ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

AUG 30 2024

2024 VT 58

SUPREME COURT CASE NO. 23-AP-346

MAY TERM, 2024

In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT (Allco Renewable Energy Limited et al., Appellants)	}	APPEALED FROM:
	}	Public Utility Commission
	}	CASE NO. 20-1611-INV

In the above-entitled cause, the Clerk will enter:

Affirmed.

FOR THE COURT:

Paul L. Reiber, Chief Justice

Concurring:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice

9/20/2024 CERTIFIED TO BE A TRUE COPY OF THE ORIGINAL AS SAME APPEARS ON FILE IN THIS OFFICE.

DEPUTY CLERK, VERMONT SUPREME COURT

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In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT
(Allco Renewable Energy Limited et al., Appellants)

Supreme Court

On Appeal from
Public Utility Commission

May Term, 2024

Anthony Z. Roisman, Chair

Michael Melone, Allco Renewable Energy Limited, New Haven, Connecticut, for Appellant.

Charity R. Clark, Attorney General, and David Golubock, Assistant Attorney General, Montpelier, for Appellee Agency of Natural Resources.

Ben Civiletti, Special Counsel, Montpelier, for Appellee Department of Public Service.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **REIBER, C.J.** Developer, Allco Renewable Energy Limited, and its affiliates, Chelsea Solar LLC, Apple Hill Solar LLC, and PLH Vineyard Sky LLC, appeal a permanent injunction and civil-penalty order issued by the Vermont Public Utility Commission (PUC). The PUC found that by clearing trees at the planned location of an electric-generation facility while its petition for a certificate of public good (CPG) was pending, developer had initiated site preparation without a CPG, in violation of 30 V.S.A. § 248(a)(2)(A). Developer argues that the tree clearing was intended not as site preparation but to support its agricultural activities, and it brings a host of jurisdictional, administrative, and constitutional arguments against the injunction and civil penalty. We conclude that the PUC had jurisdiction over developer's activities, that it acted within its authority in imposing the injunction and civil penalty, and that none of developer's remaining arguments have merit. Accordingly, we affirm the PUC's order.

I. Background

¶ 2. In 2013 and 2014, developer executed two standard-offer contracts under 30 V.S.A. § 8005(a) for solar-electric energy generation facilities at two sites, Willow Road and Apple Hill Road, located on a twenty-seven-acre parcel of land in Bennington, Vermont. Developer subsequently applied for the requisite CPGs by filing petitions with the PUC for each contract, pursuant to 30 V.S.A. § 248. The standard-offer contracts have been amended several times to extend their operational deadlines and have neither expired nor been relinquished. The PUC denied a CPG for the Willow Road site in 2016 and denied an amended petition in 2019, which this Court affirmed in 2021. See In re Chelsea Solar LLC, 2021 VT 27, 214 Vt. 526, 254 A.3d 156. The PUC granted a CPG for the Apple Hill Road site in 2018, but neighbors appealed, and this Court reversed in part and remanded for further proceedings. See In re Apple Hill Solar LLC, 2019 VT 64, 211 Vt. 54, 219 A.3d 1295.

¶ 3. Following the remand, developer filed an amended petition for a CPG for the Apple Hill Road site to reflect developer's intention to graze sheep and grow hemp on the Apple Hill Road site and an adjacent five-acre parcel, which the PUC considered part of the Apple Hill Road site. Developer's amended petition stated that the agricultural activities were "wholly unrelated to the proposed-solar [sic] use." On May 7, 2020, the PUC denied a CPG for the Apple Hill Road site on remand and denied the motion to amend the petition to reflect sheep grazing and hemp farming at the project site.

¶ 4. In June 2020, while developer's motion for reconsideration was pending, a neighbor filed a public comment with the PUC alleging that developer had begun clearing trees on the land, despite the CPG denial. In response, the Agency of Natural Resources (ANR) raised concerns that the site clearing threatened substantial and immediate harm to "rare" and "very rare" plants and requested a cease-and-desist order to prevent irreparable harm to the plants. The Department of Public Safety (DPS) also requested further investigation into whether developer initiated the tree-clearing activity as site preparation for the electric-generation facilities, in

violation of 30 V.S.A. § 248(a)(2). The PUC subsequently initiated an investigation "pursuant to 30 V.S.A. Sections 30 and 209" and informed developer to "be prepared to address with affidavits (filed before the hearing begins) or live testimony whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30."

¶ 5. At the subsequent evidentiary hearing, Thomas Melone appeared on behalf of developer and testified about the tree clearing and proposed agricultural activities. While Melone insisted that the tree clearing was being done for agricultural purposes, he stated that the "primary aspect" of the sheep grazing would be to clear vegetation around the solar facility, and he agreed that it would not be possible to build a solar facility on the site "unless the trees are cleared." Based in part on this testimony, the PUC concluded that developer's "actions on Apple Hill continue to be part of [its] plan to develop the site for the two facilities that are the subject of its standard-offer contracts." The PUC therefore issued a temporary restraining order prohibiting site-preparation activities on both the twenty-seven-acre and five-acre parcels. Despite the order, developer continued to conduct site clearing activities the following day until a sheriff arrived and ordered all work to cease. Developer appealed the temporary restraining order, but we dismissed without prejudice to refiling if a permanent injunction was granted. See In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209, No. 2020-242, 2020 WL 6799008 (Vt. Nov. 5, 2020) (unpub. mem.) [https://perma.cc/8PF3-H3DN].

¶ 6. Following a second evidentiary hearing, the PUC concluded that developer's tree-clearing activity was site preparation for the proposed solar-electric-generation facilities and thus, without a CPG, violated 30 V.S.A. § 248(a)(2). The PUC found that (1) ANR observed site-clearing activity on the twenty-seven-acre parcel; (2) developer planned to build two solar-electric-generation facilities on the site; (3) clearing for a solar facility requires tree clearing; and (4) developer planned to use sheep as part of its solar facility development plan. The PUC therefore issued a permanent injunction order in April 2021 prohibiting developer "from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified

in its standard-offer contracts or CPG petitions for solar electric generation facilities," which included both the twenty-seven-acre and five-acre parcels. The order would remain in place until either "(1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions . . . and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished." Developer again filed an appeal, which we dismissed because it was not taken from a final appealable order. See In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209, 2021 VT 92, 216 Vt. 145, 274 A.3d 823.

¶ 7. The PUC conducted additional proceedings, including a third evidentiary hearing, to determine the amount of the civil penalty under 30 V.S.A. § 30. DPS recommended a civil penalty in the amount of $5000 while ANR recommended $29,000. Pursuant to 30 V.S.A. § 30(c), the PUC analyzed eight factors to determine the amount of the penalty. The PUC concluded that developer's failure to comply with its regulatory obligations harmed the credibility and integrity of the process, resulting in harm to the statutory scheme and potential harm to public safety and welfare, the environment, and utility customers. The PUC also found developer's claims that site preparation was done solely for unrelated farming purposes to be not credible given that developer knew that it did not have a CPG, that it was required to have one, that it needed to clear trees for site preparation, and that clearing had already been denied by the PUC. Finally, the PUC found that developer had sufficient resources to pay the fine and that the $5000 penalty would have specific and general deterrent effects. While the other statutory factors did not weigh against developer, the PUC concluded that based on these findings, a $5000 fine was appropriate. This appeal followed.

II. Discussion

¶ 8. Developer makes five main arguments on appeal. First, it contends that the PUC lacked jurisdiction over its tree-clearing activities because these activities were agricultural and not "site preparation for or construction of an electric generation facility." 30 V.S.A.

§ 248(a)(2)(A). Second, developer asserts that the PUC lacked statutory authority to initiate the investigation, enjoin the tree-clearing activities, and impose civil penalties. Third, developer attacks the injunctive order on various grounds, arguing that there was no irreparable injury, that the order was overly broad, and that the order was arbitrary and capricious. Fourth, developer argues that ANR's participation in these proceedings and its classification of rare and very rare plants exceeded its authority. Finally, developer brings several constitutional challenges to the proceedings, arguing that § 248 is unconstitutionally vague, that the delegation of authority to the PUC violates separation of powers, that developer was denied due process, and that it was denied the right to a jury trial.

¶ 9. In reviewing decisions of the PUC, we accord "substantial deference" and apply "a strong presumption of validity to the Commission's orders."[1] In re Vt. Gas Sys., Inc., 2024 VT 2, ¶ 15, __ Vt. __, 312 A.3d 519 (quotation omitted) (alteration omitted). The PUC's findings "will stand unless clearly erroneous," and we will neither "reweigh conflicting evidence nor reassess the credibility of witnesses." In re Acorn Energy Solar 2, LLC, 2021 VT 3, ¶ 23, 214 Vt. 73, 251 A.3d 899 (quotation omitted). However, while our review is generally deferential, "we do not abdicate our responsibility to examine a disputed statute independently and ultimately determine its meaning." In re Swanton Wind LLC, 2018 VT 141, ¶ 7, 209 Vt. 224, 204 A.3d 635 (quotation omitted). In our "independent examination, we employ our usual tools of statutory construction," starting with the plain language of the statute. Id. In construing a statute, our "paramount goal . . . is to give effect to the intent of the Legislature." In re Portland St. Solar LLC, 2021 VT 67, ¶ 13, 215 Vt. 394, 264 A.3d 872 (quotation omitted).

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[1] As discussed below, see infra, ¶ 30 n.6, nothing in our decision today implicates deference to an agency's "permissible construction" of an ambiguous statute. See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). We therefore need not decide the impact on our jurisprudence of the U.S. Supreme Court's recent decision abrogating Chevron deference. See Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

A. The PUC's Jurisdiction

¶ 10. Developer first argues that the PUC lacks jurisdiction under 30 V.S.A. § 209 because its property is not subject to the supervision of the PUC under Chapter 5 of Title 30.[2] Developer contends that its tree-clearing activities were farming-related rather than site preparation for its proposed solar facilities and that these activities are therefore beyond the PUC's jurisdiction. We disagree. Section 209(a) of Title 30 provides in relevant part that "the [PUC] shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or property subject to supervision under [Chapter 5 of Title 30]." (emphasis added). Developer is a corporation that owns the property at issue in this case. Because it holds standard-offer contracts for two proposed solar-electric-generation facilities under 30 V.S.A. § 8005(a) and applied for CPGs for both proposed facilities under 30 V.S.A. § 248—a provision of Chapter 5 of Title 30—developer is subject to the supervision of the PUC under Chapter 5 of Title 30 and thus the PUC's jurisdiction under 30 V.S.A. § 209. See In re Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 21 n.6, 210 Vt. 27, 210 A.3d 1230 (holding that "by erecting a tower that required approval under § 246, a provision of Chapter 5 of Title 30, [property owner] subjected himself to PUC jurisdiction under [§ 209]").

¶ 11. To be sure, the PUC does not have jurisdiction over pure farming activity. See 30 V.S.A. §§ 203, 209 (describing general scope of PUC's jurisdiction); Acorn Energy Solar 2, 2021 VT 3, ¶ 114 (noting that "public administrative bodies have only such adjudicatory jurisdiction as is conferred on them by statute" (quotation omitted)). But the PUC has related jurisdiction as described in the statute. As the PUC found and the record reflects, developer's tree-clearing activities were still prohibited as "site preparation for or construction of an electric generation

[2] Developer also argues that the PUC lacks jurisdiction under § 203. Because we decide that the PUC had jurisdiction under § 209, we need not decide this question.

facility" regardless of whether they also had an agricultural character. Id. § 248(a)(2)(A). Developer provided testimony during the initial proceedings that "sheep and solar go together" and that the "primary aspect" of the sheep project would be for use in connection with the solar project. Developer's initial proposal indicated that clearing the trees would be part of site preparation. And at the temporary-injunction hearing, developer conceded that tree clearing was a prerequisite to building the solar projects. Based on this evidence, the PUC found that the sheep-farming activity would primarily serve to control vegetative growth for developer's proposed solar facilities and that tree clearing was essential to the preparation of a solar-electric-generation site. Based on these findings, the PUC could reasonably conclude that the tree clearing was "site preparation for or construction of an electric generation facility." Id. Because developer subjected its property to the PUC's supervision by applying for a CPG under 30 V.S.A. § 248(a)(2), developer was precluded from conducting site preparation for its proposed solar facilities without the requisite CPG. And based on the PUC's findings and the plain language of the statute, we agree that these activities constituted site preparation.

¶ 12. Relatedly, developer argues that its sheep-farming and hemp-growing activities have "a separate function apart from the electric facility" and that under PUC precedent, these activities must be deemed "reasonably related" to its proposed solar facilities for the PUC to have jurisdiction. Developer points to several prior decisions where the PUC applied the reasonable-relationship test to evaluate what project components should be included as part of an electric-generation-facility subject to § 248, and it argues that the PUC's decision not to apply the test here was arbitrary and capricious.[3] See Petition of Beaver Wood Energy Pownal, LLC, Docket No.

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[3] Developer also cites to our decision in Mollica v. Division of Property Valuation and Review, 2008 VT 60, 184 Vt. 83, 955 A.2d 1171, to support its argument that "a use that has a separate function apart from the electric facility is not site preparation for an electric generation facility." In Mollica, we concluded that the occasional off-season use of a building as a rental property, where it retained its predominant use as a "Christmas Cottage" for a Christmas tree farm, did not constitute the "subsequent commencement" of a nonfarming use for purposes of taxation. Id. ¶ 17 (quoting 32 V.S.A. § 3752). Contrary to developer's argument, Mollica does not stand for a broad proposition that any farming use of a property supersedes any nonfarming use of the

7678, slip op. (Vt. Pub. Util. Comm. Apr. 1, 2011).); Petition of Monument Farms Three Gen, LLC, Docket No. 7592, slip op. (Vt. Pub. Util. Comm. Oct. 22, 2010); Petition of Georgia Mountain Community Wind, LLC, Docket No. 7508, slip op. (Vt. Pub. Util. Comm. Jan. 5, 2012). However, unlike the cited cases, the PUC here was not evaluating whether developer's proposed sheep-farming and hemp-growing activities were themselves part of the electric-generation facility; instead, the PUC was evaluating whether the tree-clearing activities would be considered site preparation under § 248(a)(2). As explained above, regardless of any auxiliary agricultural purpose, the tree clearing was site preparation under § 248(a)(2). Developer therefore has not shown any inconsistency with the PUC's precedents.

¶ 13. Finally, developer contends its property can only be subject to the PUC's supervision once the PUC has issued a CPG. But developer's argument is inconsistent with the plain language of § 248(a)(2), which refers to "an electric generation facility . . . that is designed for eventual operation," and which prohibits "site preparation . . . unless the [PUC] first finds that the [electric-generation facility] will promote the general good of the State and issues a certificate to that effect." (emphasis added). As we have previously recognized, the future-oriented language of § 248(a)(2) "highlights the Legislature's intent to bring within the statute's purview proposed construction, i.e., a facility that has not yet been built." See In re Proposed Sale of Vt. Yankee Nuclear Power Station, 2003 VT 53, ¶ 10, 175 Vt. 368, 829 A.2d 1284. By developer's reasoning, it could begin site preparation for an electric-generation facility without ever submitting a CPG application, while a CPG application is pending, or, as was the case here, pending reconsideration or appeal of the denial of a CPG application. Developer's reasoning directly contradicts the CPG requirement provided for in § 248(a)(2) and would provide an avenue for developer, or any

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property. Instead, we were simply interpreting the specific language of 32 V.S.A. § 3752 to determine whether "subsequent commencement" required complete, or only partial abandonment of the farming use. The case therefore has no relevance here.

standard-offer contract holder, to circumvent the PUC's supervision under Chapter 5 of Title 30, contrary to the plain intent of the law. We therefore reject this argument.

B. The PUC's Authority

¶ 14. Developer next argues that the PUC lacked authority to open its investigation or to issue the injunction and civil-penalty orders. We again disagree. First, the PUC has the authority to open an investigation into whether developer violated 30 V.S.A. § 248(a)(2) pursuant to 30 V.S.A. § 209(a)(6), which authorizes the PUC to "restrain any company subject to supervision under [Chapter 5 of Title 30] from violations of law." Developer is a company subject to supervision under Chapter 5 of Title 30.[4] To determine whether a company has violated § 248(a)(2) and thus requires restraint, the PUC has the implied authority to investigate the matter. While developer contends that the PUC's power "to open investigations is limited to express statutory authorizations," we have long recognized that the PUC (formerly the Public Service Commission) has "such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." Trybulski v. Bellows Falls Hydro-Elec. Corp., 112 Vt. 1, 7, 20 A.2d 117, 120 (1941). We reiterate that principle here. The plain language of § 209(a)(6) authorizing restraint from violations of law implies the power to investigate such violations. Without the power to initiate an investigation, the PUC would be unable to effectively exercise the power to restrain violations of law by parties under its supervision. The PUC therefore had the authority to open an investigation into whether developer violated 30 V.S.A. § 248(a)(2) by beginning site preparation without the requisite CPG.

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[4] Section 201 of Title 30 defines "company" to mean "individuals, partnerships, associations, corporations, and municipalities owning or conducting any public service business or property used in connection therewith and covered by the provisions of [Chapter 5]." Because developer is a corporation owning property covered by § 209, a provision of Chapter 5, it qualifies as a company under § 201.

¶ 15. Developer argues that only DPS can open an investigation into violations of § 248, citing to 30 V.S.A. § 30(h), which provides that DPS "may issue an administrative citation to a person [DPS] believes after investigation violated [§ 248]." (Emphasis added). However, while § 30(h) provides one avenue for an enforcement action for a § 248 violation, nothing in the statute makes that authority exclusive. See State v. Boyajian, 2022 VT 13, ¶ 22, 216 Vt. 288, 278 A.3d 994 ("The plain, ordinary meaning of the word 'may' indicates that [a] statute is permissive and not mandatory." (quotation omitted) (alteration omitted)). Moreover, by the plain terms of the statute, the "administrative citation" available under § 30(h) is distinct from the civil penalties available under the statute's other provisions. For example, § 30(h) caps penalties at $5000, whereas § 30(b) permits penalties of up to $85,000, plus ongoing fines for continued violations. If § 30(h) were the only avenue for opening investigations, the higher penalties authorized by § 30(b) would be ineffective. Thus, the PUC had the authority to open the investigation under § 209(a)(6) regardless of whether DPS chose to exercise its authority under § 30(h). See In re SolarCity Corp., 2019 VT 23, ¶¶ 11, 18, 210 Vt. 51, 210 A.3d 1255 (recognizing that PUC and DPS have overlapping powers and distinguishing between "an administrative-citation proceeding pursuant to § 30(h)" and "an investigation under the more general provisions of § 30").

¶ 16. Second, the PUC has the authority to issue a permanent injunction order pursuant to 30 V.S.A. §§ 9 and 209. Section 9 provides that the PUC "shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and enforce the same by any suitable process issuable by courts in this State." 30 V.S.A. § 9 (emphasis added). As explained above, the PUC has jurisdiction over developer pursuant to § 209. Therefore, under § 9, the PUC has the authority to make factual findings, draw legal conclusions based on an investigation into violations of law, and take subsequent enforcement action, including issuing an injunction order which is a "suitable process issuable by courts in this State." Id.; V.R.C.P. 65; see also Petition of Vt. Elec. Power Producers, Inc., 165 Vt. 282, 293, 683 A.2d 716, 722 (1996) (noting that "the [PUC] has all

the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction"). The PUC's authority to issue an injunction order is further supported by § 209(a)(6) which gives the PUC the power "to restrain" a company "from violations of law." (Emphasis added). Here, the PUC concluded from its investigation that developer's activity was site preparation for its proposed solar facilities and therefore violated § 248(a)(2). Consequently, the PUC had the authority to issue a permanent injunction to restrain developer pursuant to §§ 9 and 209.

¶ 17. Finally, the PUC has the authority to issue civil penalties under 30 V.S.A. § 30(a)(1), which provides in relevant part that "[a] person, company, or corporation subject to the supervision of the [PUC] . . . who violates a provision of . . . section 231 or 248 . . . shall be required to pay a civil penalty." Here, as discussed above, developer is a corporation subject to the supervision of the PUC that violated a provision of § 248. The plain language of § 30(a)(1) therefore authorizes the PUC to impose a civil penalty and requires developer to pay that penalty in the amount determined by the PUC pursuant to § 30(c). Section 30(c), in turn, lays out eight factors the PUC may consider "[i]n determining the amount of a fine under [§ 30(a)]." The PUC considered those factors in determining the amount of the civil penalty here. It held three evidentiary hearings, considered DPS's and ANR's recommendations as part of its determination of the penalty, and subsequently issued the lower of the two recommendations—an amount of $5000. It therefore acted within its discretion in issuing the penalty. See Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 10 ("[T]he PUC's decision to set and impose a penalty is within its discretion and will be upheld as long as it shows a thorough and fair evaluation of the various relevant factors." (quotation omitted)).

C. The Injunction Order

¶ 18. Developer next brings two claims of error with respect to the injunctive order. First, it argues that the irreparable-harm requirement for injunctive relief applies here and was not met. Developer contends that our decision in Town of Sherburne v. Carpenter, 155 Vt. 126, 582 A.2d

145 (1990), permitting public agencies to seek injunctive relief without a showing of irreparable harm in certain circumstances, is inapplicable because there is "no statute that authorizes the PUC to issue an injunction for an alleged violation of § 248's site preparation rule." Assuming Town of Sherburne does not apply, developer argues that there was no irreparable harm here because harm to the regulatory process is not a recognized harm, and the purported environmental harms are insufficient since the trees will ultimately be cleared either way.

¶ 19. Developer is correct that a party seeking injunctive relief ordinarily must prove that an injury has occurred for which there is no adequate remedy at law. See In re Investigation into Gen. Ord. No. 45, 2013 VT 24, ¶ 7, 193 Vt. 676, 67 A.3d 285 (mem.). This burden is often met by showing that the plaintiff will suffer irreparable harm if the court does not intervene to enjoin the challenged activity. Id. But in Town of Sherburne, we held that

> [g]enerally, where a statute authorizes a . . . public agency to seek an injunction in order to enforce compliance with a local ordinance or state statute, and is silent as to the injury caused, [the agency] is not required to show irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance.

155 Vt. at 129, 582 A.2d at 148; see also 42 Paul M. Coltoff et al., Am. Jur. 2d Injunctions § 147 (2d ed. 2024) ("Where the government is enforcing a statute designed to protect the public interest, it is not required to show irreparable harm to obtain injunctive relief; the statute's enactment constitutes Congress's implied finding that violations will harm the public and ought, if necessary, be restrained.")

¶ 20. We conclude that Town of Sherburne is controlling here and that the PUC was not required to make a finding of irreparable harm. As explained above, 30 V.S.A. § 209(a)(6) authorizes the PUC, a public agency, to restrain a company under its jurisdiction from violations of law. The permanent-injunction order effected the restraint here to enforce compliance with § 248(a)(2). Because § 209(a)(6) remains silent as to the injury caused, the PUC was not required to show irreparable harm before obtaining the injunction—only that developer violated

§ 248(a)(2). As explained above, the PUC made adequate findings to that effect. The PUC was therefore not required to show irreparable injury or harm before issuing a permanent injunction order upon finding a violation of § 248(a)(2).

¶ 21. Developer further contends that Town of Sherburne requires the PUC to review and balance the equities before issuing an injunction order. But as Town of Sherburne explains, a balancing of the equities is permitted only in very narrow circumstances: namely (1) "where the violation is so insubstantial that it would be unjust and inequitable to require" injunctive relief, and (2) where the "violation is innocent," or unknowingly committed. 155 Vt. at 131-32, 582 A.2d at 149. Neither of these circumstances apply here. By the time of the temporary-injunction order, developer had already cleared three acres of its twenty-seven-acre parcel, and it had plans to clear nearly the entire parcel in the following months. And since developer began clearing the trees following the denial of a proposed amendment to reflect sheep farming activities, it had knowledge that its actions were prohibited. See id. at 132, 582 A.2d at 149 ("Courts have generally found that a conscious decision to go forward, in the face of a direction not to from the regulatory body, outweighs factors pointing against the issuance of a mandatory injunction."). Furthermore, developer continued to conduct site preparation even after the PUC had issued a temporary restraining order requiring developer to halt its tree-clearing activity. We therefore conclude developer's violation was neither insubstantial nor innocent. As such, no balancing of the equities was required by the PUC here.[5]

¶ 22. Second, developer argues that the injunction order is overbroad in that it applies not only to the physical location of the planned energy facility, but also to the adjacent five-acre

[5] In its permanent injunction order, the PUC concluded in the alternative that irreparable injury existed by way of harm to rare and very rare plants, harm to the trees that would be cleared, and harm to the regulatory process through the violation of § 248(a)(2). Because we hold that the PUC is not required to show irreparable harm when seeking an injunction to enforce compliance with § 248(a)(2), we need not decide whether it correctly concluded that irreparable injury existed here.

"horticultural use lot." While it is true that the electric-generation facility itself will not be placed on the horticultural-use lot, that lot is part of developer's CPG application and is therefore part of the overall site. In its initial proposal, developer included a plan to use conservation zones and trees in the horticultural-use lot to offset environmental and aesthetic impacts of the facility. And in its proposed amendment, developer suggested that it would construct a building on the horticultural use lot to obstruct neighboring views and limit aesthetic impacts. These environmental and aesthetic concerns were vital to developer's CPG application because § 248(b)(5) requires the PUC to find that the project "will not have an undue adverse effect on aesthetics . . . [or] the natural environment." Because the horticultural-use lot was part of developer's proposed electric-generation facility, the PUC could conclude that site preparation on the horticultural-use lot was still "site preparation for . . . an electric generation facility" in violation of § 248(a)(2).

D. ANR's authority

¶ 23. Developer next challenges ANR's participation in these proceedings on two grounds. First, developer argues that ANR lacked authority to participate in the proceedings since these proceedings were initiated under § 209 rather than § 248. However, while jurisdiction was provided by § 209, this proceeding was an enforcement action of the prohibition on site preparation without a CPG under § 248(a)(2). Under § 248(a)(4)(E), ANR is required to "appear as a party in any proceedings held under this subsection." It is therefore a proceeding under § 248 and ANR was not only permitted, but required, to participate. In participating, ANR was required to "provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section" and permitted to "provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding." Id. § 248(a)(4)(E). Thus, by participating in the proceedings, offering evidence about the environmental impacts of the tree clearing, and recommending a civil penalty, ANR acted within the explicit scope of its statutory authority.

¶ 24. Second, developer argues that ANR only has express statutory authority to classify endangered and threatened plant species, and that its classification of rare and very rare species is beyond its authority. This question has no impact on the outcome of this case and we therefore do not address it. As the PUC noted in its civil-penalty order, "the validity of ANR's classification system is of no significance because the Commission is not basing its penalty assessment on actual harm to rare plants." While the PUC did consider the rare and very rare plant classification in its injunctive order as part of its finding of irreparable harm, we concluded above that no showing of irreparable harm was required here. See supra, ¶ 20. Therefore, ANR's plant classification system did not impact the outcome of the case. Because our assessment of this question will not affect the outcome of the case, we decline to decide this issue. See In re Vt. Elec. Power Co., Inc., 2006 VT 69, ¶ 26, 179 Vt. 370, 895 A.2d 226 (declining to address appellant's contention that PUC applied overly narrow definition of statutory term where appellant failed to argue prejudice "or explain how, if at all, a broader approach would have changed the result"); see also People v. Ringland, 2017 IL 119484, ¶ 35, 89 N.E.3d 735 ("Generally, a court of review will not consider an issue where it is not essential to the disposition of the case or where the result will not be affected regardless of how the issue is decided.").

E. Constitutional Claims

¶ 25. Finally, developer raises several constitutional challenges to the proceedings. First, it argues that the prohibition on site preparation in § 248(a)(2) is unconstitutionally vague and standardless. Developer contends that the phrase "site preparation for . . . an electric generation facility" is undefined and that the statute provides no standards for interpreting or implementing it. Developer suggests that this authorizes and encourages arbitrary and discriminatory application by allowing the PUC to make ad hoc decisions. Second, developer argues that the Legislature could not, consistent with the principle of separation of powers, constitutionally grant the PUC power to act here because the use of an injunction "is the stuff of what traditional courts of equity would handle, and thus could not be delegated to the PUC."

¶ 26. Developer's first two constitutional arguments present facial challenges to the validity of § 248 and § 209 respectively. Each argument "seeks to invalidate the provision outright" and neither identifies any set of facts particular to this case "making the statute unconstitutional, nor to a set of facts under which the statute would be constitutional." In re Investigation to Rev. the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019, 2020 Vt 103, ¶ 43, 213 Vt. 542, 251 A.3d 525; see also Vitale v. Bellows Falls Union High Sch., 2023 VT 15, ¶ 3 n.1, 217 Vt. 611, 293 A.3d 309 ("In a facial challenge, a litigant argues that there is no set of circumstances under which the challenged law could be valid and seeks the invalidation of the challenged law." (quotation omitted)). As we have previously explained, "the Commission lacks jurisdiction to adjudicate a facial challenge to a statute." In re Petition of Apple Hill Solar, 2023 VT 57, ¶ 33, __ Vt. __, 311 A.3d 117. Because the PUC cannot adjudicate facial challenges, we cannot review such claims on appeal from an order of the PUC. "As we have insisted in the past, [developer's] remedy is to follow the appropriate procedures to seek a declaratory judgment in the superior court, where other interested persons have an opportunity to participate in the proceedings." Investigation to Rev. the Avoided Costs, 2020 VT 103, ¶ 44.

¶ 27. Next, developer argues that the PUC violated due process by failing to provide adequate notice of the prohibited conduct and by denying developer's request for a hearing on the "harm to the regulatory process." On the first point, developer again asserts that the meaning of "site preparation" is too vague, such that it fails to provide adequate notice of prohibited conduct. Developer also reiterates its argument that the PUC acted contrary to its precedents, which it argues require that "an improvement to property must constitute a physical part of an electric generation facility." On the second point, developer suggests that harm to the regulatory process lacks any basis in the statute or administrative law and was "simply made-up by the PUC." Because no such harm is recognized, developer asserts, a penalty based on that harm is a violation of due process.

¶ 28. We reject developer's due-process arguments. First, as discussed above, we lack jurisdiction in this matter to address developer's facial challenge that the phrase "site preparation"

is unconstitutionally vague. We similarly reject developer's arguments about the PUC's precedents for the same reasons discussed earlier. See supra, ¶ 12. The PUC did not hold that an improvement need not constitute a physical part of an electric-generation facility; rather, it held that the term "site preparation for . . . an electric generation facility" encompassed site-preparation activities that may also have a secondary purpose. This does not contradict the PUC's precedents and does not deprive developer of due process.

¶ 29. On developer's second point, we conclude that the PUC appropriately weighed the statutory factors under 30 V.S.A. § 30(c) and set a penalty within the reasonable bounds of the statute. Section 30(c)(1) allows the PUC to weigh "the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers." In discussing the harms to the statutory scheme, the PUC described the regulatory harm as "an extension of the harm and potential harm to (1) public safety and welfare, (2) the environment, and (3) utility customers." As it explained, "[t]he § 248 process aims to protect these interests by preventing undue adverse impacts to the resources protected by § 248." Thus, a violation of § 248 has "attendant potential to harm the natural environment." This discussion is in line with the PUC's obligation to analyze the statutory factors and therefore does not create any due-process issues. See 30 V.S.A. § 30(c)(1) (requiring consideration of "the extent the violation harmed or might have harmed . . . the environment" (emphasis added)).

¶ 30. Finally, developer argues that it is constitutionally entitled to a jury trial on these charges. It cites to Tull v. United States, 481 U.S. 412 (1987), for the proposition that the right to a jury trial applies to "all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption." Because this suit seeks "common-law-like legal remedies," developer argues it is entitled to a jury trial. In a supplemental citation filed after argument, developer also points to the recent U.S. Supreme Court decision in SEC v.

Jarkesy, 144 S. Ct. 2117 (2024).[6] Developer argues that under Jarkesy, when "civil penalties are sought against a person . . . said person is entitled to a trial by jury under the Seventh Amendment to the United States Constitution."

¶ 31. Despite developer's intimations to the contrary, the Seventh Amendment is not applicable to state courts, and Jarkesy is therefore nonbinding on this Court.[7] See, e.g., Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 719 (1999); Osborn v. Haley, 549 U.S. 225, 252 n.17 (2007). Instead, in defining the right to a jury trial in Vermont, "we have historically looked to our own Constitution which, like almost every other state constitution, guarantees the right to jury trial to the extent that it existed at common law at the time of the adoption of the Constitution." State v. Irving Oil Corp.,

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[6] Developer also directs us to the U.S. Supreme Court's recent decision in Loper Bright, 144 S. Ct. at 2244, overruling in part Chevron, 467 U.S. at 837. Developer argues that, like federal courts, "this Court too defers to agencies," and it asks that we overrule our precedents requiring agency deference. However, Loper Bright dealt only with "Chevron deference"—that is, deference to an agency's "permissible construction" of a statute that is "silent or ambiguous" as to the issue at hand. See Loper Bright, 144 S. Ct. at 2264; Chevron, 467 U.S. at 843. Nothing in our decision today implicates the deference to an agency's legal interpretations of an ambiguous statute called for in Chevron. Rather, our decision rests on our independent examination of the statutory text and Legislative purpose. We therefore need not decide whether to follow Loper Bright at this time. See supra, ¶ 9 n.1.

[7] However, even if it were binding, Jarkesy is easily distinguishable based on the nature of the statutory claim. The Jarkesy Court concluded that "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury." Jarkesy, 144 S. Ct. at 2127. This common-law antecedent was critical to the Court's conclusion that the "public rights" exception to the Seventh Amendment was inapplicable. Id. at 2137 (distinguishing from Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977), on the basis that the statute there "did not borrow its cause of action from the common law"). Here though, developer fails to identify, and we are unaware of, any common-law antecedent to the prohibition in § 248 on site preparation for an electric-generation facility without a CPG. Developer notes only that this case involves "common-law-like legal remedies." But under Tull and Jarkesy, the inquiry starts with the "cause of action," not the remedy. Id. at 2129; see Tull, 481 U.S. at 417 (setting forth two-part test beginning with comparison of "the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity"). Thus, as the Jarkesy Court noted, "Congress could assign . . . [certain statutory] adjudications to an agency because the claims were 'unknown to the common law.' " Jarkesy, 144 S. Ct. at 2138 (quoting Atlas Roofing, 430 U.S. at 461) (emphasis added).

2008 VT 42, ¶ 5, 183 Vt. 386, 955 A.2d 1098 (quotation omitted) (alteration omitted); see Vt. Const. ch. I, art. 12 ("That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.").

¶ 32. Under Vermont law, "[c]laims traditionally tried in a court of law to which the constitutional right [to a jury trial] attaches are to be distinguished . . . from those that are equitable in nature, which were traditionally tried solely before a judge and therefore fall outside the scope of the right." Irving Oil Corp., 2008 VT 42, ¶ 5 (quotation omitted). To determine whether the jury-trial right attaches to a statutory claim, this Court looks primarily to "the remedy sought . . . [and] whether it is legal or equitable in nature."[8] Id. ¶¶ 7, 18; Agency of Nat. Res., 2013 VT 46, ¶ 26. Under this test, injunctive relief "is distinctly an equitable remedy" and therefore does not require a jury trial. Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc., 148 Vt. 1, 8, 527 A.2d 1142, 1147 (1987) (quotation omitted).

¶ 33. In evaluating whether an action for civil penalties is equitable in nature, we look to the statutory factors and assess whether the penalty primarily exists to punish the defendant or instead serves primarily public purposes such as "protecting the public health and safety and preventing unjust enrichment at the expense of the State and the public." Irving Oil Corp., 2008 VT 42, ¶ 18. As we have explained, civil penalties can "reimburse the government for enforcement expenses and other costs generated by the violation" and "serve a remedial purpose by making

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[8] In Irving Oil Corp., we identified the two-part test from Tull, which, in addition to examining the nature of the remedy sought, required an examination of the "closest eighteenth-century analogue to the statutory cause of action." 2008 VT 42, ¶ 7. However, we noted that the nature of the remedy is "more important" to the analysis, and quoted several concurring and dissenting U.S. Supreme Court opinions that "have called for dispensing altogether with the abstruse search for what often prove to be elusive and imprecise historical analogues." Id. (quotation omitted). In our subsequent analysis of the civil penalties, we relied solely on the nature of the remedy and stated that "we do not find Tull persuasive." Id. ¶¶ 17-18. We have since characterized our test from Irving Oil Corp. as "looking beyond traditional analysis of whether [the] claim had [an] eighteenth century common law analogue" and instead focusing on whether the "penalty was equitable in nature." Agency of Nat. Res. v. Persons, 2013 VT 46, ¶ 26, 194 Vt. 87, 75 A.3d 582.

noncompliance at least as costly as compliance." Agency of Nat. Res. v. Reindeau, 157 Vt. 615, 622, 603 A.2d 360, 364 (1991). Thus, in Irving Oil Corp., we concluded that civil penalties in an environmental-enforcement action were equitable in nature because the statutory factors and legislative purpose evinced "a legislative intent to assign the careful balancing of equities . . . [to] the agency traditionally entrusted with such decisions: a judge rather than a jury." 2008 VT 42, ¶ 18.

¶ 34. Here too, we conclude that the civil penalties authorized by 30 V.S.A. § 30 are equitable in nature in that they seek primarily to promote the public welfare rather than punish violators. Cf. In re Citizens Utils. Co., 171 Vt. 447, 454, 769 A.2d 19, 26-27 (2000) (referring to § 30 as a "public remed[y]"). A comparison of the statutory factors in 30 V.S.A. § 30(c) and 10 V.S.A. § 8010(b)—the statute at issue in Irving Oil Corp.—confirms the equitable nature of the civil penalties here. Of the eight factors under § 30(c), seven are effectively identical to the factors in § 8010(b). Compare 30 V.S.A. § 30(c)(1)-(5), (7), (8), with 10 V.S.A. § 8010(b)(1)-(6), (8).[9] While some of the criteria relate to the defendant's culpability, the factors as a whole "reflect a primary legislative concern with protecting the public health and safety and preventing unjust enrichment at the expense of the State and the public." Irving Oil Corp., 2008 VT 42, ¶ 18; see 30 V.S.A. § 30(c)(1), (3) (requiring consideration of "the extent that the violation harmed or might have harmed the public health, safety, or welfare" and the "economic benefit" obtained from the violation). Because the statute requires a "careful balancing of equities" both to "impose such civil penalties" and to determine "the amount of any penalty," the Vermont Constitution does not require a trial by jury. Irving Oil Corp., 2008 VT 42, ¶ 18; see also PLH Vineyard Sky LLC v. Vt. Pub. Util. Comm'n, Case No. 2:23-cv-154, 2024 WL 1072017, at *12 (D. Vt. Mar. 12, 2024) (rejecting developer's jury trial claim in parallel federal court proceeding).

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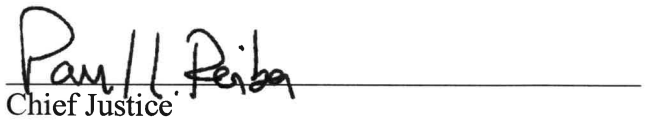
[9] Section 8010(b) was amended following our decision in Irving Oil Corp. to remove § 8010(b)(5). See 2007, No. 191 (Adj. Sess.), § 5.

III. Conclusion

¶ 35. For the reasons discussed above, we reject developer's challenges to the PUC's injunction and civil-penalty orders. The PUC had jurisdiction under § 209 because developer submitted itself to PUC supervision by applying for a CPG while holding two standard-offer contracts. Developer was therefore prohibited under § 248(a)(2) from engaging in site preparation for its electric-generation facilities—a prohibition that included the clearing of trees. The PUC was within its authority to initiate an investigation based on the credible allegations of site preparation, and based on its findings, was permitted to issue the injunctive and civil-penalty orders.

Affirmed.

FOR THE COURT:



Chief Justice