STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Petition of Randolph Davis Road Solar LLC for a Certificate of public good, pursuant to 30 V.S.A. §§ 248 and 8010, authorizing the Installation and operation of a 500kW group Net-metered solar electric generation system in Randolph, Vermont	Case No. 21-2939-NMP

NEIGHBOR INTERVENORS' MOTION FOR RECONSIDERATION

OF THE COMMISSION'S AUGUST 12, 2024 FINAL ORDER

September 9, 2024

Now come Neighbor Intervenors Joan Allen and Michael Binder, *pro se*, and submit a Motion for the Commission to Reconsider its Final Order Granting Net-Metering Certificate of Public Good because of consequential errors in the Final Order.

* incorporates a request for the Commission to reconsider its denial of Intervenors' request for an initial site visit by the full Commission.

Section 1 Background

The Intervenors submitted testimony and evidence that this project's solar array would cause permanent (post-construction) stormwater runoff, unreasonable erosion, and undue adverse effects of that erosion on the natural environment.

In response, a Procedural Order Requesting Information was entered on October 31, 2022:

> I am requesting that ANR explain whether and how Vermont's **stormwater management regulations** and the **Project's design** will address Mr. Binder's concerns about locating solar panels on steep slopes. *[emphasis added]*

ANR's Responded on November, 11 2022:

> "The Agency will respond to this request through post-hearing legal briefing."

Then, on December 16 and December 22 of 2022, ANR requested that the Commission take Judicial Notice of the Low-Risk Handbook and the Petitioner's Notice of Intent for the discharge of stormwater runoff.

Then, on December 23, 2022 the Intervenors filed a Request for Clarification and wrote: *[emphasis added]*

> ANR's 12/16/22 and 12/22/22 Motions are about **Construction** Stormwater Permits. Most of the site preparation and construction (regulated by the Construction Stormwater Permit) will occur before the array is installed. Mr. Binder's concerns are about **post-construction** concentrated runoff (effluent) from the impervious array.
>
> ANR's motions for the Commission to take Notice of Judicially Cognizable Facts are not responsive to the Hearing Officer's request for ANR to address Mr. Binder's concerns about locating solar panels on steep slopes. Neighbor Intervenors respectfully request that ANR clarify whether it will provide a responsive reply to Mr. Binder's concerns about **post-construction** stormwater management.

On January 12, 2023 ANR filed its Brief. It was not responsive to the Hearing Officer's Procedural Order Requesting Information. It concludes with:

> Mr. Binder's stormwater runoff and soil erosion concerns fall within the Agency's jurisdiction to address through its statutorily authorized permitting process. That process has resulted in the authorization of the Applicant's NOI for **construction related** stormwater discharges in this case. The requirements of the of the [sic] authorized NOI have empirically been sufficiently protective against undue soil erosion at sites with steep slopes. Based on the foregoing, the Commission should apply its reasoning outlined in Hespos and conclude that Mr. Binder's concerns are not appropriate for consideration in this proceeding.
>
> Alternatively, if the Commission does determine that Mr. Binder's concerns fall within its jurisdiction to consider, Mr. Binder has not provided the Commission with a basis **[see note below[1]]** to find that the implementation of EPSC measures required by the NOI may result in undue adverse soil erosion at the site. *[emphasis added]*

On January 26, 2023 the Intervenors responded on page 3 of their Reply Brief:

> The Petitioner's and ANR's arguments about **Construction** stormwater measures, authority and permitting, Low Risk Handbook, EPSC, NOI, etc. are a distraction from the larger stormwater issue. Other than inadequate wetland buffers **during and after** construction, Intervenors' evidence for stormwater related undue adverse effects on 248(b)(5) and 6086(a)(1)(4) criteria is primarily related to **post-construction** concentrated runoff (effluent) from the array and the road. *[emphasis added]*

On May 17, 2024 Intervenors wrote on page 9 of their comments on the 2nd PFD:

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

Against this background, a most consequential error in the Commission's Final Order is examined in the next section.

---

[1] Of course Mr. Binder did not provide the Commission a basis to find that implementation of EPSC measures may cause erosion. EPSC measures do not cause erosion, they prevent erosion during construction. Mr. Binder's point is that EPSC measures do not address post-construction stormwater and the permanent structures that are necessary to manage post-construction stormwater and to avoid post-construction erosion.

Section 2 A Consequential Error

On page 8 of the Final Order the Commission writes:

> 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. *[emphasis added]*

Here the Commission is in error. The Low-Risk Handbook and implementation of EPSC measures do NOT control the risks associated with **permanent** stormwater runoff:

- From the third paragraph of the Low-Risk Handbook: *[emphasis added]*

  > The practices in this handbook serve as the required Erosion Prevention and Sediment Control Plan for **construction** activity that is determined to be "Low Risk" under CGP 3-9020.

- Section 15 of the Low-Risk Handbook is titled: Permanent Controls. The first paragraph (and its footnote) of section 15 is: *[emphasis added]*

  > **Permanent stormwater treatment practices** are constructed to maintain water quality, preserve existing water table elevations, prevent downstream flooding, and **are often required for a project under a Vermont operational stormwater discharge permit** applicable to the construction or redevelopment of impervious surfaces.*
  >
  > * An impervious surface is a manmade surface, including, but not limited to, paved and unpaved roads, parking areas, roofs, driveways, and walkways, from which precipitation runs off rather than infiltrates.

On Page 9 of the Final Order, the Commission writes:

> We are satisfied that the Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site.

The Commission's satisfaction is not justified because it is based on the erroneous assumption that ANR's permitting requirements for **construction** are sufficient to control the risks associated with **permanent** (post-construction) stormwater runoff.

Section 3 Orderly Development

In its discussion of Orderly Development, the Commission writes on page 4 of the Final Order: *[emphasis added]*

> 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 Commission also writes on page 6 of the Final Order: *[emphasis added]*

> 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 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 bolded words above are problematic because absent an operational stormwater permit, ANR's stormwater permitting regulations do not protect against post-construction erosion and the downstream effects of that erosion on the waters and water quality of the region. The Commission, in error, is basing its conclusion about Orderly Development of the Region on the erroneous assumption that the facility's impacts, both during and **after** construction, are *"localized and adequately controlled by ANR's regulations"* and that the *"requirements of ANR's stormwater permitting regulations are sufficient to protect surface waters."*

Both the Applicant[2] and the Intervenors[3] agree that the purpose of Randolph's Land Conservation Measure which prohibits energy facility development on steep (>25%) slopes is to prevent erosion and protect water quality.

The natural consequence of flouting a Land Conservation Measure that prevents erosion is erosion. The erosion caused by flouting Randolph's Land Conservation Measure will have undue adverse effects on the White River and on a water source protection zone.

Intervenors respectfully request the Commission correct its error and find that ANR's permitting regulations do NOT protect the region from post-construction erosion, and then find that this project unduly interferes with orderly development of the region.

---

[2] Petitioner Reply Brief page 6

[3] NI Reply Brief page 8

Section 4 Burden of Persuasion

The Commission writes on Page 8-9 of its Final Order:

> 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."
>
> The Landowners 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.

Here there are two errors:

1) Both ANR and the Commission have conflated the Intervenors' testimony and exhibits about **post-construction** stormwater issues with **construction** stormwater issues that are addressed by the Low-Risk Handbook and EPSC measures. EPSC measures are measures taken to avoid construction-related erosion and have nothing to do with preventing post-construction erosion. This project's inevitable post-construction erosion is the result of reckless design and engineering which fails to account for and then fails to manage concentrated runoff on steep slopes.[4]
2) The Commission is improperly putting the burden of persuasion on the Intervenors. The burden is on the Applicant to provide persuasive evidence with testimony and exhibits that the project will not cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results **[during and after construction].**

[4] NI Reply Brief pages 4-5

It is worthy of note that the Intervenors asked in Discovery:

> "Produce a list of all other solar energy projects permitted or built by Norwich Solar Technology, that have slopes greater than 25% within their Limits of Disturbance."

The Applicant objected and did not produce. The Applicant has had, but has not taken advantage of, at least two opportunities (rebuttal and surrebuttal) since Discovery to produce evidence of their experience and competence designing and building solar projects on steep slopes without causing unreasonable erosion. The Applicant has failed its burden to show that the design and engineering of this project will not, **after construction,** cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.

Intervenors respectfully request that the Commission correct its error and put the burden of persuasion on the Applicant to show that this project, **after construction,** will not cause unreasonable soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. Inasmuch as the Applicant has not met that burden, the Commission should then deny this project a CPG on the basis of unreasonable soil erosion and all of the downstream undue adverse effects of erosion on the natural environment.

Section 5 ANR Rules versus Reckless Design and Engineering

This section of this Motion examines ANR's Rules, and how an environmentally destructive project such as this can slip through ANR's permitting regulations, and why the Commission cannot depend upon ANR's permitting regulations to prevent a post-construction environmental catastrophe.

- A construction stormwater permit is required if a project disturbs more than an acre of soil. If the project involves more than ½ acre of impervious surface, the project requires an operational stormwater permit. Operational stormwater permits often require the construction of permanent structures to manage post-construction stormwater.
- A small project (less than 1 acre, and less than ½ acre impervious surface) does not require a stormwater permit and is not immune to environmental catastrophe caused by slipshod construction practices and/or slipshod or reckless design and engineering.
- Projects (such as the present project) with a construction stormwater permit comply with EPSC rules, require inspections during construction, and are unlikely to cause environmental catastrophe **during construction.**
- When a project (such as the present project) has no operational stormwater permit, there is no review of its post-construction design and engineering. An environmental catastrophe may occur **after construction** if the design and engineering of the project is reckless and does not account for and manage concentrated runoff on steep slopes and/or highly erodible soils.

The testimony and exhibits in this case demonstrate that the design and engineering of this project is reckless and is certain to cause a post-construction environmental catastrophe.[5] In particular, the array and the access road on steep slopes stand out as examples of reckless design and engineering, and are examined in the subsections below.

[5] NI Brief page 12, NI Reply Brief pages 4-5, Exh. NI MB-40 page 2

Subsection 5A The Array

The solar array is an impervious surface. The Applicant and ANR assert that this project does not require an operational stormwater permit because the solar array is not impervious and does not count[6] towards the ½ acre impervious surface threshold which triggers the requirement for an operational stormwater permit. ANR on page 2 of its brief states:

> The Agency is also generally vested with the authority to interpret the Stormwater Rule's definition of "impervious surface". See Stormwater Rule § 22-201(23).

ANR's assertion that it has the authority to interpret "impervious" to mean "not impervious" on ALL slopes and ALL soils is arbitrary, injudicious, and absurd. It will lead to an environmental catastrophe. No person can reasonably believe that rain passes through a solar panel as if it were not there.

Stormwater Rule § 22-201(23):

> "Impervious surface" means those manmade surfaces, including paved and unpaved roads, parking areas, roofs, driveways, and walkways, from which precipitation runs off rather than infiltrates.

From Section 15 of the Low-Risk Handbook:

> An impervious surface is a manmade surface, including, but not limited to, paved and unpaved roads, parking areas, roofs, driveways, and walkways, from which precipitation runs off rather than infiltrates.

ANR is ignoring its own definition of "impervious surface" and consequently is violating its own Rule that requires an operational stormwater permit for projects that involve more than ½ acre of impervious surface. An Operational stormwater permit would mean that there are at least some engineering standards for this project. It would provide some protection against post-construction environmental catastrophe caused by reckless design and engineering.

---

[6] The base or foundation of the array does count as impervious surface.

It is noteworthy that requiring an operational stormwater permit on a solar project does not necessarily impose a burden on the developer. Operational stormwater permits do not always require the construction of permanent structures to manage post-construction stormwater. An engineer may determine that no permanent stormwater management practices are necessary; in other words, on some sites[7] the array may be treated by an engineer as if it is not impervious. However, the array is impervious and concentrated runoff from an impervious array is always taken into account when a competent engineer designs the necessary permanent stormwater practices for an array on moderate or steep slopes and/or on highly erodible soils.[8]

ANR does not take into consideration the slope of the land when it pretends that solar arrays are not impervious. The Commission, however, does not have ANR's freedom to ignore the slope of the land. 10 V.S.A. § 6086(a)(1) requires that the District Commission shall find that the development will not result in undue water pollution. In making this determination it shall at least consider, inter alia, **the slope of the land** and its effects on effluents and the availability of streams for the disposal of effluents.

The reckless design and engineering of this project takes no account of the concentrated runoff from the array on steep slopes. The Intervenors' testimony and exhibits about the **post-construction** erosion hazards of this project have not been contradicted by testimony or evidence. The Applicant has failed its burden to provide persuasive testimony and exhibits that this project will not cause unreasonable erosion **after** construction. ANR and the Commission have dismissed the Intervenors' testimony and exhibits about **post-construction** erosion hazards

---

[7] especially on vegetated flat and gentle slopes and soils that are not highly erodible. see Exh. NI MB-40

[8] Exh. NI MB-40

because the project will receive a **construction** stormwater permit. The Commission's conclusion that ANR's **construction** permitting requirements are sufficient to avoid unreasonable erosion **after construction** is not based on any evidence and is in error.

Subsection 5B The Access Road

Arguably, the most obvious example of this project's reckless design is the access road. The grading diagram of the access road on the site plan shows several hundred feet of the roadbed is set in the bottom of a trench on a steep hillside.[9] The trench has no roadside ditches, culverts, or other drainage structures. The design and engineering of the road is reckless and the road will fail if it is built as shown in the site plan.

No party has rebutted the Intervenors' exhibits and testimony that the access road will wash out after construction. No person, Board, or Court can reasonably believe that the access road, if built as shown on the site plan, will not wash out. The Commission's conclusion that ANR's **construction** permitting requirements are sufficient to avoid unreasonable erosion **after construction** is not based on any evidence and is in error.

The Commission should not be swayed by knowledge that many roads, steeper than this project's road, have been successfully built. Proper design and engineering, lacking in the present case, is necessary to successfully build a road on steep hillsides.

[9] Exh. NI MB-50

Subsection 5C Perspective

In the matter of Orderly Development, slope is the fundamental issue because Randolph's Land Conservation Measure specifically makes slope the fundamental issue. On the § 248 erosion criteria, the fundamental issue is not slope, but reckless design and engineering. Intervenors have never asserted that a solar array cannot be safely built on steep slopes. It would take some extreme and creative engineering to disperse concentrated runoff on this project site's steep slopes, but probably it could be done. Mr. Binder gave an example of extreme engineering (gutters on solar panels) at Oral Arguments[10].

The array and the access road on steep slopes stand out as examples of the reckless design and engineering of this project. ANR's permitting regulations do not protect the State of Vermont from the post-construction consequences of this project's reckless design and engineering. The State is fortunate that this project requires a CPG and that the Commission has the authority and responsibility to protect the State from the undue adverse effects of this project's **unmanaged concentrated runoff** on the natural environment.

Intervenors respectfully request that the Commission correct its error and find that ANR's permitting regulations do not protect the environment from (post-construction) unreasonable erosion. Intervenors also respectfully request that the Commission then find that the Applicant has not met their burden of persuasion to show that the **unmanaged concentrated runoff** from the array and the access road will not cause unreasonable erosion and the downstream undue adverse effects of that erosion.

---

[10] Oral Arguments Tr. page 20

Section 6 Abdication of responsibility

ANR's statutory authority to issue stormwater permits does not relieve the Commission of its statutory responsibility to deny a CPG to a project that causes unreasonable erosion and the downstream undue adverse effects of erosion on the natural environment.

If the Commission defers to ANR's permitting practices, it is abdicating its responsibility to look at the evidence and determine whether this project will cause unreasonable erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results; and it is abdicating its responsibility to consider the slope of the land and its effects on effluents and the availability of streams for the disposal of effluents.

Section 7 Buffers and AMPs

On page 10 of the Final Order, the Commission writes: *[emphasis added]*

> 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.

As per Section 2 of this Motion, compliance with ANR's stormwater permitting requirements is NOT sufficient to protect the environment from post-construction erosion.

Furthermore, logging operations that comply with the AMPs appear to be exempt from requiring a stormwater permit,[11] not the other way around. A stormwater permit does not relieve the Applicant of the requirement to follow mandatory AMP Rules.[12]

From page 21 of Guidance For Agency Act 250 And Section 248 Comments Regarding Riparian Buffers: *[emphasis added]*

> Riparian buffers filter stormwater runoff that flows through them as sheetflow. Buffer vegetation catches sediment and absorbs some of the nutrients and other pollutants contained in the runoff. Pollutant removal depends on the pollutant load and type, the composition and slope of the buffer, and the amount of runoff (Chase et al 1995). In general, to provide the same level of pollutant capture, **buffers in steep slope areas will need to be wider** as flows are typically faster moving and more concentrated.

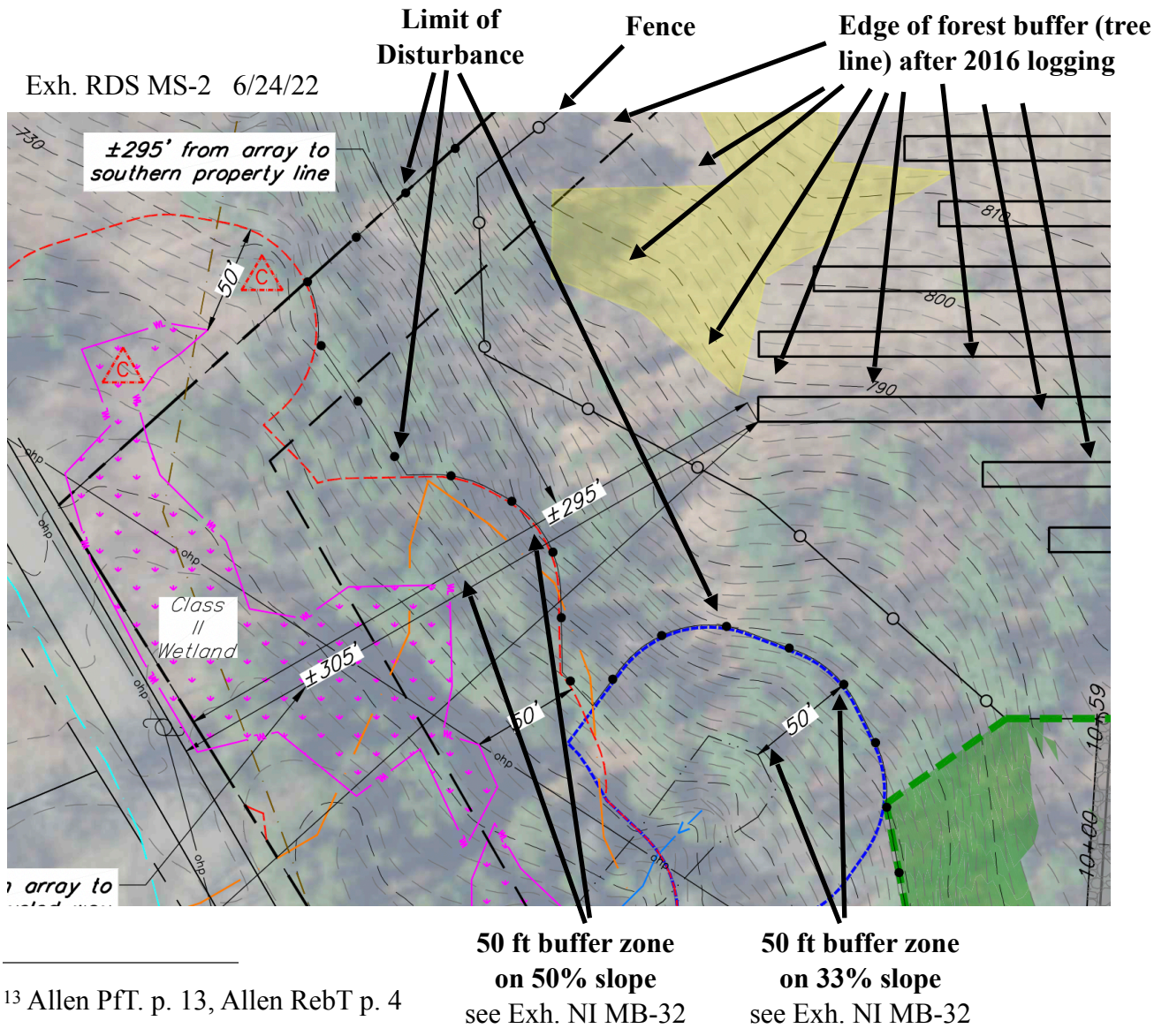
---

[11] From page 1 of the AMP Rules: "Additionally, logging operations that are in compliance with the AMPs are exempt from the discharge permit requirements in accordance with 10 V.S.A. §1259(f), the stream alteration permit requirements pursuant to 10 V.S.A §1021(f), and the stormwater permit requirements pursuant to 10 V.S.A. §1264(d)(1)(C)."

[12] From page 2 of the AMP Rules: "The AMPs apply 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 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."

AMPs have specified buffer widths depending on slope. For example, a 50% slope requires a 130 foot buffer.[13] Regardless of whether or not AMPs apply here, the Commission should be certain that streams and wetlands are adequately buffered. The site was logged by Sam Lincoln in 2016 and Mr. Binder testified:[14]

> More than 100 ft of forest (including some of the pine plantation) was left intact to serve as buffer above the wetlands. The wide buffer was necessary because the slopes above the wetlands are so steep. On the Site Plan (or Exhibit MB-32) one can still see the old forest buffer that is above the wetlands, and one can also see that the LoD extends down into the forested buffer. *[see demonstrative aid below]*



[13] Allen PfT. p. 13, Allen RebT p. 4

[14] Binder RebT p. 4

The Commission should respect the 2016 wetland and stream buffers and not permit logging in the area between the limits of disturbance and the existing tree line; in which case the limits of disturbance should be moved to the existing tree line that was the 2016 buffer. The statutory **minimum** buffer for class 2 wetlands is 50 feet on flat terrain. No person can reasonably believe that the same 50 foot minimum buffer required on flat land is adequate on a 50% slope.

10 V.S.A. § 6086(a)(1) requires that the District Commission shall find that the development will not result in undue water pollution. In making this determination it shall at least consider, inter alia, **the slope of the land** and its effects on effluents and the availability of streams for the disposal of effluents.

Intervenors respectfully request the Commission reconsider its denial of the Intervenors' request for the full Commission to make an initial site visit. If the Commissioners stand on the edge of the wetlands and look up at the forested 50% slope, the Commission might better consider the slope of the land, and then reconsider its approval of the bare minimum wetland and stream buffers that are shown in the site plan.

Section 8 AAFM Conditions

The western half of PAS stockpile on the site plan is on greater than 15% slope in violation of AAFM's conditions.[15] On page 9 of the Final Order, the Commission writes:

> 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%.
>
> 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. *[emphasis added]*

Intervenors have NOT argued or asserted that the Applicant **will be able** or **will not be able** to relocate the stockpile to comply with AAFM's conditions. No party has given testimony that the proposed stockpile can or cannot be relocated within the approved limits of disturbance on a slope that meets the AAFM conditions. It is unreasonable and unjust to require the Intervenors demonstrate that the stockpile cannot be relocated because that is, in effect, requiring the Intervenors to prove a negative.

It is not the burden of the Intervenors to redesign the project (i.e. relocate the stockpile) so that it meets AAFM's conditions. Nor is it the burden of the Intervenors to prove that the stockpile cannot be relocated. The burden falls on the Applicant to provide a project design that complies with AAFM's conditions. The Applicant has failed that burden.

---

[15] Exh. NI MB-41

On page 9 of the Final Order, the Commission writes: *[emphasis added]*

> **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.

Intervenors have testified that the stockpile on the site plan does not comply with AAFM's conditions for slope. No party has provided contradictory testimony or evidence. No person can reasonably doubt that **the Applicant WILL need** to relocate the stockpile in order to comply with AAFM's slope condition.

AAFM conditions also call for the PAS to be sequenced at decommissioning. The Reclamation Guidelines require at least two separate PAS stockpiles (one for each horizon of the disturbed soil) in order to sequence PAS. Therefore, in addition to relocating the existing PAS stockpile, the Applicant must also build a 2nd stockpile in order to comply with AAFM's sequencing requirements.

The site plan shows another violation of AAFM's conditions that is more important than the impermissible siting of the stockpile. In particular, the Applicant is planning to only stockpile a negligible amount of the disturbed PAS. Four hundred feet of the access road is on PAS. The Applicant admitted in Discovery that 12 inches of PAS taken from 75 feet of the road and 6 inches taken from 40 ft of the road will be stockpiled.[16] That is a negligible amount of PAS. If all of the PAS disturbed by the road were to be stockpiled, the stockpile shown on the site plan would be undersized by two orders of magnitude.[17]

---

[16] Exh. NI MB-38 page 7

[17] Exh NI MB-50 pages 4-5

Rather than stockpiling PAS for reclamation, the Applicant intends to bury most of it up to 9 feet deep under a berm of non-PAS fill.[18] No barrier (as required by AAFM's conditions) is specified in the site plan to separate the PAS from the fill.[19] Even if the Applicant were to modify the site plan and specify a barrier between the PAS and the fill, the Intervenors have testified that the PAS cannot be meaningfully reclaimed at decommissioning after 25 years of anaerobic compaction under 9 feet of non-PAS fill.[20] No party has provided any testimony or evidence to the contrary.

The Commission's Rules permit applicants to make non-substantial modifications to their plans after approval, but that should only be done when the need for modifications was not foreseen during the application process. On Sept. 9, 2022 the Intervenors submitted testimony and an exhibit demonstrating that the stockpile was improperly sited.[21] The Applicant has had two full years since then to amend their project, but has not done so.

If the Commission grants a CPG with the expectation that the Applicant will modify the project after receiving a CPG, then the Commission should be absolutely certain that any post-CPG modifications are non-substantial. There is no testimony or evidence from any party that the inevitable modifications will be non-substantial.

The above mentioned violations of AAFM conditions are evident on the site plan. There is also a potential violation that is not seen on the site plan. The Commission should consider

---

[18] Exh NI MB-50 pages 4-6

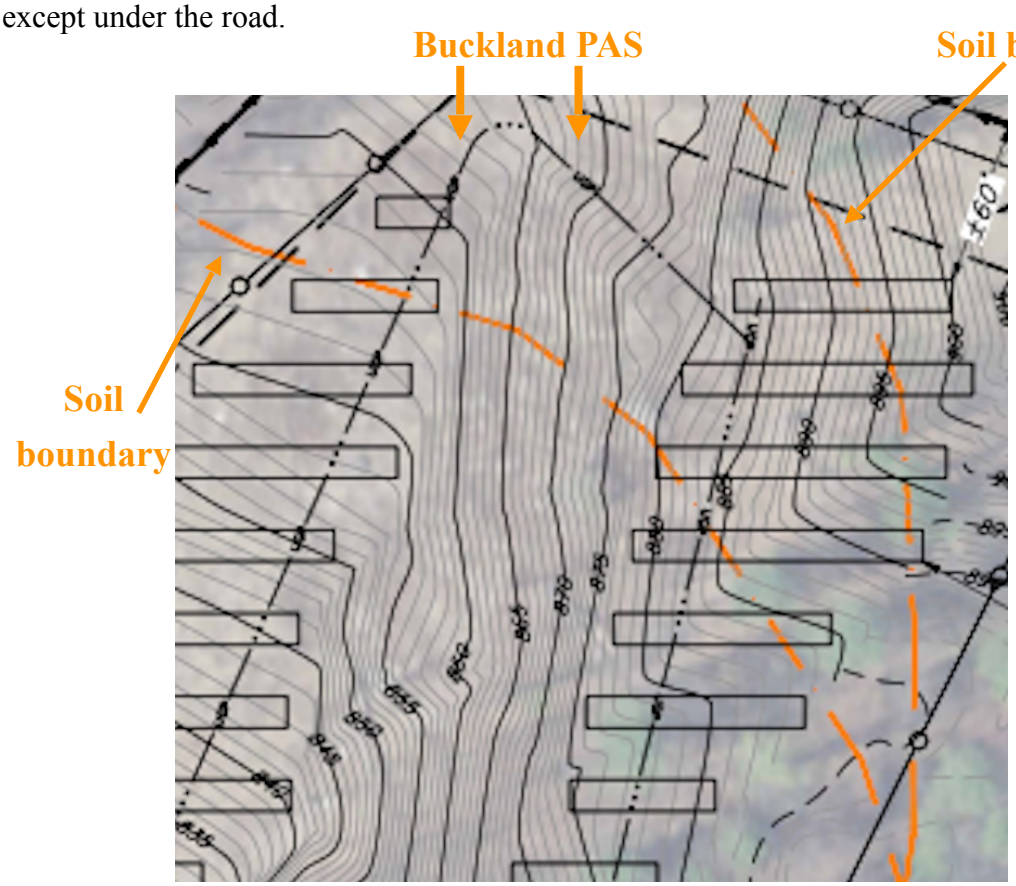
[19] Exh, RDS MS-2

[20] Binder SurT. page 6

[21] Exh. NI MB-41, Binder SurT p. 7

whether it is plausible for the Applicant to abide by the AAFM condition that PAS may not be graded except under the access road.

There are two areas of PAS within the limits of disturbance. The northern area is steep and gnarly[22] and now has 8 years of woody growth since the 2016 logging. If the Applicant grades this PAS, they will be in violation of the AAFM condition that there be no grading of PAS except under the road.



Northern area of PAS
From Exhibit NI MB-40

Siting the array perpendicular to the contour lines on very steep slopes without permanent stormwater management practices is reckless. Unreasonable erosion is inevitable. Once erosion begins after construction, any attempts at mitigation (berms, terraces, level spreaders, swales,

[22] Binder PfT page 4

etc) will involve grading of the northern PAS, in violation of AAFM's conditions that there be no grading of PAS except under the road.

The staging area (not shown) is sited on the southern area of PAS.[23] The terrain there is also rough. The Applicant intends to place a geotextile fabric barrier on the PAS and then to cover the barrier with gravel.[24] If the Applicant grades the staging area prior to installing the fabric, the Applicant will be in violation of the AAFM condition that there be no grading of PAS except under the road.

The Commission should consider whether it is plausible that the Applicant can build this project without grading the PAS underlying the staging area and/or the array.

Intervenors respectfully request that the Commission reconsider its denial of the Intervenors' request for the full Commission to make an initial site visit. A site visit might help the Commission decide whether it is plausible that the Applicant will be able to comply with AAFM conditions and not grade PAS under the array and under the staging area.

The Commission should not take the risk of approving a non-complying project that does not protect and reclaim PAS, or that cannot plausibly be built without impermissible grading of PAS. The risk is that the Commission will burden itself and the parties with further proceedings related to CPG violations.

Intervenors respectfully request that the Commission reconsider its final decision to approve this project, and respectfully request the Commission not consider approving this project again until after the Applicant amends this project to comply with all AAFM conditions.

---

[23] Exh. RDS MS-2

[24] Exh. RDS MS-2

Section 9 Conclusion

ANR has not provided a responsive reply to the Procedural Order Requesting Information:[25]

> I am requesting that ANR explain whether and how Vermont's **stormwater management regulations** and the **Project's design** will address Mr. Binder's concerns about locating solar panels on steep slopes. *[emphasis added]*

Rather than offer a responsive reply, ANR warns in its Brief: (page 4)

> A Commission finding that solar panels should be considered impervious surface would likely result in competing stormwater permitting requirements in § 248 cases: an Agency process consistent with its current practice supported by rule, and a unique requirement applicants must meet based on whatever different standard the Commission articulates.

It is proper for the Commission to articulate a different standard than ANR's current practice:

- ANR's current practice is to arbitrarily, injudiciously, and absurdly interpret "impervious" to mean "not impervious"; and consequently to not require this project obtain an operational stormwater permit; and consequently to not require this project be competently designed and engineered.
- The Commission's standard is to be shown sufficient facts based upon persuasive evidence that unreasonable erosion, undue water pollution, and undue adverse impact on water purity, the natural environment, streams, rivers, and PAS will not occur **during and after** construction.

The Commission is statutorily required to look at the evidence and determine if this project will cause unreasonable erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results. Nothing in the text of Section 6086(a)(1)(4) or the Commission's precedent holds that the Commission's consideration of the soil erosion criterion is limited solely to whether a facility will comply with Vermont's stormwater regulations.[26]

---

[25] Procedural order October 31, 2022

[26] Procedural Order June 23, 2022 page 5

If the Commission defers to ANR's stormwater permitting rules on the erosion criteria, the Commission is abdicating its responsibility to look at the evidence and see that this project will cause unreasonable erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results.

Also as a consequence of deferring to ANR's stormwater permitting rules on the erosion criteria, the Commission fails to recognize that the project's post-construction erosion is NOT localized and adequately controlled by ANR's regulations, and that this project's violation of Randolph's Land Conservation Measure unduly interferes with orderly development of the region.

Neighbor Intervenors respectfully request that the Commission correct the errors in the Final Order, and then deny this project a CPG on the basis of undue interference with Orderly Development of the Region and on the basis of unreasonable erosion and the downstream effects of unreasonable erosion on waters, wetlands, PAS, and the natural environment.

Dated at Randolph, Vermont this
9th day of September, 2024

/s/ *Joan Allen*
Joan Allen, *pro se*
1953 Davis Rd.
Randolph Center, VT 05061
joanbarballen@gmail.com

Dated at Randolph, Vermont this
9th day of September, 2024

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