

**STATE OF VERMONT  
PUBLIC UTILITY COMMISSION**

---

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

---

Case No. 21-2939-NMP

**LANDOWNER'S RESPONSE TO PETITIONER'S MOTION TO STRIKE PORTIONS  
OF LANDOWNERS' SURREBUTTAL TESTIMONY AND EXHIBITS**

September 26, 2022

Now come Neighbor Intervenors (Landowners) Michael Binder and Joan Allen, *pro se*, and hereby oppose Petitioner's September 12, 2022 Motion to Strike Portions of Landowner's Surrebuttal Testimony and Exhibits.

**Exhibits filed with this response:** MB-55 (A&B) Virginia DEQ memos

**CONTENTS**

**PART 1 Objections to Testimony and Exhibits Based on Hearsay      Page 2**

**PART 2 Objections to Testimony based on Lack of Expertise      Page 8**

**PART 1 Objections to Testimony and Exhibits Based on Hearsay**

The Petitioner's Motion states:

Petitioner objects to the admission of Landowners' exhibits JA-20, JA-21, JA-23, MB-40, MB-42- MB-43, MB-44(A&B), MB-45, MB-46, MB47, MB-48, MB-52, and MB-54, because they are "out-of-court statements to prove the truth of the matter asserted" and therefore impermissible hearsay.

and also states:

The following portions of Ms. Allen's and Mr. Binder's surrebuttal testimony, which relies on hearsay exhibits for the truth of the matter asserted, are also hearsay: Allen A5, fifth and sixth sentences; Binder A10, third sentence (including the block quote); Binder A8-A9; Binder A10, second sentence; Binder A17, second sentence; and Binder A18, second sentence.

**JA-20 (U.S. Fish & Wildlife: Birds of Conservation Concern 2021)** is admissible because it is excluded from the hearsay rule under **VRE 803(8) *Public records and reports*** as a record, report, statement, or data compilation in any form of the U.S. Fish & Wildlife Service, which is a public agency with such duty. The content of the exhibit is also admissible because it is excluded from the hearsay rule under **VRE 803(18) *Learned Treatise*** to the extent relied upon by Ms. Allen in her expert testimony.

**JA-21 (Cornell Ornithology: Vanishing: More than 1 in 4 Birds Has Disappeared in the Last 50 Years)**, the content of this exhibit is admissible because it is excluded from the hearsay rule under **VRE 803(18) *Learned Treatise*** to the extent relied upon by Ms. Allen in her expert testimony.

The Petitioner objects to the fifth and sixth sentences of **Allen Surrebuttal A5** which are:

These declines are well-documented in the literature by experts who have been conducting research over the last two or more decades (for examples see Exhibits **JA-20** and **JA-21**). A significant cause of these declines is the degradation and destruction of the habitat they need for nesting, foraging, feeding their young, and avoiding predation.

As argued above, **JA-20** is a public record and learned treatise and **JA-21** is a learned treatise relied upon by Ms. Allen and are thus excluded from the hearsay rule by VRE 803. In the alternative, if the exhibits are stricken as impermissible hearsay, the remainder of the fifth and sixth sentences [outside of the parentheses] should stand as Ms. Allen's testimony.

**JA-23 (Vermont Fish & Wildlife Department - A Mapping and Conservation Guide)**, is admissible because it is excluded from the hearsay rule under **VRE 803(8) *Public records and reports*** as a record, report, statement, or data compilation in any form of the Vermont Fish & Wildlife Department, which is a public agency with such duty. The content of the exhibit is also admissible because it is excluded from the hearsay rule under **VRE 803(18) *Learned Treatise*** to the extent relied upon by Ms. Allen in her expert testimony.

In the first sentence of **Allen Surrebuttal A10**, Ms. Allen points out that Ms. Barton referred to and relied on ANR's BioFinder as the basis for her disagreement with Ms. Allen's testimony. In the second sentence of **Allen Surrebuttal A10**, Ms. Allen testifies that the BioFinder is unreliable as used by Ms. Barton. Ms. Allen continues her testimony by quoting an important and relevant disclaimer in the BioFinder (**JA-23**). The disclaimer supports Ms. Allen's claim that the BioFinder is unreliable as used by Ms. Barton. Landowners respectfully request the Commission take notice of the BioFinder disclaimer quoted in **Allen Surrebuttal A10** when it weighs the competing testimony of Ms. Barton and Ms. Allen.

The first two pages of **MB-40 Concentrated Runoff** are testimony, not hearsay. The remainder of **MB-40** (pages 3-6) is a compendium of excerpts from out-of-state governmental documents **MB-43, MB-44(A&B), MB-45, MB-46, and MB-48** (*vide infra*).

Mr. Binder testifies<sup>1</sup> in both **MB-40** and in **Binder Surrebuttal A8** that a common denominator in several cited out-of-state jurisdictions is that solar panels must be treated as an impervious surface when built on slopes such as the present site. He does not testify that out-of-state rules are binding in Vermont, nor does he testify that this project cannot be designed and built if the panels are treated as the impervious surfaces that they are.

The first paragraph of **MB-40** is Mr. Binder's transcription of a statement made by Brendan Malley at a Randolph Selectboard meeting, which content is contained on public recording (ORCA) of the meeting.<sup>2</sup>

In the second paragraph of **MB-40**, Mr. Binder explains the purpose of a Level Spreader<sup>3</sup> and provides the Ohio illustration (page 1 of **MB-40**) as a demonstrative aid for the reader to better understand his testimony. At the bottom of the first page of **MB-40** is Mr. Binder's own illustration to assist in demonstrating his testimony (in **Binder Surrebuttal A8**) that orientation of the panels against the contour lines concentrates the flow of water on a slope.

The illustration on page 2 of **MB-40** is from the Petitioner's Site Plan. The remainder of page 2 of **MB-40** is Mr. Binder's testimony. He does not rely on hearsay, but rather on his experience and expertise surveying stormwater management structures on slopes to inform his opinions and testimony in **MB-40** and **Binder Surrebuttal A8**.

---

<sup>1</sup> Mr. Binder's experience in land surveying and development has involved much reading and comprehension of regulatory and advisory governmental land use documents.

<sup>2</sup> The transcribed quote is at 1:37:59 here: <https://www.orcamedia.net/show/january-13-2022-rs>

<sup>3</sup> Mr. Binder has professionally surveyed (both pre, during, and post construction) berms, swales, level spreaders, detention ponds, infiltration trenches, culverts, and other stormwater management structures.

The Petitioner objects to the second sentence of **Binder Surrebuttal A10** because it relies on hearsay. The second sentence is "See Exhibit **MB-40** for why it wrong, in the present case, to pretend the panels are pervious." That sentence is referring to Mr. Binder's testimony in **MB-40**, not to any hearsay evidence.

The Petitioner objects to the second sentence of **Binder Surrebuttal A18** because it relies on hearsay. In that sentence Mr. Binder testifies that failure to build **ANY** stormwater control structures on steep slopes will cause severe erosion. That is a reasonable and common sense opinion that does not rely on hearsay evidence.

Exhibit **MB-42** (**Vermont AAFM Reclamation of Vermont Agricultural Soils**) is admissible because it is excluded from the hearsay rule under **VRE 803(8) *Public records and reports*** as a record, report, statement, or data compilation in any form of the Vermont Agency of Agriculture, Farms and Markets which is a public agency with such duty.

AAFM (in their comments) and Mr. Depillis in his prefiled testimony have cited and referred to this document and have requested the Commission require compliance with provisions in the document. Surely the Commission must be allowed to see this document if it is to consider the requests made by AAFM and Mr. Depillis.

The Petitioner objects to the second sentence of **Binder Surrebuttal A17** because it relies on hearsay. Mr. Binder refers to exhibit **MB-42** (**Reclamation of Vermont Agricultural Soils** *vide supra*) and quotes a sentence from it in his testimony that the Petitioner's project does not comply with provisions in Reclamation of Vermont Agricultural Soils. As argued in the preceding paragraph, **MB-42** is excluded from the hearsay rule.

Exhibits **MB-43, MB-44(A&B), MB-45, MB-46, and MB-48** are admissible out-of-state governmental documents. They are excluded from the hearsay rule under **VRE 803(8) *Public records and reports***.

They are not introduced into evidence for the purpose of proving the truth of the matter asserted. In fact, the various jurisdictions do not even agree with each other on the particulars of how to regulate solar development on slopes. No truth is being asserted by entering these documents into evidence. Mr. Binder refers (indirectly) to these documents in **Binder Surrebuttal A8** and more directly in exhibit **MB-40** (*vide supra*) which contains (on pages 3-6) a compendium of excerpts from these documents.

Landowners respectfully request that the Commission take notice of these other States' regulations.

Exhibit **MB-47** (**VT DEC Literature Review ... Wetland Impacts from Solar Facilities**), is admissible because it is excluded from the hearsay rule under **VRE 803(8) *Public records and reports*** as a record, report, statement, or data compilation in any form of the Vermont Department of Environmental Conservation, which is a public agency with such duty. The content of the exhibit is also admissible because it is excluded from the hearsay rule under **VRE 803(18) *Learned Treatise***.

**MB-47** is not introduced into evidence for the purpose of proving the truth of any matter that it asserts. It is a literature review. Mr. Binder does not refer to **MB-47** in his Surrebuttal testimony. In exhibit **MB-40** he mentions that the illustrations in the VT DEC Solar Literature Review (**MB-47**) are from Maryland's Solar Design Guidance (**MB-43**).

Exhibit **MB-52** (**Vermont DEC Response Summary General Permit 3-905**), is admissible because it is excluded from the hearsay rule under **VRE 803(8) *Public records and reports*** as a record, report, statement, or data compilation in any form of the Vermont Department of Environmental Conservation, which is a public agency with such duty.

Mr. Homsted wrote in his Rebuttal testimony: "The State of Vermont has maintained that solar panels are not jurisdictional impervious surface." Mr. Homsted gave no reference to any Vermont Rules or Statutes. ANR's comments (in exhibit **MB-52** and as quoted in **Binder Surrebuttal A9**) bear on Mr. Homsted's contention that "Vermont has maintained that solar panels are not jurisdictional impervious surface". Mr. Binder's testimony (**Binder Surrebuttal A9**) and exhibit **MB-52** are intended to show the Commission that ANR does not take slope into consideration when it permits solar panels to be treated as pervious surface. The testimony and exhibit are also intended to show the Commission why it cannot rely on ANR to join the Landowners in opposing the Petitioner's claim that this project does not require an Operational Stormwater Permit.

Exhibit **MB-54** (**Virginia Mercury - Youngkin sets stricter runoff rules for solar farms**) is not hearsay under VRE 801 because it is not being offered for the truth of the matter asserted. If Exhibit **MB-54** is deemed hearsay, it should be admitted into evidence because the events described were widely reported and are readily verifiable from many reliable sources.

Exhibits **MB-55 (A&B)** submitted with this motion are the Virginia DEQ memos referred to in the Virginia Mercury article (**MB-54**). Mr. Binder chose to submit the Virginia Mercury article with his surrebuttal testimony (rather than the memos) because it provides meaningful context to the Virginia DEQ memos. If **MB-54** is stricken, Landowners respectfully request that exhibits **MB-55A** and **MB-55B** (submitted with this Motion) be entered into evidence in its place.

## **PART 2 Objections to Testimony based on Lack of Expertise**

The Petitioner's Motion states:

In Questions and Answers 8-11 and Question and Answer 18, Mr. Binder purports to offer scientific, technical and other specialized knowledge about stormwater impacts and policy, which is impermissible under V.R.E. 701.

Mr. Binder has expertise in surveying stormwater structures before, during, and after construction. He does not claim the specialized knowledge (or license) required to design the structures (e.g. calculating the necessary length, width, and depth of an infiltration trench or a detention pond), but he understands their purpose and expects to see them in a site plan. His testimony and opinions in **Binder Surrebuttal A8-A11** and **A18** does not require the scientific, technical and other specialized knowledge about stormwater impacts and policy that a professional engineer might possess.

As mentioned in the discussion of **MB-40** (*vide supra*), Mr. Binder testifies in both **Binder Surrebuttal A8** and **MB-40** that a common denominator in the cited out-of-state jurisdictions is that solar panels must be treated as an impervious surface when built on slopes such as the present site. It requires no scientific, technical and other specialized knowledge of stormwater impacts and policy for him to notice the common denominator in the cited jurisdictions.<sup>4</sup>

In **Binder Surrebuttal A9**, Mr. Binder quotes an ANR comment from exhibit **MB-52 (Vermont DEC Response Summary General Permit 3-9050)**. It requires no scientific, technical and other specialized knowledge of stormwater impacts and policy for Mr. Binder to quote this document.

---

<sup>4</sup> Mr. Binder's experience in land surveying and development has involved much reading and comprehension of regulatory and advisory governmental land use documents.



The first sentence of **Binder Surrebuttal A10** is a quote from Landowner's Regional Plan (TRORC). It requires no scientific, technical and other specialized knowledge of stormwater impacts and policy for Mr. Binder to quote from that plan. The second sentence of **Binder Surrebuttal A10** is "See Exhibit **MB-40** for why it wrong, in the present case, to pretend the panels are pervious." Mr. Binder's testimony in **MB40** (*vide supra*) requires no scientific, technical and other specialized knowledge of stormwater impacts and policy.

In **Binder Surrebuttal A11**, Mr. Binder states:

When the precedent of treating the panels as pervious is abused by developers, environmental catastrophes occur and jurisdictions tighten up their regulations. The most recent example of this sequence of events that I am aware of is in Virginia. (Exhibit **MB-54**)

As argued in the discussion of **MB-54** (*vide supra*), the Virginia Mercury article is admissible. Mr. Binder's testimony in **Binder Surrebuttal A11** is his reasonable conclusion based on his observations that many (most?) land use regulations are reactive to events. His conclusion requires no scientific, technical and other specialized knowledge of stormwater impacts and policy.

The Petitioner's Motion states:

Mr. Binder's surrebuttal Questions and Answers 14-17 purport to offer scientific, technical and other specialized knowledge about primary agricultural soils ("PAS"), and such statements therefore are also inadmissible under V.R.E. 701

Nothing in **Binder Surrebuttal A14 - A17** requires scientific, technical and other specialized knowledge of PAS.<sup>5</sup> The testimony in **Binder Surrebuttal A14 - A17** requires only the ability to read a site plan, the ability to read AAFM's Reclamation of Vermont Agricultural Soils (**MB-42**), and the ability to call out the discrepancies.

---

<sup>5</sup> Mr. Binder's familiarity (**Surrebuttal A15**) with the horizons of Buckland PAS is informed, in part, by having lived on Buckland PAS for 42 of the past 42 years (in the towns of Norwich, Chelsea, and Randolph).

**CONCLUSION**

For all of the above reasons, Landowners request the Commission to deny Petitioner's Motion to Strike Portions of Landowner's Surrebuttal Testimony and Exhibits.

**/s/ Joan Allen**

Joan Allen, *pro se*  
1953 Davis Rd.  
Randolph Center, VT 05061  
joanbarballen@gmail.com

**/s/ Michael Binder**

Michael Binder, *pro se*  
1953 Davis Rd.  
Randolph Center, VT 05061  
michaeljbinder@yahoo.com