

IN THE SUPREME COURT
OF THE STATE OF VERMONT

CASE NO. 25-AP-005

IN RE PETITION OF RANDOLPH DAVIS SOLAR LLC

APPEALED FROM THE VERMONT PUBLIC UTILITY COMMISSION

Case No. 21-2939-NMP

Brief of Appellee, Randolph Davis Solar LLC

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ISSUES PRESENTED

1. Whether the Vermont Public Utility Commission's order was clearly erroneous in determining that the Randolph Davis Solar Project will not cause unreasonable soil erosion under 10 V.S.A. § 6086(a)(4), as incorporated by 30 V.S.A. § 248 (b)(5).
2. Whether the Vermont Public Utility Commission's order was clearly erroneous in determining that the Randolph Davis Solar Project will not unduly interfere with the orderly development of the region under 30 V.S.A. § 248 (b)(1).
3. Whether the Vermont Public Utility Commission's order was clearly erroneous in determining that the proposed Project site satisfies the requirement of a preferred site under Commission Rule 5.103.

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STATEMENT OF THE CASE

On August 11, 2021, Randolph Davis Solar LLC (“Randolph Davis Solar” or “Appellee”) filed a petition with the Vermont Public Utility Commission (“Commission” or “PUC”) for a certificate of public good (“CPG”), pursuant to 30 V.S.A. § 248 and 30 V.S.A. § 8010, to install and operate a 500 kW solar group net-metering system at 0 Davis Road in Randolph, Vermont (the “Project” or “Facility). PC-402.

The Facility will consist of a solar electric system with a total capacity of 500 kW AC. PC-407. The Facility will include approximately twenty-five rows of ground-mounted solar panels interconnected via a line extension from the utility distribution line on Davis Road, accessed from Davis Road via a gravel access drive. PC-407.

In June 2021, the Town of Randolph (the “Town”) and the Two Rivers-Ottauquechee Regional Commission (the “TRORC”) executed a joint letter of support designating the Project site as preferred for solar siting under Commission Rule 5.103. PC-121. Commission Rule 5.100 specified that after January 1, 2017, ground-mounted solar projects over 150 kilowatts in capacity would be eligible as net-metered systems only if constructed on “preferred sites” which must, among other possible options, be located in a “specific location that is identified on a joint letter of support from the municipal legislative body and municipal and regional planning commissions ... ” PC-409.

Appellants Michael Binder and Joan Allen (“Appellants” or “Landowners”) objected to the Facility’s location, pointing to a provision of the Town Plan that “prohibits energy facility development ‘in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, [or] lands over 25% slope.’” PC-413. The Facility’s initial design would have located the panels, access road, and distribution line in areas with slopes that exceed 25%. PC-408. Appellee modified the original site plan to move the Facility’s solar panels off areas with slopes exceeding 25%. PC-408.

Landowners first raised this issue with the Town in October 2021, challenging the preferred site letter issued for the Project by the Town and requesting that the Town rescind the letter. PC-206. In response to Landowners’ complaints, the Randolph Planning Commission in December of 2021 issued a “Notice of Discrepancy” to Randolph Davis Solar, siting the 25% slopes prohibition. PC-208, 210. The Town also modified its preferred siting approval on the condition that Petitioner re-locate the Facility’s solar panels to avoid areas with a slope greater

than 25% and by providing supporting survey data to the Town and the Landowners. PC-214, 408. Randolph Davis Solar agreed and submitted a modified site plan with the Commission depicting the proposed shift in the array away from slopes greater than 25%, together with certifications from Petitioner's Vermont licensed surveyor attesting to same. PC-408-409; Supp. PC-6-7, 11, 13.

Notwithstanding the shift of the array away from slopes exceeding 25%, Landowners continued to request the Town to rescind the preferred siting designation and urged the Commission to stay its proceedings. PC-404. On June 5, 2023, the Hearing Officer issued a proposal for decision (the "1st Proposal for Decision") recommending dismissal of the petition, asserting that the preferred-site letter of support did not meet the requirements of Commission Rule 5.103, and thus made the Project ineligible to participate in the net-metering program pursuant to Commission Rule 5.104. PC-361. Both Randolph Davis Solar and the Vermont Department of Public Service ("Department") filed comments on the 1st Proposal for Decision detailing the evidence on record of numerous Town meetings where the Town had extensively deliberated the issue of preferred siting and determined not to rescind the Project's preferred siting designation. PC-389.

On October 11, 2023, the Commission issued an order rejecting the Hearing Officer's 1st Proposal for Decision and remanded the case to the Hearing Officer to address the remaining Section 248 criteria. PC-387. The Commission held that "it is not the Commission's role to second-guess the Town's decision that a particular site is preferred under Rule 5.103 absent extraordinary circumstances, which... are not present in this case." PC-392. However, the Commission remained concerned that the record did not clearly reflect that the Town had confirmed that its condition -- shifting the location of the panels off slopes exceeding 25% per a survey -- was satisfied. PC-387, 391. Therefore, the Commission ordered Randolph Davis Solar to file such evidence from the Town. PC-392. On January 9, 2024, Randolph Davis Solar filed a letter from the Town stating that "the condition of the Town's December 2021 letter has been satisfied." PC-395. The Commission accepted this as proof that the Town's condition was satisfied. PC-15.

On August 12, 2024, following the admission and review of multiple rounds of testimony and over one hundred exhibits, and with the support of all participating state agencies, the Commission issued an order finding that the Project will promote the general good of the State of

Vermont pursuant to 30 V.S.A. §§ 248 and 8010, and issued a CPG to that effect. PC-16, PC-400-436.

STANDARD OF REVIEW OF SECTION 248 ORDERS ON APPEAL

A developer seeking to construct a net-metered electric power system in Vermont must first obtain a CPG from the Commission after demonstrating that the Project satisfies the applicable requirements of 30 V.S.A. § 248 and Vt. Admin. Code 30-000-01500. *In re LK Holdings, LLC*, 2018 VT 109, ¶ 11, 209 Vt. 14, 201 A.3d 373 (2018).

On appeal of Section 248 decisions, the Court’s review is limited. *In re Apple Hill Solar LLC*, 2023 VT 57, ¶ 11, 218 Vt. 520, 311 A.3d 117. When the Commission evaluates a Section 248 petition, it is “engaged in a legislative, policy-making process.” *Id.* (quotation omitted). “The Commission ‘must employ its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment.’” *Id.* “Accordingly, when reviewing the Commission’s decision in a CPG proceeding, ‘[the Court] gives[s] great deference to the Commission’s expertise and judgment and accord[s] a strong presumption of validity to its orders.’” *Id.* (quotation omitted). *See also In re Vt. Gas Sys.*, 2024 VT 2, ¶ 15, 218 Vt. 587, 312 A.3d 519 (“Out of respect for the expertise and informed judgment of agencies, and in recognition of this Court’s proper role in the separation of powers, [the Court] accord[s] agency decisions substantial deference”). “Deference to the Commission is particularly appropriate in this context, given the specialized expertise involved in awarding CPGs ... and the Commission’s thorough adjudicative process.” *In re Conservation Law Found.*, 2018 VT 42, ¶ 18, 207 Vt. 309, 188 A.3d 667 (citing 30 V.S.A. § 9).

The Court “will not disturb the Commission’s factual findings unless the appellant demonstrates that they are clearly erroneous.” *In re Apple Hill Solar LLC*, 2023 VT 57, ¶ 11, 218 Vt. 520, 311 A.3d 117. “To demonstrate clear error, intervenor carries a heavy burden.” *In re Vt. Gas Sys.*, 2024 VT 2, ¶ 17, 218 Vt. 587, 312 A.3d 519. The Court 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). “[S]o long as the Commission’s factual findings are supported in the evidentiary record, those findings will not be overturned for clear error.” *In re Vt. Gas Sys.*, 2024 VT 2, ¶ 17, 218 Vt. 587, 312 A.3d 519.

ARGUMENT

I. The Commission’s Decision That the Project Will Not Cause Unreasonable Soil Erosion or Stormwater Runoff is Supported by the Evidence and Findings

Section 248(b)(5) provides in relevant part that before the Commission grants a CPG, it must find that a proposed electric generation facility will not have an undue adverse effect on “air and water purity, the natural environment, the use of natural resources, and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8).” 30 V.S.A. § 248 (b)(5). Relevant to this discussion, the Commission must consider whether the energy facility will “cause unreasonable soil erosion or [a] reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.” PC-9 (citing 10 V.S.A. § 6086(a)(4)).

A. The Commission Properly Determined That the Numerous Project Erosion Prevention and Sediment Control Measures Will Mitigate Against Undue Soil Erosion and Stormwater Impacts from Construction of the Project

Evidence relied upon by the Commission to support its findings and conclusions regarding soil erosion and stormwater control included Project-specific erosion prevention and sediment control (“EPSC”) specifications prepared by Appellee’s civil engineer that identified an “extensive variety of [Erosion Prevention and Sediment Control (“EPSC”)] measure options available to be employed throughout the [Facility] area during construction to prevent erosion and keep sediment from leaving the site and reaching receiving waters.” PC-10, 426-27. These include perimeter controls such as silt fence and Silt Soxx installed downslope of all disturbed areas to prevent sediment from leaving the site, use of various mulching materials to limit the amount of ground disturbance and provide temporary ground stabilization while vegetation is established. PC-10. All disturbed areas will be temporarily stabilized with mulch within 14 days of initial ground disturbance and these areas will be “aggressively seeded” to ensure a permanent vegetative cover. PC-10. “[A]ll disturbed areas ‘must be completely stabilized with vegetation, stone, mulch, stump grindings, or gravel prior to completion of the [Facility].’” PC-10, 427.

In addition, Randolph Davis Solar applied for and received authorization under the Vermont Agency of Natural Resources (“Agency” or “ANR”) Construction General Permit 3-9020 for Stormwater Runoff from Construction Sites (“General Permit 3-9020”). PC-11, 426,

343.¹ The General Permit 3-9020 authorization issued for the Project classifies the Project as a “low-risk” construction site and requires compliance with the Vermont Standards & Specifications for Erosion Prevention and Sediment Control, and the Low-Risk Site Handbook for Erosion Prevention and Sediment Control (“Low-Risk Handbook”). PC-11, 426, 345. The Low-Risk Handbook addresses construction on slopes greater than 25% and classifies 33% slopes as “moderate” and 50-100% slopes as “very steep.” PC-11.

The Low-Risk Handbook also requires the implementation of a variety of EPSC measures to control erosion risks associated with construction-related and permanent stormwater runoff, including development on moderate slopes such as at the Facility site. PC-11. Under General Permit 3-9020, EPSC measures in the Low-Risk Handbook are equivalent to a project-specific EPSC Plan. General Permit 3-9020, § 1.3(A)(1). These measures include stabilization of graded surfaces, the use of upland runoff diversion measures in disturbed areas with an average slope of 20% or more, the use of perimeter controls, and the use of specific slope protection practices on slopes greater than 33%. PC-11; Supp. PC-14, 29-49, 61-62.

In addition to conditioning the permit authorization upon compliance with the Low-Risk Handbook, the General Permit 3-9020 authorization for the Project also includes enumerated conditions, including:

- Stabilizing all areas of disturbance within 14 days;
- Limiting land disturbed at any time to no more than 5 acres;
- Prohibiting disturbance within 50 feet upslope of any stream, river, wetland, lake or pond;
- Imposing a 50-foot vegetated buffer from the construction site to filtrate stormwater runoff;
- Requiring inspections at least once every 7 days during winter construction period for all disturbed areas not yet finally stabilized; and
- Monitoring for and reporting of discolored stormwater runoff.

PC-345-46.

¹ The Vermont Stormwater Permitting Rule, Vt. Admin. Code 12-030-019, empowers the Secretary of the Agency to issue general permits and require applicants to secure authorization to discharge stormwater under those general permits. Stormwater Rule §§ 22-301, 22-303(b).

On appeal, Landowners contend that the Commission improperly “conflated” ANR stormwater construction permit compliance with 30 VSA § 248 compliance, and exclusively relied upon the General Permit 3-9020 authorization for the Project to conclude that the Project will satisfy Section 248(b)(4) concerning soil erosion. Landowners’ Brief at 11, 14-15. This is inaccurate.

The Commission conducted a thorough investigation regarding potential stormwater impacts. Its findings and order reflect its review and reliance upon not only the extensive EPSC measures required by the Low-Risk Handbook, but also the Project specific EPSC plans and specifications developed by Randolph Davis Solar’s civil engineering expert. PC-426-28. Appellee’s civil engineering expert testified that his firm had worked on dozens of sites that required construction stormwater permits since the program was implemented in 2003 and that the above measures have shown to be effective in preventing erosion and sediment laden stormwater from leaving construction sites. Supp. PC-88. The Commission understood that there are slopes greater than 25% at the site and determined that Appellee’s compliance with General Permit 3-9020 and the numerous EPSC measures in Appellee’s Project plans, the General Permit 3-9020 authorization conditions, and those in the Low-Risk Handbook, all demonstrate that the Project will take adequate measures to control erosion and stormwater runoff, including development on moderate slopes such as at the Facility site. PC-10-12.

The Commission also reviewed and considered Landowners’ evidence and arguments. PC-9-12, 19-21, 427-28. Landowners did not provide expert testimony from a qualified engineer to support their theories about the potential for undue erosion, and they admitted that they themselves are not qualified experts on the topic, nor had they ever prepared an EPSC plan or a stormwater permit application. Supp. PC-89, 90, 91, 92. The Commission concluded that “the Landowners had 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.” PC-11-12. The Commission’s decision is based upon substantial evidence demonstrating that sufficient erosion control measures will be employed to guard against undue erosion and stormwater runoff. There was no clear error.

B. The Commission's Deference to the Agency's Determination That Ground Mounted Solar Panels are Not Impervious for Purposes of Stormwater Regulation, Was Reasonable

Landowners acknowledge that the Facility does not require an operational stormwater permit from ANR because the solar panels are not considered impervious under the stormwater regulations, and the new impervious surface from the Facility is below the 0.5-acre threshold of the Agency's Operational Stormwater Permit 3-9050. Appellants' Brief at 7. However, Landowners challenge the Commission's order because they assert that ANR's interpretation is a "legal fiction" and that the Commission should have ignored the Agency standards and instead treated the solar panels as new impervious surface. Appellants' Brief at 16, 20-21. There is no legal fiction.

In its Order, the Commission explained that it was persuaded by the Agency's rationale for not counting ground-mounted solar panel surfaces as impervious. PC-21. Under this rationale, impervious surface is calculated based on the material that covers the ground, so if a solar panel is elevated and precipitation coming off the panel reaches the vegetated ground surface, only the base or foundation of the panel is calculated when calculating impervious surface area. PC-428, PC-21. As explained by Randolph Davis Solar's engineering expert, "[t]he ground under the panels remains able to infiltrate runoff and grow vegetation." Supp. PC-88.

The Commission and this Court generally give substantial deference to ANR's interpretation of its own regulations. *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶ 15, 196 Vt. 467, 98 A.3d 16. "Absent a clear and convincing showing to the contrary, decisions made within the expertise of such agencies are presumed correct, valid and reasonable." *Id.*, ¶ 15 (quotations omitted).

No such clear and convincing showing was made by Landowners here. Further, "courts are not a higher environmental agency entrusted with the power to make environmental law and policy, but rather exercise a narrow role in ensuring that the decisions of ANR are made in accordance with law." *In re Korrow Real Estate, LLC Act 250 Permit Amendment Application*, 2018 VT 39, ¶ 24, 207 Vt. 274, 187 A.3d 1125 (quotation omitted). The Commission's deference to the Agency was appropriate. The Commission's decision was not clearly erroneous.

C. Contrary to Appellant’s Claim, ANR Did Submit Evidence on Construction Stormwater

Landowners claim that the Commission erred in stating it relied upon ANR “evidence”, because they assert ANR did not introduce any evidence. Appellants’ Brief at 21, 22. The claim is incorrect. In response to a Commission information request, ANR filed a request for official notice² of the Project’s General Permit 3-9020 authorization, as well as the Low-Risk Handbook. PC-341. In its request for judicial notice, ANR stated that “the materials... are critical to the Agency’s response to the Hearing Officer’s request, and noticing the materials will allow the Commission to make findings of fact related to this issue pursuant to 3 V.S.A. § 809(g).” PC-342.

The Commission cited to and relied upon these materials in making its findings and conclusions of law in this case. The suggestion that ANR offered no evidence or that the Commission did not investigate and consider the substantial record evidence on the erosion control measures, including the evidence offered by ANR, is contrary to the extensive record evidence in this case.

II. The Commission Did Not Err in Finding That the Project Satisfies 30 V.S.A. § 248 (b)(1) Regarding Orderly Development

Before issuing a CPG, the Commission must find that a project will not unduly interfere with the orderly development of the region. 30 V.S.A. § 248(b)(1); *In re Acorn Energy Solar 2, LLC*, 2021 VT 3 ¶ 22, 214 Vt. 73, 251 A.3d 899. “In making this finding, the PUC is required to give ‘due consideration’ to the ‘recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of an affected municipality.’” *Id.* A substantial deference standard applies under Section 248(b)(1) if a municipality or regional commission has adopted land

² Section 810(4) of the Vermont Administrative Procedures Act, as incorporated by Vt. Admin. Code 30-000-2000, provides that “[n]otice may be taken of judicially cognizable facts” by an agency. Vermont Rule of Evidence 201(d), as incorporated by 3 V.S.A. § 810(1) and Commission Rule 2.216(A), directs that an agency “shall take judicial notice if requested by a party and supplied with the necessary information.” Judicial notice may be taken at any stage of a proceeding. V.R.E. 201(f). “A judicially noticed fact must be one that is not subject to reasonable dispute in that it is . . . (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” V.R.E. 201(b).

conservation measures and specific policies contained in a duly adopted regional or municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352. *Id.* (citing 30 V.S.A. § 248 (b)(1)(C)).

In this case, while the TRORC Plan had received an affirmative determination of energy compliance, the Randolph Town Plan had not. PC-412. Accordingly, the Commission found that the Randolph Town Plan is entitled to due consideration only. PC-414.

The Commission held that the Facility would not unduly interfere with orderly development of the region, having given due consideration to the Town Plan. PC-7,412. While Section 248(b)(1) does not define what “due consideration” means, the Court has on numerous occasions reinforced that it is not, like Act 250, a compliance standard. *In re Petition of Apple Hill Solar LLC*, 2021 VT 69, ¶ 31, 215 Vt. 523, 280 A.3d 44 (“In contrast to the Act 250 permitting context, where compliance with duly adopted local or regional plans is a prerequisite to an Act 250 permit, see 10 V.S.A. § 6086(a)(10), for purposes of § 248 review, land-conservation measures in municipal plans are entitled to ‘due consideration’”).

In this case, key to the Commission’s ruling was the fact that the evidence failed to show any regional impacts. PC-7. Section 248(b)(1) “relates to the orderly development of *the region*, not to a particular municipality within the region.” PC-416-417 (citing *In re Petition of Rutland Renewable Energy, LLC for Certificate of Public Good Pursuant to 30 V.S.A. § 248*, 2016 Vt. 50, ¶ 9, 147 A.3d 621). In fact, “the permitting process pursuant to § 248 preempts municipal zoning requirements altogether—an aspect of the statutory structure that further undermines any suggestion that the [Commission] owes deference to [a] Town’s solar siting standards.” *In re Petition of Rutland Renewable Energy, LLC.*, 2016 VT 50, ¶ 36 (concurring opinion) (citing *City of S. Burlington v. Vt. Elec. Power Co.*, 133 Vt. 438, 447-48, 344 A.2d 19, 24-25 (1975) (“recognizing that municipalities’ role in § 248 matters is advisory” and that § 248 “did not give ‘single municipalities the power to subvert utility projects statewide in scope and broadly entrusted to a single planning and supervisory agency’”)).

The Court’s ruling in *Rutland Renewable Energy* is on point. That case involved a Rutland Town Plan provision prohibiting solar facilities from being placed less than 200 feet from property lines or public highways, and an issue on appeal was the question of whether the facility should have been found to fail Section 248(b)(1) because it was proposed to be sited within the prohibited

setback distance. *Id.*, ¶ 6. The Court held that the Rutland Town Plan provision was not controlling because only local, not regional, impacts were shown. *Id.*, ¶ 12.

Like *Rutland Renewable Energy*, where no regional impacts were involved, the Project in this case does not have any regional impacts. PC-7, 417. The Commission distinguished this situation from the situation in the *Apple Hill Solar* case, where the Commission found that significant regional impacts would occur if a solar array were installed on a prominent hillside location identified in the Bennington Town Plan that had “regional significance as a gateway [into the region]” PC-417. Based upon these important distinguishing considerations, the Commission held that “the Facility will not unduly interfere with the orderly development of the region” because “[t]he character and severity of the Facility’s noncompliance with the Randolph Town Plan do not support a finding of an undue regional impact.” PC-418.

Even if there were regional impacts, which there are not, the statute requires that such interference with regional development must be “undue.” 30 V.S.A. § 248 (b)(1). As the Court has recognized, “any new energy project will likely have some adverse impacts, and thus there must be the qualitative measure represented by ‘unduly,’ a word often taken to be synonymous with ‘excessively’ or ‘beyond a proper degree.’” *Id.* (quoting *Vt. Elec. Power Co. v. Bandel*, 135 Vt. 141, 150, 375 A.2d 975, 981 (1977)). “However, the Legislature has placed this weighing process in the hands of the [Commission]. So long as [the Commission] has exercised this authority in good faith, with adequate evidentiary basis, this Court will not intrude upon its decision.” *Id.* Having weighed the facts and applicable authority, the Commission concluded that the record does not support a finding of undue regional impact in this case. PC-418. There is no evidence that the Commission had an insufficient evidentiary basis to reach its determination or otherwise did not exercise good faith in exercising its consideration of the evidence in this case. The Commission’s decision was not clearly erroneous.

III. The Commission Did Not Err in Finding That the Facility Site Is a “Preferred Site”

The record shows that the Commission fully investigated the Town’s preferred site determination and was satisfied with the Town’s determination that the Project is a preferred site for solar. *See supra* at 1-3. The Commission’s decision was not clearly erroneous.

CONCLUSION

The Commission's evidentiary record was significant, and after having exercised its expertise and informed judgement, acting in good faith, and weighing the evidence, the Commission made sufficient findings and conclusions that support its decision. There was no clear error.

Dated: June 9, 2025

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I, Kimberly K. Hayden, certify in accordance with V.R.A.P. 32 (a)(7), that this *Brief of Appellee Randolph Davis Solar LLC* has been shown by the “word count” feature of Microsoft Word to consist of 2,931 words (excluding the statement of issues, table of contents, table of authorities, signature blocks, and certifications) in accordance with V.R.A.P. 32 (a)(7)(C).

DATED at Burlington, Vermont, this 9th day of June, 2025.

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CERTIFICATION OF SERVICE

I, Kimberly K. Hayden, certify that on June 9, 2025, the preceding *Brief of Appellee, Randolph Davis Solar LLC* was served on all parties to this case electronically via Odyssey E-File & Serve and via the Public Utility Commission’s ePUC platform.

DATED at Burlington, Vermont, this 9th day of June, 2025.

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