STATE OF VERMONT
PUBLIC UTILITY COMMISSION

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	)))))))	Case No. 21-2939-NMP *Filed electronically via ePUC*

VERMONT AGENCY OF NATURAL RESOURCES' RESPONSE TO MOTION FOR RECONSIDERATION

The Agency of Natural Resources hereby responds to the Neighbor Intervenors' Motion for Reconsideration ("Motion") in accordance with the Hearing Officer's September 13, 2024 Order Setting Deadline to File Responses. The Commission has already addressed Neighbor Intervenors' arguments concerning stormwater, soil erosion, and the applicability of the Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont (the "AMPs"). Their Motion should be denied.

I. Standard of Review

The Commission reviews requests for reconsideration pursuant to Commission Rule 2.221, which incorporates the language of Vermont Rule of Civil Procedure 59 without modification.[1] Relief pursuant to Rule 59 is an extraordinary remedy that is to be used with great caution.[2] Rule 59 does not permit parties to relitigate issues or correct previous tactical decisions.[3] It is not a vehicle to introduce new evidence or advance arguments that could have been made previously.[4] A party's disagreement with the Commission's decision is not grounds for reconsideration.[5]

II. Argument

Neighbor Intervenors raise two concerns in their Motion: (1) that the Project will result in increased amounts of impervious surface (and increased stormwater runoff) and cause

---

1 *Petition of City of Burlington Electric Department to transfer Thermal Energy & Process Fuel funds for use in its District Energy System support program*, Case No. 23-1870-PET, Order of 11/03/23 at 2.

2 Id. (citing *Petition of Vermont Gas Systems, Inc. for authority to condemn easement rights in property interests of the Town of Hinesburg, Vermont, at Shelburne Falls Road, Hinesburg, Vermont, for the purpose of constructing the pipeline authorized in Docket 7970*, Docket 8643, Order of 11/3/16 at 2).

3 Id.

4 Id. (citing In re B.K., 2017 VT 105, ¶ 13).

5 Id. (citing *Investigation to consider revising maximum and minimum water levels at Great Averill Pond, Little Averill Pond, and Norton Lake in the towns of Averill, Norton, and Warren's Gore, Vermont*, Docket No. 8429, Order of 12/21/17 at 6).

unreasonable soil erosion after construction is complete, and (2) that compliance with AMPs during construction is necessary to ensure construction-stormwater runoff does not cause unreasonable soil erosion. These concerns are not new. Neighbor Intervenors simply disagree with the Commission's decision and are advancing arguments that were (or could have been) made previously in the three years since the Petition was filed. Their Motion should be denied.

1. Post-Construction Stormwater Management

Neighbor Intervenors are first concerned about post-construction erosion, contending that "Vermont's stormwater management regulations" do not address "solar panels on steep slopes."[6] To be clear, Neighbor Intervenors are referring to concerns about post-construction runoff from increased amounts of impervious surface. They maintain that "*regardless of what procedures are followed during construction*, [the access] road will wash out after construction" due to the "concentrated runoff (effluent) from the impervious array."[7] The Agency addressed this concern in its Initial Brief filed on January 12, 2023 by explaining that solar panels are not considered impervious surfaces under the Agency's stormwater regulations.[8] The Commission recognized this in its Final Order before concluding that compliance with all necessary permits will be sufficient to satisfy Section 248(b)(5).[9]

This does not mean, as Neighbor Intervenors now argue, that "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."[10] On the contrary, the Agency regulates post-construction erosion through a litany of different stormwater permits.[11] Each of these permitting regimes is designed to protect the water quality of State waters.[12] Each of these post-construction permitting regimes, though, is triggered by the creation of impervious surface

---

6 Motion at 2.
7 Motion at 3.
8 ANR Brief (Jan. 12, 2023).
9 *Petition of Randolph Davis Solar LLC*, Case No. 21-2939-PET, Order of 8/12/24 at 28-29.
10 Motion at 5.
11 *See* Stormwater Permitting Rule § 22-101(c)(2) (describing the Rule as including "permitting requirements for the management of post-construction regulated stormwater runoff"), *available at* https://dec.vermont.gov/sites/dec/files/wsm/stormwater/docs/2019_02_15%3B%20Final%20Adopted%20Chapter%2022%2C%20Stormwater%20Permitting%20Rule.pdf; *see also* id. § 22-301 (listing types of permits); *see also, e.g.*, id. at Subchapter 6 (MS4 General Permit); id. at Subchapter 9 (Operational Permits); id. at Subchapter 11 (Municipal Roads Permit).
12 Id. § 22-101(a).

because impervious surfaces increase stormwater runoff and its associated impacts.[13] Solar panels are not considered impervious surfaces.[14] This issue has been briefed and decided.

Because solar panels are not impervious surfaces, regulation under a post-construction Agency stormwater permit is unnecessary. Indeed, Appellants concede that even if the solar panels were considered impervious, and even if operational stormwater permitting was triggered, the Project may not need any "permanent structures to manage post-construction stormwater."[15] There is a lack of impervious surface and associated impacts.

Neighbor Intervenors are re-raising post-construction stormwater and erosion concerns because they disagree with how they were addressed earlier in this proceeding. Their Motion should be denied.

2. Construction-Related Stormwater Management - AMPs

Neighbor Intervenors' second concern relates to erosion caused by stormwater runoff during construction. Even though Project construction is subject to a stormwater construction permit, Neighbor Intervenors contend that site clearing for the Project requires compliance with the AMPs to avoid unreasonable impacts from soil erosion.[16] This, too, is an argument already addressed by the Commission.

As discussed at length in the Final Order, "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."[17] The Commission "considered the [Neighbor Intervenors'] concerns related to the potential for soil erosion" and determined that "Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site."[18] The Commission concluded that Neighbor Intervenors "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

---

13 *See* id. § 22-107(b)(1)–(5), (c) (describing the permitting triggers for impervious surface).
14 ANR Brief at 5 (Jan. 12, 2023).
15 Motion at 11.
16 Id. at 15.
17 *Petition of Randolph Davis Solar LLC*, Case No. 21-2939-PET, Order of 8/12/24 at 8 (citing ANR Brief at 5).
18 Id. at 8-9.

requirements, particularly when ANR does not contend that both are necessary."[19]

Neighbor Intervenors present no basis to alter this conclusion. They simply disagree, contending that the AMPs' restrictions on logging within stream buffers are "mandatory" in all cases.[20] Not only does this conflict with the Agency's determination that compliance with General Permit 3-9020 is sufficient for construction stormwater control, but it is illogical and inconsistent with the statute and purpose and effect of the AMPs and other Agency permits.

By statute, AMPs are "advisory and not mandatory."[21] The AMPs provide measures "to comply with the Vermont Water Quality Standards and minimize the potential for a discharge [of sediment, petroleum products, and slash] from logging operations in Vermont."[22] Logging operations in compliance with the AMPs are presumed to be in compliance with the Vermont Water Quality Standards, so they are "exempt from the discharge permit requirements" statutorily prescribed under 10 V.S.A. § 1259.[23] In other words, "[p]ermits are not required for any discharges that inadvertently result from logging operations if responsible management practices have been followed to protect water quality."[24]

A stormwater construction permit ensures the same water quality protection and already authorizes the discharge.[25] Subject to its terms and conditions, Construction General Permit 3-9020 authorizes permittees to discharge stormwater runoff from construction activities.[26] Requiring compliance with the AMPs—which results in an exemption from the discharge permit requirements—ignores the fact that the stormwater construction permit authorizes the subject discharge. A permitted discharge need not be exempted from discharge permitting requirements. It would be redundant and illogical, particularly when both ensure compliance with the Water Quality Standards.

---

19 Id. at 10.
20 Motion at 15 ("A stormwater permit does not relieve the Applicant of the requirement to follow mandatory AMP Rules.").
21 10 V.S.A. § 2622(b).
22 *Acceptable Management Practices for Maintain Wate Quality on Logging Jobs in Vermont*, at 1 (Aug. 11, 2018), *available at* https://fpr.vermont.gov/sites/fpr/files/Forest_and_Forestry/Forest_Management/Library/AMP%20final%20version%207-17-18.pdf.
23 Id.
24 https://fpr.vermont.gov/forest/managing-your-woodlands/acceptable-management-practices.
25 *See* Stormwater Permitting Rule § 22-101(a) (describing the Rule's purpose to "reduce the adverse effects of stormwater runoff … [and] ensure compliance with the Vermont Water Quality Standards").
26 Construction General Permit 3-9020 § 1.4(A), *available at* https://dec.vermont.gov/sites/dec/files/documents/3-9020_Stormwater_ConstructionGeneralPermit_2020-02-19.pdf; *see also* https://dec.vermont.gov/watershed/stormwater/permit-information-applications-fees/stormwater-construction-discharge-permits.

Mandating compliance with the AMPs would also improperly elevate the regulatory force of the AMPs beyond its intended purpose. Rather than exempting a discharge from permitting requirements when responsible management practices have been followed, the buffer restrictions in the AMPs would create conflicts with resource-specific permits that also apply. Any Agency permit that authorized activity within a restricted buffer zone—stormwater construction permits, stream alteration permits, wetland permits, shoreland protection permits, etc.—would be subservient to the AMPs. The various permitting standards would be irrelevant so long as responsible management practices were followed in attempting to avoid a discharge. This is not a reasonable interpretation of the Agency's regulatory framework.

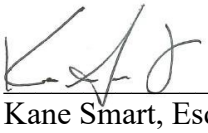
Neighbor Intervenors have presented no reason to alter the Commission's conclusion that compliance with the AMP Rule is unnecessary. Their Motion should be denied.

III. Conclusion

Neighbor Intervenors are improperly attempting to relitigate issues that were fully litigated in this three-year proceeding. Their Motion for Reconsideration should be denied.

DATED this 11th day of October 2024, at South Burlington, Vermont.

AGENCY OF NATURAL RESOURCES

By: 

Kane Smart, Esq.
Agency of Natural Resources
1 National Life Drive, Davis 2
Montpelier, VT 05620
Phone: (802) 490-6103
E-mail: kane.smart@vermont.gov