/22).

4. The Facility will include:
   a. approximately 25 rows of solar panels mounted on racking anchored to the ground;
   b. rows running east-west with panels facing to the south;
   c. 10 string inverters and electrical lines connecting the rows of solar panels;
   d. three pole-mounted transformers on a new GMP distribution pole; and
   e. an eight-foot-high wildlife fence, with mesh size no smaller than six inches by six inches secured by a locked gate, or, in the event a fence is not required, energized equipment rated for outdoor use, securely shielded by locked enclosure covers, and otherwise be code compliant for the "Guarding of Live Parts."

5. The solar array equipment, other than the panels themselves, will be galvanized metal and will have a light gray finish. The panels will have an anti-glare coating and are expected to be a dark color. Staskus pf. at 5.

6. The site is a combination of woods and cleared land with signs of previous logging activity and log landings. Staskus pf. at 5; exh. RDS-MS-6.

7. The limit of disturbance for the Facility is approximately 11.6 acres, and the entire limit of disturbance is subject to tree clearing. Staskus pf. at 5; Staskus affidavit dated 4/19/22; exh. RDS-MS-2 (rev. 7/13/22).

8. The Facility will be accessed from Davis Road via a gravel access drive. Staskus pf. at 8; exh. RDS-MS-2 (rev. 7/13/22).

9. The access drive will require areas of cut and fill due to the slopes under the access road's path. The limit of disturbance around the access drive will be more than 200 feet wide at the lower section of the access drive. Exh. RDS-MS-2 (rev. 7/13/22).

10. The Facility site is not subject to an Act 250 permit. Staskus pf. at 4.

11. Estimated Facility-related sound levels will be 22.9 dBA at the nearest offsite residence. Staskus pf. at 13; exh. RDS-MS-8.

12. Installation activities and related deliveries will occur between 7:00 AM and 7:00 PM Monday through Friday, and on Saturdays from 8:00 AM to 5:00 PM, if required to meet the Facility schedule. No construction activities or deliveries will occur on Sundays or on state or federal holidays. Staskus pf. at 9.

Discussion

The Department has requested that the Commission include a condition requiring the Applicant to notify the Commission before the Facility begins operation of the actual method used to protect public safety with respect to securing the Facility's electrical equipment. As described in finding 4 above, the Applicant has proposed to either install an eight-foot-high wildlife fence or secure energized equipment in a locked enclosure. To ensure the Facility does not have an unduly adverse impact on public safety, I recommend that the Commission include this condition in any CPG issued for the Facility.

Preferred Site Status

13. The Facility's initial design would have located the panels, access road, and distribution line in areas with slopes that exceed 25%. Exh. MB-33.

14. The Applicant revised the Facility's layout in response to the slope issues raised by the Landowners and the Randolph Selectboard. The Facility's solar panels were moved to areas with less than a 25% slope, according to the Applicant's survey data. Exh. RDS-MS-2 (rev 7/13/22).

15. In a letter dated December 14, 2021, the Town conditioned its preferred-site letter on locating the Facility's panels to avoid areas with a slope greater than 25% and providing survey data to the Town and the Landowners. Exh. RDS-MS-14.

16. The conditions of the Town's December 14, 2021, letter have been satisfied. Exh. RDS-MS-26.

Discussion

To qualify as a preferred site under Commission Rule 5.103, a net-metering system must, among other possible options, be located on "a specific location that is identified in a joint letter of support from the municipal legislative body and municipal and regional planning commissions in the community where the net-metering system will be located."

The Town of Randolph's letter of support was conditioned on the Applicant moving the proposed panels from areas where slopes exceed 25% and providing supporting survey data to the Town.[49] In the Remand Order, the Commission concluded that there was insufficient evidence to support a conclusion that the Town's conditions had been met and, for this reason, found that the joint letter of support did not conform with Commission Rule 5.103.[50] The Commission gave the Applicant 90 days to file evidence demonstrating that the Town's condition had been met.[51]

On January 9, 2024, the Applicant filed a letter (Exh. RDS-MS-26) from the Town stating that "the site plan submitted to the Commission (Exh. RDS-MS-2A) shows that the condition of the Town's December 2021 letter (Exh. RDS-MS-14) has been satisfied."[52] The Applicant represents that the Selectboard and Planning Commission each held public meetings on December 14, 2023, and January 3, 2024, and at those meetings, each body voted that the condition had been satisfied.

On January 23, 2024, the Landowners filed an objection to the letter filed by the Applicant. The Landowners state that the site plan presented to the Town was the third (Exh. RDS-MS-2A Site Plan) of six site plans that have been filed by the Applicant. The Landowners state that Exh. RDS-MS-2, dated July 13, 2022, is the sixth and final site plan filed by the

[49] Exh. RDS-MS-14.
[50] Order of 10/11/23 at 1.
[51] *Id.* at 32, Condition No. 2.
[52] Exh. RDS-MS-26.

Applicant and differs from Exh. RDS-MS-2A, which was the site plan presented by the Applicant to the Town. The Landowners contend that the arrangement of the solar arrays and the slope layers presented are different. The Landowners argue that Exh. RDS-MS-2A is obsolete because it is not the final site plan. The Landowners request that the Commission order the Applicant to produce a seventh site plan with LiDAR[53] contour lines and 25% slope layers and present this site plan to the Town so that the Town can make "an informed and credible determination that the conditions in RDS-MS-14 have been satisfied."[54]

On February 2, 2024, the Applicant filed a response to the Landowners' objection. The Applicant asks the Commission to reject the objection because the Town's letter speaks for itself and satisfies Condition No. 2 of the Remand Order.[55] The Applicant cites the Remand Order, which states that "[a]bsent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred."[56]

For the Commission to make a determination on preferred-site status in this case, the Commission requires a clear statement from the municipal legislative body and municipal and regional planning commissions that supports the Facility in the proposed location. Because the Town's earlier letter conditioned support on two factors, additional evidence was necessary. Thus, the Commission required: "Within 90 days of this Order, Randolph Davis Solar LLC must file with the Commission evidence demonstrating that the Town of Randolph Planning Commission and Selectboard have determined that their condition stated in Exh. RDS-MS-14 has been satisfied."[57] The Landowners do not dispute that the Town's letter submitted by the Applicant states that the Town's conditions for support have been met. Thus, the remaining dispute is over whether the subsequent site plan calls into question the Town's support letter. The Landowners contend that a new site plan must be presented to the Town because (1) the site layout changed in subsequent site plans, and (2) the site plan provided to the Town should include LiDAR data.

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[53] LiDAR, which stands for Light Detection and Ranging, is a remote sensing method that uses light in the form of a pulsed laser to measure the surface of the earth.

[54] *Landowners' Objection* at 12.

[55] Condition No. 2 states: "Within 90 days of this Order, Randolph Davis Solar LLC must file with the Commission evidence demonstrating that the Town of Randolph Planning Commission and Selectboard have determined that their condition stated in Exh. RDS-MS-14 has been satisfied."

[56] Remand Order at 32.

[57] Remand Order at 32.

Turning first to the site layout, the last site plan filed by the Applicant is Exh. RDS-MS-2, filed on July 13, 2022. I have compared the July 13, 2022, site plan to the February 9, 2022, Exh. RDS-MS-2A, site plan referenced by the Town in its January 4, 2024, letter. Evaluating these site plans side-by-side, I have identified minor changes to the layout of the arrays.[58] The Facility is separated into two arrays. For one array, the number of rows has been reduced from 18 rows in the February 9, 2022, site plan to 16 rows in the July 13, 2022, site plan. For the second array, the number of rows has increased from 8 rows in the February 9, 2022, site plan to 9 rows in the July 13, 2022, site plan. While the layout of the two arrays is different, I do not find these differences to be material because the Applicant's survey data, which is shown in yellow on both plans, indicates that the panels in either configuration are located outside areas with slopes greater than 25%. For this reason, I am not persuaded by the Landowners' objection to the admission of the Town's January 4, 2024, letter based on the assertion that the site plan presented to the Town is obsolete. Accordingly, as indicated above, Exh. RDS-MS-26 is admitted into the record.

The Landowners contend that the Applicant should be required to present a new site plan to the Town that includes LiDAR data. The Town's December 2021 letter (Exh. RDS-MS-14) was conditioned on survey data being provided to the Town and the Landowners. The Commission did not direct the Applicant to present specific survey methodologies to the Town in the Remand Order. The Commission stated: "In our view, the method of measuring the slope is not the issue."[59] Under this guidance, I find the Applicant's survey data to be sufficient and the Applicant should not be required to present a new site plan to the Town with LiDAR data.
For the reasons discussed above, I recommend that the Commission find that the Applicant has met the requirement of Condition No. 2 of the Remand Order, accept the joint letter of support, and conclude that the Facility is located on a preferred site for purposes of Rule 5.103.

Applicable Rate Adjustors

17. The Applicant has elected to transfer the Facility's renewable energy credits ("RECs") to GMP. Application at 4.

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[58] Exh. RDS-MS-26

[59] Remand Order at 31.

18. The Facility will be located on a preferred site, as defined in Commission Rule 5.103, because the Randolph Selectboard and Planning Commission and the Two Rivers-Ottauquechee Regional Commission ("TRORC") have each designated the Facility location as a preferred site. Staskus pf. at 10; exhs. RDS MS-5 and RDS-MS-26.

Discussion

Pursuant to Commission Rule 5.127(C)(2), because the Facility is greater than 150 kW and is located on a preferred site, a siting adjustor of minus three cents per kilowatt hour applies to all energy generated by the net-metering system.

Because the Applicant has elected to transfer the ownership of the RECs generated by the net-metering system, there is no REC adjustor, pursuant to Commission Rule 5.127(B).

The siting and REC adjustors will be stated in the Facility's CPG, pursuant to Commission Rule 5.127(B)(2) and (C)(1).

Orderly Development of the Region

[30 V.S.A. §§ 248(b)(1) and 248(b)(1)(C)]

19. The Facility will not unduly interfere with the orderly development of the region. In making this finding, due consideration has been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. Substantial deference has been given to the land conservation measures and specific policies contained in the duly adopted regional plan. This finding is supported by the additional findings below.

20. The Town of Randolph Planning Commission and Selectboard and the TRORC signed a letter designating the Facility location as a preferred site for solar development. The letter states that these entities "take no position on the [Facility's] compliance with any requirement of Rule 5.100 or of other applicable provisions of Vermont law. This letter is solely for the purpose of providing support for the [Facility] under Rule 5.103." Exh. RDS-MS-5.

21. The TRORC has adopted an enhanced energy plan. The Town of Randolph has not. Exh. RDS-MS-6 at 9.

22. The Town of Randolph has modified the chapter on energy in its Town Plan to address considerations identified in Act 174 but has not received a regional determination of energy compliance. Exh. RDS-MS-6 at 9.

23. Chapter 6 of the Randolph Town Plan prohibits energy facility development "in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, [or] lands over 25% slope." Exh. MB-5 at 29.

24. The Applicant modified its original site plan so that the Facility's solar panels will not be located on slopes greater than 25%. A portion of the access road, interconnection line, fence, and tree clearing will be situated on slopes exceeding 25%. Staskus supp. pf. at 2-3; exh. RDS-MS-2 (rev. 7/13/22).

25. The Facility's impact on land use and slopes greater than 25% are localized and do not have a regional impact. Exh. RDS-MS-6 at 9.

26. The TRORC Regional Plan contains specific policies for the siting of renewable energy facilities. The Facility is consistent with those specific policies. The Regional Plan does not prohibit the development of renewable energy facilities on steep slopes. Exh. MB-3 at 260.

Discussion

Section 248(b)(1) of Title 30 of the Vermont Statutes Annotated requires that before the Commission issues a CPG, it must find that the construction of a generation facility will not unduly interfere with the orderly development of the region, with due consideration having been given to the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality. The Vermont Supreme Court has explained that the use of the term "due consideration" means 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."[60] The Commission must also give "substantial deference to the land conservation measures and specific policies contained in a duly adopted

[60] *In re Petition of Apple Hill Solar LLC*, 2021 VT 69, ¶ 31, 215 Vt. 523, 280 A.3d 44 ("*Apple Hill Solar*").

regional and municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352."[61]

The Regional Plan has received an affirmative determination of energy compliance under 24 V.S.A. § 4352. The Town of Randolph has not adopted an enhanced energy plan that has received an affirmative determination of energy compliance.[62] Accordingly, Randolph's Town Plan is afforded "due consideration," not "substantial deference," by the Commission under the Section 248(b)(1) criteria.

The Landowners argue that the Facility does not comply with the Town Plan. The Landowners contend that the prohibition on energy facility development on "lands over 25% slope" is a land conservation measure and that the Facility as proposed would violate the Town Plan.[63] The Landowners assert that because the Facility does not comply with the Town Plan's electric-generation-facility siting provision, the Facility would unduly interfere with the orderly development of the region and the Applicant should be denied a CPG.

The Landowners maintain that the prohibition against energy facility development "in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, [or] lands over 25% slope"[64] is "a very specific prohibition that applies to very specific and very limited environmentally-sensitive areas in the Town."[65] The Landowners argue that the prohibitions described above are policies put in place to address "stormwater and landscape resiliency, which language evinces the several Town Plan Goals and Policies that protect floodways and wetlands and streams and encourage flood resiliency."[66]

The Department argues that, in siting the Facility, the Applicant has given due consideration to the Town Plan and the Randolph Planning Commission's concerns. The Department asserts that while the Town Plan contains a general prohibition of energy generation facility development on land with slopes greater than 25%, it does not specify the purpose or

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[61] 30 V.S.A. § 248(b)(1)(C); *see also id*. ("In this subdivision (C), 'substantial deference' means that a land conservation measure or specific policy shall be applied in accordance with its terms unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh the application of the measure or policy.").

[62] Department Brief at 3-4.

[63] Landowners' Brief at 9.

[64] Exh. MB-5 at 29.

[65] Landowners' Reply Brief at 8.

[66] Landowners' Reply Brief at 8.

policy for the general prohibition.[67] The Department states that even if the slope prohibition constituted a land conservation measure in the Town Plan, the Applicant has amended the Facility's original plans by relocating the solar panels to other areas of the Facility site with less than a 25% slope.[68] The Department maintains that given the limited scope and characteristics of the Facility, any non-compliance with the Town Plan's slope prohibition would be localized in nature and does not pose a demonstrable impact on the region.[69]

Before turning to the issue of land conservation measures, the statute requires the Commission to consider the recommendations of the Town of Randolph Selectboard and Planning Commission and the TRORC.[70] These entities signed a letter designating the Facility as located on a preferred site. According to the Applicant, the letter "reinforce[d] that the [Facility] will not unduly interfere with the orderly development of the region."[71] However, the letter states that these entities "take no position on the [Facility's] compliance with any requirement of Rule 5.100 or of other applicable provisions of Vermont law. This letter is solely for the purpose of providing support for the [Facility] under Rule 5.103."[72] Rule 5.103 defines certain "preferred sites" to determine the incentives applicable to a net-metering facility. Preferred-site status is a prerequisite for participating in the net-metering program for large net-metering systems.[73] Thus, absent additional explanation, a letter merely stating that a site is preferred for purposes of Rule 5.103 is not directly relevant to a facility's impact on orderly development. Accordingly, I recommend that the Commission give no weight to the preferred site letter because the letter does not contain a recommendation addressing the Facility's impact on orderly development.

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[67] Land conservation measures must evince a specific policy directed towards land conservation; general policy statements in plans that apply indiscriminately throughout the municipality do not rise to the level of a land conservation measure. *See Petition of Vermont Electric Power Company, Inc. and Green Mountain Power Corporation for a certificate of public good, pursuant to 30 V.S.A. Section 248, authorizing VELCO to construct the so-called Northwest Vermont Reliability Project*, Docket 6860, Order of 1/28/05 at 201-202.

[68] Department Brief at 3.

[69] Department Brief at 4.

[70] 30 V.S.A. § 248(b)(1).

[71] Exh. RDS-MS-6 at 9-10.

[72] Exh. RDS-MS-5.

[73] *See* Rule 5.104 (requiring facilities greater than 150 kW to be located on a preferred site in order to receive a net-metering CPG).

Next, I turn to the issue of land conservation measures. The Randolph Town Plan's prohibition on energy facility development "in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, [or] lands over 25% slope" is sufficiently specific to qualify as a land conservation measure. In *Apple Hill Solar*, the Vermont Supreme Court discussed the level of specificity required for a statement in a town plan to constitute a land conservation measure in the context of evaluating a town plan's restriction on development "in prominently visible locations on hillsides."[74] In concluding that the provision at issue was sufficiently specific to be a land conservation measure, the Court discussed two of its decisions reviewing town plans in the context of Act 250.[75] For example, the Court has found that a town plan's limitation on development on "steep slopes" was too abstract to require compliance.[76] In contrast, the Court has concluded that a restriction on "residential development on slopes exceeding twenty percent" was a "specific policy" that had to be complied with for an Act 250 permit to be issued.[77] The Randolph Town Plan's prohibition on energy facility development on "lands over 25% slope" is no less specific than the provision at issue in *Green Peak Estates* cited by the Court and therefore constitutes a land conservation measure.

Portions of the Facility's access road, fence, interconnection line, and tree clearing will be located on slopes that exceed 25%.[78] This infrastructure and clearing activity are integral to the Facility and thus constitute "energy facility development" that the Randolph Town Plan prohibits on slopes greater than 25%.

However, as stated above, noncompliance with a municipal land conservation measure is not dispositive of the Section 248(b)(1) review to determine whether a proposed facility unduly interferes with the orderly development of the region.[79] It is up to the Commission, giving due consideration to the Facility's noncompliance with this land conservation measure, to assess

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[74] *In re Petition of Apple Hill Solar LLC*, 2021 VT 69, ¶¶ 45-46.

[75] *Id.* at ¶ 46 (discussing *In re Kisiel*, 172 Vt. 124, 772 A.2d 135 (2000) and *In re Green Peak Estates*, 154 Vt. 363, 577 A.2d 676 (1990)). In Act 250 proceedings, compliance with town and regional plans is required for a permit. *Id.* at ¶ 31.

[76] *In re Kisiel*, 172 Vt. 124, 130 (2000).

[77] *In re Green Peak Estates*, 154 Vt. 363, 367, 369 (1990).

[78] *See* Exh. RDS-MS-2 (rev. 7/13/22) (showing the Facility's access road, tree clearing, and power line within areas shaded green that have slopes greater than 25%.

[79] *In re Petitioner of Apple Hill Solar LLC*, 2021 VT 69, ¶ 31.

whether the Facility will unduly interfere with the orderly development of the region and ultimately, whether the Facility is in the public good.

No party has argued that the Facility runs afoul of any specific policy contained in the Regional Plan. The Regional Plan contains land conservation measures and specific policies for energy facilities; however, none of the regional land conservation measures and specific policies for energy facilities prohibit locating the Facility on the proposed site. The Regional Plan states:

> The following locations shall be considered regionally unsuitable for renewable energy generation facilities: floodways shown on FEMA Flood Insurance Rate Maps (except as required for hydro facilities), Class 1 Wetlands as indicated on Vermont State Wetlands Inventory maps or identified through site analysis, Wilderness Areas, including National Wilderness Areas, *any unsuitable areas as identified in a duly adopted municipal plan that has received a determination of energy compliance from the Department of Public Service or TRORC*.[80]

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.[81]

The Department and the Applicant argue that there is no evidence of a regional impact because the Facility's impacts will be localized. The Commission has previously stated that "localized impacts may be found to interfere with orderly regional development due to their character or severity."[82] In *Apple Hill Solar* the Commission found a regional impact where a local land conservation measure protected prominent hillsides and the proposed facility would be visible to travelers entering the region.[83] *Apple Hill Solar* is an example of impacts that would

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[80] Exh. MB-3 at 260 (emphasis added).

[81] The Regional Plan discusses sites with "raw potential" for solar and states that "only lands with good exposure and gentle slopes make sense for solar development." Exh. MB-3 at 257. However, this statement does not evince a specific policy about slopes and therefore is not a land conservation measure. *In re Kisiel*, 172 Vt. 124, 130 (2000).

[82] *Petition of Rutland Renewable Energy, LLC*, Case No. 8188, Order of 3/11/15 at 18.

[83] *Petition of Apple Hill Solar LLC for A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248, Authorizing the Installation & Operation of A 2.0 Mw Solar Elec. Generation Facility at 1133 Willow Rd. in Bennington, Vermont,* No. 8454, Order of 5/16/22 at 10.

have been limited to a specific location but nonetheless were found to be regionally significant because the affected area had regional significance as a gateway.[84]

After considering the authorities and arguments discussed above—including the fact that the Facility is not compliant with Randolph Town Plan—I recommend that the Commission find that the Facility will not unduly interfere with the orderly development of the region. In describing the orderly development criterion, the Vermont Supreme Court has emphasized that "the statutory requirement relates to the orderly development of the region, not to a particular municipality within the region."[85] The character and severity of the Facility's noncompliance with the Randolph Town Plan do not support a finding of an undue regional impact.

In addressing the importance of the Town Plan, the Landowners raise arguments regarding floodways, streams, wetlands, and soil erosion. However, these issues are local in nature and more germane to the criteria of Section 248(b)(5) and not orderly development under Section 248(b)(1). In this proposal for decision, I have reviewed the Facility for impacts on floodways, streams, wetlands, and soil erosion. The Facility is not located in a floodway. ANR has not raised any concerns regarding the impact of the Facility on streams. I have recommended that the Commission include conditions developed by ANR to ensure that the Facility will not have an undue adverse effect on wetlands. Regarding soil erosion, ANR has authorized a construction stormwater permit for the Facility as a low-risk site. These areas of concern are further addressed in the findings below, along with additional discussion of how the Applicant has addressed concerns raised by ANR. These concerns do not implicate issues of regional importance.

In summary, the Landowners improperly merge a violation of the Randolph Town Plan—a town plan that is not an enhanced energy plan that has received an affirmative determination of energy compliance—with a finding that the Facility will unduly interfere with the orderly development of the region.[86] Based on the language of Section 248(b)(1) and the Vermont's Supreme Court precedent on the orderly development criterion, this analysis is incorrect and the record does not support a finding that the Facility would unduly interfere with the orderly

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[84] *Id.*

[85] *In re Petition of Rutland Renewable Energy, LLC for Certificate of Public Good Pursuant to 30 V.S.A.§248, et al.*, 2016 VT 50, ¶ 9 ("*Rutland Renewable*").

[86] Landowners' Brief at 9.

development of the region. Accordingly, I recommend that the Commission conclude that the Facility will not unduly interfere with the orderly development of the region.

Municipal Screening Requirements
[30 V.S.A. § 248(b)(1)(B)]

27. The Town has not adopted screening requirements for ground-mounted solar electric generation facilities pursuant to either 24 V.S.A. §§ 2291(28) or 4414(15). Staskus pf. at 18.

Impact on System Stability and Reliability
[30 V.S.A. § 248(b)(3)]

28. The Facility will not have an adverse effect on system stability and reliability. This finding is supported by the additional findings below.

29. On September 21, 2021, GMP issued a Feasibility Study for the Facility. Exh. RDS-MS-11.

30. The Applicant is responsible for paying all necessary interconnection costs designated as the Applicant's responsibility in the Feasibility Study, as required by Rule 5.500. Staskus pf. at 13.

Discussion

To ensure that the Facility has no adverse effects on system stability and reliability, I recommend that the Commission include a condition in any CPG issued in this proceeding that the CPG Holder will not commence construction until it receives interconnection approval from GMP.

Aesthetics, Historic Sites, Air and Water Purity, the Natural Environment, the Use of Natural Resources, and Public Health and Safety
[30 V.S.A. § 248(b)(5)]

31. Subject to the conditions described below, the Facility will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, the use of natural resources, or public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), impacts on primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts. This finding is supported by the additional findings below.

Outstanding Resource Waters
[10 V.S.A. § 1424a(d)] and [30 V.S.A. § 248(b)(8)]

32. The Facility will not affect any outstanding resource waters as defined by 10 V.S.A. § 1424a(d) because there are no outstanding resource waters in the Facility area. Exh. RDS-DB-2 at Section VI.

Air Pollution and Greenhouse Gas Impacts
[30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)]

33. The Facility will not result in undue air pollution or greenhouse gas emissions. Any air pollution and greenhouse gas emissions caused by the Facility will be minimal and limited to the construction phase of the Facility and periodic equipment maintenance site visits. Staskus pf. at 13.

Water Pollution
[10 V.S.A. § 6086(a)(1)]

34. The Facility will not result in undue water pollution. This finding is supported by findings under the criteria of headwaters through soils, below.

Headwaters
[10 V.S.A. § 6086(a)(1)(A)]

35. The Facility site is located in a headwaters area because it is located in a watershed of less than 20 square miles and is characterized by steep slopes. Exh. RDS-DB-2 at Section IV.

36. The Facility will meet all applicable health and Vermont Department of Environmental Conservation regulations regarding reduction of the quality of the ground or surface waters in a headwaters area. Exh. RDS-DB-2 at Section IV.

37. The Facility is in zone 3 of the surface water source protection area for Royalton Fire District 1 (water system identification number VT0005330). In accordance with the Vermont Hazardous Waste Management Regulations, any hazardous material spill at the Facility site will be immediately reported to the Department of Environmental Conservation's Spills Response Team and the Royalton Fire District 1. Proposed CPG at 2.

Discussion

The Applicant has proposed a condition, which ANR supports, that will serve to ensure adequate surface water source protection, and I recommend that the Commission include this condition in any CPG issued for the Facility.[87]

Waste Disposal
[10 V.S.A. § 6086(a)(1)(B)]

38. The Facility will meet all applicable health and Vermont Department of Environmental Conservation regulations regarding the disposal of wastes and will not involve the injection of waste materials or any harmful or toxic substances into groundwater or wells. Staskus pf. at 15.

39. There are no onsite sanitary wastewater systems, and therefore no associated injection of sanitary wastewater into the ground. Staskus pf. at 18.

40. The Facility will use three GMP pole-mounted transformers that will utilize mineral oil. Staskus pf. at 9.

Water Conservation
[10 V.S.A. § 6086(a)(1)(C)]

41. The Facility will not have an undue adverse effect on water conservation because the use of water will be limited to what is necessary to control dust during installation and to promote germination of seed. Staskus pf. at 19.

Floodways
[10 V.S.A. § 6086(a)(1)(D)]

42. The Facility is not located within a floodway or floodway fringe and therefore will not restrict or divert the flow of flood waters, significantly increase the peak discharge of a river or stream within or downstream from the Facility, or endanger the health, safety, or welfare of the public or owners of riparian land during flooding. Exh. RDS-DB-2 at Section V.

Streams
[10 V.S.A. § 6086(a)(1)(E)]

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[87] Proposed CPG filed on August 11, 2021.

43. The Facility will, subject to conditions, maintain the natural condition of all streams and will not endanger the health, safety, or welfare of the public or adjoining landowners because no work is required or proposed in any streams. This finding is supported by the additional findings below.

44. The closest stream is an unnamed tributary located approximately 75 feet southwest of the Facility. There is no stream located within the Facility's limits of disturbance. Exh. RDS-DB-2 at Section VI and Figure 1; exh. RDS-MS-2 (rev. 7/13/22).

45. The Applicant has proposed to maintain a minimum of at least a 50-foot riparian buffer zone from this stream resource. Exh. RDS-DB-2 at Section VI; exh. RDS-MS-2 (rev. 7/13/22).

Discussion

In determining whether a proposed facility will have an undue adverse effect on the natural environment, the Commission must give due consideration to whether the facility "will maintain the natural condition of all streams and will not endanger the health, safety, or welfare of the public or adjoining landowners."[88] The Landowners argue that the Applicant has failed to consider the slope of the land and as a result, the Facility will cause streams to be harmed by effluents from the access road and inadequate forest buffers.[89] According to the Landowners, the Acceptable Management Practices for Logging Professionals ("AMP Rule") published by ANR's Department of Forests, Parks, and Recreation requires forest buffers of at least 90 feet due to the slope of the land. The Landowners also argue that the Applicant has overlooked a perennial stream at the site.

The Applicant responds that it did not overlook a perennial stream and that the feature the Landowners point to is in fact a swale that ANR does not define as a stream. The Applicant did not address the applicability of the AMP Rule to the Facility.

First, I turn to the Landowners' argument that the AMP Rule requires a 90-foot or greater buffer where the slope of the land is more than 21%. The AMP Rule states that the rule applies to:

> all logging operations on public and private lands in Vermont regardless of the purpose of the logging. For example, logging may be conducted for forest

[88] 30 V.S.A. § 248(b)(5); 10 V.S.A. § 6086(a)(1)(E).
[89] Landowners' Brief at 16.

> management purposes or logging may be conducted for the purpose of clearing land for some other type of land use, such as commercial, residential or utility development.[90]

The AMP Rule requires minimum forest buffers at streams that increase as the slope of the land increases.[91] 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."[92]

The Commission has previously required energy facilities to conduct logging in accordance with the AMP Rule.[93] It is also standard practice for the Commission to condition approval of energy facilities on compliance with all applicable regulations. However, ANR has also published specific guidance for stream buffers in Section 248 cases.[94] This guidance could be read as superseding any other existing practices and procedures related to streams, though generally an agency guidance document cannot supplant a rule adopted through the Vermont Administrative Procedure Act.[95]

The Facility's plans and ANR's recommendations appear to be based on ANR's guidance for stream buffers in Section 248 cases.[96] The Applicant has agreed to ANR's recommended 50-foot buffer to ensure that the naturally vegetated riparian zone along the stream located near the Facility is undisturbed and maintained. However, given the steep slopes on the site and the plain language of the AMP Rule, which is designed "to comply with the Vermont Water Quality Standards and minimize the potential for a discharge from logging operations," I recommend that the Commission adopt an additional condition to protect the stream.[97]

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[90] VERMONT AGENCY OF NATURAL RESOURCES, ACCEPTABLE MANAGEMENT PRACTICES FOR MAINTAINING WATER QUALITY ON LOGGING JOBS IN VERMONT ("AMP Rule") at § 4.

[91] *Id*. at § 6.14.

[92] *Id*. at § 6.7.

[93] *Petition of Green Mountain Power Corp. for A Certificate of Pub. Good, Pursuant to 30 V.S.A. Section 248, Authorizing the Installation & Operation of Three Temp. Wind Meteorological Towers on Lowell Mountain in Lowell, Vermont*, Case No. 7558, Order of 2/08/10 at 8.

[94] VERMONT AGENCY OF NATURAL RESOURCES, GUIDANCE FOR AGENCY ACT 250 AND SECTION 248 COMMENTS REGARDING RIPARIAN BUFFERS (2005) (available at: https://anr.vermont.gov/sites/anr/files/co/planning/documents/guidance/Guidance%20for%20Agency%20Act%20250%20and%20Section%20248%20Comments%20Regarding%20Riparian%20Buffers.pdf).

[95] *See id*. at 2 (stating that "For projects *not* under Act 250 or Section 248 jurisdiction, this Guidance does not replace existing practices and procedures.").

[96] *See id*. at 4 (recommending a 50-foot buffer in certain circumstances).

[97] AMP Rule at § 2.

To address the Landowners' concerns and to ensure the Facility will not damage the natural condition of the stream to the southwest of the Facility, I recommend that the Commission condition its approval of the Facility on the Applicant conducting any logging activity at the site in accordance with the AMP Rule. The record shows that a stream is located approximately 75 feet from the Facility's limits of disturbance, where logging may occur on steep slopes greater than 21%.[98] This condition may require a minor adjustment of the Facility's limits of disturbance in the vicinity of the stream to maintain the required buffer.

Last, I turn to the Landowners' allegations that the Applicant failed to identify a perennial stream near the Facility. I agree with the Applicant that the weight of evidence in this case shows that the feature described by the Landowners is a swale and not a stream.[99]

Subject to the additional condition discussed above, I recommend that the Commission adopt ANR's proposed condition[100] to protect streams and that this condition be included in any CPG issued for the Facility.

Shorelines
[10 V.S.A. § 6086(a)(1)(F)]

46. The Facility is not located on or near a shoreline. RDS-DB-2 at Section VII.

Wetlands
[10 V.S.A. § 6086(a)(1)(G)]

47. The Facility will not have an undue adverse effect on wetlands. This finding is supported by the additional findings below.

48. The Applicant reviewed available maps (including Vermont Significant Wetland Inventory Maps and the U.S. Department of Agriculture Natural Resources Conservation Service Soil Survey) and conducted a field inventory to identify wetlands. The Applicant used the U.S. Army Corps of Engineers Wetlands Delineation Manual (2009 Regional Supplement for the Northcentral and Northeast Region) to delineate wetlands as required by Section 3.2 of the

[98] Exh. RDS-DB-2 at Section VI; exh. RDS-MS-2 (rev. 7/13/22); Staskus 2d Supp. Affidavit at ¶ 4 ("[T]he entire area within the limit of disturbance (11.9 acres) is subject to clearing of vegetation.").
[99] Barton pf. reb. at 4.
[100] ANR Comments of October 20, 2021.

Vermont Wetland Rules. Exh. RDS-DB-2 at 6-7; Dori Barton, Applicant ("Barton") pf. reb. at 4.

49. A Class II wetland is located in the southwest area of the Facility parcel along Davis Road, and a vernal pool is located on the Landowners' parcel northwest of the Facility. Exh. RDS-DB-2 at 7; Barton reb. pf. at 4-5; exh. RDS-MS-2 (rev. 7/13/22).

50. The Vermont Wetland Rules specify a 50-foot protective buffer for Class II wetlands and a 100-foot buffer for Class I wetlands. The Vermont Wetland Rules do not require a larger buffer for vernal pools. Barton pf. reb. at 4.

51. The Facility has been designed to maintain a 50-foot buffer for the Class II wetland along Davis Road and a 100-foot buffer for the vernal pool located on the Landowners' property. Barton pf. reb. at 4.

Discussion

The Landowners argue that the evidence does not support a positive finding under the natural environment criteria of Section 248(b)(5) due to the impact of the Facility on wetlands. The Landowners maintain that the standard 50-foot buffer specified in the Vermont Wetland Rules does not take into account the slope of the affected land.[101] The Landowners state that the AMP Rule requires a 90-foot buffer on land with 21-30% slope, 110 feet for 31-40% slope, and an additional 20 feet for each 10% increase over 40%.[102] The Landowners explain that when the Facility site was logged in 2016, there was a 100-foot or larger forested buffer left intact around the wetlands and streams.[103]

The Applicant has proposed a condition, which ANR supports, that serves to ensure that the Facility does not have an undue adverse effect on wetlands[104] ANR has also requested that the Commission include a condition requiring the Applicant to maintain the 100-foot buffer zone around the vernal pool located on the Landowners' parcel.[105]

ANR did not express concern related to the Facility's alleged non-compliance with the AMP Rule cited by the Landowners. Additionally, the AMP Rule cited by the Landowners

[101] Landowners' Brief at 15-16.
[102] Landowners' Brief at 16.
[103] Binder pf. reb. at 4.
[104] Proposed CPG filed on August 11, 2021.
[105] ANR Comments of September 9, 2022.

applies to minimum buffers for "streams or other waters" and not wetlands.[106] Therefore, it is not clear how the AMP Rule is relevant to the Commission's consideration of wetlands.

I recommend that the Commission find that the measures identified by ANR are sufficient to protect wetlands on the Facility site and that the Commission condition the CPG on implementation of these protective measures to ensure that the Facility will not have an undue adverse impact on wetlands or the vernal pool located near the Facility site.

Sufficiency of Water and Burden on Existing Water Supply
[10 V.S.A. §§ 6086(a)(2) and (3)]

52. The Facility will not cause an unreasonable burden on an existing water supply because the Facility will use water only to control dust during construction and to promote germination of seed as needed. Staskus pf. at 19.

Soil Erosion
[10 V.S.A. § 6086(a)(4)]

53. The Facility will not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. This finding is supported by the additional findings below.

54. ANR's regulations and standards for erosion prevention and sediment control include the Department of Environmental Conservation ("DEC") Construction General Permit 3-9020, issued February 19, 2020, effective May 19, 2020. Scott Homsted, Applicant ("Homsted") reb. pf. at 3.

55. Under the requirements of General Permit 3-9020, a Facility will be categorized as either low risk or moderate risk. Facilities designated as moderate risk are ineligible to use the general permit and must file an application for an individual permit. Homsted reb. pf. at 3.

56. The Facility will add approximately 0.3 acre of impervious surface, which is below the threshold of 0.5 acre; therefore, an Operational Stormwater Permit 3-9050 is not required. Homsted reb. pf. at 6.

[106] ACCEPTABLE MANAGEMENT PRACTICES FOR MAINTAINING WATER QUALITY ON LOGGING JOBS IN VERMONT, VERMONT AGENCY OF NATURAL RESOURCES at § 6.7.1.

57. The Applicant received authorization from DEC's Stormwater Management Program on October 22, 2022, to proceed under General Permit 3-9020. Exh. Attachment ANR-1.

58. The Facility will be constructed in accordance with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control and the Low-Risk Site Handbook for Erosion Prevention and Sediment Control. Staskus pf. at 19.

59. The Applicant will employ construction practices that conform with the regulatory standards for erosion prevention and sediment control. For example, the Applicant will stabilize the entrance to the Facility site and the staging area and will install silt fence downslope of all disturbed areas to prevent erosion. In addition, various mulching materials will be used to limit the amount of ground disturbance and to provide temporary ground stabilization while vegetation is established. Homsted reb. pf. at 2-3.

60. The Facility access drive will be levelized and stabilized with coarse gravel. Exh. RDS-MS-2 (rev. 7/13/22).

61. These measures will prevent undue soil erosion and stormwater impacts on the Facility site. Homsted reb. pf. at 4.

Discussion

The Landowners argue that the evidence does not support a finding that the Facility will not cause undue impacts due to soil erosion.[107] The Landowners assert that the access road will wash out in the absence of a roadside ditch or culverts.[108] The Landowners do not agree with the Applicant's assertion that the solar panels are not an impervious surface. The Landowners are concerned that the impact of the Facility on soil erosion due to "the steepness of the site and the erodibility of the soils" will reduce the capacity of the land to hold water such that a dangerous or unhealthy condition may result.[109]

The Applicant responds that ANR is responsible for stormwater regulation, including determining appropriate stormwater management control for construction and what constitutes an impervious surface for purposes of operational stormwater regulation. The Applicant obtained authorization to proceed with construction of the Facility as a low-risk site, and no

[107] Landowners' Brief at 12.
[108] Landowners' Brief at 12.
[109] Landowners' Brief at 12-13.

operational stormwater permit is required. The Applicant argues that the Facility's compliance with General Permit 3-9020 will prevent unreasonable soil erosion.

ANR explains that stormwater permitting requirements and process and any related issues fall under its jurisdiction because the Vermont Legislature has explicitly tasked it with developing rules to manage stormwater runoff, which led to the adoption of the Stormwater Rule.[110] Further, ANR is "also generally vested with the authority to interpret the Stormwater Rule's definition of 'impervious surface.'"[111]

ANR asserts that the stormwater construction permit requirements that apply to the Facility site are sufficiently protective to address the Landowners' concerns about runoff on steep slopes.[112] ANR explains that the Facility does not meet the one-half-acre impervious surface development threshold that would trigger the need to secure an Operational Stormwater Permit 3-9050.[113] ANR's guidance on construction of solar energy facilities is that the impervious surface is calculated based on the material that covers the ground. If a solar panel is elevated and precipitation coming off the panel reaches a vegetated ground surface, only the base or foundation of the panel is accounted for when calculating impervious surface area.[114]

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 soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. ANR is the state agency charged with overseeing water quality issues, and the Applicant has worked with ANR to receive authorization to discharge under General Permit 3-9020. The CPG will require the Applicant to obtain and comply with all necessary permits for work on the Facility site. For these reasons, I recommend that the Commission find that the Facility will not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.

Transportation
[10 V.S.A. § 6086(a)(5)]

[110] ANR Brief at 1-2.
[111] ANR Brief at 2.
[112] ANR Brief at 4.
[113] ANR Brief at 5.
[114] Exh. MB-52 at 4.

62. The Facility will not result in undue traffic or congestion because the Facility will cause only a small increase in traffic for a short duration during construction, and no transportation-related permits are needed for the delivery of equipment or materials. Staskus pf. at 20.

Educational Services
[10 V.S.A. § 6086(a)(6)]

63. The Facility will not place a burden on the ability of a municipality to provide educational services because the Facility will not require or affect educational services. Staskus pf. at 20.

Municipal Services
[10 V.S.A. § 6086(a)(7)]

64. The Facility will not place an unreasonable burden on the ability of the affected municipality to provide municipal or government services. Use of municipal roads to transport equipment and materials will be for a limited duration. Staskus pf. at 20.

Aesthetics, Historic Sites, and Rare and Irreplaceable Natural Areas
[10 V.S.A. § 6086(a)(8)]

65. The Facility will not have an undue adverse impact on aesthetics or on the scenic or natural beauty of the area, nor will the Facility have an undue adverse effect on historic sites or rare and irreplaceable natural areas. This finding is supported by the additional findings below.

Aesthetics

66. The Facility site is located in the northwest corner of a larger parcel and is approximately 1,500 feet from the intersection of Davis Road and Route 14 in East Randolph. The property is an undeveloped parcel consisting of wooded areas with signs of previous logging activity including log landings. The landscape is a mix of wooded and open hillsides, fields, residences, and farm structures situated on rolling terrain. Exh. RDS-MS-6 at 2.

67. The Facility will be located approximately 256 feet from Davis Road, the nearest public road, and will be approximately 75 feet above road level. Views from Davis Road will be limited due to existing vegetation, changes in topography, and the changing orientation of the traveled way. Exh. RDS-MS-6 at 6.

68. The Facility will not be a dominant element in the landscape. It will be screened from public views by the undulating topography and existing vegetation. Exh. RDS-MS-6 at 6.

69. Based on a review of the regional and town plans, the Facility will not violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area. Exh. RDS-MS-6 at 9.

70. The Facility will not be shocking or offensive to the average person because it is largely screened from views by topography and vegetation. Exh. RDS-MS-6 at 7.

71. The Applicant has incorporated reasonable mitigation measures to reduce the Facility's visual impacts through site selection and design, with the result that views of the Facility are limited and mitigated by existing vegetation and the topography of the site and surrounding landscape. Exh. RDS-MS-6 at 9.

Discussion

I recommend that the Commission find that the Facility's aesthetic effects will be adverse but not unduly so.

In determining whether a net-metering system satisfies the aesthetics criterion contained in 30 V.S.A. § 248(b)(5), the Commission applies the so-called "Quechee test."[115] The first step of the test is to determine whether the Facility would have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings. If the answer is no, then the Facility satisfies the aesthetics criterion.

If a Facility will have an adverse effect on aesthetics, such adverse impact will be found to be undue if any one of the three following questions is answered affirmatively: (a) Would the Facility violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? (b) Would the Facility offend the sensibilities of the average person? (c) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed Facility with its surroundings?

A Facility has an adverse effect on aesthetics if it would be out of character with its surroundings. Specific factors used in making this evaluation include the nature of the Facility's surroundings, the compatibility of the Facility's design with those surroundings, the suitability of

[115] *In Re Halnon*, 174 Vt. 515 (2002).

the Facility's colors and materials with the immediate environment, the visibility of the Facility, and the impact of the Facility on open space.[116] Here, the visibility of the Facility from public roads will be limited. The solar array equipment, other than the panels themselves, will be galvanized metal and will have a light gray finish. The panels will have an anti-glare coating and are expected to be a dark color.

The Facility will introduce new components into the landscape that will create a visible change within the context of the immediate surroundings. These changes in context will adversely affect the aesthetics of the area. As demonstrated by the findings above, there are no clear, written community standards intended to preserve the aesthetics or scenic beauty of the area, the Facility would not offend the sensibilities of the average person, and the Applicant has taken reasonably available mitigating steps to reduce the Facility's visual and aesthetic impacts, as detailed in the findings above. Therefore, I recommend that the Commission conclude that the Facility's aesthetic impact will be adverse but not unduly adverse.

Historic Sites

72. The Facility will not have an undue adverse effect on historic properties. This finding is supported by the additional findings below.

73. DHP conducted a review of the Facility and determined that the site is not archeologically sensitive and the Facility will have no effect on any historic sites listed in or eligible for inclusion in the State Register of Historic Places. DHP Comments.

74. The historic sites assessment shows that the Facility will not result in an adverse effect on historic sites. Exh. RDS-MS-6 at 10; exh. RDS-MS-10.

Rare and Irreplaceable Natural Areas

75. The Facility will not have an undue adverse effect on rare and irreplaceable natural areas because there are no rare and irreplaceable natural areas within the Facility area. Exh. RDS-DB-2 at Section IX.

Necessary Wildlife Habitat and Endangered Species

[10 V.S.A. § 6086(a)(8)(A)]

[116] Commission Rule 5.112.

76. The Facility will not have an undue adverse effect on any endangered species or necessary wildlife habitat. This finding is supported by the additional findings below.

77. The Facility area is mapped by the Vermont Fish and Wildlife Department as a white-tailed deer wintering area. Exh. RDS-DB-2 at 8.

78. There will be no site preparation, construction, or decommissioning activity within the deer wintering area during the period from December 15 to April 15, unless the CPG Holder is given specific prior written authorization by the Vermont Fish and Wildlife Department. Exh. RDS-DB-2 at 8.

79. There is no bear habitat identified by the Vermont Fish and Wildlife Department within the Facility area. Exh. RDS-DB-2 at 8.

80. The type of concentrated and identifiable habitat that would be decisive to the survival of black bears would include stands of beech and oak trees and spring feeding wetlands. There are no beech or oak stands in the Facility area. Barton surreb. pf. at 1-2.

81. Any wetlands located outside the limit of disturbance will not be impacted by the Facility. To the extent black bears visit wetlands outside of the Facility area, access to those wetlands will not be affected by the Facility. Barton surreb. pf. at 2.

82. The Facility will not destroy or imperil rare, threatened, or endangered species. Exh. RDS-DB-2 at 9-10.

Discussion

The Landowners have raised concerns related to impacts of the Facility on wildlife. They argue that the Facility will fragment the land used by wildlife and hinder the movement of bears to feeding sites.[117] The Landowners explain that the Facility will have an adverse impact on black bear habitat because there have been signs of black bears on and around the Facility parcel, including in a wetland adjacent to Davis Road.[118]

The Vermont Fish and Wildlife Department has not identified the Facility area as bear habitat, and the Applicant's witness did not observe bear use or feeding during field inventories.[119] ANR has not proposed any conditions that would address the impact of the

[117] Landowners' Brief at 23.
[118] Allen reb. pf. at 4.
[119] Exh. RDS-DB-2 at 8.

Facility on bear habitat. Therefore, I recommend that the Commission conclude that the Facility will not have an adverse impact on bear habitat.

The Applicant has proposed a condition, which ANR supports, that is intended to protect the Facility from having an undue adverse effect on deer wintering areas.[120] I recommend that the Commission adopt this condition to ensure that the Facility will not have an undue adverse impact on the necessary wildlife habitat identified by the Vermont Fish and Wildlife Department.

Development Affecting Public Investments
[10 V.S.A. § 6086(a)(9)(K)]

83. The Facility will not unnecessarily or unreasonably endanger the public or quasi-public investment in any facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of, or access to any such facility, service, or lands. This finding is supported by the additional finding below.

84. The impact of the Facility on local public roadways and other public investments will be minimal and temporary. Staskus pf. at 22.

Public Health and Safety
[30 V.S.A. § 248(b)(5)]

85. The Facility will not have any undue adverse effects on the health, safety, and welfare of the public. This finding is supported by the additional findings below.

86. The Facility's transformers and inverters will be compliant with GMP's specifications. Staskus pf. at 14, 17.

87. All energized equipment will be rated for outdoor use, securely shielded, include locked enclosure covers, and otherwise compliant with National Electrical Code requirements for "Guarding of Live Parts." Staskus pf. at 14; exh. RDSMS-4.

Primary Agricultural Soils
[30 V.S.A. § 248(b)(5)]

88. The Facility will not have any undue adverse effects on primary agricultural soils as defined in 10 V.S.A. § 6001. This finding is supported by the additional findings below.

[120] Proposed CPG filed on August 11, 2021.

89. The Facility has the potential to affect approximately two acres of primary agricultural soil within the limit of disturbance. Impacts on primary agricultural soils may occur from construction of the perimeter fence, temporary staging area, and access road; trenching for underground power, the AC combiner pad, and the AC 17 disconnect pedestal; and tree clearing. Alex DePillis, AAFM ("DePillis") pf. at 4.

90. The Applicant will follow AAFM guidelines for managing and reclaiming primary agricultural soils. Staskus pf. at 5.

91. The Applicant will stockpile soils on the Facility site that are disturbed by the installation of the access road. For soils disturbed by trenching for the underground electrical conduit, the Applicant will excavate and backfill those soils in the same soil layers. Ex. RDS-MS-2A (rev. 2/9/22).

92. At decommissioning, the Applicant will remove the facilities and the primary agricultural soils will be returned to the sites. Staskus pf. at 21.

Discussion

The Commission is required to give due consideration to impacts to primary agricultural soils when determining whether a facility will have an undue adverse effect on the natural environment and the use of natural resources.[121] The Landowners argue that the evidence does not support a positive finding under the primary agricultural soils criteria of Section 248(b)(5) because the Applicant's testimony and exhibits do not contain sufficient facts and the Facility "as proposed is incompatible with several of AAFM's reasonable requested conditions."[122] The Landowners contend that two storage areas are needed in order to comply with AAFM regulations and that permanent stormwater management structures must be built to prevent erosion of primary agricultural soils.[123]

AAFM has reviewed the Facility and filed testimony in this case concluding that the Facility will have no undue adverse effect on primary agricultural soils if the Commission includes certain conditions in the CPG. The Landowners claim that the Applicant will not be able to "meaningfully reclaim" the soils buried under the access road. However, AAFM's

[121] 30 V.S.A. § 248(b)(5).
[122] Landowners' Brief at 21.
[123] Binder surreb. at 6, 8.

testimony makes clear that AAFM only expects the Applicant to restore primary agricultural soils to their preconstruction condition "to the greatest extent possible."[124] AAFM is aware that soils under the access road will be subject to compaction and has recommended conditions to mitigate this harm, such as limiting the size of vehicles using the access road and specifying methods of separating native soils from fill or gravel using geotextile fabric.[125] Therefore, the record does not support the Landowners' contention that the Facility is incompatible with AAFM's conditions because the potential issues identified by the Landowners were considered by AAFM and are addressed in the proposed conditions. For these reasons, I recommend that the Commission condition the CPG on the measures proposed by AAFM to protect the primary agricultural soils on the Facility site and find that, with these conditions, there will be no undue adverse effects on primary agricultural soils.

Minimum Setback Requirements
[30 V.S.A. § 248(s)]

93. The Facility will comply with Vermont's statutory setback requirements for ground-mounted solar electric generation facilities because the Facility's solar panels or support structures for the solar panels are set back at least 100 feet from the nearest road and at least 50 feet from the nearest property boundary line. Staskus pf. at 18.

Discussion

Section 248(s) of Title 30 of the Vermont Statutes Annotated requires that the nearest portion of a facility's solar panels or support structure for a solar panel be set back at least 100 feet from any state or municipal highway and at least 50 feet from any property boundary that is not a state or municipal highway. The setbacks proposed for the Facility's solar panels or support structures for the solar panels meet these minimum requirements.

V. DECOMMISSIONING PLAN

94. At the end of the Facility's useful life, the CPG Holder will remove the Facility's infrastructure and restore the site to its current condition to the greatest extent practicable. Exh. RDS-MS-9.

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[124] DePillis pf. at 8.
[125] *Id*. at 7-8.

95. The Applicant submitted a decommissioning plan detailing the steps for decommissioning activities. Exh. RDS-MS-9.

Discussion

Commission Rule 5.107(C)(12) requires that all applications for net-metering systems with capacities greater than 150 kW must include a plan for decommissioning the Facility at the end of its useful life. The decommissioning plan must provide for the removal and safe disposal of Facility components and the restoration of any primary agricultural soils if such soils are present within the net-metering system's limits of disturbance.

Commission Rule 5.904(A) requires that a Facility with a capacity equal to or greater than 150 kW and less than or equal to 500 kW must be removed once it is no longer in service, and the site must be restored to the condition it was in before installation of the facility to the greatest extent practicable.

The Applicant has provided a detailed plan for decommissioning the Facility. I recommend that the Commission approve that plan and require, as a condition of approval, that the Applicant comply with the terms and conditions of its proposed decommissioning plan, identified in the evidentiary record as exhibit RDS-MS-9.

VI. CONCLUSION

Based upon the certifications of the Applicant and the above findings, I recommend that the Commission conclude that, subject to conditions, the Facility will comply with the requirements of Commission Rule 5.100 and will promote the general good of the State.

This proposal for decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated: May 3, 2024

Andrea C. Poppiti
Hearing Officer

PUC Case No. 21-2939-NMP - SERVICE LIST

Parties:

Michael Binder, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
michaeljbinder@yahoo.com

L. Brooke Dingledine, Esq. (for Joan Allen)
Valsangiacomo, Detora & McQuesten, P.C.
P.O. Box 625
Barre, VT 05641
lbrooke@vdmlaw.com

Eric B. Guzman (for Vermont Department of Public Service)
Vermont Department of Public Service
112 State Street
Montpelier, VT 05620
eric.guzman@vermont.gov

Kimberly K. Hayden, Esq. (for Randolph Davis Solar LLC)
Paul Frank + Collins PC
One Church Street 05402
P.O. Box 1307
Burlington, VT 05401
khayden@pfclaw.com

Willy Jane Patry (for Agency of Agriculture, Food & Markets)
Agency of Agriculture, Food & Markets
116 State St
Montpelier, VT 05620-2901
willyjane.patry@vermont.gov

Kane Smart, Esq. (for Vermont Agency of Natural Resources)
Vermont Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
kane.smart@vermont.gov