

IN THE SUPREME COURT OF THE STATE OF VERMONT

CASE NO. 25-AP-005

*In re Petition of Randolph Davis Solar LLC
(Joan Allen* & Michael Binder*)*

APPEAL FROM THE
VERMONT PUBLIC UTILITY COMMISSION
Case No. 21-2939-NMP

Brief of Appellee Vermont Department of Public Service

VERMONT DEPARTMENT OF PUBLIC SERVICE

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ISSUES PRESENTED

- I. Did the Public Utility Commission (“Commission”) appropriately conclude that the project is located on a preferred site in accordance with Commission Rule 5.103? [p. 4]

- II. Did the Commission err in concluding that the project will not unduly interfere with the orderly development of the region under 30 V.S.A. § 248a(b)(1)? [p. 9]

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STATEMENT OF THE CASE

This case stems from an application filed by Randolph Davis Solar LLC with the Vermont Public Utility Commission (“Commission”) for a certificate of public good (“CPG”), pursuant to 30 V.S.A. §§ 248 and 8010, to install and operate a 500 kW solar group net-metering facility at 0 Davis Road in Randolph, Vermont (the “Project”). The Commission issued a CPG for the Project on August 12, 2024, adopting the hearing officer’s proposal for decision (except for one CPG condition) after considering written comments and oral argument from parties. PC-5-6. In the instant challenge to the Commission’s decision to grant a CPG, Appellants raise issues with the Commission’s findings as to water pollution and soil erosion under 30 V.S.A. § 248(b)(5), the preferred site requirement under Commission Rule 5.103, and orderly development of the region under 30 V.S.A. § 248(b)(1). The Vermont Department of Public Service (“Department”) submits this brief for the purpose of addressing Appellants’ preferred sites and orderly development arguments.

Overview of Procedural History

Randolph Davis Solar filed an application with the Commission for a CPG for the Project on August 11, 2021. Appellants and adjoining landowners, Joan Allen and Michael Binder, moved to intervene in the Commission’s proceeding on October 25, 2021, after raising concerns about the Project’s compliance with the Randolph Town Plan, and particularly its prohibition on energy facility development on slopes over 25%, with the Town of Randolph Planning Commission. PC-206, 403.

In their correspondence with the Planning Commission, Appellants sought to have the Planning Commission rescind the joint letter it signed with the Town of Randolph Selectboard and the Two-Rivers-Ottawquechee Regional Commission (“TRORC”) in June of 2021, designating the Project’s proposed location a preferred site. PC-207. The Planning Commission discussed Appellants’ challenge to the preferred-site letter at a meeting on December 7, 2021, and subsequently issued a “Notice of Discrepancy” letter to Randolph Davis Solar on December 10, 2021. PC-208, 210. Randolph Davis Solar responded on December 13, 2021, with a letter expressing a commitment to confirm the grade of slopes in the area of the Project’s solar panels through a pre-construction site specific survey conducted by a Vermont licensed surveyor, and to arrange the solar panels so they are not installed on slopes greater than 25%. PC-212-213. On December 14, 2021, the Planning Commission issued a letter accepting Randolph Davis Solar’s agreement to move the panels off slopes greater than 25% and provide pre-construction survey data, requesting that the “onsite survey data . . . be provided to both the Town of

Randolph and the Allen/Binders” along with the “final Solar Array plot plan prior to construction.” PC-214.

On June 5, 2023, the hearing officer issued a proposal for decision recommending denial of the CPG on the basis of Commission Rule 5.104, finding that the Project is over 150 kW but not located on a preferred site (“First PFD”). PC-404. Randolph Davis Solar and the Department submitted comments in opposition to the First PFD, while Appellants filed comments in support. PC-389-390. On October 11, 2023, the Commission issued an order remanding the case to the hearing officer for further proceedings (“Remand Order”), finding that the record had insufficient information to determine whether Randolph Davis Solar had satisfied the Town’s letter of December 14, 2021, and which prevented the Commission from making a determination on the preferred-site requirement. PC-387. The Commission gave Randolph Davis Solar 90 days to file evidence to complete the record. PC-392. On January 9, 2024, Randolph Davis Solar filed a letter (dated January 4, 2024) from the Town of Randolph Planning Commission and Selectboard stating the Town’s intent to verify that the condition of the December 14th letter had been met. PC-214.

On May 3, 2024, the hearing officer issued a second proposal for decision (“Second PFD”) recommending that the Commission conclude that the Project complies with the requirements of Commission Rule 5.100 and that the application does not raise a significant issue under the applicable criteria of 30 V.S.A. §§ 248 and 8010. On August 12, 2024, the Commission issued an order (“Final Order”) adopting the findings, conclusions, and recommendations in the Second PFD, except for one CPG condition related to the Acceptable Management Practices for Logging Professionals Rule. PC-6. On November 22, 2024, the Commission denied Appellants’ motion for reconsideration.

STANDARD OF REVIEW

The Commission’s evaluation of a petition for a CPG under § 248 “is a legislative, policy-making process,” in which the Commission “must employ its discretion to weigh alternatives presented to it, utilizing its particular expertise and informed judgment.” *In re Vermont Elec. Power Co.*, 2006 VT 69, ¶ 6 (quotations omitted). The Court consequently reviews Commission decisions in CPG proceedings with “great deference,” applying a “strong presumption of validity to its orders.” *In re Petition of Apple Hill Solar LLC*, 2023 VT 57, ¶ 11, *citing In re UPC Vt. Wind, LLC*, 2009 VT 19, ¶ 2. The Court “will affirm the PUC’s findings unless they are clearly erroneous and its legal conclusions if they are rationally derived from a correct interpretation of the law and supported by the

findings.” *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 22. The “appellant bears a heavy burden of demonstrating clear error.” *In re UPC Vt. Wind, LLC*, 2009 VT 19, ¶ 2.

ARGUMENT

The Department responds to the arguments Appellants raise regarding the Commission’s determinations on the preferred site requirement in Commission Rule 5.103, and orderly development under § 248(b)(1). On each issue, Appellants attempt to interfere with the Commission’s legitimate exercise of discretion, relying on mischaracterizations of the applicable standards and burdens under Section 248 and Commission Rules, and failing to demonstrate clear error. This Court should affirm the Commission’s decision below.

I. The Public Utility Commission Appropriately Concluded that the Project is Located on a Preferred Site in Accordance with Commission Rule 5.103.

Appellants argue that the Commission misapplied Commission Rule 5.103 and erred in its finding that the Project’s proposed location is a preferred site, asserting that Randolph Davis Solar did not comply with the Commission’s Remand Order of October 11, 2023, and did not meet its burden of proof. This argument, set out in more detail below, is based on a mischaracterization of the Remand Order and the burden on Randolph Davis Solar, and a misapprehension of the Commission’s role in the preferred-site determination.

Commission Rules require net-metered systems with capacities between 150 and 500 kW to be built on “preferred sites.” Commission Rule 5.103, 5.104. *See e.g. In re Acorn Energy Solar 2, LLC*, 2021 VT 3, ¶ 58. It is the applicant’s burden to establish that a proposed net-metering facility meets this and all other applicable CPG requirements. Commission Rule 5.103 defines multiple types of preferred sites that a net-metering system could qualify for, including:

A specific location designated in a duly adopted municipal plan under 24 V.S.A. chapter 117 for the siting of a renewable energy plant or specific type or size of renewable energy plant, provided that the plant meets the siting criteria recommended in the plan for the location; or a specific location that is identified in a joint letter of support from the municipal legislative body and municipal and regional planning commissions in the community where the net-metering system will be located.

Commission Rule 5.103(7), effective July 1, 2017 (Dept. Supp. PC-12).¹ The “letter of support” provision of the preferred-sites definition gives localities a bigger role in the CPG process than they would otherwise have, providing municipal and regional bodies with significant autonomy to direct development in their area according to their preferences. While the Commission reviews a letter of support for conformance with the rule in order to make the ultimate determination that an applicant satisfied the preferred-sites requirement, the actual decision as to whether or not the location is deemed “preferred” is subject to the discretion of the locality.

In this case, Randolph Davis Solar received a letter in June of 2021, signed by the Town of Randolph Planning Commission, the Town of Randolph Selectboard, and the Two-Rivers-Ottawquechee Regional Commission (“TRORC”), designating the Project’s proposed location at 0 Davis Road as a preferred site under Rule 5.103. PC-121. However, following Appellants’ challenge to this letter on the basis of the Town Plan’s prohibition on energy facility development on slopes greater than 25%, the Planning Commission made the Town’s support for the Project’s preferred-site designation conditional in a letter issued December 14, 2021. PC-208, 210, 214. The December 14th letter followed from assurances that Randolph Davis Solar made to the Town in response to concerns over the 25% slope prohibition in the Town Plan. In the letter, the Planning Commission accepted Randolph Davis Solar’s commitment to have a “Vermont licensed surveyor set grade stakes for the solar array rows location and document the slopes,” prior to construction, and to ensure the “array will be arranged so that solar panels within the current limit of disturbance are not installed on slopes greater than 25%.” PC-214. The letter further requested that Randolph Davis Solar provide the Town with the “onsite survey data” and the “final Solar Array plot plan prior to construction. *Id.*

In the First PFD, the hearing officer interpreted the December 14th letter as conditioning the initial preferred-site letter of June 2021 and found that the preferred-site letter did not meet the requirements of Rule 5.103 due in part to a lack of agreement between Randolph Davis Solar and the Town. PC-377-378. In the Remand Order, the Commission agreed that the preferred-site letter did not meet the requirements of Rule 5.103, but for different reasons than stated in the First PFD. PC-391. The Commission

¹ The Department applies the version of Rule 5.100 that was in effect from July 1, 2017, to February 29, 2024, and has included relevant excerpts from this version of the rule in the Department’s Supplemental Printed Case. As the Commission explains in the Final Order, the Commission’s “review of an application is governed by the rules in effect at the time a complete application is filed.” PC-14. *In re Times & Seasons, LLC*, 2011 VT 76, ¶¶ 13-14.

ordered the remand on the basis that the December 14th letter conditioned the Town's support on Randolph Davis Solar relocating the panels from areas where slopes exceed 25% and providing supporting survey data to the Town, and that the record did not contain sufficient information to determine whether the Town's condition had been met. PC-387. The Commission directed Randolph Davis Solar to provide "evidence demonstrating that the Town of Randolph Planning Commission and Selectboard have determined that their condition stated in Exh. RDS-MS-14 has been satisfied." PC-392.

In response to the Remand Order, Randolph Davis Solar filed a letter from the Town of Randolph Planning Commission and Selectboard dated January 4, 2024, in which the Town states that it writes "to verify that the site plan submitted to the Commission ("Exhibit RDS MS-2A Site Plan") shows that the condition of the Town's December 2021 letter ("Exhibit RDS MS-14") was satisfied." PC-395. In the Second PFD, the hearing officer found this verification sufficient to recommend that the Commission should find Randolph Davis Solar met the directive in the Remand Order, accept the June 2021 joint letter of support, and conclude that the Project is located on a preferred site for the purposes of Rule 5.103. PC-411. The Commission agreed with the hearing officer upon its review and adopted the recommendations as to the preferred-site determination in the Final Order.

Appellants' primary concern with the Commission's preferred-site determination appears to be that following the Remand Order, Randolph Davis Solar provided the Town with what Appellants consider to be an outdated site plan, specifically the third of six site plans filed by Randolph Davis Solar. Appellants argue that the third site plan, filed February 25, 2022 (Exh. RDS MS-2A), differs from the most recent sixth site plan, filed July 13, 2022 (Exh. RDS-MS-2), and is consequently not the final site plan that the Town requested in the letter of December 14, 2021. As a result, Appellants argue that Randolph Davis Solar did not comply with the Remand Order and did not meet its burden of proof that the facility location is a preferred site.

First, it is important to note that the hearing officer reviewed both site plans in the Second PFD and found that the differences were not material. PC-411. Appellants do not appear to oppose those findings. In response to Appellants' evidentiary objection to the admission of the Town's letter of January 4, 2024, the hearing officer compared the third site plan, Exh. RDS MS-2A (PC-396),² to the sixth site plan, Exh. RDS-MS-2 (Supp. PC-

² In the Second PFD, the hearing officer refers to the third site plan as both "Exh. RDS MS-2A" and as the "February 9, 2022 site plan." PC-411. In doing so, the hearing officer may be referencing the date listed on the exhibit itself as opposed to its filing date. While

13), and identified only minor differences in the layout of the arrays. PC-411. The hearing officer concluded that the differences were not material because “Applicant’s survey data, which is shown in yellow on both plans, indicates that the panels in either configuration are located outside areas with slopes greater than 25%.” PC-411. While Appellants are right that the December 14th letter requests the “final Solar Array plot plan prior to construction,” the site plan that Randolph Davis Solar provided to the Town accurately serves its intended purpose of demonstrating that Randolph Davis Solar followed through on its agreement to ensure the Project’s arrays are not located on slopes greater than 25%.

Appellants are correct that the December 14th letter requested the final site plan, but otherwise incorrect about the burden imposed by the Remand Order and the December 14th letter. The fact that Randolph Davis Solar did not provide a final site plan does not mean that it did not comply with the Remand Order. In that order, the Commission found the remand necessary because the record lacked sufficient information to “clearly demonstrate whether the Town has reviewed the Project’s site layout and survey data and is satisfied that the Town’s condition has been met.” PC-391. Consequently, the Commission gave Randolph Davis Solar 90 days to file “evidence demonstrating that the Town of Randolph Planning Commission and Selectboard have determined that their condition stated in Exh. RDS-MS-14 has been satisfied,” with the referenced exhibit being the December 14th letter. PC-392. The Commission did not ask Randolph Davis Solar to provide any specific or additional information to the Town to satisfy the order. The burden on Randolph Davis Solar under the Remand Order was to complete the record by filing evidence demonstrating that the Town had reviewed the site layout and survey data and determined that the information satisfied its December 14th letter. Randolph Davis Solar fully complied with the Remand Order when it submitted the Town’s letter dated January 4, 2024, signed by the chairs of the Town Planning Commission and Town Selectboard, verifying that the conditions imposed on the preferred site designation had been met. PC-395.

In the Remand Order, the Commission rightly left it up to the Town to determine whether Randolph Davis Solar satisfied the condition on its support for the Project’s preferred-site designation. Following the Remand Order, the Town Planning Commission and the Town Selectboard held public meetings on December 14, 2023, and January 3, 2024, respectively. PC-409. Appellants had an opportunity to raise their concerns about

Exh. RDS MS-2A was filed on February 25, 2022, the caption at the top of the exhibit states that it was revised on February 9, 2022, with a slope layer added on February 22, 2022. PC-396.

the site plans during each meeting. *See Neighbor Intervenor's Obj. to Public Comment & Evidence Submitted on January 9, 2024, Case No. 21-2939-NMP, filed January 23, 2024, at 3, 11.* The Planning Commission and Selectboard were consequently fully informed that Exh. RDS MS-2A was not the final site plan when they each voted in favor of finding that Randolph Davis Solar had satisfied the conditional aspect of the December 14th letter. PC-409. If the Town still had significant concerns, either body could have raised those issues instead of confirming support for the Project's location. Randolph Davis Solar met its burden of proof under Commission Rule 5.103 when the Town decided to sign the January 2024 verification letter.

To the extent Appellants also argue that the Commission had a duty to address Appellants' disagreement over the method of measuring the slope, the Department emphasizes the appropriateness of the Commission's determination that the issue is not one for the Commission to resolve. PC-15. In the December 14th letter, the Planning Commission identified the type of information it would like to see to establish that the arrays had been relocated from slopes greater than 25%. It specifically requested the survey data Randolph Davis Solar offered to provide from a Vermont licensed surveyor. PC-214 ("[w]e request the onsite survey data mentioned above be provided to both the Town of Randolph and the Allen/Binders"). The Town could have requested additional evidence regarding the slope grades at any point, including following the Remand Order, but instead voted to support a preferred-site designation.

The Commission has a limited role under this provision of Rule 5.103. *See Petition of Norwich Upper-Loveland Solar, LLC, Case No. 21-3587-NMP, Order Granting Motion for Reconsideration of 6/12/2024, at 5* ("[i]nquiries into preferred-site letters should be rare and, when warranted, limited in scope"). Especially in cases where the Town is not a party, the Commission should avoid inserting itself into Town decision-making, displacing the autonomy given to the Town under the Rule. As the Commission explained in the Remand Order, "[a]bsent extraordinary circumstances, the Commission will not second-guess a municipal determination that a site is preferred." PC-391.

Further, Appellants' disagreement over the extent to which the Project's location complies with the Town Plan does not establish that Randolph Davis Solar did not meet its burden of proof that the proposed location for the Project is a preferred site. The "letter of support" provision of Rule 5.103 leaves the identification of preferred sites up to the discretion of the municipal and regional governing boards and commissions, providing localities with the discretion to identify preferred sites beyond those set out in the Town plan. *See Report to the Vermont General Assembly on the Net-Metering Program Pursuant to Act 99 of 2014, Vermont Public Utility Commission, January 20, 2017, at 20*

(Dept. Supp. PC-35) (responding to comments received during the revision process for Rule 5.100, the Commission stated that it “agrees with these comments and has revised the definition of preferred sites to include not only sites identified in a town plan, but also sites identified in a joint letter signed by the municipal legislative body and planning commission”). The Town provided clear, explicit confirmation of its intent to designate the Project’s proposed location as a preferred site, and the Commission appropriately found that the Project has met the requirements of Rule 5.103.

Randolph Davis Solar provided evidence of the Town Planning Commission, the Town Selectboard, and the Regional Planning Commission’s clearly expressed intent to designate the Project’s proposed location as a preferred site, in satisfaction of its burden under the rule. The Commission did not err in finding that the Project is located on a preferred site consistent with Rule 5.103.

II. The Commission Did Not Err in Concluding that the Project Will Not Unduly Interfere with the Orderly Development of the Region under 30 V.S.A. § 248(b)(1).

One of the statutory criteria of 30 V.S.A § 248 that the Commission must consider in its review of an application for a CPG is that of orderly development, pursuant to § 248(b)(1). Prior to issuing a CPG for a proposed facility, the Commission must find that it will not “unduly interfere with the orderly development of the region” after giving “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 any affected municipality.” 30 V.S.A. § 248(b)(1). In this case, the Commission’s orderly development review centers on the Randolph Town Plan (“Town Plan”) and the Two Rivers-Otauquechee Regional Commission (“TRORC”) Regional Plan (“Regional Plan”) because the municipal and regional planning commissions and municipal legislative body did not provide recommendations for the Commission to consider. While the Town of Randolph Planning Commission and Selectboard, and the TRORC, signed a letter designating the proposed Project location as a “preferred site,” they did not take a position on Project’s compliance with orderly development. PC-121, 415.

In the Second PFD, the hearing officer considered both the Town Plan and the Regional Plan, appropriately applying the “due consideration” standard to land conservation measures in the Town Plan because it has not received an affirmative determination of energy compliance under 24 V.S.A. § 4352, and the “substantial deference” standard to those in the Regional Plan, which has received the § 4352

determination. 30 V.S.A § 248(b)(1)(C); PC-413-414. The § 248 definition of “substantial deference” directs the Commission to apply a “land conservation measure or specific policy . . . in accordance with its terms unless there is a clear and convincing demonstration that other factors affecting the general good of the State outweigh the application of the measure or policy.” 30 V.S.A. § 248(b)(1)(C).

The hearing officer found that the Randolph Town Plan contained a land conservation measure prohibiting energy facility development on slopes greater than 25%, and that the Project does not comply with the measure, but that the noncompliance does not amount to undue adverse impact on orderly development of the region because the Project’s impacts are localized and not regional. PC-413, 418. With regard to the Regional Plan, the hearing officer found that “none of the regional land conservation measures and specific policies for energy development prohibit locating the Facility on the proposed site.” PC-416. In the Final Order, the Commission adopted the hearing officer’s determination that the Project will not unduly interfere with the orderly development of the region despite not meeting the land conservation measure in the Town Plan, agreeing with the hearing officer that the Project’s “impacts were localized and adequately controlled by ANR’s regulations.” PC-7.

Appellants challenge the Commission’s conclusion that the Project will not unduly interfere with the orderly development of the region by arguing first that the Commission misapplied § 248(b)(1) when it found that the Project meets the standard despite its contravention of the land conservation measure in the Town Plan that prohibits energy facility development on lands over 25% slope. Appellants also attempt to establish that the record lacks evidence to support the orderly development finding, and that the Project has regional impacts. The Department responds to Appellants’ arguments in the discussion below.

A. Noncompliance with a land conservation measure is not determinative of the question of undue interference on the orderly development of the region.

The Randolph Town Plan contains a provision that prohibits “energy facility development . . . in floodways, class 1 and 2 wetlands, lands within 50 feet of the top of bank of perennial streams, lands over 25% slope.” PC-144. The hearing officer reviewed this provision in the Second PFD and determined it to be sufficiently specific to qualify as a land conservation measure and receive due consideration. PC-415-416. The hearing officer found that portions of the Project’s infrastructure and clearing activity are proposed to be located on slopes greater than 25%, such that the Project does not comply

with the Town Plan, but ultimately concluded that the Project will not unduly interfere with the orderly development of the region. PC-413, 418.

Appellants assert that the Commission committed reversible error in adopting this determination, arguing based on principles of statutory construction that the contravention of a land conservation measure should be determinative of the § 248(b)(1) orderly development inquiry. Specifically, Appellants claim that “[i]f noncompliance with a town plan land conservation measure could not comprise an adverse regional impact, the directive to give due consideration to land conservation measures in a town plan would be mere surplusage.” Appellants’ Br. at 27.

Appellants’ interpretation of “due consideration” as something akin to a requirement that the Commission give full weight or deference to the Town Plan runs contrary to established Vermont Supreme Court precedent regarding its meaning. In *UPC Vt. Wind*, the Commission reacted to a similar argument that the Commission “was required to find that the project strictly adhered to the regional plan,” by explaining that “under the plain terms of the statute, however, the Board need only give ‘due consideration.’” *In re UPC Vt. Wind, LLC*, 2009 VT 19, ¶ 17. As the hearing officer notes in the Second PFD, the Vermont Supreme Court has interpreted the term “due consideration” to mean that “even a clear, written land-conservation measure in a municipal land-use plan does not present an insurmountable obstacle to approval of a certificate of public good under § 248.” *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 31.

This interpretation fits with the overall statutory scheme of § 248, in which “municipalities play an advisory rather than controlling role in the § 248 process.” *Id.* at ¶ 58, citing *City of S. Burlington v. Vt. Elec. Power Co.*, 133 Vt. 438, 447-48 (1975). See *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 36 (Robinson, J., concurring) (“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 Board owes deference to the Town’s solar siting standards”). In giving “due consideration” to a land conservation measure, the Commission “retains the final policy decision and may approve a project even if it violates a clear, written, community standard.” *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 33.

The hearing officer recognized the obligation to give due consideration to Project’s noncompliance with the land conservation measure in the Town Plan, and also recognized that noncompliance is not determinative of the Commission’s § 248(b)(1) review of whether the Project will unduly interfere with orderly development of the region. PC-416. The Commission acted entirely within its discretion in deciding to grant a CPG to the Project despite its noncompliance with the 25% grade prohibition in the Town Plan.

B. The Commission's conclusion regarding orderly development is supported by the record.

Appellants further attempt to establish that the Commission erred in finding that the Project will not unduly interfere with orderly development of the region by arguing that the record lacks evidence to support that conclusion. Specifically, Appellants are concerned with a lack of evidence that the Project will be located in an area that is depicted as “suitable” on the solar siting map attached to the Regional Plan. Appellants’ Br. at 29-30. Appellants argue that Randolph Davis Solar failed to meet its burden under Commission Rule 5.107(C)(8), requiring applicants to “describe how the project complies with or is inconsistent with the land conservation measures” in local and regional plans, by not providing evidence that the Project site is mapped in an area that is not prohibited in the Regional Plan.

Appellants’ arguments that Randolph Davis Solar failed to meet its burden under 5.107(C)(8), and that the Commission’s orderly development findings are unsupported, centered entirely on a lack of evidence in the record about the map itself. By focusing just on the map, Appellants appear to suggest that the map is the only authority in the Regional Plan that establishes land conservation measures, or at least that the map is the only way to determine whether a location is “unsuitable.” The emphasis is misplaced, however, as the Regional Plan sets out a list of areas deemed “regionally unsuitable for renewable energy generation” in the text of the Plan. PC-189. The map itself appears to be more of a guidance tool that illustrates the energy siting policies in the Regional Plan. *See* PC-185-186. As the Regional Plan explains, the map is a “starting point for the local identification of where renewable energy generation should be located within your community.” PC-185. Appellants do not identify any land conservation measures that are only depicted on the map and not anywhere else in the Regional Plan.

Regardless of any evidence about the map, the hearing officer found that the Regional Plan “contains specific policies for the siting of renewable energy facilities” which receive substantial deference, and concluded based on the record that the Project “is consistent with those specific policies.” PC-413. The Regional Plan’s section on Utility-Scale Renewable Energy Facility Siting contains a chart setting out “Goals, Policies, and Recommendations: Utility-Scale Renewable Energy Siting,” which states:

The following locations shall be considered regionally unsuitable for renewable energy generation facilities: floodways shown on FEMA Flood Insurance Rate Maps (except as required for hydro facilities), Class 1 Wetlands as indicated on Vermont State Wetlands Inventory maps or identified through site analysis, Wilderness Areas, including National Wilderness Areas, any unsuitable areas as

identified in a duly adopted municipal plan that has received a determination of energy compliance from the Department of Public Service or TRORC. PC-189.

The hearing officer's findings establish that the Project is not proposed to be located within either a floodway or a Class I wetland, in accordance with the Regional Plan. *See* PC-418, 421, 424. Appellants do not raise a challenge to (or otherwise address) these findings in this section of their argument. The Commission did not need to make findings about the map when it was clear from the record that the Project is not proposed for an "unsuitable" location prohibited in the Regional Plan. Contrary to Appellants' assertion, the Commission's conclusion as to orderly development is supported by record.

C. The Commission appropriately found that the Project will not have regional impacts.

As the Court has explained in previous cases, the orderly development standard "relates to the orderly development of the region, not to a particular municipality within the region." *In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 9. Acknowledging the requirement that they must demonstrate regional impacts, Appellants assert that the record does contain evidence that the Project "will unduly interfere with orderly development on a regional scale," contrary to the Commission's findings under § 248(b)(1). Appellants' Br. at 30. To establish regional impacts, Appellants first argue that due to the Project's location in a regionally designated Surface Water Protection Area, "even if unreasonable erosion were localized and confined to the project site, it would still have undue adverse Regional Impact" because the Regional Plan considers substantial impact on public water supply to be a substantial regional impact. Appellants' Br. at 31. Appellants also claim that the Project's impacts on soil erosion rise to the level of a regional impact. Appellants' Br. at 32.

The hearing officer considered these arguments in the Second PFD, as did the Commission in the Final Order. The hearing officer reviewed the Project "for impacts on floodways, streams, wetlands, and soil erosion," in other sections of the Second PFD, and determined that Appellants' concerns do not amount to regional impact. PC-418. *See e.g.* PC-426, 427 (findings on soil erosion). Recognizing that "ANR has authorized a construction stormwater permit for the Facility as a low-risk site," the hearing officer concluded that Appellants' "concerns do not implicate issues of regional importance." PC-418. This conclusion aligns with the hearing officer's determination regarding soil erosion under 10 V.S.A. § 6086(a)(4) that the Project "will not cause undue soil erosion or reduce the capacity of the land to hold water so that a dangerous or unhealthy condition results." PC-428. In the Final Order, the Commission adopted the hearing

officer's conclusions that the Project's "impacts are localized and adequately controlled by ANR's regulations." PC-7. Conducting additional review in response to comments and oral argument from the parties on the Second PFD, the Commission further concluded that the Project's location in a surface water protection area does not amount to undue interference, finding that the Regional Plan does not prohibit energy facility development in source protection areas, and agreeing with the hearing officer and ANR that "the requirements of ANR's stormwater permitting regulations are sufficient to protect surface waters." PC-8; PC-12 (concluding also that "Applicant's compliance with ANR's permitting requirements is sufficient to prevent unreasonable soil erosion at the Facility site").

Appellants do not cite any issue of alleged regional impact that the hearing officer and Commission did not already consider and address with findings. The Commission reached a determination that the Project will not have a regional impact after reviewing evidence and arguments offered by Appellants, Randolph Davis Solar, and ANR. It is the Commission's role to weigh the evidence presented to it, and Appellants' disagreement with the Commission's conclusion does not establish clear error. *Cf. In re UPC Vt. Wind, LLC*, 2009 VT 19, ¶ 21 (explaining the extent of the Court's review where appellant "essentially asks this Court to reconsider the evidence and reach a conclusion opposite to that reached by the [Commission]," finding that "it is for the [Commission], not this Court, to weigh the evidence and assess the credibility of witnesses"). The Commission's determination that the Project will not unduly interfere with the orderly development of the region was an appropriate exercise of its discretion.

CONCLUSION

For the foregoing reasons, this Court should affirm the Commission's decision below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Caroline Daniels, Special Counsel for the Vermont Department of Public Service, hereby certifies that this brief complies with the word-count limit in V.R.A.P. 32(a)(4). According to the Microsoft Word processing software used to prepare this brief, the text of this brief contains 5,649 words.

/s/ Caroline Daniels

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