STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 21-2939-PET

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

Order entered: 11/22/2024

ORDER DENYING LANDOWNER INTERVENORS' MOTION FOR RECONSIDERATION

I. INTRODUCTION

In today's Order, the Vermont Public Utility Commission ("Commission") denies the motion filed by Joan Allen and Michael Binder (the "Landowners") seeking reconsideration of the Commission's August 12, 2024, Order granting a certificate of public good ("CPG") to Randolph Davis Solar LLC ("Applicant") authorizing the installation and operation of a 500 kW solar group net-metering system at 0 Davis Road in Randolph, Vermont (the "Facility"). The motion presents no persuasive reason for the Commission to reconsider our decision to grant a CPG to the Applicant.

II. PROCEDURAL HISTORY

On August 12, 2024, the Commission issued an Order adopting the hearing officer's proposal for decision ("Proposal for Decision") and granting the Applicant a CPG with conditions ("August 12 Order").[1]

On September 9, 2024, the Landowners filed a motion to reconsider the Commission's August 12, 2024, Order ("Landowners' Motion"). The Landowners also requested that the Commission conduct a second site visit and take judicial notice of a memorandum dated March 29, 2022, from the Virginia Department of Environmental Quality.

On October 11, 2024, the Vermont Agency of Natural Resources ("ANR") file a response to the motion for reconsideration ("ANR Response").

[1] The full procedural history leading up to the August 12 Order and CPG can be found in the procedural history section of the August 12 Order.

No other responses to the motion for reconsideration were filed with the Commission.

III. Legal Standard

The Commission reviews motions to reconsider pursuant to Commission Rule 2.221, which incorporates the language of Vermont Rule of Civil Procedure 59 without modification. Thus, precedent applying Rule 59(e) is relevant to the application of Commission Rule 2.221(A). Reconsideration under Rule 2.221 is appropriate only to avoid an unjust result due to "mistake or inadvertence of the [Commission], and not the fault or neglect of a party."[2] The disposition of a reconsideration motion rests with the discretion of the Commission.[3]

Granting reconsideration is an extraordinary remedy to be used with great caution.[4] Rule 2.221 does not permit parties to relitigate issues or correct previous tactical decisions.[5] It is not a vehicle to introduce new evidence or advance arguments that could have been made previously.[6] The Commission also retains "discretion to deny consideration of discrete issues not raised prior to entry of judgment."[7]

IV. Discussion

The Landowners' motion for reconsideration reiterates arguments made earlier in the proceeding concerning soil erosion, the applicability of the Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont ("AMPs"), [8] and primary agricultural soils. We address each of the issues raised by the Landowners below.

Soil Erosion

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[2] *Rubin v. Sterling Enterprises, Inc.*, 164 Vt. 582, 588, 674 A.2d 782 (1996) (citing *In re Kostenblatt*, 161 Vt. 292, 302, 620 A.2d 39, 45 (1994)).

[3] *Alden v. Alden*, 2010 VT 3, ¶ 7, 187 Vt. 591, 992 A.2d 298.

[4] *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 No. 8643, Order of 11/3/16 at 2.

[5] *Id.*

[6] *See, e.g.*, *In re B.K.*, 2017 VT 105, ¶ 13, 206 Vt. 110, 179 A.3d 758 ("While the trial court has broad power under Rule 59(e) to reconsider issues previously presented, the rule does not contemplate reopening the evidence or creating a new record.").

[7] *Everbank v. Marini*, 2015 VT 131, ¶ 34, 200 Vt. 490, 134 A.3d 189; *see also* 11C. Wright, Miller & Kane, Federal Practice and procedure § 2810.1 (3d ed.) (2022 Update) ("The Rule 59(e) motion may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.").

[8] The August 12 Order refers to the "Acceptable Management Practices for Logging Professionals Rule ("AMP Rule")." In today's Order, we use the title as stated by ANR in its response to the motion for reconsideration.

In their motion for reconsideration, the Landowners reiterate their concerns related to soil erosion. The Landowners argue again that the "solar array is an impervious surface" and that an operational stormwater permit should be required.[9] 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."[10] The Landowners assert 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."[11]

The Landowners argue that the Commission should not rely on "the erroneous assumption that ANR's permitting requirements for construction are sufficient to control the risks associated with permanent (post-construction) stormwater runoff."[12] As they have done throughout the proceeding, the Landowners continue to assert that the solar panels should be considered impervious surfaces. The Landowners argue that the Commission should "correct its error" and find that ANR's permitting regulations do not protect the region from post-construction erosion.[13]

In its response, ANR addresses the issues raised by the Landowners and asserts that "[t]hese concerns are not new."[14] ANR explains that it "regulates post-construction erosion through a litany of different stormwater permits."[15] ANR goes on to state that these post-construction permits are "triggered by the creation of impervious surface because impervious surfaces increase stormwater runoff and its associated impacts."[16] ANR asserts that because solar panels are not impervious surfaces, regulation under a post-construction stormwater permit is unnecessary.

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[9] Landowners' Motion at 10.
[10] Landowners' Motion at 3.
[11] Landowners' Motion at 5.
[12] Landowners' Motion at 4.
[13] Landowners' Motion at 6.
[14] ANR Response at 2.
[15] ANR Response at 2. *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).
[16] ANR Response at 3. *See id.* § 22-107(b)(1)–(5), (c) (describing the permitting triggers for impervious surface).

As we recognized in our August 12 Order, ANR is the state agency charged with overseeing water quality issues. Stormwater permitting requirements and related issues fall squarely under ANR's jurisdiction because the Vermont Legislature has explicitly tasked ANR with developing rules to manage stormwater runoff.[17] We also recognized that "ANR's guidance on construction of solar energy facilities is that the impervious surface is calculated based on the material that covers the ground."[18] Therefore, if a solar panel is elevated and precipitation coming off the panel reaches a vegetated ground surface, only the base or foundation of the panel is accounted for when calculating impervious surface area.[19]

ANR conducted a risk evaluation of the Facility site and "determined that the Applicant's compliance with General Permit 3-9020 is sufficient for stormwater control" and that no operational permit is required.[20] ANR explained that the Facility does not meet the one-half-acre impervious surface development threshold that would trigger the need to secure an Operational Stormwater Permit 3-9050 because solar panels are not considered impervious surfaces.[21] We agreed with ANR's determination that the Facility does not require an operational permit for post-construction activities. We stated that "[we] are satisfied that the Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site."[22] We see no reason to reconsider this conclusion.

The Landowners allege that if the Commission defers to ANR's permitting practices, it is "abdicating its responsibility to look at the evidence and determine where this project will cause unreasonable erosion. . ."[23] We have considered the evidence presented by both the Landowners and ANR. We are more persuaded by the evidence and arguments presented by ANR and are satisfied that ANR's stormwater-related regulations and permitting requirements are sufficient to prevent unreasonable soil erosion at the Facility site.

Acceptable Management Practices in Logging Jobs

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[17] Proposal for Decision at 29.
[18] Proposal for Decision at 29.
[19] Proposal for Decision at 29 citing exh. MB-52 at 4.
[20] August 12 Order at 8.
[21] Proposal for Decision at 29.
[22] August 12 Order at 9.
[23] Landowners' Motion at 6.

The Landowners contend that "[a] stormwater permit does not relieve the Applicant of the requirement to follow mandatory AMP Rules."[24] The Landowners assert that site clearing for the Facility requires compliance with the AMPs.

ANR explains that the AMPs for maintaining water quality in logging jobs in Vermont are "advisory and not mandatory."[25] 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."[26] Construction General Permit 3-9020, as applicable to the Facility in this case, authorizes permittees to discharge stormwater runoff from construction activities.[27] ANR argues that "[r]equiring 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."[28] We agree with ANR's position that the Applicant's compliance with General Permit 3-9020 is sufficient for construction stormwater control at the Facility site.

In our August 12 Order, we concluded that the "Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site."[29] In its response to the motion for reconsideration, ANR has provided further context to explain that the Applicant is not subject to the AMPs because it is subject to a stormwater permit. The Landowners have only reiterated arguments made earlier in this proceeding, and we see no basis to reconsider our conclusion that the Applicant's compliance with the stormwater permitting required by ANR is sufficient.

Primary Agricultural Soils

In their motion for reconsideration, the Landowners argue that the Applicant will not comply with the conditions proposed by the Vermont Agency of Agriculture, Food & Markets

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[24] Landowners' Motion at 15.

[25] ANR Response at 4 citing 10 V.S.A. § 2622(b).

[26] 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

[27] 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.

[28] ANR Response at 4.

[29] August 12 Order at 9.

("AAFM") based on the site plan presented for the Facility. The Landowners have reiterated arguments made earlier in the proceeding that were addressed in the August 12 Order.

The Applicant has committed to follow AAFM guidelines for managing and reclaiming primary agricultural soils,[30] and we have included AAFM's proposed conditions in the Applicant's CPG. Importantly, we found that "the potential issues identified by the Landowners were considered by AAFM and are addressed in the proposed conditions" and determined that the Landowners had not demonstrated that it would be impossible for the Applicant to comply with the conditions.[31] The Applicant can seek additional approval from the Commission if substantial changes to the Facility's plans are necessary in order to comply with the conditions related to primary agricultural soils. We see no basis to revisit our determination that the AAFM conditions will adequately mitigate the impact of the Facility on primary agricultural soils.

Request for Site Visit

In their motion for reconsideration, the Landowners requested that the Commission "reconsider its denial of the [Landowners'] request for the full Commission to make an initial site visit."[32] The Landowners state that "[i]f 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" and that "[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 [primary agricultural soils] under the array and under the staging area." [33]

On June 10, 2024, we issued an Order denying the Landowners' request for the full Commission to make a site visit.[34] The hearing officer and Commission staff conducted a site visit on March 25, 2022. As previously noted, a site visit is not evidence in a case and the purpose of a site visit is to provide context to the testimony and exhibits that are filed as part of a proceeding.[35] We are satisfied that our understanding of the testimony and exhibits in this case

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[30] Proposal for Decision at 35, finding 90.
[31] Proposal for Decision at 36.
[32] Landowners' Motion at 17, 22.
[33] Landowners' Motion at 17, 22.
[34] Order of 6/10/24 at 2.
[35] *Petition of Babcock Solar Farm, LLC for A Certificate of Pub. Good Pursuant to 30 V.S.A. S 248 Authorizing Constr. of A 2.2 Mw (Ac) Photovoltaic Sys. in Brandon, Vermont*., Case No. 18-2924-PET, Order of 10/24/18 at 1.

is sufficient without the need to conduct a second site visit. Accordingly, the request for a second site visit is again denied.

Request for Judicial Notice

The Landowners filed a request for the Commission to take judicial notice of a memorandum dated March 29, 2022, from the Virginia Department of Environmental Quality. Motions for reconsideration are not the appropriate vehicle for introducing new evidence.[36] The request for judicial notice is denied.

V. CONCLUSION

The Landowners' Motion does not demonstrate any mistake or inadvertence by the Commission, nor does it present any new factual information that could not have been presented previously. The Landowners' Motion therefore does not meet the standard for relief under Rule 59(e). Accordingly, for the above reasons and those set forth in the Commission's August 12, 2024, order, the Landowners' motion for reconsideration is denied.

SO ORDERED.

[36] *In re SP Land Co., LLC*, 190 Vt. 418, 435, 35 A.3d 1007, 1019 (2011) (it is well settled that Rule 59(e) "does not allow a party to introduce new evidence" (Reiber, C.J. dissenting)).

Dated at Montpelier, Vermont, this 22nd day of November, 2024.

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

OFFICE OF THE CLERK

Filed: November 22, 2024

Attest: ______________________________

Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

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

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