No. 24-589

IN THE
Supreme Court of the United States

ALLCO RENEWABLE ENERGY LIMITED, PLH VINEYARD SKY LLC, APPLE HILL SOLAR LLC, AND CHELSEA SOLAR LLC, *PETITIONERS*,

v.

AGENCY OF NATURAL RESOURCES AND DEPARTMENT OF PUBLIC SERVICE, *RESPONDENTS*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Vermont

PETITION FOR A WRIT OF CERTIORARI

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November 27, 2024

QUESTION PRESENTED

Whether statutory provisions that empower the Vermont Public Utility Commission (PUC) to initiate and adjudicate administrative enforcement proceedings seeking civil penalties violate the Seventh Amendment?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Allco Renewable Energy Limited, a Florida corporation, discloses that there is no parent or publicly held company owning 10% or more of its stock. PLH Vineyard Sky LLC, a Florida limited liability company, discloses that there is no parent or publicly held company owning 10% or more of its membership units. Apple Hill Solar LLC, a Vermont limited liability company, and Chelsea Solar LLC, a Vermont limited liability company, disclose that Allco Finance Limited, a Florida corporation, owns 100% of their membership units and that there is no parent or publicly held company owning 10% or more of the stock of Allco Finance Limited.

RELATED PROCEEDINGS

Supreme Court of The State of Vermont,
In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209 into whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT, (*Allco Renewable Energy Limited et al.),* No. 23-AP-346, 2024 VT 58 (August 30, 2024).

Vermont Public Utility Commission,
Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2), No. 20-1611-INV (April 1, 2021, May 30, 2023, June 13, 2023 and September 19, 2023)

PETITION FOR A WRIT OF CERTIORARI

Allco Renewable Energy Limited, PLH Vineyard Sky LLC, Apple Hill Solar LLC, and Chelsea Solar LLC (collectively, Allco) respectfully seek a writ of certiorari to review the judgment of the Supreme Court of the State of Vermont in this case.

OPINIONS BELOW

The opinion of the Vermont Supreme Court affirming the decision of the Vermont Public Utility Commission (PUC) is reported at 2024 VT 58 and reprinted in the Appendix to the Petition ("App.") beginning at App.1a.

The opinions of the PUC are unreported. They are reprinted beginning at App.31a.

JURISDICTION

The Vermont Supreme Court issued its opinion, which also constitutes its judgment, on August 30, 2024. The jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment is set forth at App.118a. Relevant provisions of Vermont law are reprinted beginning at App.119a.

STATEMENT OF THE CASE

Last Term this Court reigned in the power of the Federal Administrative State in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), and *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024). This case is *Jarkesy* at the State level.

The Vermont Legislature transferred jurisdiction to the juryless PUC as part of its land use regulation of when a landowner can put a solar energy facility on her property. As part of the transfer of jurisdiction to the PUC, the Vermont statute allows for knee-buckling fines and leaves the PUC to its own devices for the process for implementation and levying of fines.

Jarkesy is not binding upon the States unless this Court applies the Seventh Amendment's right to a civil jury trial to the States. To date, the Seventh Amendment has been treated as a distant relation to the other rights in the Bill of Rights.

While the Petitioners' applications to build solar electric generation facilities on a 27-acre parcel in Bennington, Vermont, were pending before the PUC, the Petitioners sought to use the parcel for farming. A member of the public complained to the PUC that the Petitioners' clearing of the parcel for its farming activities would constitute "site preparation" for the construction of an electric generation facility without a certificate of public good, and thus would violate 30 V.S.A. § 248(a)(2).

The PUC then *sua sponte* opened up an investigation in which it was the complainant, the prosecutor, the judge and the jury.

While the Petitioners disputed the charges, pleas to "the same body that approved the charges[] tend to go about as one might expect." *Jarkesy,* (Gorsuch, J., concurring) 144 S. Ct. at 2142.

And they did. While the investigation against Petitioners initially donned a cloak of purported "environmental protection", in the end, even the PUC was not willing to hold that noxious weeds and plants that can be purchased at Home Depot were entitled to environmental protection. But the PUC issued a penalty despite conceding that there was no threat of environmental damage. After all, farming is an as-of-right use in Vermont.

The PUC made it clear that its imposition of a civil penalty was to punish the Petitioners. *See*, App. 54a ("Any penalty imposed in this case must specifically deter the Developer from making the same mistake again, and also generally deter any other developers of Section 248 projects from making the same error.") App. 58a ("we believe a $5,000 penalty on top of these costs serves as an important specific and general deterrent.")

The Petitioners argued before the PUC that they were entitled to a jury trial because intended to impose a civil penalty as punishment and not for any type of restitution.

The Vermont Supreme Court upheld the PUC's juryless treatment of the Petitioners, explicitly holding that the civil jury protections in Vermont's Constitution are not as protective as the Seventh Amendment after *Jarkesy*.

REASONS FOR GRANTING THE PETITION

While this Court "has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment," *Curtis v. Loether*, 415 U.S. 189, 192 n. 6 (1974), a state court is not involved here, a state agency is. If the Vermont Supreme Court's opinion is allowed to stand, there will be a massive loophole in the protection of Americans' property rights that would encourage States to do exactly what the Crown did—transfer jurisdiction over various cases to juryless administrative tribunals.

The Fourteenth Amendment, provides, among other things, that a State may not deprive "any person of life, liberty, or property, without due process of law." In *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010), this Court laid out the test for incorporation of the Bill of Rights against the States: "whether the right … is fundamental to our scheme of ordered liberty, .. or as we have said in a related context, whether this right is 'deeply rooted in this Nation's history and tradition.'" (citations omitted).

As *Jarkesy* makes plain, the Seventh Amendment's right to a jury trial—"the glory of the English law"— 144 S. Ct. at 2128, easily satisfies *both* of those criteria.

At stake here are two fundamental rights at the heart of liberty in a democratic society—property rights and a right to trial by jury. "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither

could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). "That rights in property are basic civil rights has long been recognized. J. Locke, *Of Civil Government* 82-85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, Democracy, Liberty, and Property 121-132 (1942); 1 W. Blackstone, *Commentaries* *138-140." *Id.*

Thomas Jefferson identified the jury "as the only anchor, ever yet imagined by man, by which a government can be held to the principles of its constitution." Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in The Papers of Thomas Jefferson 267 (Julian P. Boyd ed., 1958). And John Adams called trial by jury (along with popular elections) "the heart and lungs of liberty." The right to jury trial is quite simply the most deeply rooted right in American history and tradition. Steven G. Calabresi, Sarah E. Agudo, and Kathryn L. Dore, *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?* 85 So. Cal. L. Rev. 1451, 1511-12 (2012). Disputes between government and its officers on the one part, and the subject or citizen on the other, as here, were the "very cases where, of all others, [the jury trial] was most essential for [the people's] liberty." Luther Martin, *Genuine Information* (1787), reprinted in 3 *The Records of the Federal Convention of 1787*, at 222 (Max Farrand ed., 1911) (italics omitted).

Trial by jury is a "fundamental" component of our legal system "and remains one of our most vital barriers to governmental arbitrariness." *Reid v.*

Covert, 354 U.S. 1, 9-10, 77 S. Ct. 1222 (1957). The Seventh Amendment protects that right.

Jarkesy makes clear that the treatment of Petitioners at the hands of the PUC has been simply inconsistent with the American scheme of liberty. 144 S. Ct. at 2131-2132 ("there is no liberty if the power of judging be not separated from the legislative and executive powers," citing and quoting The Federalist No. 78, at 466 (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)).

And here, the PUC opened up the investigation *sua sponte*, and acted as prosecutor, judge and jury. In other words, it was the same Commissioners that brought the charges that also found the facts, decided the law, and imposed the punishment, which is the perfect replication of the Colonial vice-admiralty courts that sparked the American Revolution.

As explained in *Jarkesy*, 144 S. Ct. at 2128:

> the right is *not limited* to the common-law forms of action recognized when the Seventh Amendment was ratified. [citation]. As Justice Story explained, the Framers used the term 'common law' in the Amendment in *contradistinction to equity*, and admiralty, and maritime jurisprudence. [citation]. The Amendment therefore *embraces all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form* which they may

assume."

(Internal citations and quotations omitted) (emphasis added).

When, *as here*, civil penalties are sought against a person (on their own or as part of other relief), said person should be entitled to a trial by jury. *Id.* at 2129 ("while courts of equity could order a defendant to return unjustly obtained funds, only courts of law issued monetary penalties to punish culpable individuals.") (internal quotation and citation omitted). No longer should the Seventh Amendment be treated as a poor relation to the other rights guaranteed in the Bill of Rights.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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NOVEMBER 27, 2024

APPENDIX

APPENDIX

APPENDIX A

2024 VT 58

No. 23-AP-346

In re Investigation Pursuant to 30 V.S.A. Sec. 30 & 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington, VT; (Allco Renewable Energy Limited et al., Appellants)	Supreme Court On Appeal from Public Utility Commission. May Term, 2024

August 30, 2024, Filed

Anthony Z. Roisman, Chair.

Michael Melone, Allco Renewable Energy Limited, New Haven, Connecticut, for Appellant.

Charity R. Clark, Attorney General, and *David Golubock*, Assistant Attorney General, Montpelier, for Appellee Agency of Natural Resources.

Ben Civiletti, Special Counsel, Montpelier, for Appellee Department of Public Service.

Present: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶1. **Reiber, C.J**. Developer, Allco Renewable Energy Limited, and its affiliates, Chelsea Solar LLC, Apple Hill Solar LLC, and PLH Vineyard Sky LLC, appeal a permanent injunction and civil-penalty order issued by the Vermont Public Utility Commission (PUC). The PUC found that by clearing trees at the planned location of an electric-generation facility while its petition for a certificate of public good (CPG) was pending, developer had initiated site preparation without a CPG, in violation of 30 V.S.A. § 248(a)(2)(A). Developer argues that the tree clearing was intended not as site preparation but to support its agricultural activities, and it brings a host of jurisdictional, administrative, and constitutional arguments against the injunction and civil penalty. We conclude that the PUC had jurisdiction over developer's activities, that it acted within its authority in imposing the injunction and civil penalty, and that none of developer's remaining arguments have merit. Accordingly, we affirm the PUC's order.

I. Background

¶2. In 2013 and 2014, developer executed two standard-offer contracts under 30 V.S.A. § 8005(a) for solar-electric energy generation facilities at two sites, Willow Road and Apple Hill Road, located on a twenty-seven-acre parcel of land in Bennington, Vermont. Developer subsequently applied for the requisite CPGs by filing petitions with the PUC for each contract, pursuant to 30 V.S.A. § 248. The standard-offer contracts have been amended several times to extend their operational deadlines and have neither expired nor been relinquished. The PUC

denied a CPG for the Willow Road site in 2016 and denied an amended petition in 2019, which this Court affirmed in 2021. See *In re Chelsea Solar LLC*, 2021 VT 27, 214 Vt. 526, 254 A.3d 156. The PUC granted a CPG for the Apple Hill Road site in 2018, but neighbors appealed, and this Court reversed in part and remanded for further proceedings. See *In re Apple Hill Solar LLC*, 2019 VT 64, 211 Vt. 54, 219 A.3d 1295.

¶3. Following the remand, developer filed an amended petition for a CPG for the Apple Hill Road site to reflect developer's intention to graze sheep and grow hemp on the Apple Hill Road site and an adjacent five-acre parcel, which the PUC considered part of the Apple Hill Road site. Developer's amended petition stated that the agricultural activities were "wholly unrelated to the proposed-solar [sic] use." On May 7, 2020, the PUC denied a CPG for the Apple Hill Road site on remand and denied the motion to amend the petition to reflect sheep grazing and hemp farming at the project site.

¶4. In June 2020, while developer's motion for reconsideration was pending, a neighbor filed a public comment with the PUC alleging that developer had begun clearing trees on the land, despite the CPG denial. In response, the Agency of Natural Resources (ANR) raised concerns that the site clearing threatened substantial and immediate harm to "rare" and "very rare" plants and requested a cease-and-desist order to prevent irreparable harm to the plants. The Department of Public Safety (DPS) also requested further investigation into whether developer initiated the tree-clearing activity as site

preparation for the electric-generation facilities, in violation of 30 V.S.A. § 248(a)(2). The PUC subsequently initiated an investigation "pursuant to 30 V.S.A. Sections 30 and 209" and informed developer to "be prepared to address with affidavits (filed before the hearing begins) or live testimony whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30."

¶5. At the subsequent evidentiary hearing, Thomas Melone appeared on behalf of developer and testified about the tree clearing and proposed agricultural activities. While Melone insisted that the tree clearing was being done for agricultural purposes, he stated that the "primary aspect" of the sheep grazing would be to clear vegetation around the solar facility, and he agreed that it would not be possible to build a solar facility on the site "unless the trees are cleared." Based in part on this testimony, the PUC concluded that developer's "actions on Apple Hill continue to be part of [its] plan to develop the site for the two facilities that are the subject of its standard-offer contracts." The PUC therefore issued a temporary restraining order prohibiting site-preparation activities on both the twenty-seven-acre and five-acre parcels. Despite the order, developer continued to conduct site clearing activities the following day until a sheriff arrived and ordered all work to cease. Developer appealed the temporary restraining order, but we dismissed without prejudice to refiling if a permanent injunction was granted. See *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, No. 2020-242, 2020 WL 6799008, 2020 Vt. LEXIS 118 (Vt.

Nov. 5, 2020) (unpub. mem.) [https://perma.cc/8PF3-H3DN].

¶6. Following a second evidentiary hearing, the PUC concluded that developer's tree-clearing activity was site preparation for the proposed solar-electric-generation facilities and thus, without a CPG, violated 30 V.S.A. § 248(a)(2). The PUC found that (1) ANR observed site-clearing activity on the twenty-seven-acre parcel; (2) developer planned to build two solar-electric-generation facilities on the site; (3) clearing for a solar facility requires tree clearing; and (4) developer planned to use sheep as part of its solar facility development plan. The PUC therefore issued a permanent injunction order in April 2021 prohibiting developer "from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities," which included both the twenty-seven-acre and five-acre parcels. The order would remain in place until either "(1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions … and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished." Developer again filed an appeal, which we dismissed because it was not taken from a final appealable order. See *In re Investigation Pursuant to 30 V.S.A. §§ 30 & 209*, 2021 VT 92, 216 Vt. 145, 274 A.3d 823.

¶7. The PUC conducted additional proceedings, including a third evidentiary hearing, to determine

the amount of the civil penalty under 30 V.S.A. § 30. DPS recommended a civil penalty in the amount of $5000 while ANR recommended $29,000. Pursuant to 30 V.S.A. § 30(c), the PUC analyzed eight factors to determine the amount of the penalty. The PUC concluded that developer's failure to comply with its regulatory obligations harmed the credibility and integrity of the process, resulting in harm to the statutory scheme and potential harm to public safety and welfare, the environment, and utility customers. The PUC also found developer's claims that site preparation was done solely for unrelated farming purposes to be not credible given that developer knew that it did not have a CPG, that it was required to have one, that it needed to clear trees for site preparation, and that clearing had already been denied by the PUC. Finally, the PUC found that developer had sufficient resources to pay the fine and that the $5000 penalty would have specific and general deterrent effects. While the other statutory factors did not weigh against developer, the PUC concluded that based on these findings, a $5000 fine was appropriate. This appeal followed.

II. Discussion

¶8. Developer makes five main arguments on appeal. First, it contends that the PUC lacked jurisdiction over its tree-clearing activities because these activities were agricultural and not "site preparation for or construction of an electric generation facility." 30 V.S.A. § 248(a)(2)(A). Second, developer asserts that the PUC lacked statutory authority to initiate the investigation, enjoin the tree-clearing activities, and impose civil penalties. Third,

developer attacks the injunctive order on various grounds, arguing that there was no irreparable injury, that the order was overly broad, and that the order was arbitrary and capricious. Fourth, developer argues that ANR's participation in these proceedings and its classification of rare and very rare plants exceeded its authority. Finally, developer brings several constitutional challenges to the proceedings, arguing that § 248 is unconstitutionally vague, that the delegation of authority to the PUC violates separation of powers, that developer was denied due process, and that it was denied the right to a jury trial.

¶9. In reviewing decisions of the PUC, we accord "substantial deference" and apply "a strong presumption of validity to the Commission's orders."[1] *In re Vt. Gas Sys., Inc.*, 2024 VT 2, ¶ 15, ___ Vt. ___, 312 A.3d 519 (quotation omitted) (alteration omitted). The PUC's findings "will stand unless clearly erroneous," and we 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). However, while our review is generally deferential, "we do not abdicate our responsibility to examine a disputed

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[1] As discussed below, see *infra*, ¶ 30 n.6, nothing in our decision today implicates deference to an agency's "permissible construction" of an ambiguous statute. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). We therefore need not decide the impact on our jurisprudence of the U.S. Supreme Court's recent decision abrogating *Chevron* deference. See *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024).

statute independently and ultimately determine its meaning." *In re Swanton Wind LLC*, 2018 VT 141, ¶ 7, 209 Vt. 224, 204 A.3d 635 (quotation omitted). In our "independent examination, we employ our usual tools of statutory construction," starting with the plain language of the statute. *Id.* In construing a statute, our "paramount goal … is to give effect to the intent of the Legislature." *In re Portland St. Solar LLC*, 2021 VT 67, ¶ 13, 215 Vt. 394, 264 A.3d 872 (quotation omitted).

A. The PUC's Jurisdiction

¶10. Developer first argues that the PUC lacks jurisdiction under 30 V.S.A. § 209 because its property is not subject to the supervision of the PUC under Chapter 5 of Title 30.[2] Developer contends that its tree-clearing activities were farming-related rather than site preparation for its proposed solar facilities and that these activities are therefore beyond the PUC's jurisdiction. We disagree. Section 209(a) of Title 30 provides in relevant part that "the [PUC] shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of any corporation owning or operating any plant, line, or *property subject to supervision under [Chapter 5 of Title 30]*." (emphasis added). Developer is a corporation that owns the property at issue in this case. Because it holds standard-offer contracts for two proposed solar-electric-generation facilities under 30

[2] Developer also argues that the PUC lacks jurisdiction under § 203. Because we decide that the PUC had jurisdiction under § 209, we need not decide this question.

V.S.A. § 8005(a) and applied for CPGs for both proposed facilities under 30 V.S.A. § 248 — a provision of Chapter 5 of Title 30 — developer is subject to the supervision of the PUC under Chapter 5 of Title 30 and thus the PUC's jurisdiction under 30 V.S.A. § 209. See *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 21 n.6, 210 Vt. 27, 210 A.3d 1230 (holding that "by erecting a tower that required approval under § 246, a provision of Chapter 5 of Title 30, [property owner] subjected himself to PUC jurisdiction under [§ 209]").

¶11. To be sure, the PUC does not have jurisdiction over pure farming activity. See 30 V.S.A. §§ 203, 209 (describing general scope of PUC's jurisdiction); *Acorn Energy Solar 2*, 2021 VT 3, ¶ 114 (noting that "public administrative bodies have only such adjudicatory jurisdiction as is conferred on them by statute" (quotation omitted)). But the PUC has related jurisdiction as described in the statute. As the PUC found and the record reflects, developer's tree-clearing activities were still prohibited as "site preparation for or construction of an electric generation facility" regardless of whether they also had an agricultural character. *Id.* § 248(a)(2)(A). Developer provided testimony during the initial proceedings that "sheep and solar go together" and that the "primary aspect" of the sheep project would be for use in connection with the solar project. Developer's initial proposal indicated that clearing the trees would be part of site preparation. And at the temporary-injunction hearing, developer conceded that tree clearing was a prerequisite to building the solar projects. Based on this evidence, the PUC found that the sheep-farming activity would primarily serve

to control vegetative growth for developer's proposed solar facilities and that tree clearing was essential to the preparation of a solar-electric-generation site. Based on these findings, the PUC could reasonably conclude that the tree clearing was "site preparation for or construction of an electric generation facility." *Id.* Because developer subjected its property to the PUC's supervision by applying for a CPG under 30 V.S.A. § 248(a)(2), developer was precluded from conducting site preparation for its proposed solar facilities without the requisite CPG. And based on the PUC's findings and the plain language of the statute, we agree that these activities constituted site preparation.

¶12. Relatedly, developer argues that its sheep-farming and hemp-growing activities have "a separate function apart from the electric facility" and that under PUC precedent, these activities must be deemed "reasonably related" to its proposed solar facilities for the PUC to have jurisdiction. Developer points to several prior decisions where the PUC applied the reasonable-relationship test to evaluate what project components should be included as part of an electric-generation-facility subject to § 248, and it argues that the PUC's decision not to apply the test here was arbitrary and capricious.[3] See *Petition of*

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[3] Developer also cites to our decision in *Mollica v. Division of Property Valuation and Review*, 2008 VT 60, 184 Vt. 83, 955 A.2d 1171, to support its argument that "a use that has a separate function apart from the electric facility is not site preparation for an electric generation facility." In *Mollica*, we concluded that the occasional off-season use of a building as a rental property, where it retained its predominant use as a "Christmas Cottage" for a Christmas tree farm, did not

Beaver Wood Energy Pownal, LLC, Docket No. 7678, slip op. (Vt. Pub. Util. Comm. Apr. 1, 2011).); *Petition of Monument Farms Three Gen, LLC*, Docket No. 7592, slip op. (Vt. Pub. Util. Comm. Oct. 22, 2010); *Petition of Georgia Mountain Community Wind, LLC*, Docket No. 7508, slip op. (Vt. Pub. Util. Comm. Jan. 5, 2012). However, unlike the cited cases, the PUC here was not evaluating whether developer's proposed sheep-farming and hemp-growing activities were themselves part of the electric-generation facility; instead, the PUC was evaluating whether the tree-clearing activities would be considered site preparation under § 248(a)(2). As explained above, regardless of any auxiliary agricultural purpose, the tree clearing was site preparation under § 248(a)(2). Developer therefore has not shown any inconsistency with the PUC's precedents.

¶13. Finally, developer contends its property can only be subject to the PUC's supervision once the PUC has issued a CPG. But developer's argument is inconsistent with the plain language of § 248(a)(2), which refers to "an electric generation facility … that is designed for *eventual operation*," and which prohibits "site preparation … unless the [PUC] *first finds* that the [electric-generation facility] will

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constitute the "subsequent commencement" of a nonfarming use for purposes of taxation. *Id.* ¶ 17 (quoting 32 V.S.A. § 3752). Contrary to developer's argument, *Mollica* does not stand for a broad proposition that any farming use of a property supersedes any nonfarming use of the property. Instead, we were simply interpreting the specific language of 32 V.S.A. § 3752 to determine whether "subsequent commencement" required complete, or only partial abandonment of the farming use. The case therefore has no relevance here.

promote the general good of the State and issues a certificate to that effect." (emphasis added). As we have previously recognized, the future-oriented language of § 248(a)(2) "highlights the Legislature's intent to bring within the statute's purview proposed construction, i.e., a facility that has not yet been built." See *In re Proposed Sale of Vt. Yankee Nuclear Power Station*, 2003 VT 53, ¶ 10, 175 Vt. 368, 829 A.2d 1284. By developer's reasoning, it could begin site preparation for an electric-generation facility without ever submitting a CPG application, while a CPG application is pending, or, as was the case here, pending reconsideration or appeal of the denial of a CPG application. Developer's reasoning directly contradicts the CPG requirement provided for in § 248(a)(2) and would provide an avenue for developer, or any standard-offer contract holder, to circumvent the PUC's supervision under Chapter 5 of Title 30, contrary to the plain intent of the law. We therefore reject this argument.

B. The PUC's Authority

¶14. Developer next argues that the PUC lacked authority to open its investigation or to issue the injunction and civil-penalty orders. We again disagree. First, the PUC has the authority to open an investigation into whether developer violated 30 V.S.A. § 248(a)(2) pursuant to 30 V.S.A. § 209(a)(6), which authorizes the PUC to "restrain any company subject to supervision under [Chapter 5 of Title 30] from violations of law." Developer is a company subject to supervision under Chapter 5 of Title 30.[4] To

[4] Section 201 of Title 30 defines "company" to mean "individuals, partnerships, associations, corporations, and municipalities

determine whether a company has violated § 248(a)(2) and thus requires restraint, the PUC has the implied authority to investigate the matter. While developer contends that the PUC's power "to open investigations is limited to express statutory authorizations," we have long recognized that the PUC (formerly the Public Service Commission) has "such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted." *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 7, 20 A.2d 117, 120 (1941). We reiterate that principle here. The plain language of § 209(a)(6) authorizing restraint from violations of law implies the power to investigate such violations. Without the power to initiate an investigation, the PUC would be unable to effectively exercise the power to restrain violations of law by parties under its supervision. The PUC therefore had the authority to open an investigation into whether developer violated 30 V.S.A. § 248(a)(2) by beginning site preparation without the requisite CPG.

¶15. Developer argues that only DPS can open an investigation into violations of § 248, citing to 30 V.S.A. § 30(h), which provides that DPS "*may* issue an administrative citation to a person [DPS] believes after investigation violated [§ 248]." (Emphasis

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owning or conducting any public service business or property used in connection therewith and covered by the provisions of [Chapter 5]." Because developer is a corporation owning property covered by § 209, a provision of Chapter 5, it qualifies as a company under § 201.

added). However, while § 30(h) provides one avenue for an enforcement action for a § 248 violation, nothing in the statute makes that authority exclusive. See *State v. Boyajian*, 2022 VT 13, ¶ 22, 216 Vt. 288, 278 A.3d 994 ("The plain, ordinary meaning of the word 'may' indicates that [a] statute is permissive and not mandatory." (quotation omitted) (alteration omitted)). Moreover, by the plain terms of the statute, the "administrative citation" available under § 30(h) is distinct from the civil penalties available under the statute's other provisions. For example, § 30(h) caps penalties at $5000, whereas § 30(b) permits penalties of up to $85,000, plus ongoing fines for continued violations. If § 30(h) were the only avenue for opening investigations, the higher penalties authorized by § 30(b) would be ineffective. Thus, the PUC had the authority to open the investigation under § 209(a)(6) regardless of whether DPS chose to exercise its authority under § 30(h). See *In re SolarCity Corp.*, 2019 VT 23, ¶¶ 11, 18, 210 Vt. 51, 210 A.3d 1255 (recognizing that PUC and DPS have overlapping powers and distinguishing between "an administrative-citation proceeding pursuant to § 30(h)" and "an investigation under the more general provisions of § 30").

¶16. Second, the PUC has the authority to issue a permanent injunction order pursuant to 30 V.S.A. §§ 9 and 209. Section 9 provides that the PUC "shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may *render judgments, make orders* and decrees, *and enforce the same* by any suitable process issuable by courts in this State." 30 V.S.A. § 9 (emphasis added). As explained

above, the PUC has jurisdiction over developer pursuant to § 209. Therefore, under § 9, the PUC has the authority to make factual findings, draw legal conclusions based on an investigation into violations of law, and take subsequent enforcement action, including issuing an injunction order which is a "suitable process issuable by courts in this State." *Id.*; V.R.C.P. 65; *see also Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996) (noting that "the [PUC] has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction"). The PUC's authority to issue an injunction order is further supported by § 209(a)(6) which gives the PUC the power "to *restrain*" a company "from violations of law." (Emphasis added). Here, the PUC concluded from its investigation that developer's activity was site preparation for its proposed solar facilities and therefore violated § 248(a)(2). Consequently, the PUC had the authority to issue a permanent injunction to restrain developer pursuant to §§ 9 and 209.

¶17. Finally, the PUC has the authority to issue civil penalties under 30 V.S.A. § 30(a)(1), which provides in relevant part that "[a] person, company, or corporation subject to the supervision of the [PUC] … who violates a provision of … section 231 or 248 … shall be required to pay a civil penalty." Here, as discussed above, developer is a corporation subject to the supervision of the PUC that violated a provision of § 248. The plain language of § 30(a)(1) therefore authorizes the PUC to impose a civil penalty and requires developer to pay that penalty in the amount determined by the PUC pursuant to § 30(c). Section 30(c), in turn, lays out eight factors the PUC may

consider "[i]n determining the amount of a fine under [§ 30(a)]." The PUC considered those factors in determining the amount of the civil penalty here. It held three evidentiary hearings, considered DPS's and ANR's recommendations as part of its determination of the penalty, and subsequently issued the lower of the two recommendations — an amount of $5000. It therefore acted within its discretion in issuing the penalty. See *Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 10 ("[T]he PUC's decision to set and impose a penalty is within its discretion and will be upheld as long as it shows a thorough and fair evaluation of the various relevant factors." (quotation omitted)).

C. The Injunction Order

¶18. Developer next brings two claims of error with respect to the injunctive order. First, it argues that the irreparable-harm requirement for injunctive relief applies here and was not met. Developer contends that our decision in *Town of Sherburne v. Carpenter*, 155 Vt. 126, 582 A.2d 145 (1990), permitting public agencies to seek injunctive relief without a showing of irreparable harm in certain circumstances, is inapplicable because there is "no statute that authorizes the PUC to issue an injunction for an alleged violation of § 248's site preparation rule." Assuming *Town of Sherburne* does not apply, developer argues that there was no irreparable harm here because harm to the regulatory process is not a recognized harm, and the purported environmental harms are insufficient since the trees will ultimately be cleared either way.

¶19. Developer is correct that a party seeking injunctive relief ordinarily must prove that an injury has occurred for which there is no adequate remedy at law. See *In re Investigation into Gen. Ord. No. 45*, 2013 VT 24, ¶ 7, 193 Vt. 676, 67 A.3d 285 (mem.). This burden is often met by showing that the plaintiff will suffer irreparable harm if the court does not intervene to enjoin the challenged activity. *Id.* But in *Town of Sherburne*, we held that [g]enerally, where a statute authorizes a … public agency to seek an injunction in order to enforce compliance with a local ordinance or state statute, and is silent as to the injury caused, [the agency] is not required to show irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance. 155 Vt. at 129, 582 A.2d at 148; see also 42 Paul M. Coltoff et al., Am. Jur. 2d Injunctions § 147 (2d ed. 2024) ("Where the government is enforcing a statute designed to protect the public interest, it is not required to show irreparable harm to obtain injunctive relief; the statute's enactment constitutes Congress's implied finding that violations will harm the public and ought, if necessary, be restrained.")

¶20. We conclude that *Town of Sherburne* is controlling here and that the PUC was not required to make a finding of irreparable harm. As explained above, 30 V.S.A. § 209(a)(6) authorizes the PUC, a public agency, to restrain a company under its jurisdiction from violations of law. The permanent-injunction order effected the restraint here to enforce compliance with § 248(a)(2). Because § 209(a)(6) remains silent as to the injury caused, the PUC was not required to show irreparable harm before

obtaining the injunction—only that developer violated § 248(a)(2). As explained above, the PUC made adequate findings to that effect. The PUC was therefore not required to show irreparable injury or harm before issuing a permanent injunction order upon finding a violation of § 248(a)(2).

¶21. Developer further contends that *Town of Sherburne* requires the PUC to review and balance the equities before issuing an injunction order. But as *Town of Sherburne* explains, a balancing of the equities is permitted only in very narrow circumstances: namely (1) "where the violation is so insubstantial that it would be unjust and inequitable to require" injunctive relief, and (2) where the "violation is innocent," or unknowingly committed. 155 Vt. at 131-32, 582 A.2d at 149. Neither of these circumstances apply here. By the time of the temporary-injunction order, developer had already cleared three acres of its twenty-seven-acre parcel, and it had plans to clear nearly the entire parcel in the following months. And since developer began clearing the trees following the denial of a proposed amendment to reflect sheep farming activities, it had knowledge that its actions were prohibited. See *id.* at 132, 582 A.2d at 149 ("Courts have generally found that a conscious decision to go forward, in the face of a direction not to from the regulatory body, outweighs factors pointing against the issuance of a mandatory injunction."). Furthermore, developer continued to conduct site preparation even after the PUC had issued a temporary restraining order requiring developer to halt its tree-clearing activity. We therefore conclude developer's violation was neither

insubstantial nor innocent. As such, no balancing of the equities was required by the PUC here.[5]

¶22. Second, developer argues that the injunction order is overbroad in that it applies not only to the physical location of the planned energy facility, but also to the adjacent five-acre "horticultural use lot." While it is true that the electric-generation facility itself will not be placed on the horticultural-use lot, that lot is part of developer's CPG application and is therefore part of the overall site. In its initial proposal, developer included a plan to use conservation zones and trees in the horticultural-use lot to offset environmental and aesthetic impacts of the facility. And in its proposed amendment, developer suggested that it would construct a building on the horticultural use lot to obstruct neighboring views and limit aesthetic impacts. These environmental and aesthetic concerns were vital to developer's CPG application because § 248(b)(5) requires the PUC to find that the project "will not have an undue adverse effect on aesthetics … [or] the natural environment." Because the horticultural-use lot was part of developer's proposed electric-generation facility, the PUC could conclude that site preparation on the horticultural-use lot was still "site

[5] In its permanent injunction order, the PUC concluded in the alternative that irreparable injury existed by way of harm to rare and very rare plants, harm to the trees that would be cleared, and harm to the regulatory process through the violation of § 248(a)(2). Because we hold that the PUC is not required to show irreparable harm when seeking an injunction to enforce compliance with § 248(a)(2), we need not decide whether it correctly concluded that irreparable injury existed here.

preparation for … an electric generation facility" in violation of § 248(a)(2).

D. ANR's authority

¶23. Developer next challenges ANR's participation in these proceedings on two grounds. First, developer argues that ANR lacked authority to participate in the proceedings since these proceedings were initiated under § 209 rather than § 248. However, while jurisdiction was provided by § 209, this proceeding was an enforcement action of the prohibition on site preparation without a CPG under § 248(a)(2). Under § 248(a)(4)(E), ANR is required to "appear as a party in any proceedings held under this subsection." It is therefore a proceeding under § 248 and ANR was not only permitted, but required, to participate. In participating, ANR was required to "provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section" and permitted to "provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding." *Id.* § 248(a)(4)(E). Thus, by participating in the proceedings, offering evidence about the environmental impacts of the tree clearing, and recommending a civil penalty, ANR acted within the explicit scope of its statutory authority.

¶24. Second, developer argues that ANR only has express statutory authority to classify endangered and threatened plant species, and that its classification of rare and very rare species is beyond its authority. This question has no impact on the outcome of this case and we therefore do not address

it. As the PUC noted in its civil-penalty order, "the validity of ANR's classification system is of no significance because the Commission is not basing its penalty assessment on actual harm to rare plants." While the PUC did consider the rare and very rare plant classification in its injunctive order as part of its finding of irreparable harm, we concluded above that no showing of irreparable harm was required here. See *supra*, ¶ 20. Therefore, ANR's plant classification system did not impact the outcome of the case. Because our assessment of this question will not affect the outcome of the case, we decline to decide this issue. See *In re Vt. Elec. Power Co., Inc.*, 2006 VT 69, ¶ 26, 179 Vt. 370, 895 A.2d 226 (declining to address appellant's contention that PUC applied overly narrow definition of statutory term where appellant failed to argue prejudice "or explain how, if at all, a broader approach would have changed the result"); see also *People v. Ringland*, 2017 IL 119484, ¶ 35, 89 N.E.3d 735 ("Generally, a court of review will not consider an issue where it is not essential to the disposition of the case or where the result will not be affected regardless of how the issue is decided.").

E. Constitutional Claims

¶25. Finally, developer raises several constitutional challenges to the proceedings. First, it argues that the prohibition on site preparation in § 248(a)(2) is unconstitutionally vague and standardless. Developer contends that the phrase "site preparation for … an electric generation facility" is undefined and that the statute provides no standards for interpreting or implementing it. Developer suggests that this authorizes and encourages arbitrary and

discriminatory application by allowing the PUC to make ad hoc decisions. Second, developer argues that the Legislature could not, consistent with the principle of separation of powers, constitutionally grant the PUC power to act here because the use of an injunction "is the stuff of what traditional courts of equity would handle, and thus could not be delegated to the PUC."

¶26. Developer's first two constitutional arguments present facial challenges to the validity of § 248 and § 209 respectively. Each argument "seeks to invalidate the provision outright" and neither identifies any set of facts particular to this case "making the statute unconstitutional, nor to a set of facts under which the statute would be constitutional." *In re Investigation to Rev. the Avoided Costs that Serve as Prices for the Standard-Offer Program in 2019*, 2020 Vt 103, ¶ 43, 213 Vt. 542, 251 A.3d 525; see also *Vitale v. Bellows Falls Union High Sch.*, 2023 VT 15, ¶ 3 n.1, 217 Vt. 611, 293 A.3d 309 ("In a facial challenge, a litigant argues that there is no set of circumstances under which the challenged law could be valid and seeks the invalidation of the challenged law." (quotation omitted)). As we have previously explained, "the Commission lacks jurisdiction to adjudicate a facial challenge to a statute." *In re Petition of Apple Hill Solar*, 2023 VT 57, ¶ 33, ___ Vt. ___, 311 A.3d 117. Because the PUC cannot adjudicate facial challenges, we cannot review such claims on appeal from an order of the PUC. "As we have insisted in the past, [developer's] remedy is to follow the appropriate procedures to seek a declaratory judgment in the superior court, where other interested persons have an opportunity to participate in the proceedings."

Investigation to Rev. the Avoided Costs, 2020 VT 103, ¶ 44.

¶27. Next, developer argues that the PUC violated due process by failing to provide adequate notice of the prohibited conduct and by denying developer's request for a hearing on the "harm to the regulatory process." On the first point, developer again asserts that the meaning of "site preparation" is too vague, such that it fails to provide adequate notice of prohibited conduct. Developer also reiterates its argument that the PUC acted contrary to its precedents, which it argues require that "an improvement to property must constitute a physical part of an electric generation facility." On the second point, developer suggests that harm to the regulatory process lacks any basis in the statute or administrative law and was "simply made-up by the PUC." Because no such harm is recognized, developer asserts, a penalty based on that harm is a violation of due process.

¶28. We reject developer's due-process arguments. First, as discussed above, we lack jurisdiction in this matter to address developer's facial challenge that the phrase "site preparation" is unconstitutionally vague. We similarly reject developer's arguments about the PUC's precedents for the same reasons discussed earlier. See *supra*, ¶ 12. The PUC did not hold that an improvement need not constitute a physical part of an electric-generation facility; rather, it held that the term "site preparation for … an electric generation facility" encompassed site-preparation activities that may also have a secondary purpose. This does not

contradict the PUC's precedents and does not deprive developer of due process.

¶29. On developer's second point, we conclude that the PUC appropriately weighed the statutory factors under 30 V.S.A. § 30(c) and set a penalty within the reasonable bounds of the statute. Section 30(c)(1) allows the PUC to weigh "the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers." In discussing the harms to the statutory scheme, the PUC described the regulatory harm as "an extension of the harm and potential harm to (1) public safety and welfare, (2) the environment, and (3) utility customers." As it explained, "[t]he § 248 process aims to protect these interests by preventing undue adverse impacts to the resources protected by § 248." Thus, a violation of § 248 has "attendant potential to harm the natural environment." This discussion is in line with the PUC's obligation to analyze the statutory factors and therefore does not create any due-process issues. See 30 V.S.A. § 30(c)(1) (requiring consideration of "the extent the violation harmed *or might have harmed* … the environment" (emphasis added)).

¶30. Finally, developer argues that it is constitutionally entitled to a jury trial on these charges. It cites to *Tull v. United States*, 481 U.S. 412, 107 S. Ct. 1831, 95 L. Ed. 2d 365 (1987), for the proposition that the right to a jury trial applies to "all actions akin to those brought at common law as those actions were understood at the time of the Seventh Amendment's adoption." Because this suit seeks

"common-law-like legal remedies," developer argues it is entitled to a jury trial. In a supplemental citation filed after argument, developer also points to the recent U.S. Supreme Court decision in *SEC v. Jarkesy*, 144 S. Ct. 2117, 219 L. Ed. 2d 650 (2024).[6] Developer argues that under *Jarkesy*, when "civil penalties are sought against a person … said person is entitled to a trial by jury under the Seventh Amendment to the United States Constitution."

¶31. Despite developer's intimations to the contrary, the Seventh Amendment is not applicable to state courts, and *Jarkesy* is therefore nonbinding on this Court.[7] See, e.g., *Curtis v. Loether*, 415 U.S. 189, 192

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[6] Developer also directs us to the U.S. Supreme Court's recent decision in *Loper Bright*, 144 S. Ct. at 2244, overruling in part *Chevron*, 467 U.S. at 837. Developer argues that, like federal courts, "this Court too defers to agencies," and it asks that we overrule our precedents requiring agency deference. However, *Loper Bright* dealt only with "*Chevron* deference" — that is, deference to an agency's "permissible construction" of a statute that is "silent or ambiguous" as to the issue at hand. See *Loper Bright*, 144 S. Ct. at 2264; *Chevron*, 467 U.S. at 843. Nothing in our decision today implicates the deference to an agency's legal interpretations of an ambiguous statute called for in *Chevron*. Rather, our decision rests on our independent examination of the statutory text and Legislative purpose. We therefore need not decide whether to follow *Loper Bright* at this time. See *supra*, ¶ 9 n.1.

[7] However, even if it were binding, *Jarkesy* is easily distinguishable based on the nature of the statutory claim. The *Jarkesy* Court concluded that "[t]he SEC's antifraud provisions replicate common law fraud, and it is well established that common law claims must be heard by a jury." *Jarkesy*, 144 S. Ct. at 2127. This common-law antecedent was critical to the Court's conclusion that the "public rights" exception to the Seventh Amendment was inapplicable. *Id.* at 2137 (distinguishing from

n.6, 94 S. Ct. 1005, 39 L. Ed. 2d 260 (1974); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 719, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999); *Osborn v. Haley*, 549 U.S. 225, 252 n.17, 127 S. Ct. 881, 166 L. Ed. 2d 819 (2007). Instead, in defining the right to a jury trial in Vermont, "we have historically looked to our own Constitution which, like almost every other state constitution, guarantees the right to jury trial to the extent that it existed at common law at the time of the adoption of the Constitution." *State v. Irving Oil Corp.*, 2008 VT 42, ¶ 5, 183 Vt. 386, 955 A.2d 1098 (quotation omitted) (alteration omitted); see Vt. Const. ch. I, art. 12 ("That when any issue in fact, proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred.").

¶32. Under Vermont law, "[c]laims traditionally tried in a court of law to which the constitutional right

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Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 97 S. Ct. 1261, 51 L. Ed. 2d 464 (1977), on the basis that the statute there "did not borrow its cause of action from the common law"). Here though, developer fails to identify, and we are unaware of, any common-law antecedent to the prohibition in § 248 on site preparation for an electric-generation facility without a CPG. Developer notes only that this case involves "common-law-like legal remedies." But under *Tull* and *Jarkesy*, the inquiry starts with the "cause of action," not the remedy. *Id.* at 2129; see *Tull*, 481 U.S. at 417 (setting forth two-part test beginning with comparison of "the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity"). Thus, as the *Jarkesy* Court noted, "Congress could assign … [certain statutory] adjudications to an agency because *the claims* were 'unknown to the common law.'" *Jarkesy*, 144 S. Ct. at 2138 (quoting *Atlas Roofing*, 430 U.S. at 461) (emphasis added).

[to a jury trial] attaches are to be distinguished … from those that are equitable in nature, which were traditionally tried solely before a judge and therefore fall outside the scope of the right." *Irving Oil Corp.*, 2008 VT 42, ¶ 5 (quotation omitted). To determine whether the jury-trial right attaches to a statutory claim, this Court looks primarily to "the remedy sought … [and] whether it is legal or equitable in nature."[8] *Id.* ¶¶ 7, 18; *Agency of Nat. Res.*, 2013 VT 46, ¶ 26. Under this test, injunctive relief "is distinctly an equitable remedy" and therefore does not require a jury trial. *Campbell Inns, Inc. v. Banholzer, Turnure & Co., Inc.*, 148 Vt. 1, 8, 527 A.2d 1142, 1147 (1987) (quotation omitted).

¶33. In evaluating whether an action for civil penalties is equitable in nature, we look to the statutory factors and assess whether the penalty primarily exists to punish the defendant or instead

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[8] In *Irving Oil Corp.*, we identified the two-part test from *Tull*, which, in addition to examining the nature of the remedy sought, required an examination of the "closest eighteenth-century analogue to the statutory cause of action." 2008 VT 42, ¶ 7. However, we noted that the nature of the remedy is "more important" to the analysis, and quoted several concurring and dissenting U.S. Supreme Court opinions that "have called for dispensing altogether with the abstruse search for what often prove to be elusive and imprecise historical analogues." *Id.* (quotation omitted). In our subsequent analysis of the civil penalties, we relied solely on the nature of the remedy and stated that "we do not find *Tull* persuasive." *Id.* ¶¶ 17-18. We have since characterized our test from *Irving Oil Corp.* as "looking beyond traditional analysis of whether [the] claim had [an] eighteenth century common law analogue" and instead focusing on whether the "penalty was equitable in nature." *Agency of Nat. Res. v. Persons*, 2013 VT 46, ¶ 26, 194 Vt. 87, 75 A.3d 582.

serves primarily public purposes such as "protecting the public health and safety and preventing unjust enrichment at the expense of the State and the public." *Irving Oil Corp.*, 2008 VT 42, ¶ 18. As we have explained, civil penalties can "reimburse the government for enforcement expenses and other costs generated by the violation" and "serve a remedial purpose by making noncompliance at least as costly as compliance." *Agency of Nat. Res. v. Riendeau*, 157 Vt. 615, 622, 603 A.2d 360, 364 (1991). Thus, in *Irving Oil Corp.*, we concluded that civil penalties in an environmental-enforcement action were equitable in nature because the statutory factors and legislative purpose evinced "a legislative intent to assign the careful balancing of equities … [to] the agency traditionally entrusted with such decisions: a judge rather than a jury." 2008 VT 42, ¶ 18.

¶34. Here too, we conclude that the civil penalties authorized by 30 V.S.A. § 30 are equitable in nature in that they seek primarily to promote the public welfare rather than punish violators. Cf. *In re Citizens Utils. Co.*, 171 Vt. 447, 454, 769 A.2d 19, 26-27 (2000) (referring to § 30 as a "public remed[y]"). A comparison of the statutory factors in 30 V.S.A. § 30(c) and 10 V.S.A. § 8010(b) — the statute at issue in *Irving Oil Corp.* — confirms the equitable nature of the civil penalties here. Of the eight factors under § 30(c), seven are effectively identical to the factors in § 8010(b). Compare 30 V.S.A. § 30(c)(1)-(5), (7), (8), with 10 V.S.A. § 8010(b)(1)-(6), (8).[9] While some of the

[9] Section 8010(b) was amended following our decision in *Irving Oil Corp.* to remove § 8010(b)(5). See 2007, No. 191 (Adj. Sess.), § 5.

criteria relate to the defendant's culpability, the factors as a whole "reflect a primary legislative concern with protecting the public health and safety and preventing unjust enrichment at the expense of the State and the public." *Irving Oil Corp.*, 2008 VT 42, ¶ 18; see 30 V.S.A. § 30(c)(1), (3) (requiring consideration of "the extent that the violation harmed or might have harmed the public health, safety, or welfare" and the "economic benefit" obtained from the violation). Because the statute requires a "careful balancing of equities" both to "impose such civil penalties" and to determine "the amount of any penalty," the Vermont Constitution does not require a trial by jury. *Irving Oil Corp.*, 2008 VT 42, ¶ 18; *see also PLH Vineyard Sky LLC v. Vt. Pub. Util. Comm'n*, Case No. 2:23-cv-154, 2024 WL 1072017, at *12, 2024 U.S. Dist. LEXIS 43153 (D. Vt. Mar. 12, 2024) (rejecting developer's jury trial claim in parallel federal court proceeding).

III. Conclusion

¶35. For the reasons discussed above, we reject developer's challenges to the PUC's injunction and civil-penalty orders. The PUC had jurisdiction under § 209 because developer submitted itself to PUC supervision by applying for a CPG while holding two standard-offer contracts. Developer was therefore prohibited under § 248(a)(2) from engaging in site preparation for its electric-generation facilities — a prohibition that included the clearing of trees. The PUC was within its authority to initiate an investigation based on the credible allegations of site preparation, and based on its findings, was permitted to issue the injunctive and civil-penalty orders.

Affirmed.

APPENDIX B

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the Respondents initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	Evidentiary hearings conducted June 26, 2020, December 4, 2020, and July 20, 2023

Order entered: 09/19/2023

FINAL ORDER IMPOSING CIVIL PENALTY

I. INTRODUCTION

Pursuant to 30 V.S.A. §§ 30, 209, and 248(a)(2), in this order the Vermont Public Utility Commission ("Commission") imposes a civil penalty of $ 5,000 on Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates and subsidiaries (collectively, the "Developer" or "Respondents") for conducting unauthorized site preparation for an electric generation facility without a certificate of public good ("CPG") on Apple Hill in Bennington, Vermont, in June 2020.

II. BACKGROUND

This case arises out of the Developer's efforts to construct two solar facilities on Apple Hill in Bennington, Vermont. A detailed history of those efforts and the resulting Commission proceedings can be found in our previous orders. [1] It is relevant to this Order that on April 1, 2021, after two evidentiary hearings, the Commission issued an order finding that the Developer had violated Section 248(a)(2)(A) by beginning site preparation without a CPG and ordered additional proceedings to determine the amount of a penalty pursuant to 30 V.S.A. § 30. [2]

The Commission also enjoined the Developer from engaging in any further site preparation without a CPG, including tree clearing for proposed solar facilities on Apple Hill (the "Injunction Order"). The Injunction Order was to remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on the site, or (2) final orders are issued by the Vermont Supreme Court denying both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily

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[1] Case No. 20-1611-INV, Order of 4/1/21 at 3-9.

[2] *Id.* at 3 ("We also direct that [the Developer] communicate with the other parties and file a schedule for the next phase of this proceeding. This next phase of the proceeding will determine the civil penalty Allco must pay under Section 30 of Title 30 for violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.")

relinquished. Neither of these conditions has been fully satisfied and the Injunction Order remains in place.

On April 2, 2021, the Developer filed notice that it was appealing the Injunction Order to the Vermont Supreme Court.

On April 16, 2021, the Developer filed a motion requesting that the Commission stay the penalty phase of these proceedings because, according to the Developer, the Commission had been divested of all matters relating to the scope of the appeal. The Commission denied the Developer's stay request on June 11, 2021.

On December 3, 2021, the Vermont Supreme Court dismissed the Developer's appeal of the Injunction Order because it was not a final appealable order from the Commission.

On November 4, 2022, the Developer filed a second motion to stay the proceedings. This motion was denied on December 14, 2022, in an order that requested that the Vermont Agency of Natural Resources ("ANR") confer with the other parties and file a schedule for the remainder of the case.

On January 13, 2023, ANR filed a proposed one-month schedule for the penalty phase of this proceeding. The Developer responded with a year-long schedule proposal.

On January 30, 2023, the Commission rejected the Developer's proposed schedule and adopted a schedule for briefs.

On March 2, 2023, ANR and the Vermont Department of Public Service ("Department") each filed briefs with penalty recommendations.

On March 16, 2023, the Developer filed its response to the penalty recommendations and a motion for a third evidentiary hearing. The Developer also filed the affirmations of Steve Broyer, the Developer's project manager, and Jim McClammer, its natural resources consultant.

On May 30, 2023, the Commission granted the Developer's motion for a third evidentiary hearing in part, limiting the scope of the hearing to the criteria of 30 V.S.A. §§ 30(c)(3) ("the economic benefit, if any, that could have been anticipated from an intentional or knowing violation") and (6) ("economic resources of the respondent"). The Commission also scheduled an oral argument so the parties could address the agencies' penalty recommendations.

On June 14, 2023, the Developer filed a second motion for a third evidentiary hearing (the "Second Motion"), requesting that the Commission broaden the scope of the limited evidentiary hearing granted in the May 30, 2023, Order to address "all relevant evidence that Respondents seek to introduce." [3] Specifically, the Developer requested an opportunity to provide evidence that no environmental harm had, or could have, occurred due to the Developer's activities. The Developer also requested an opportunity to present evidence challenging ANR's system of classifying rare and very rare plant species.

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[3] Second Motion at 5.

The Developer withdrew the Broyer affirmation and filed the affirmations of Thomas Melone and Jim McClammer.

On June 28, 2023, the Department and ANR filed responses recommending that the Commission deny the Developer's second motion for a third evidentiary hearing.

On July 20, 2023, the Commission held a limited evidentiary hearing and an oral argument. At the evidentiary hearing the Commission denied the Developer's Second Motion and admitted elements of the Melone testimony into evidence as discussed further below.

III. DEVELOPER'S SECOND MOTION FOR A THIRD EVIDENTIARY HEARING

At the beginning of the July 20, 2023, limited evidentiary hearing, Chairman Roisman denied the Developer's Second Motion, stating:

The Commission is denying the Developer's second motion for a broadened third evidentiary hearing and reaffirming the rejection of the testimony of Mr. McClammer as untimely filed and unrelated to the topic of this limited evidentiary hearing. We are admitting discrete portions of the affidavit of Mr. Melone that are arguably related to either economic development or the ability of the developer to pay a fine.

The remainder of Mr. Melone's affidavit, which is primarily legal argument, for belatedly seeking to present evidence on the issue of whether developer's activities at the site without possessing a CPG

constitute a violation of relevant statutes and regulations will be admitted to the record of the case, but it's not admitted as evidence.

For the purposes of the evidentiary hearing today the Commission has created Commission Exhibit 1, which is now visible on your screen, to identify the specific paragraphs of Mr. Melone's testimony that are being admitted into evidence. These paragraphs are -- and I will read them off. Sections -- and these are the numbered paragraphs in Mr. Melone's affidavit: 1 through 9, 12 through 21, paragraph 47, paragraph 55, and paragraph 64. We will reduce these determinations regarding admissibility of evidence and rejection of Mr. Melone's request for an expanded evidentiary hearing when we issue the final order in this proceeding today. [4]

What follows is further discussion of our denial of the Developer's second motion for a third evidentiary hearing.

A. Positions of the Parties

1. Developer

The Developer requests to broaden the scope of the hearing to address the amount of the penalty, the constitutional requirement of rough proportionality, the eight factors enumerated in Section 30(c), and ANR's classification system for rare and very rare plant species. According to the Developer, due process

[4] Tr. 7/20/23 at 7-8 (Roisman).

and 30 V.S.A. § 30(a)(1) require an opportunity for hearing on these issues. The Developer argues that while hearings were held in connection with the temporary restraining order ("TRO") and whether a violation occurred, neither hearing was the one required by 30 V.S.A. § 30(a) because the Commission bifurcated this proceeding into two phases.

2. Department

The Department recommends that the Commission deny the Developer's motion. The Department contends that this investigation was conducted pursuant to Section 30 from the outset and that the Developer has already been afforded two evidentiary hearings. The Department argues that the existing record provides an adequate basis to impose a penalty for regulatory harm and there is no need to reopen the record to relitigate aspects of the violation itself. The Department asserts that the process provided by the Commission, including an opportunity to submit evidence on the two penalty factors and oral argument on the penalty assessment more broadly, is sufficient and appropriate.

The Department recommends that the Commission admit the new Melone testimony that addresses the economic benefit and financial resources criteria and objects to all other portions of the Melone testimony as "outside the scope of the limited hearing." The Department does not object to the portions of the Developer's testimony that were not admitted as evidence being considered as a legal brief.

3. ANR

ANR objects to the motion, arguing that "[t]he Developer, once again, seeks to reopen the record to relitigate issues that have been fully litigated, and for which the Public Utility Commission has made findings and conclusions in this proceeding." [5] ANR further argues that "[t]he Developer has persistently and repeatedly exhibited disregard for orderly process" and that "[s]uch actions have resulted in an inefficient use of [ANR]'s, and the public's, resources as ANR has had to repeatedly address filings which ignore Commission orders, filings which are duplicative, late filings, and incoherent filings." [6] Finally, ANR recommends that the Commission "deny the Developer's June 14, 2023, Second Re-Hearing Motion; deny admission of the McClammer affidavit; and deny admission of the Melone affidavit in its present form." [7]

B. Discussion of the Developer's Second Motion

The Developer argues that due process and Section 30(a)(1) require a third hearing to give the Developer an opportunity to present all relevant evidence on the amount of the penalty, the constitutional requirement of rough proportionality, the eight factors enumerated in Section 30(c), and ANR's classification system for rare and very rare plant species. Having reviewed the affidavits offered by the Developer on June 14, 2023, and considering the three

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[5] ANR's Response to the Developer's Second Motion for a Third Evidentiary Hearing, filed 6/28/23, at 1 and 4.

[6] *Id.* at 2-3 (citations omitted).

[7] *Id.* at 4.

evidentiary hearings and oral argument conducted in the course of this proceeding, the Commission concludes that the requirements of due process and Section 30(a)(1) have been met. The Commission further concludes that an evidentiary hearing addressing ANR's classification system for rare and very rare plant species is unnecessary because ANR's system has not been given any weight in determining the amount of a penalty under Section 30(c).

Section 30(a)(1) provides that the Commission may assess a penalty "after notice and opportunity for hearing." On June 24, 2020, the Commission issued an order titled Order Opening Investigation and Notice of Hearing. [8] The order's caption stated that the matter was "an investigation pursuant to 30 V.S.A. § 30" and requested that "the parties be prepared to address with affidavits (filed before the hearing begins) or live testimony whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30." This notice and the hearing that followed on July 6, 2020, satisfied the basic requirements of procedural fairness and Section 30(a)(1) with respect to whether that violation occurred and resulted in factual findings relevant to this penalty determination.

At the outset of the July 6, 2020, evidentiary hearing, the Commission explicitly stated that the matter being heard was an investigation that was being conducted pursuant to Section 30 and that the purpose of the hearing was, among other things, to

[8] Case No. 20-1611-INV, Order of 6/24/2020.

determine whether a violation of Section 248(a)(2) had occurred. [9] At the evidentiary hearing ANR presented evidence with the express purpose of addressing the criteria the Commission considers in determining the amount of a penalty. [10] Significant portions of the hearing were devoted to whether any harm to the environment had or could have occurred.

The Commission held a second evidentiary hearing on December 4, 2020, again for the purpose of addressing "whether the Developer's site work to date constitutes site clearing activities without a certificate of public good in violation of 30 V.S.A. Section 248(a)(2)." [11] The Developer presented testimony and documentary evidence addressing its intent to conduct clearing on the site, which is relevant to the penalty factor contained in Section 30(c)(2). [12]

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[9] Tr. 6/26/2020 at 4 (Roisman) (this emergency hearing [is being held] to address whether site clearing being conducted on Apple Hill in Bennington, Vermont, violates Section 248(a)(2) of Title 30.").

[10] *Id.* at 16 (Einhorn) ("The second issue is, what is the harm? What is the harm of the clearing that's taking place? . . . the degree of harm will, will naturally be factored into what an ultimate penalty is.").

[11] Tr. 12/04/2020 at 4 (Roisman).

[12] *See Id.* at 54-55 (Kobelia), 60-63 (Kobelia), 65-66 (Kobelia), 118-119 (Melone), 130-132 (Melone), and 134-138 (Melone). *See also* Tr. 6/26/2020 at 22-24 (Lowkes), 41-42 (Popp), 50-51 (Popp), 63-68 (Melone), and 88-90 (Melone). Further, the prefiled testimony and documentary evidence relied upon in our findings

On April 1, 2021, the Commission made a finding of violation but deferred its ultimate determination of the penalty amount until after an opportunity for parties to recommend additional process. [13] After reviewing the parties' penalty recommendations, the Commission granted the Developer a third opportunity to present evidence on two penalty factors that had not been addressed at the previous hearings. [14]

We deny the Developer's Second Motion to expand the scope of the hearing because the Developer has had an opportunity to present its case through the three evidentiary hearings described above. Any evidence developed in the first two evidentiary hearings was available to support a penalty determination. [15] Contrary to the Developer's assertion, the Commission's determination that additional process was necessary to determine the amount of a penalty did not automatically trigger a new requirement to hold another evidentiary hearing explicitly addressing each of the factors in Section 30(c). The Commission was within its discretion to limit the scope of the additional process to those subjects that had not been previously addressed in

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and in our penalty conclusion here was entered into evidence at the evidentiary hearings.

[13] Case No. 20-1611-INV, Order of 4/1/21 at 25.

[14] Case No. 20-1611-INV, Order of 5/30/23.

[15] *See In re SolarCity Corp.*, 2019 VT 23, at P 33 ("The evidence supporting the Commission's finding that petitioner committed a violation also provides an evidentiary basis to find liability and to support the imposition of a penalty.").

the first two evidentiary hearings. We also find that an opportunity to challenge ANR's assertions concerning actual or potential harm to rare and very rare plants and ANR's system of classification for rare plants is unnecessary because our determination of the penalty in this case is not based on any actual harm to rare plants.

IV. ADDITIONAL FINDINGS RE CIVIL PENALTY

In addition to the findings made by the Commission in its previous orders in this proceeding, the Commission makes the following additional findings based on the testimony and exhibits admitted into the record at the third evidentiary hearing held on June 14, 2023.

1. The Developer lost $ 2,200 in fees paid to the Vermont Agency of Agriculture Food and Markets for hemp growing licenses. During the time of the Commission's injunction the Developer has also incurred carrying costs such as taxes for both the 27-acre and a neighboring 5-acre parcel in the amount of $ 10,506 in property taxes. Melone pf. 6/14/23 at 18, P 64.

2. The Developer has continued to pursue the construction of solar facilities on Apple Hill, and the Commission's injunction has stopped the Developer from commencing site preparation activities on its land since the TRO was issued on June 26, 2020. Melone pf. 6/14/23 at 2, P 9.

V. LEGAL STANDARD: CIVIL PENALTY CRITERIA OF 30 V.S.A. § 30

Section 30(a)(1) of Title 30 of the Vermont Statues provides that:

A person, company, or corporation subject to the supervision of the Commission or the Department of Public Service. . . who violates a provision of chapter 2, 7, 75, or 89 of this title, or a provision of section 231 or 248 of this title . . . shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing.

Before July 1, 2021, and applicable in this case, Subsection (b) provided: [16]

The Commission may impose a civil penalty under subsection (a) of this section of not more than $ 40,000.00. In the case of a continuing violation, an additional fine of not more than $ 10,000.00 per day may be imposed. In no event shall the total fine exceed the larger of: (1) $ 100,000.00; or (2) one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company, or corporation in the preceding year.

[16] The penalty amounts authorized by Section 30 were amended upward effective July 1, 2021. However, because the violation discussed in this decision occurred before the amendments to Section 30 became effective, the older, lower penalty amounts stated above apply in this case.

Subsection 30(c) identifies eight factors the Commission may consider in determining the amount of a civil penalty:

(1) the extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service or the other interests of utility customers;

(2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;

(3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;

(4) the length of time that the violation existed;

(5) the deterrent effect of the penalty;

(6) the economic resources of the respondent;

(7) the respondent's record of compliance; and

(8) any other aggravating or mitigating circumstance.

The Department's recommends a $ 5,000 civil penalty assessment for regulatory harm. [17] ANR recommends a civil penalty of $ 29,000.00 for

[17] Department's Response to Developer's Second Motion for a Third Evidentiary Hearing, 6/28/23, at 4.

regulatory harm and harm to the natural environment. [18]

Based on our consideration of these factors, and the recommendations of the parties, the Commission determines that a civil penalty of $ 5,000 is appropriate.

VI. CIVIL PENALTY DISCUSSION

A. The extent that the violation harmed or might have harmed the public health, safety or welfare, the environment, the reliability of utility service, or the other interests of utility customers.

By engaging in site clearing at the Apple Hill parcel without a CPG, the Developer violated Section 248(a)(2)(A). The purpose of the blanket statutory prohibition on site preparation without a CPG is to allow time for the Section 248 review process to occur. In this case, the prohibited activity consisted of site clearing and its attendant potential to harm the natural environment. The Commission, ANR, and the Department needed the time created by the statutory prohibition against site preparation without a CPG to assess the potential impact of the proposed project on the natural environment before site clearing began, and to propose measures that could mitigate those impacts, so that any undue adverse impact on the natural environment would be avoided. The Developer's violation of § 248(a)(2(A)

[18] ANR's Response to Developer's Second Motion for a Third Evidentiary Hearing, 6/28/23, at 3-4.

created harm to the statutory scheme and had the potential to harm the natural environment.

The Developer disputes whether any harm to the environment occurred or might have occurred due to the violation. The Developer specifically challenges ANR's position that there was harm to rare plants and mature trees. [19] More generally, the Developer attacks ANR's system of regulation for rare and very rare plants. [20] However, these arguments miss the mark because ANR has conceded that "the degree of actual harm to the environment which resulted from the clearing activities on the Apple Hill parcel was minor." [21] Therefore, the validity of ANR's classification system is of no significance because the Commission is not basing its penalty assessment on actual harm to rare plants.

The Developer questions whether there was harm to the regulatory process. [22] As explained in the Department's penalty recommendation, the Commission has held that failure to comply with regulatory obligations "harms the integrity and

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[19] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 8.

[20] *Id.*

[21] ANR's Brief and Penalty Recommendation, 3/2/23, at 10.

[22] *See* Respondents' Brief Re: Penalty Recommendations, 3/16/23, at 6.

credibility of the regulatory process." [23] The finding of a violation itself provides the basis for the harm. This notion is well-established and follows from the principle that the process "cannot function when regulated entities ignore their obligations." [24] The regulatory harm is an extension of the harm and potential harm to (1) public safety and welfare, (2) the environment, and (3) utility customers. The § 248 process aims to protect these interests by preventing undue adverse impacts to the resources protected by § 248. "When an entity acts within the Commission's jurisdiction but without the Commission's approval, such conduct undermines the integrity of the regulatory review process, which exists to protect the public from harm." [25]

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[23] *See, e.g., Investigation into potential violations of the Public Utility Commission's March 23, 2021, Order in Case No. 20-2570-PET*, Case No. 21-2501-INV, Order of 10/07/21 at 5.

[24] *See Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Otter Creek Solar, LLC's certificates of public good issued in Cases 8797 and 8798*, Case No. 19-1596-INV, Order of 4/1/21 at 4-5; *see also, e.g., Investigation pursuant to 30 V.S.A. §§ 30, 209, and 248 regarding the 2.2 MW solar plant owned by Charlotte Solar, LLC in Charlotte, Vermont*, Case No. 8636, order of 10/23/17; *Investigation pursuant to 30 V.S.A. §§ 30 and 209 into potential violations of Coolidge Solar I, LLC's certificate of public good issued in Docket 8685*, Case No. 19-3671-INV, Order of 7/24/20.

[25] *See* Case No. 19-3671-INV, order of 7/24/20 at 8 (quotation omitted); *see also Investigation pursuant to 30 V.S.A. §§ 30 and 209 into alleged violation of Newbury GLC Solar, LLC's certificate of public good issued in Case No. 17- 4721-NMP*, Case No. 19-0734-INV, Order of 8/1/19 at 7-8.

This factor strongly weighs in favor of a significant penalty.

B. Whether the Developer knew or had reason to know the violation existed and whether the violation was intentional.

The Developer knew that it did not have a CPG. It was aware that it was statutorily required to have a CPG before engaging in site clearing to construct its proposed electric generation facilities. The Developer also acknowledged that it needed to clear trees to construct its solar electric generation facilities at the Apple Hill parcel. [26] The clearing performed by the Developer in June 2020 was the very same clearing that the Commission told the Developer it could not undertake when, on May 7, 2020, the Commission denied the Developer's March 23, 2020, request to amend the Apple Hill solar project's Section 248 petition in Docket 8454. [27]

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[26] Tr. 6/26/20 at 65-66 and 88-90 (Melone); exh. ANR-10 at 10.

[27] Order of 4/1/21 at 29. On March 23, 2020, the Developer filed a motion to amend its Section 248 petition in Docket 8454, indicating that one of the changes to its Apple Hill solar facility would involve the clearing of trees for hemp and sheep operations which would occur quite some time before the solar facility would be constructed. *See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Developer's Second Proposed Amendment, filed 3/23/20, at 1 n.1. The proposed amendment was denied as untimely by the Commission by order dated May 7, 2020, in Docket 8454.

The Developer acknowledged that it knew that "they could not engage in site clearing to construct a proposed electric generation facility" and that the clearing of trees was necessary to build a solar facility on Apple Hill. [28] The Developer argues that these facts are irrelevant because "[t]he site work was done in connection with the Horticultural and Farming Activities, two completely separate businesses of Respondent." [29]

The Developer asserts that:

Based on [Commission] precedent in *Georgia Mountain, Beaver Wood and Monument Farms*, there was no reason for Respondents to know or have reason to know that a violation existed, let alone a knowing and intentional one. [30]

While it was clear to the [Developer] based on [Commission] precedent that they would be permitted

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[28] Respondents' Brief Re: Penalty Recommendation, 3/16/23, at 20; Case No. 20-1611-INV, Order of 4/1/21 at 12 ("Site clearing for a solar facility requires clearing trees.").

[29] Respondents' Brief Re: Penalty Recommendation, 3/16/23, at 20.

[30] *Id.* at 21, citing *Petition of Georgia Mountain Community Wind, LLC*, Docket 7508, order of 1/5/12; *Petition of Beaver Wood Energy Pownal, LLC*, Dockets 7678 and 7679, Order of 4/1/11; and *Petition of Monument Farms Three Gen, LLC*, Docket 7592, Order of 10/22/23 (October 22, 2010). *See* Case No. 20-1611-INV, Order of 4/1/21, at 23-24 ("We are not persuaded by [the Developer's] arguments that these activities are not site preparation, and that 'incidental overlap' is inapposite. The cases [the Developer] references are all readily distinguishable factually and procedurally.")

to clear the parcel in question for an activity unrelated to the electric generating facilities, the [Commission] has now made it clear that it is no longer abiding by its prior precedent. [31]

Here, even if clearing for a farming use and agricultural structures could be considered (as the [Commission] concludes) as bearing a reasonable relationship to the proposed solar facility and as a precursor, neither the clearing nor the structures are "part of an electric transmission or generation facility," Op. Vt. Att'y Gen., No. 715 (Aug. 5, 1971) at 172, and those activities are being done specifically for another purpose--farming, and not in preparation for the construction of an electric facility." [32]

The Commission has already distinguished this case from the cases cited by the Developer in its Order of April 1, 2021, and rejects the Developer's assertion that its violation was unintentional for the same reasons. The Developer intentionally cleared the property based on its erroneous interpretation of the law and did so without first seeking explicit acceptance of its novel interpretation from the Commission.

This factor strongly weighs in favor of a significant penalty.

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[31] Melone pf. 6/14/23 at 16.

[32] *Id.* at 17.

C. The economic benefit, if any, that the Company could have anticipated from an intentional or knowing violation.

The record in this case contains no evidence of any economic benefit that the Developer could have anticipated from intentional or knowing violations.

The Department did not consider this factor to be significant in rendering a civil penalty recommendation. [33] ANR contends it is not aware of any economic benefit that resulted from the violation by the Developer in this matter but that "[i]f the Developer were successful in this endeavor the potential economic benefit could have been substantial due to the Developer avoiding the costs and limitations of environmental compliance." [34] The Developer argues that "[t]he third factor weighs heavily in favor of no penalty." [35]

The Developer further argues that:

[T]here would have been no economic benefit to the Developer from the clearing vis-à-vis the section 248 process. In fact, there could have been an economic detriment if the CPG required certain screening that would have been provided by the trees. No costs and limitations of environmental compliance would have been avoided by clearing the land in connection with

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[33] *See* Department's Recommendation of Penalty Assessment, filed 3/2/23, at 3-4 (noting that "this factor is assigned a neutral weight").

[34] ANR Brief and Penalty Recommendation, 3/2/23, at 11-12.

[35] Melone pf. 6/14/23 at 14.

the Horticultural and Farming Activities. In fact, the type of clearing required for the Horticultural and Farming Activities can be more than twice as expensive as the clearing involved for a solar facility. [36]

We find that this factor has no weight in determining the amount of any civil penalty.

D. The length of time that the violation existed.

Though the record does not reflect precisely when the site preparations began, the contract for the Developer's forester was dated June 8, 2020. [37] Site clearing work was underway by June 16, 2020, and by June 26 approximately three acres had been cleared. [38] A representative of ANR visited the Apple Hill parcel on June 16, 2020, and observed that site clearing was being done by the Developer at that time. Subsequently, the Commission was notified of the clearing activities and opened an investigation into the matter because the parcel was the subject of solar electric generation facility petitions filed by the Developer and, after appeals, no final CPGs authorizing clearing have been issued by the Commission. The Commission then conducted an evidentiary hearing on June 26, 2020, and on that same date issued a TRO prohibiting the Developer

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[36] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 22.

[37] Tr. 06/26/20 at 127 (Kobelia).

[38] *See* Case No. 20-1611-INV, Order of 4/1/21 at findings 1, 11; Tr. 6/26/20 at 121 (Kobelia); and Case No. 20-1611-INV, Order of 4/1/21 at findings 15-16; see also Tr. 12/4/20 at 39-44 (Kobelia).

from continuing site clearing. Despite this, the Developer continued with the site clearing on the morning of June 27 until around mid-day, at which time site clearing stopped. [39]

Thus, the unlawful site clearing took place from at least June 16 through June 27, a period of 12 days.

The length of time is not fully established or particularly significant in this context, and therefore is a neutral factor in the Department's analysis. ANR considers 12 days to be a moderate length of time and relevant to determining an appropriate penalty amount. The Developer argues that that the Commission's bench order had no effect and the "fourth factor does not weigh in favor of a penalty." [40] We disagree with the Developer's arguments.

The record shows that the TRO was issued from the bench on the afternoon of June 26, 2020, and reiterated in a written order issued at 10:31 P.M. that night. The Developer's forester, who participated in the TRO hearing, was not informed of the order until the next day at noon. He had begun working early that morning. No effort was made by the Developer to otherwise contact the forester before he continued site clearing activity on the morning of June 27, 2020. [41]

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[39] Case No. 20-1611-INV, Order of 4/1/21 at finding 15; Tr. 12/4/20 at 41-44 (Kobelia).

[40] Melone pf. 6/14/23 at 14-15.

[41] This fact also supports the conclusion that the Developer committed a knowing violation, above.

This factor has limited weight in determining the appropriate civil penalty.

E. The deterrent effect of the penalty.

The Developer asserts that its unauthorized site clearing in violation of 30 V.S.A. § 248(a)(2)(A) is the result of its interpretation of Commission precedent addressing that rule. As discussed in our Order of April 1, 2021, the Developer's interpretation of the Commission precedent addressing the blanket statutory prohibition on site preparation is mistaken. The Developer could have resolved this interpretative error prior to investing in an unauthorized activity by seeking a declaratory judgment from the Commission pursuant to Commission Rule 2.403. Had the Developer sought a ruling regarding the applicability of 30 V.S.A. § 248(a)(2)(A) to the Developer's proposed site clearing for sheep grazing on Apple Hill, the Commission would have made a determination before the Developer began a three-year litigation process involving three state agencies and including two Vermont Supreme Court dismissal rulings, the hiring and restraining of a forester for cutting down trees, and the continued limitations on the Developer's use of its property. Any penalty imposed in this case must specifically deter the Developer from making the same mistake again, and also generally deter any other developers of Section 248 projects from making the same error. [42]

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[42] *See e.g., Investigation Pursuant to 30 V.S.A.* §§ *30, 247 & 248 into Possible Violations of Section 248 by Roderick & Irene Ames.*, Docket 7896, Order of 12/20/12 at 1 (Respondent misunderstood Commission rules and procedure and mistakenly conducted site preparation without a CPG); and *Investigation*

As the Commission recognized in its April 1, 2021, order in this case:

[A] proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent. [43]

The Department asserts that a $ 5,000 civil penalty will:

[D]iscourage [the Developer] from committing this type of violation in the future, as well as deter others from following suit, by attaching meaningful consequences. The circumstances of the Developer's violation and the importance of deterring this type of activity, which undermines the foundational

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Pursuant to 30 V.S.A. Ss 30 & 209 Regarding the Alleged Taking of Harsh Sunflower Plants by Vermont Gas Sys., Inc. in Monkton, Vermont, Docket 8791, Order of 5/25/17, at 8 ("Imposing a higher civil penalty would have a specific deterrent effect on the Company. ... and a general deterrent effect here, placing the Company and other CPG holders on notice that they are responsible for ensuring that their contractors are in strict compliance, not only with state environmental laws, but also with applicable [Commission] Orders, CPGs, and MOUs.").

[43] Case No. 20-1611-INV, Order of 4/1/21, at 1-2.

elements of Title 30, weigh strongly in favor of a substantial penalty. [44]

The legislature has assigned to ANR the role of representing the interests of the people of Vermont in protecting Vermont's natural environment in the context of energy siting proceedings before the Commission. [45] ANR contends that it would be unable to perform this role, and carry out the legislative intent, if site clearing takes place before an area that is cleared can be adequately assessed to determine the presence, extent, and significance of any natural resources that exist in the area at the time the clearing is proposed. [46]

ANR argues that:

In the context of Section 248, and its standard of no undue adverse effect on the natural environment, the relationship between the prohibition on site preparation or construction without a CPG and ANR's assigned role in representing the interests of the people of Vermont in protecting Vermont's natural environment, are inseparable. One cannot function effectively without the other. The need to deter violations of the site clearing prohibition must be great if ANR's ability to perform its work is to be preserved. As such, the penalty imposed in this case, must be substantial enough to deter not only this

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[44] Department's Recommendation of Penalty Assessment, filed 3/2/23, at 4.

[45] 30 V.S.A. § 248(a)(4)(E).

[46] ANR's Brief and Penalty Recommendation, filed 3/2/23, at 13.

Developer from repeating its behavior but to also deter others who are required to meet the Section 248(b)(5) standard of no undue adverse impact on the natural environment and obtain a CPG before commencing their projects. ANR recommends a $ 29,000 penalty and contends that this factor weighs heavily in support of a substantial penalty amount in this case. [47]

The Developer addresses the deterrent effect of the penalty by asserting that its approach to this case relies on Commission precedent, implying that the Commission has altered that precedent in rendering its determinations in this case. [48] The Developer concludes that: "The fifth factor does not weigh in favor of a penalty." [49] The Developer argues that:

A penalty in this case will not act as a deterrent. Respondents have already borne a significant financial impact. The [Developer] has suffered a financial impact from the inability to use its property, from the loss of fees paid for hemp-grow licenses, from the need to re-work cleared areas, and from the payment of taxes on land it cannot now use for any purpose. Importantly, a penalty here would only impact future activity on the [Developer]'s land. It

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[47] *Id.*

[48] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.

[49] Melone pf. 6/14/23 at 15.

would not have any deterrent effect beyond the unique facts here. [50]

We disagree. While we are cognizant of some of the costs incurred by the Developer as it has continued over a ten-year period to litigate the use of its land on Apple Hill for solar development, we believe a $ 5,000 penalty on top of these costs serves as an important specific and general deterrent. Moreover, the deterrent effect of this Order is not only focused on this Developer, but on future developers who will think twice before applying novel interpretations to clear Commission rules and precedents without first seeking guidance from the Commission on the correctness of their interpretation.

F. The economic resources of the Developer

ANR asserts that:

The Developer appears to have substantial financial resources. The Developer owns the 27-acre Apple Hill parcel, having acquired it to construct solar facilities. The Developer paid Green Mountain Power $ 850,000 to upgrade and extend a distribution line to the Apple Hill parcel for the purpose of connecting its proposed solar electric generation facilities to the grid. In addition, the Developer has proposed or already developed at least nine utility scale solar electric generation facilities in Vermont. [51]

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[50] Melone pf. 6/14/23 at 15.

[51] ANR's Brief and Penalty Recommendation, filed 3/2/23, at 13. *See also* Case No. 20-1611-INV, Order of 4/1/21 at findings 9 and 23.

Based on the same evidence, "the Department finds it reasonable to conclude that [the Developer] has adequate resources to pay a substantial penalty." [52]

The Developer's entities include a private corporation with multiple affiliated entities operating in Vermont. [53] The Developer argues that this proceeding is the product of a business decision by its property-owning subsidiary: "The entire reason this proceeding exists is because PLH decided that the time had come to put both the Apple Hill parcel and the horticultural use parcel to productive use after nearly a decade of operating in the red." [54]

The Developer further asserts that "the actual Respondents, Apple Hill Solar LLC and Chelsea Solar LLC, in this proceeding have no cash or assets to pay a penalty from unless and until a CPG is granted." [55]

We do not find the Developer's assertion that it has no cash or assets to pay a penalty to be credible and find that the Developer, a collective entity including Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates, and

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[52] Department's Recommendation of Penalty Assessment, filed 3/2/23, at 5.

[53] *Id.* and Case No. 20-1611-INV, Order of 4/1/21 at 2.

[54] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.

[55] Melone pf. 6/14/23 at 16.

subsidiaries, has sufficient assets to pay a $ 5,000 civil penalty in this case.

G. The Developer's record of compliance.

ANR and the Department state that they are not aware of prior penalties issued to Allco Renewable Energy Limited or its affiliates or subsidiaries for violations of Title 30 in Vermont. [56] The Developer concurs with this summary. [57]

We conclude that this factor weighs against a significant penalty.

H. Any other aggravating or mitigating circumstances

The Department argues:

A lower penalty may be appropriate when there are mitigating circumstances, such as when the respondent self-reports the violation in a timely manner or initiates corrective steps. There are no mitigating circumstances here, however, as [the Developer] did not report the violation nor engage in any other behavior that could be reasonably found to weigh against the severity of the violation.

To the contrary: beyond its failure to report the violation, [the Developer] has demonstrated conscious

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[56] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23.; Department's Recommendation of Penalty Assessment, filed 3/2/23, at 5.

[57] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 23-24.

disregard for its obligations while actively resisting compliance with the regulatory scheme and the Commission's efforts to enforce it. This uncooperative and unrepentant approach is most clearly seen in [the Developer]'s failure to ensure that site-clearing work ceased following the [temporary restraining order] that the Commission issued from the bench in the early afternoon of June 26, 2020. The Department considers this conduct, particularly the violation of the Commission's TRO, to be an aggravating factor weighing in favor of a substantial penalty. [58]

The Developer asserts that "[t]he mitigating circumstances in this case should be the fact that Respondents believed (and continue to believe) that the actions they performed were permitted under Vermont and Commission precedent." [59] The Developer further contends that "[a]n additional mitigating factor is that the Respondents have already been sufficiently penalized by the imposition of these proceedings." [60]

As discussed above, we are not persuaded by the Developer's argument that its unauthorized action was permitted. Section 248(a)(2)(A) prohibits all site preparation before the issuance of a CPG.

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[58] Department's Recommendation of Penalty Assessment, filed 3/2/23 at 5 (citation omitted).

[59] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 24.

[60] *Id.*

The statute on its face disallows beginning site preparation for any electric generation facility without issuance of a CPG. In June 2020, the Developer began site preparation for a solar electric generation facility on Apple Hill without the authority of a CPG. There is no exception for a facility with a lengthy review or for new agricultural activity that would be part of the operation of the electric generation facility.

We are not persuaded by the Developer's arguments that Commission precedent would allow for its violation of this blanket prohibition so integral to the Section 248 review process. We are cognizant of some of the Developer's continued costs in attempting to build a facility on Apple Hill, and the costs to the state agencies responding to this extended effort, but we do not believe that the Developer's misinterpretation of the statute mitigates its violation of that statute.

I. Determination of Penalty Amount

We have considered the parties' filings and arguments addressing the factors identified in Section 30. While the Developer's unauthorized activity did not have a significant impact on the natural environment, it was an intentional violation of the statute that undermined the effectiveness of the regulatory process. Therefore, the Commission is imposing a penalty of $ 5,000 on the Developer for its violation of Section 248(a)(2).

VII. OTHER ISSUES

The Developer raises several other arguments against imposing a penalty in this matter. We address

each of these briefly. First, the Developer argues that it is not a person, company, or corporation subject to the supervision of the Commission or the Department of Public Service and, therefore, is not subject to a penalty under Section 30. This Commission rejected this argument in its April 1, 2021, Order and does so again here for the same reasons. [61]

Second, the Developer argues that a penalty is a "retroactive extraction" that "would violate [the Developer's] rights to Due Process because of lack of fair notice." This argument has already been rejected by the Commission previously. The prior cases involving ongoing agricultural activity cited by the Developer are readily distinguishable from this case. [62] Therefore, there are no issues with a lack of notice in this case because there has been no departure from precedent by the Commission.

Third, the Developer argues that Section 30(c) is unconstitutionally vague because it does not provide notice of penalty amounts. This argument ignores the fact that the statute includes a specific dollar limit on the amount of a penalty the Commission can assess. The Developer is on fair notice that it can be penalized any amount up to the maximum provided in the statute.

The Developer further argues that the recommendations of the Department and ANR violate

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[61] 20-1611-INV, Order of 4/1/21 at 17.

[62] *Id.* at 23-24.

the "unconstitutional conditions doctrine." [63] This argument is inapposite because the recommendations of the Department and ANR are not the sort of condition or extraction that would implicate the constitutional limits cited by the Developer. The penalty imposed by the Commission is the result of the Developer's violation of a state statute and is not imposed as a condition of any approval sought by the Developer.

VIII. CONCLUSION

Based on our consideration of the factors in Section 30(c), the Commission imposes a $ 5,000 penalty on the Developer for commencing site preparation of an electric generation facility without a CPG, in violation of Section 248(a)(2).

IX. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Vermont Public Service Commission ("Commission") that:

1. Pursuant to 30 V.S.A. § 30, Allco Renewable Energy Limited, PLC Vineyard Sky LLC, and PLH LLC, and their related affiliates, and subsidiaries, must pay a penalty of $ 5,000 by sending to the Commission at 112 State Street, Montpelier, VT 05620-2701, a check in that amount made payable to the State of Vermont within 30 days of the date of this Order.

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[63] Respondents' Brief Re: Penalty Recommendation, filed 3/16/23, at 5.

Dated at Montpelier, Vermont, this 19th day of September, 2023.

Anthony Z. Roisman

Margaret Cheney

PUBLIC UTILITY COMMISSION OF VERMONT

APPENDIX C

STATE OF VERMONT PUBLIC UTILITY COMMISSION

Case No. 20-1611-INV

Investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether the petitioner initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)	Evidentiary hearings conducted: June 26, 2020, and December 4, 2020

Order entered: 04/01/2021

ORDER MAINTAINING INJUNCTION PROHIBITING FURTHER SITE PREPARATION, RULING ON MOTIONS, AND DIRECTING SCHEDULING PROPOSAL

I. INTRODUCTION

This case raises the fundamental question of whether the Vermont Public Utility Commission ("Commission") can enforce the statutory prohibition against any company or person "begin[ning] site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed

for immediate or eventual operation at any voltage." [1] We conclude that the Vermont Legislature has granted us this authority.

As the Vermont Department of Public Service ("Department") correctly notes, the developer's activities here "challenge the integrity of the Section 248 permitting process." [2] If we did not have authority to enjoin illegal site preparation, then every applicant for a certificate of public good ("CPG") would have an incentive to bulldoze its proposed project site before submitting an application, even if it meant the permanent destruction of trees, rare plants, and very rare plants, as well as other environmental degradation. After all, a proposal to build an electric generation plant on a bulldozed site would raise far fewer environmental issues than a proposal to place the same facility on a site that contains environmentally sensitive species and other features. This destruction would all be done without any review of its environmental impacts, which is directly contrary to legislative intent. This is why the Vermont Legislature has placed a blanket prohibition on even "begin[ning]" site preparation without a CPG. [3]

In this Order, we find that the petitioner has begun site preparation without a CPG, and we enjoin any further site preparation without a CPG. Because an evidentiary hearing addressing an injunction has

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[1] 30 V.S.A. § 248(a)(2)(A).

[2] Department Brief at 5. 04/01/2021.

[3] 30 V.S.A. § 248(a)(2)(A).

been conducted, this injunction is permanent. [4] But, as discussed further below, this injunction is temporally limited. We also rule on pending motions regarding the admission of other filings into evidence.

On June 24, 2020, we opened an investigation pursuant to 30 V.S.A. §§ 30 and 209 into whether Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors (collectively, "Allco" or "petitioner" or "Developer") were conducting site clearing on Apple Hill in Bennington, Vermont, in violation of Section 248(a)(2) of Title 30. [5]

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[4] *See Committee to Save the Bishop's House*, 136 Vt. 213, 218 (1978) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2942, at 368 (1973)); *see also* Commission Rule 2.406(A)(3) (noting that the Environmental Board may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

[5] Allco is the respondent in this investigation. Allco is referred to as the petitioner in the case caption because it has petitioned the Commission for two standard-offer contracts and for three certificates of public good ("CPGs") for proposed solar electric generation facilities on Apple Hill in Bennington, Vermont. The standard-offer contracts were executed in 2013 and 2014 and have been amended several times at Allco's request to extend the contracts' operational deadlines. *See Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 20-0185-PET, Order of 3/12/20 (granting a fourth extension of the operational deadline for the Apple Hill facility contract); *and Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET (granting a fourth extension to the operational deadline for the neighboring Chelsea Solar/Willow Road facility); *Petition of Chelsea Solar*

On June 26, 2020, we conducted an evidentiary hearing and issued a temporary restraining order ("TRO") against Allco prohibiting any further tree clearing or other site preparation on any property for the facilities proposed by Allco in its petitions in Docket 8454 and Case No. 17-5024-PET. [6]

In this Order we enjoin Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties identified in its standard-offer contracts or CPG petitions for solar electric generation facilities on Apple Hill in Bennington, Vermont. This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG

LLC, pursuant to 30 V.S.A. § 248, for a Certificate of Public Good authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 500 Apple Hill Road in Bennington, Vermont, Docket 8302, Order of 2/6/16 (denying petition for CPG); *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending); and *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, Case No. 17-5024-PET, Order of 6/12/19 (denying petition for CPG) (appeal pending).

[6] Case No. 20-1611-INV, Order of 6/26/20.

petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished. In other words, this injunction will remain in place until we know whether the Developer will or will not build solar facilities on this site.

In this Order we conclude that Allco's preparation of the Apple Hill site for solar development without a CPG violated 30 V.S.A.§ 248(a)(2)(A), which requires a CPG before site preparation may begin, and warrants a proceeding to address the issuance of a civil penalty for that violation of Section 30, pursuant to 30 V.S.A. § 30.

We also direct that Allco communicate with the other parties and file a schedule for the next phase of this proceeding. This next phase of the proceeding will determine the civil penalty Allco must pay under Section 30 of Title 30 for violating Section 248(a)(2) of Title 30 by conducting site preparation without a CPG on Apple Hill in June 2020.

II. BACKGROUND

On May 16, 2013, the Commission approved Allco's petition for a standard-offer contract for the electrical energy to be generated by the "Bennington" facility, which was one of two then-proposed 2.0 MW solar electric generation facilities to be located on a 27-acre parcel on Apple Hill in Bennington, Vermont. The Commission also denied Allco's request for a

standard-offer contract for the second proposed facility, the adjacent Apple Hill facility.

On June 20, 2013, Allco executed a standard-offer contract for the Bennington facility, also referred to as the Chelsea Solar facility in Docket 8302 and then later with a different footprint as the Willow Road facility in Case No. 17-5024-PET. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than June 19, 2015. [7] In later orders, the Commission extended the deadlines for these development milestones. [8]

After the Commission's denial of a standard-offer contract for the Apple Hill facility, Allco successfully appealed that ruling to the Vermont Supreme Court, which reversed the Commission's determination. [9]

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[7] The Vermont Standard Offer Purchase Power Agreement is between Ecos Energy, LLC (an Allco subsidiary) and VEPP Inc., a Vermont nonprofit corporation.

[8] *In re request of Sudbury Solar, LLC and Chelsea Solar, LLC for an extension of time to commission their respective solar electric generating projects*, Order of 1/8/15; I *n re request of Chelsea Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*, Order of 3/31/16; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 17-4695-PET, Order of 3/15/18; *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[9] *In re Programmatic Changes to the Standard-Offer Program and Investigation into the Establishment of Standard-Offer Prices under the Sustainably Priced Energy Enterprise Development (SPEED) Program*, 2014 VT 29.

On May 13, 2014, Apple Hill Solar LLC, on behalf of Allco, was awarded a standard-offer contract for the electrical energy to be generated by the second of the two solar facilities proposed for the Apple Hill site. Paragraph 7 of that contract contained development milestones, including a requirement that the Developer commission the project by no later than May 12, 2016. In later orders, the Commission extended the deadlines for these development milestones. [10]

On February 16, 2016, in Docket 8302, the Commission denied Allco's request for a CPG for the Chelsea Solar facility located on the site of the Bennington facility for which a standard-offer contract was executed on June 20, 2013. [11]

On September 26, 2018, in Docket 8454, the Commission approved Allco's request for a CPG for the Apple Hill solar facility for which a standard-offer

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[10] *In re request of Apple Hill Solar LLC for an extension of time to commission a solar electric generating project in Bennington, Vermont*; Order of 3/31/16; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 18-3727-PET, Order of 12/27/18; *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

[11] *Petition of Chelsea Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 500 Apple Hill Road, Bennington, Vermont*, Docket 8302, filed 6/19/14.

contract was issued on May 13, 2014. [12] Neighbors appealed the Commission's approval of the Apple Hill facility. The Vermont Supreme Court then reversed the Commission's approval in part and remanded the case to the Commission for further action consistent with its remand. [13]

On December 27, 2018, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the proposed Apple Hill facility a second time. [14] The commissioning deadline in Allco's May 13, 2014, standard-offer contract for Apple Hill was extended to twelve months after the date the Vermont Supreme Court issued a mandate letter for any appeal taken with respect to the Commission's final order in Docket 8454.

On June 12, 2019, in Case No. 17-5024-PET, the Commission denied an amended petition for the Bennington facility, now referred to as the Willow Road facility, for which a standard-offer contract was executed on June 20, 2013. [15] Allco has appealed our

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[12] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454.

[13] *In re Petition of Apple Hill Solar LLC*, 2019 VT 64.

[14] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, Case No. 18-3727-PET, Order of 12/27/18.

[15] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the "Willow Road Project," a 2.0 MW solar electric*

decision in the *Willow Road* case to the Vermont Supreme Court, where that matter is pending.

On August 20, 2019, the Commission issued an order extending the commissioning deadline in the standard-offer contract for the Bennington/Chelsea/Willow Road facility a fourth time. [16] In this fourth extension, the commissioning deadline in Allco's June 20, 2013, standard-offer contract was extended to twelve months after the date the Vermont Supreme Court issues a mandate letter for an appeal taken with respect to the Commission's final order in Case No. 17-5024-PET.

On March 12, 2020, the Commission issued an order extending the commissioning deadline for the proposed Apple Hill facility a third time to twelve months after the Commission issued its decision on remand in Docket 8454. [17]

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition for the Apple Hill facility to reflect its intention to graze sheep at

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generation facility on Willow Road in Bennington, Vermont, Case No. 17-5024.

[16] *Petition of Chelsea Solar, LLC for relief from standard-offer contract milestone*, Case No. 19-2179-PET, Order of 8/20/19.

[17] *Petition of Apple Hill Solar LLC for relief from standard-offer contract milestone*, 20-0185-PET, Order of 03/12/20.

the site and to grow hemp on the neighboring 5-acre Orchard Lot. [18]

On May 7, 2020, the Commission issued a final order on remand denying a CPG for the proposed Apple Hill facility in Docket 8454 and denying the motion to amend the petition to reflect grazing sheep at the project site. [19]

On June 19, 2020, public comments were filed by Annette Smith alleging that tree clearing was occurring on Apple Hill on the sites of the two proposed 2.0 MW solar electric generation facilities. Ms. Smith also alleged that the area of Apple Hill set aside for rare, threatened, and endangered species was being disturbed by the tree-clearing activity.

Also on June 19, 2020, Allco filed a response to Ms. Smith's comments, alleging that at approximately 12:45 P.M. on June 16, 2020, the Apple Hill site was visited by Vermont Agency of Natural Resources ("ANR") Environmental Enforcement Officer Patrick Lowkes, who "confirmed that NO [rare, threatened, or endangered species] area was being disturbed and

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[18] Amendment to Petition for Certificate of Public Good of Apple Hill Solar LLC, filed 3/23/20.

[19] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

that the [rare, threatened, or endangered species] area was cordoned off to prevent intrusion." [20]

On June 23, 2020, ANR filed preliminary comments in response to Ms. Smith's public comments. ANR stated that it "has confirmed that site clearing activity is occurring on the 27-acre parcel on which the Apple Hill and Willow Road solar projects are proposed to be constructed." [21]

ANR also noted that the tree-clearing activity raised two concerns. The first concern is that Allco is conducting site preparation without a CPG. The second concern is that the site clearing has not been reviewed to ensure that it does not have an undue adverse effect on the environment. Specifically, ANR was concerned that the site clearing presented a substantial and immediate harm to "very rare" and "rare" plants at the site. ANR requested a cease-and-desist order to prevent irreparable harm to the plants.

On June 24, 2020, the Department also filed comments stating:

> In this case, based on the Agency of Natural Resources Environmental Enforcement Officer's initial findings regarding the site clearing activity, cause appears to exist meriting further investigation into whether petitioner initiated preparing the Apple

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[20] Email from Thomas Melone to the PUC Clerk, at 7:07 P.M. on June 19, 2020.

[21] ANR Comments at 2.

Hill site for electric generation in violation of 30 V.S.A. § 248(a)(2). [22]

Also on June 24, 2020, the Apple Hill Homeowners Association, Libby Harris, and the Mount Anthony Country Club (collectively, the "Intervenors") filed comments in response to Ms. Smith's public comments. The Intervenors assert that: (1) the standard-offer contracts for the two proposed facilities on Apple Hill were procured by fraud and should be voided by the Commission; and (2) the Developer has engaged in site preparation in violation of 30 V.S.A. § 248 and the Commission should declare the petitions for those facilities to be withdrawn or abandoned.

On June 24, 2020, the Commission initiated this investigation.

On June 26, 2020, the Commission held the first of two evidentiary hearings in this proceeding and issued the TRO restraining Allco from further site-preparation activity on Apple Hill. The Commission also scheduled a second evidentiary hearing for July 9, 2020, to address whether the TRO should be lifted and whether Allco's tree-clearing activities were site-clearing operations in violation of 30 V.S.A. § 248(a)(2).

On June 27, 2020, Allco conducted additional site-clearing work at the Apple Hill site.

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[22] Department Comments at 2.

On July 1, 2020, the Commission issued a procedural order providing guidance for the July 9, 2020, injunction hearing.

Also on July 1, 2020, Allco filed a motion to vacate the injunction hearing.

On July 2, 2020, the Commission issued an order postponing the July 9 evidentiary hearing until after the Commission ruled on Allco's July 1 motion.

On August 26, 2020, the Commission issued an order denying Allco's July 1 motion and rescheduling the injunction hearing to September 8, 2020 (the "Jurisdiction Order").

On August 31, 2020, Commission staff conducted a status conference with the parties, and Allco requested that the injunction hearing be further postponed to allow Allco additional time to conduct discovery on the rare plant issue.

On September 1, 2020, the Developer filed a notice of appeal to the Vermont Supreme Court seeking relief from the Commission's TRO and Jurisdiction Order. Also on September 1, 2020, the Commission cancelled the September 8, 2020, hearing.

On November 5, 2020, the Vermont Supreme Court dismissed Allco's appeal without prejudice to refiling it if an injunction is granted.

On November 13, 2020, the Commission provided the parties notice of a rescheduled injunction hearing and

advised the parties of the procedures that would be used in that evidentiary hearing scheduled for Friday, December 4, 2020.

On December 4, 2020, the Commission conducted the second evidentiary hearing during which Allco requested that it be permitted to conduct additional limited discovery on ANR.

On December 8, 2020, the Commission issued an order establishing a briefing schedule and limiting the scope of additional discovery to four specific areas.

On December 17, 2020, ANR filed a motion on behalf of all the parties requesting a change to the post-hearing schedule.

On December 18, 2020, the Commission granted the parties' motion to alter the post-hearing schedule and set aside the previous post-hearing schedule. This revised schedule included a January 8, 2021, deadline for ANR to respond to additional discovery questions requested by Allco as well as a January 29 deadline for initial briefs and a February 12, 2021, deadline for reply briefs.

On January 26, 2021, Allco filed two motions and the supplemental prefiled testimony of Thomas Melone. We respond to these motions below.

On January 29, 2021, Allco, ANR, and DPS each filed post-hearing briefs.

On February 1, 2021, the Intervenors filed their post-hearing brief.

On February 8, 2020, ANR responded to Allco's motion for administrative notice. ANR requests that the Commission deny the motion because: (1) the documents are not "facts" as contemplated by V.R.E. 201(b); (2) the evidentiary record is already closed; and (3) the documents are irrelevant.

On February 12, 2021, the parties each filed post-hearing reply briefs.

On February 16, 2021, Allco replied to ANR's February 8 response to the motion for administrative notice asserting that the documents contain relevant facts and that the evidentiary record is not closed. Allco also filed the supplemental prefiled testimony of Jim McClammer with six exhibits.

On February 23, 2021, ANR objected to the Commission's consideration of Allco's supplemental filings of February 16 because the evidentiary record is closed.

No other comments have been filed by the parties.

III. RULING ON EVIDENTIARY MOTIONS

The record in this proceeding was closed at the end of the second hearing on December 4, 2020. However, the Commission made a limited exception for parties to introduce new information that would address four specific factual concerns that had arisen in that hearing, and the evidentiary record was therefore kept open to address those--and only those--issues, including any relevant responses to the Intervenors'

request for information from Allco and Allco's remaining discovery requests of ANR. [23]

In a December 8, 2020, order, the Commission reiterated the limited scope of evidence that may be submitted into the record. Specifically, based on Allco's representations during the hearing, Allco was to: (1) file a correction to the website link addressed in a footnote in its recent filings and queried by the parties during the hearing; (2) file the total number of rare plant populations inventoried by Arrowwood Environmental as shown in Figure 1 of its 2019 Apple Hill Solar Rare Plant Monitoring Report, exhibit ANR-14; (3) develop with ANR a reasonable and timely schedule for ANR to respond to the Developer's pending discovery requests on ANR; and (4) respond in a reasonable and timely fashion to the discovery request filed by the Intervenors on December 7, 2020.

On December 8, 2020, Allco filed an affidavit and exhibit from Robert Kobelia. This was directly responsive to the Commission's request that Allco respond to the Intervenors' discovery request. The Commission's December 8, 2020, Order allowed this filing. Further, this filing provides relevant information, and no one objects to it. For these reasons, the December 8, 2020, affidavit and exhibit of Robert Kobelia are admitted into the record.

On January 25, 2021, Allco filed supplemental prefiled testimony of Thomas Melone and three

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[23] "The record is not open for new witnesses, new exhibits, new testimony, other than whatever responses you get from these discovery requests." Tr. 12/4/20 at 221 (Roisman).

related exhibits. This filing addressed (1) the website link issue, and (2) the rare plant inventories of Arrowwood Environmental. These are both topics that the Commission said it would allow into the record in our December 8, 2020, Order. Again, this filing is relevant, and no party has objected to it. For these reasons, the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5) are admitted into the record.

On January 26, 2021, Allco filed two motions to supplement the record. The first Allco motion was a request that the Commission take administrative notice of six documents, marked as exhibits A through F, addressing rare plants by different declarants who have not been made available for cross-examination. The second Allco motion requested that the Commission further supplement the evidentiary record by admitting three additional exhibits (AH-JM-4, 5, and 6) that had been inadvertently omitted from Allco's response to discovery questions answered by Jim McClammer in his testimony of December 3, 2020. These documents address the presence of rare plants in the vicinity of Apple Hill.

On February 16, 2021, Allco filed another round of supplemental prefiled testimony from Mr. McClammer, along with six additional exhibits (AH-JM-7, 8, 9, 10, 11, and 12).

ANR objected to the admission of Exhibits A through F and the February 16, 2021, supplemental prefiled testimony and exhibits because they are late, irrelevant, and do not meet the requirements for

administrative notice. ANR further requested that the Commission admonish Allco for ignoring Commission orders and directives.

We deny both of Allco's January 26, 2021, motions to supplement the record. We also deny Allco's attempt to place additional documents into the record on February 16, 2021--documents that cannot possibly be put into the record at this late date because they were not accompanied by any motion requesting their admittance into the record.

We deny Allco's motions for two reasons.

First, the information Allco seeks to admit into evidence, including the testimony of Mr. McClammer, is untimely and outside the scope of the limited information that we said could be submitted for the record. While Allco claims that the Commission left the door open to any evidence that is related in any way to ANR's answers to Allco's discovery questions, that is incorrect. There have been two evidentiary hearings in this proceeding. And now, two months after the record was closed with the exception of specific limited items, and eight months after Allco requested discovery, Allco seeks to file new testimony and six articles totaling more than 400 pages. None of this new information was discussed or addressed in the second evidentiary hearing, nor was ANR or any other party given an opportunity to cross-examine Mr. McClammer on any of this information.

Second, even if the record remained open to the testimony and documents filed by Allco, administrative notice does not apply here. The

testimony and attached documents are not the type of irrefutable information that might be given administrative notice and entered into the record. Mr. McClammer makes numerous assertions that are in dispute. Had this testimony or these documents been presented before or during the hearing, ANR could have cross-examined Mr. McClammer on these matters.

IV. FINDINGS

At the evidentiary hearing on June 26, 2020, the Commission admitted those exhibits listed in the transcript from that proceeding, including Commission Exhibit 1, ANR Exhibits 1-9, PLH Exhibits 1 and 2 and their attachments, and Intervenors Exhibit 1. The Commission provided an opportunity for parties to object to those exhibits remaining part of the record for future stages of this proceeding, and no party objected. Therefore, the transcript and exhibits admitted as part of the June 26, 2020, hearing remain part of the record. At the evidentiary hearing on December 4, 2020, the Commission admitted the additional exhibits listed in the transcript from that proceeding. As noted earlier in today's Order, the Commission is also admitting the December 8, 2020, affidavit and exhibit of Robert Kobelia, as well as the January 25, 2021, supplemental prefiled testimony of Thomas Melone and its three exhibits (PLH-TMM-3, 4, and 5). Based on the exhibits admitted in the record and the testimony provided in the two evidentiary hearings, the Commission makes the following findings.

1. On June 16, 2020, the Apple Hill site was visited by ANR Environmental Enforcement Officer Patrick Lowkes, who observed that site-clearing activity was occurring on Apple Hill on the 27-acre parcel on which the Apple Hill and Willow Road solar facilities are proposed to be constructed. Tr. 6/26/20 at 22, 24 (Lowkes); Lowkes affidavit 6/24/20 at P 5.

2. Allco's forester has cleared part of the site on Apple Hill by carving out a truck turnaround spot at the end of Willow Road on the Apple Hill site and clearing a path around the site to install soil-erosion fencing. This work cleared approximately 3 of the 27 acres. Allco's forester had anticipated completing all the site-clearing work, including clearing approximately 26 of the 27 acres, by mid-September 2020. Tr. 6/26/20 at 126-127 (Kobelia).

3. As part of its CPG petitions in Dockets 8302 and 8454 and Case No. 17-5024-PET, Allco had previously surveyed the site for rare, threatened, and endangered plants and located both rare (nimblewill muhly, *Muhlenbergia schreberi*) and very rare species (white arrow-leaved asters, *Symphyotrichum urophyllum*). Some of the very rare plants, the white arrow-leaved asters, were relocated to conservation areas set aside on the 27-acre site. These conservation areas were marked by Allco and enclosed with soil-erosion fencing. The rare plants were not relocated. Tr. 6/26/20 at 40 (Popp); tr. 6/26/20 at 114 (Kobelia); exh. ANR-10 through 15.

4. There are several areas outside the conservation areas where the rare plant species are located. These would be harmed by the proposed site-clearing activities. Tr. 6/26/20 at 40, 43, 46, 49, and 51 (Popp); exh. ANR-10 through 15.

5. Although Allco states that it is clearing the site to allow for grazing sheep and growing hemp, those activities would not begin until the 2021 growing season. Tr. 6/26/20 at 73 and 87 (Melone); Melone Affirmation 6/25/20 at 2.

6. Allco plans to build two facilities with a combined 4.0 MW of solar generation at this site. Tr. 6/26/20 at 63, 67, 70, and 81 (Melone).

7. Site clearing for a solar facility requires clearing trees. Tr. 6/26/20 at 65-66 and 88-90 (Melone); exh. ANR-10 at 10.

8. Sheep grazing is compatible with a ground-mounted solar facility, and in this case Allco plans to use sheep as part of its solar development. Sheep are used primarily to control vegetative growth at a solar site. Sheep and solar go together as part of Allco's business plan. Tr. 6/26/20 at 64-65, 92, 93 (Melone); tr. 12/4/20 at 129-130 and 137 (Melone).

9. Allco has paid $ 850,000.00 for Green Mountain Power Corporation to construct a line extension to Apple Hill that would serve the two solar facilities that have been proposed there. Tr. 6/26/20 at 69-70 (Melone).

10. Allco does not have binding contractual arrangements with any expert entities to begin sheep and hemp production on Apple Hill. Tr. 6/26/20 at 71 (Melone).

11. Allco's forester had conducted approximately three acres of clearing, laying out the boundary of the area to be clear-cut and installing a silt fence on Apple Hill before June 26, 2020. Tr. 6/26/20 at 121, 126 (Kobelia).

12. On June 26, 2020, Allco's forester participated as a remote witness in the Commission's TRO hearing and sent texts that afternoon asking Allco's Project

Manager Chris Little about the "cease and desist potential" and whether he would be "ok for tomorrow" to do additional site-clearing work. Kobelia affidavit 12/8/20 at 2.

13. Around 1:30 P.M. on June 26, 2020, the Commission announced from the bench that it was issuing a temporary restraining order: "We've decided to issue a TRO. We will issue an order to explain our reasoning later today." The Commission then issued a written order around 10:30 P.M. that same day. Tr. 6/26/20 at 146 (Roisman); Order of 6/26/20.

14. Around 8:30 P.M. on June 26, 2020, after the Commission had issued its ruling from the bench, but before a written order was issued, Allco's Project Manager told Allco's forester that he had "not received a TRO yet, so unless we receive one tonight or tomorrow morning we're good to go. You will hear from me the moment I see it hit my inbox." Kobelia affidavit 12/8/20 at 2.

15. Allco's forester continued site-clearing work on June 27, 2020, at 7 A.M. having not been informed by Allco that the Commission had issued a temporary restraining order halting site-clearing work at the Apple Hill site by order on June 26, 2020. The forester's work on Apple Hill ended shortly after 1 P.M. on June 27, 2020, when he received a text from Allco informing him of the TRO at the same time that the sheriff arrived at the site and informed the forester of the order to cease and desist from work at the site. Tr. 12/4/20 at 41-44 (Kobelia).

16. Between 7 A.M. and 1 P.M. on June 27, 2020, the forester used a bulldozer to continue clearing a 100-foot-by-250-foot area of the Apple Hill site of vegetation after the TRO hearing. The forester bulldozed the area so that it could serve as a place

where a truck could turn around. Tr. 12/4/20 at 49-53, 66 (Kobelia).

17. The forester was not contractually required to avoid rare plants while clearing the Apple Hill site. Tr. 12/4/20 at 53-55 (Kobelia).

18. During the site-clearing work done by Allco's forester before June 27, 2020, several white arrow-leaved aster plants and nimblewill plants were destroyed. The total number of plants destroyed and the number of plants that might be destroyed if the work continues remain uncertain in the absence of a seasonally appropriate survey for rare and endangered plant species at the site. Tr. 12/4/20 at 153-155, and 194-195; exhs. AH-RK-2, PLH-TMM-5, and AH-JM-6.

19. White arrow-leaved asters were present at the site of the vegetation cleared by the forester on June 27, 2020. Tr. 12/4/20 at 77, 79 (McClammer); exh. ANR-10 at 5; exh. ANR-14.

20. White arrow-leaved asters present on June 27, 2020, would have been difficult to locate and identify because at this time of year they would be diminutive and likely obscured by the foliage of other plants present at the Apple Hill site. Tr. 12/4/20 at 90-91 (McClammer).

21. ANR's system for the classification of rare, threatened, and endangered species, like the white arrow-leaved aster, is a rational technique for addressing those species. Tr. 12/4/20 at 85 (McClammer).

22. Cutting and skidding trees at the Apple Hill site would tear the aboveground portions of the white arrow-leaved asters and the nimblewill plants from their roots. In addition, the heavy equipment used to do the site clearing would compact the soil and crush

any plant over which it is driven. Exh. ANR-10 at 9-10.

23. Thomas Melone is the sole owner of Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates. Tr. 12/4/20 at 98-101 (Melone).

24. Allco agreed not to develop the 5-acre parcel--referred to variously as Lot Number 1, the Orchard Lot, and the horticultural lot--in a settlement agreement with the Town of Bennington on September 14, 2018. Tr. 12/4/20 at 102-103; Intervenors Exh. 4 at P 7.

25. This 5-acre parcel is adjacent to the 27-acre parcel hosting the proposed Apple Hill and Chelsea/Willow Road solar facilities. In Docket 8454, Allco filed exhibit AHS-MK-12, proposing that it would plant a row of trees at the northern edge of this parcel, which is owned by Allco, as part of the facility's landscaping plan as the "Hill Road Planting" to shield views of the solar facility from a neighboring property. The 5-acre parcel is part of the Apple Hill site where site-clearing activity is enjoined by this Order. Tr. 12/4/20 at 124 (Melone); Intervenors exh. 4 at exh. B.

V. DISCUSSION

Introduction

In 2013, Allco petitioned the Commission to construct two solar facilities on Apple Hill in Bennington using standard-offer contracts authorized by the Commission. The current form of those proposed solar facilities is reflected in petitions filed in Docket 8454 and Case No. 17-5024-PET. The Commission has

denied CPGs to Allco based on those petitions, and those denials are currently under review by the Vermont Supreme Court. Allco has amended or sought to amend each of these proposed facilities significantly, altering their proposed footprints, solar technology, access routes, access to the distribution grid, and aesthetic and natural resources impacts. [24] The proposed facilities currently under review by the Vermont Supreme Court differ significantly from the facilities proposed by Allco in 2013 in the standard-offer petitions.

On January 6, 2020, the hearing officer in Docket 8454 issued a proposal for decision on remand in the Apple Hill case recommending that we deny the petition.

On March 23, 2020, Allco filed a motion requesting that we amend the Docket 8454 petition a second time. [25] This second amendment reflected a plan by Allco to use the neighboring Orchard Lot and the

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[24] We denied two requests to amend the Chelsea Solar petition in Docket 8302 in Orders of 4/14/17 and 10/12/17. These denials were followed by Allco filing a new petition further revising the proposed facility as the *Willow Road* case in Case No. 17-5024-PET. As explained in more detail below, we also denied Allco's March 23, 2020, proposed amendment to the Apple Hill project in Docket 8454. Docket 8454, Order of 5/7/20, at 24-25.

[25] Allco's first amendment request in Docket 8454 was made on April 4, 2016, before a proposal for decision or final order had issued. The first request reflected technological changes that reduced the proposed facility's footprint. The hearing officer approved that amendment request, and we approved the petition as amended. The Vermont Supreme Court reversed our decision and remanded the case.

facility site for agricultural purposes accommodating sheep grazing and hemp production. Among the specific changes to the petition, Allco proposed clearing the facility site because "[b]y the time construction might commence on the solar project, the hemp and sheep operations would be established for quite some time (as the litigation over the project is likely to continue for at least a couple more years)." [26]

On May 7, 2020, the Commission issued an Order adopting the hearing officer's proposal for decision on remand that we deny the petition in Docket 8454. We also denied the second proposed amendment because we had no jurisdiction on remand to reopen the original petition and because it was untimely. We concluded that Allco's interpretation of the Commission's amendment rule "would lead to the absurd result of allowing amendments that would give a project proposal a potentially unlimited lifespan." [27] We required that "new projects be filed as new projects." [28]

Then in June 2020, Allco began to clear-cut the site of the neighboring proposed solar facilities on Apple Hill without a CPG. Allco claims that this was farming activity unrelated to the solar facilities and outside the Commission's jurisdiction. By their comments of June 23, 2020, ANR requested that the Commission

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[26] Docket 8454, Second Proposed Amendment, filed March 23, 2020, at 1 n.1.

[27] Docket 8454, Order of 5/7/20, at 24-25.

[28] *Id.* at 25.

declare that Allco was violating Section 248. [29] Later comments by ANR, as well as by the Department and the Intervenors, requested that we order Allco to stop clear-cutting its property on Apple Hill.

We initiated this investigation and learned that Allco was cutting down trees and doing other site preparation work on Apple Hill at the site of the two proposed solar facilities. Based on those facts and pursuant to our jurisdiction under 30 V.S.A. §§ 9, 10, 30, 209, 203, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65, we ordered Allco to stop clearing trees on the parcel because that action is harmful to the natural environment and the orderly regulation of the generation of electricity in Vermont.

The potential for harm remains, and we maintain that injunctive order. As discussed below, we also now declare that Allco's clearing activity is site preparation in violation of 30 V.S.A. § 248(a)(2)(A). We direct the parties to propose a schedule for the proceeding to address an appropriate civil penalty to be issued against Allco pursuant to 30 V.S.A. § 30.

A. The Commission has Jurisdiction to Oversee, Enjoin, and Penalize Allco

The Commission Has Jurisdiction over Allco

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[29] ANR Comments at 2-3; *see also* Commission Rule 2.403 (noting that the Commission may issue declaratory rulings).

We have jurisdiction over Allco pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209, and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Allco has two standard-offer contracts, and it is in active pursuit of CPG authorization to build two 2.0 MW solar electric generation facilities on Apple Hill in Bennington, Vermont, to take advantage of those standard-offer contracts. Having submitted two petitions for CPGs for the proposed Chelsea Solar/Willow Road facilities and an original petition that was later amended for the proposed Apple Hill facility, Allco has been continuously engaged in seeking CPG authorization to build these facilities since it acquired the standard-offer contracts in 2013 and 2014. Allco's actions on Apple Hill continue to be part of Allco's plan to develop the site for the two facilities that are the subject of its standard-offer contracts.

Section 209 of Title 30 addresses the Commission's jurisdiction, in part, as follows:

(a) General jurisdiction. On due notice, the Commission shall have jurisdiction to hear, determine, render judgment, and make orders and decrees in all matters provided for in the charter or articles of *any corporation owning or operating* any plant, line, *or property subject to supervision under this chapter*, and shall have like jurisdiction in all matters respecting:

(8) the sale to electric companies of electricity generated by facilities:

(A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and

(B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8). [30]

Because Allco is a "corporation owning or operating . . . property subject to supervision under this chapter," the Commission has jurisdiction over Allco and its activities at the sites where it seeks to build solar facilities.

In 2013 and 2014, Allco signed standard-offer contracts to sell electricity derived from solar electric generation facilities on Apple Hill in Bennington, Vermont. By doing so, Allco became subject to the Commission's jurisdiction. Because Allco has not relinquished or let expire the two standard-offer contracts at the Apple Hill site--in fact, Allco has repeatedly sought and obtained extensions of the expiration dates of those contracts--and has not abandoned development of the facilities to be located

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[30] 30 V.S.A. § 209 (emphasis added); *see also, Amended Petition of Vermont Gas Systems, Inc. for a certificate of public good, pursuant to 30 V.S.A. § 248 authorizing the construction of the "Addison Natural Gas Pipeline" consisting of approximately 43 miles of new natural gas transmission pipeline in Chittenden and Addison Counties, approximately 5 miles of new distribution mainlines in Addison County, together with three new gate stations in Williston, New Haven and Middlebury, Vermont*, Docket 7970, Order of 8/4/14 at 3 (Commission temporarily halted all soil-disturbing activity of pipeline project pending completion of soil management plan pursuant to its general supervisory jurisdiction as a precautionary measure to protect public health and safety).

there, Allco is subject to the Commission's jurisdiction pursuant to 30 V.S.A. § 209(a)(8).

Under Section 248 of Title 30, electric generation facilities in Vermont must obtain construction and siting approval from the Commission. This approval is known as a certificate of public good, or CPG. Before the Commission may issue a CPG, it must make findings under various statutory criteria supporting that the proposed project is in the public good--the Section 248 criteria. In addition to the CPG-permitting process, the Commission also oversees Vermont's standard-offer program, pursuant to 30 V.S.A. § 8005a. Under this incentive program, renewable energy plants of 2.2 MW capacity or less may receive long-term contracts with stable pricing. Allco has standard-offer contracts for two 2.0 MW solar facilities on Apple Hill in Bennington.

Allco is incorrect in its unsupported argument that the Commission's jurisdiction over the Apple Hill site would only arise after a CPG is issued. As long as Allco's actions are part of its plan to sell renewable energy generated on Apple Hill to an electric company using the standard-offer contract, Allco is subject to the Commission's jurisdiction. Such actions by Allco include the filing and amendment of any CPG petitions for the Apple Hill facilities, and the clear-cutting activities that Allco was engaged in here, and any other acts in preparation of the site for electric generation.

Additionally, Section 248(a)(2)(A) provides the Commission with the authority to oversee and limit preparation of the Apple Hill site by the Developer:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage.

There is no doubt that this applies to the Developer because, regardless of whether the Developer also qualifies as a company, the Developer is a "person" as defined in 10 V.S.A. § 6001(14):

"Person":
(i) shall mean an individual, partnership, corporation, association, unincorporated organization, trust or other legal or commercial entity, including a joint venture or affiliated ownership; ...
(iii) includes individuals and entities affiliated with each other for profit, consideration, or any other beneficial interest derived from the partition or division of land.

We are not persuaded by Allco's argument that it is not a "collective person" as addressed in *In re Mountain Top Inn & Resort* because that case is factually different from and irrelevant to these circumstances. [31] The legal and commercial entities embodied in the Allco corporate scheme are

[31] *In re Mountain Top Inn & Resort*, 2020 VT 57, 238 A.3d 637 (2020) (renters of resort homes not a "collective person" subject to Act 250 jurisdiction).

companies and "persons" in their own right as defined by 10 V.S.A. § 6001(14) and hence are subject to Commission oversight and jurisdiction.

If 30 V.S.A. § 248(a)(2)(A)'s prohibition of site preparation in advance of obtaining a CPG is to have any meaning, then: (1) the Commission's jurisdiction over a "proposed site" attaches as soon as that site is designed for immediate or eventual operation of an electric generation facility, and (2) a "proposed site" remains within the Commission's jurisdiction until there is a "ceasing and abandoning" of the proposed use of the site for an electric generation facility, supported by sufficient evidence, that negates the use of the land for that purpose, and, thus, the need for Commission review. [32] The general jurisdiction conferred under Section 209 over "property subject to supervision under this chapter" further enhances the Commission's particular jurisdiction over pre-construction site preparation on the property proposed for siting an electric generation facility, including the site preparation proposed for solar facilities here.

Otherwise, developers could submit an application and, while it is pending, begin site preparation in advance of receiving Commission approval, thereby mooting out all review under the Section 248 criteria by the Department, ANR, the Agency of Agriculture Foods & Markets, the Division for Historic Preservation, and other agencies, interested parties,

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[32] *In re Audet*, 2004 VT 30, P 13, 176 Vt. 617, 850 A.2d 1000 (mem.) (providing analysis of abandonment in Act 250 context).

and the Commission. Agency-proposed conditions or objections would be meaningless, and facilities that would otherwise present an undue impact under the Section 248 criteria could perform the work that creates that impact before approval. Contrary to statute, the Commission would then be reviewing the site for a proposed facility not at the time it is filed, but instead at the moment before the CPG is issued. Thus, jurisdiction must attach, at the latest, at the time a developer submits an application for a proposed facility.

The denial of CPGs for the Chelsea Solar, Apple Hill Solar, and Willow Road Solar facilities by the Commission is not sufficient evidence of ceasing and abandoning those projects because Allco has appealed those decisions and continues to actively seek approval to build these facilities. In addition to actively pursuing reconsideration and appeal of denials of its CPG petitions, Allco still has standard-offer contracts for two 2.0 MW solar electric generation facilities on Apple Hill. Further, Allco has invested $ 850,000.00 to pay for GMP to upgrade the distribution line connecting the electric grid to the Apple Hill site and both proposed solar facilities, and Allco's clearing of trees from the 27-acre plot helps prepare the site for development of the proposed solar electric generation facilities.

Allco has admitted that it intends to pursue these electric generation facilities and has not abandoned those proposals. [33] Allco acknowledges that the act of

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[33] Finding 6, above. Further, with regard to the Apple Hill facility, Allco has made clear that at the Vermont Supreme

clear-cutting trees on Apple Hill would be a necessary action to prepare the site for a solar facility. [34] Allco also states that it plans to build solar facilities on the Apple Hill site in order to sell the renewable electricity generated by those facilities pursuant to the terms of its standard-offer contracts. Therefore, the Commission has jurisdiction to oversee Allco and has the jurisdiction to take the extraordinary step of providing injunctive relief pursuant to Commission Rule 2.406.

The Commission Has the Authority to Grant Injunctive Relief

We have jurisdiction to grant injunctive relief pursuant to 30 V.S.A. §§ 9, 10, 30, 203, 209 and 248, as well as Commission Rule 2.406 and Vermont Rules of Civil Procedure Rule 65. Section 9 of Title 30 provides the Commission with authority to enjoin those subject to the Commission's jurisdiction from violating Section 248 of Title 30:

The Commission shall have the powers of a court of record in the determination and adjudication of all matters over which it is given jurisdiction. It may render judgments, make orders and decrees, and

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Court it seeks approval of the project as Allco has proposed to amend it, but it also has not abandoned the alternative argument that the original proposal for this facility should be approved. Tr. 12/4/20 at 133 (Melone).

[34] Finding 7, above.

enforce the same by any suitable process issuable by courts in this State. [35]

As observed by the Department and ANR, Commission Rule 2.406 has long been used by the Commission to address requests by parties for injunctive relief, like the case here. The Commission did not exceed its authority when it issued the TRO on June 26, 2020. By this Order, having conducted an evidentiary hearing, we determine to maintain that injunction as a permanent injunction as allowed under Commission Rule 2.406. [36] This injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished.

Along with having the powers of a court of record under Section 9 of Title 30, other authorities support the Commission's ability to issue orders to restrain

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[35] 30 V.S.A. § 9.

[36] Commission Rule 2.406(A)(3) (noting that the Commission may grant a permanent injunction "after a hearing held upon legal notice and where the proceedings have allowed the parties adequate opportunity to avail themselves of all procedures provided for by these rules and by all other provision of law").

activities under its jurisdiction. These authorities include:

- 30 V.S.A. § 10(e), which states that "the Commission or a single member may grant temporary restraining orders";
- 30 V.S.A. § 209(a)(6), which allows the Commission to "restrain any company subject to supervision under this chapter from violations of law";
- 30 V.S.A. § 248(a)(2)(A), which specifically prohibits site preparation without a CPG;
- Commission Rule 2.406, which provides for temporary restraining orders, preliminary injunction, and permanent injunctions; [37]
- Vermont Rules of Civil Procedure Rule 65, which governs the granting of injunctions; and
- the precedent from cases such as *Petition of Vt. Elec. Power Producers, Inc.*, where the Vermont Supreme Court noted that the Commission "has all the powers of a trial court in the determination and adjudication of matters over which it has jurisdiction." [38]

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[37] Commission Rule 2.406 is similar to Vermont Rule of Civil Procedure 65. It promulgates the Commission's authority and the process for issuing TROs and injunctions--a process that the Commission observed in this proceeding. Further, the Legislature has declared that validly promulgated rules, such as Rule 2.406, "shall be valid and binding on persons they affect and shall have the force of law unless amended or revised or unless a court of competent jurisdiction determines otherwise." 3 V.S.A. § 845(a). No court has amended or revised Rule 2.406.

[38] *Petition of Vt. Elec. Power Producers, Inc.*, 165 Vt. 282, 293, 683 A.2d 716, 722 (1996).

Further, as addressed above, approving site-preparation activities for electric generation facilities would occur with the approval of a CPG and is within the Commission's jurisdiction pursuant to 30 V.S.A. § 248(a)(2)(A). Section 203 of Title 30 also provides that the Commission has jurisdiction over companies or persons that manufacture electricity for the public "so far as may be necessary to enable [it] to perform the duties and exercise the powers conferred upon [it] by law."

Allco asserts that the Commission does not have any jurisdiction over the 5-acre "horticultural use" parcel that is adjacent to the 27 acres dedicated to the two solar facilities. We disagree. As we conclude in Findings 24 and 25, above, and as we previously stated in our Order of July 1, 2020, [39] this lot is subject to our jurisdiction because it was identified as a location for mitigation plantings in Docket 8454 and was admitted into evidence in Case No. 17-5024-PET as an element of the settlement agreement with the Town of Bennington that we adopted in that case. We observed in our July 1 Order that the TRO restricted site-preparation activities in the 5-acre parcel, and we reiterate that conclusion here. Because the 5-acre parcel is part of the project petitions in each of the two CPG cases, Allco also shall not engage in site-preparation activities on what it refers to as its "horticultural use" parcel.

Allco also argues that Section 30(h) and Section 7061 of Title 30 limit the Commission's authority. This

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[39] Case No. 20-1611-INV, Order of 7/1/20, at 3, n.4.

argument is wholly misplaced. That statutory guidance in Title 30 is inapplicable to the Commission but instead applies to the Department and the Enhanced E911 Board, respectively.

Section 7061 is in Chapter 87 of Title 30, which applies to Enhanced 911; Emergency Services. The Developer refers to Section 7061(a), which states: "The Board may file a civil action for injunctive relief in Washington County Superior Court to enforce a provision of this chapter or a rule adopted by the Board under this chapter. The court shall award the Board its costs and reasonable attorney's fees in the event that the Board prevails in an action under this subsection." Under Chapter 87 of Title 30, the "Board" means the Vermont Enhanced 911 Board established under section 7053 of Title 30. [40] Contrary to the Developer's arguments, this reference to the "Board" is not a reference to the Public Utility Commission.

B. The Injunction Shall Remain in Place

Section 248(a)(2)(A) specifically prohibits site preparation without a CPG. The clearcutting of trees and other site work that Allco has already performed--and seeks to continue to perform--at this site constitutes site preparation without a CPG. An injunction remains necessary to prohibit this unlawful conduct.

Allco asserts that the site work does not constitute site-clearing activities in violation of 30 V.S.A. §

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[40] *See* 30 V.S.A. § 7051 Definitions at (4).

248(a)(2)(A), which requires a CPG before site preparation for the construction of an electric generation facility. Allco's claim that its activities are solely for farming does not alter our jurisdiction over its site-clearing activities on Apple Hill. [41] Allco acknowledges that tree clearing is an essential element of preparing a solar electric generation site and that the location it is clearing is the site of a proposed solar facility. In fact, Allco's proposed amendment of the Apple Hill petition filed on March 23, 2020, specifically acknowledges this by seeking to remove tree clearing from the amended petition because the site would already be cleared to accommodate farming activity. We are not persuaded that clearing a site for farming--when that site is already proposed for a solar project--provides a legitimate end-run around the clear statutory prohibition on site clearing for an electric generation facility before obtaining a CPG. As Mr. Melone stated as a witness under oath: "If there are trees on the site, you need to clear the trees to put solar." [42]

We are not persuaded by Allco's arguments that these activities are not site preparation and that "incidental overlap" is inapposite. The cases Allco references are

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[41] *See J.P. Carrara & Sons, Inc.*, #1R0589-ER (Vt. Envtl. Bd. Order issued 2/17/88), 1988 WL 220545 (Environmental Board had jurisdiction over tree clearing at proposed quarry site before filing of Act 250 permit because it was site preparation); and *Luce Hill Partnership*, #5L1055-EB (Vt. Envtl Bd. Order issued 7/7/92), 1992 WL 18664 (site of proposed residential subdivision was cleared before Act 250 review determined to be site preparation under Environmental Board jurisdiction).

[42] Tr. 6/26/20 at 89 (Melone).

all readily distinguishable factually and procedurally. [43]

In *Georgia Mountain*, the Commission responded to complaints of logging activities that had not been approved in a CPG. [44] However, in *Georgia Mountain* the landowner's logging was a preexisting activity and occurred in an unrelated location away from the approved electrical generation construction. [45] Here, by contrast, the Developer's site-clearing activities are located at the precise location of Allco's two proposed solar facilities, including the location of the footprint of those facilities and the location of proposed solar facility aesthetic mitigation, and the Developer's site-clearing activities were not pre-existing uses of the land.

In *Beaver Wood*, the Commission did not exercise jurisdiction over the building of a wood pellet facility that we found to be distinct and independent of the electric generation facility. [46] The Commission limited its jurisdiction to activities related to the construction and operation of an electrical generation facility

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[43] *See* Department's Reply Brief at 7-8 and ANR Reply Brief at 4-6.

[44] *Petition of Georgia Mountain Community Wind*, Docket 7508, Memorandum of 1/5/12 at 3.

[45] *See, e.g., Petition of Georgia Mountain Community Wind*, Docket 7508, Order of 6/11/2010 at Finding 39 (noting that the "existing uses" of Georgia Mountain included "active logging on portions of the mountain").

[46] *Petition of Beaver Wood Energy Pownal, LLC and Beaver Wood Energy Fair Haven*, Dockets 7678 and 7679.

related to the wood pellet facility. Here, Allco has explicitly linked the clearing activity to its ultimate plan to construct the electric generation facilities, and we are similarly limiting Allco from engaging in any further site preparation without a CPG, including tree clearing, on any properties specifically identified in the standard-offer contracts and CPG petitions for its two proposed solar facilities on Apple Hill.

Finally, in *Monument Farms*, the Commission responded to a petition from a CPG holder to begin construction early while the CPG holder was still seeking an amendment to the CPG. [47] Here, by contrast, Allco is not a CPG holder but has nonetheless begun site-clearing activities in violation of Section 248(a)(2)(A). The cases Allco cites simply do not support its argument that the Commission does not have jurisdiction to enjoin its site-clearing activities on Apple Hill.

Our determination that Allco's activities are site clearing has not been altered since we issued the TRO on June 26, 2020, when we stated:

> The petitioner's activities constitute site preparation without a CPG in violation of 30 V.S.A. § 248(a)(2). The petitioner's claim in his affidavit that his activities are solely for farming purposes is not credible. The Vermont Agency of Agriculture, Food and Markets defines a farm as land that is "devoted *primarily* to farming." The petitioner testified in this proceeding that, although the sheep may end up being

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[47] *Petition of Monument Farms Three Gen LLC*, Docket 7592, Order of 10/22/10.

used for some farming purposes, he was putting the sheep in this location "primarily" to serve the proposed solar projects. This does not qualify as farming. Further, the petitioner testified that the clearing activities are a prerequisite to building the solar projects that have not received CPGs. This violates 30 V.S.A. § 248(a)(2). [48]

In multiple filings and during the December 4, 2020, hearing, Allco has argued that we were incorrect to conclude that it planned to use sheep in this location "primarily" to serve the proposed solar projects. According to Allco, the sheep would also serve other solar facilities. [49] However, even if we accept Allco's assertion that these sheep would serve other facilities, this distinction is irrelevant. We still find that the primary purpose of placing sheep *at this location* is to keep down vegetative growth around the proposed solar facilities *at this location*, regardless of whether the sheep may also be used elsewhere. [50]

Allco also asserts that § 248(a)(2)(A) is unconstitutionally vague. It argues that the language "site preparation for an electric generation facility"

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[48] Case No. 20-1611-INV, Order of 6/26/20 at 4 (citing Vermont Agency of Agriculture, Food and Markets, Farm Definitions and Determinations, https://agriculture.vermont.gov/water-quality/regulations/farm-definitions-and-determinations).

[49] Tr. 12/4/20 at 129-130 (Melone).

[50] Tr. 12/4/20 at 130 (Melone) ("[T]he primary motivation for getting into the business was the fact that we basically have this . . . captive revenue stream, because we have to maintain all these sites anyway . . . .").

provides "no standard for ordinary people to understand." Nonetheless, Allco, has shown that it knows what site preparation is. Specifically, Allco's witness and sole owner, Mr. Melone, stated: "If there are trees on the site, you need to clear the trees to put solar." [51] With the plain language of this testimony, Allco affirms its understanding of the clear language of the statute. Further, even if there were ambiguity, Mr. Melone has admitted that he is aware of the Commission's process for hearing petitions for declaratory relief, which could have resolved any alleged ambiguity before Allco went ahead with its site-clearing activities. [52]

We agree with the Department's reasoning and conclusion that Allco's constitutional arguments continue to fail on the merits. "The vagueness doctrine of the Due Process Clause asks whether a statute provides fair notice of that conduct which is prohibited and whether there are proper standards for adjudication." [53]

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[51] Tr. 6/26/20 at 89 (Melone).

[52] Tr. 12/4/20 at 131 (Melone); *see, e.g., Agency of Nat. Res. v. Persons*, 2013 VT 46, P 19, 194 Vt. 87, 94, 75 A.3d 582, 588 ("Based on the totality of facts, defendants had sufficient reason to know that the excavation work was prohibited without a permit or a conditional use determination. At the very least, defendants should have sought the advice of [a state agency] before commencing work."); *see also, e.g., id.* at P 17 (holding that due process requires less precision in delineating what is prohibited when a matter involves civil penalties rather than criminal penalties).

[53] Department's Reply Brief at 9-10.

Allco understands that tree-clearing is necessary site preparation for a solar facility. In its second motion to amend the petition in Docket 8454 to reflect the fact that the site would be cleared for agricultural use, Allco showed that it understands that clearing the trees for agricultural purposes would prepare the site for a solar facility. Allco has further shown that it understands that it needs a CPG to clear trees by claiming, after Allco was denied a CPG for the Apple Hill solar facility, that PLH Vineyard Sky LLC is clearing trees for solely farming activity, albeit farming related to a future when the site will be used for a solar facility. Having been denied a CPG and an amendment to a CPG that would reflect farming activity, Allco began clearing trees and conducting site preparation without a CPG.

We are not persuaded by Allco's constitutional argument because the statute is clear, and Allco itself is acting in willful violation of the statute it claims is unconstitutionally vague.

The Vermont Supreme Court has held that, in general, when a municipality or state agency seeks "compliance with a local ordinance or state statute," as ANR and the Department seek here, the agency need not demonstrate "irreparable harm or the unavailability of an adequate remedy at law before obtaining an injunction; rather, all that must be shown is a violation of the ordinance." [54] As noted

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[54] *Town of Sherburne v. Carpenter*, 155 Vt. 126, 129, 582 A.2d 145, 148 (1990); *see also, e.g., City of St. Albans v. Hayford*, 2008 VT 26, P 12 183 Vt. 596, 599, 949 A.2d 1058, 1062 (holding that the failure to get a land-use permit cannot generally be

above, ANR and the Department have made that showing here by demonstrating Allco's failure to comply with 30 V.S.A. § 248(a)(2). Further, the clearcutting of 27 acres or more of trees--in an area that contains rare and very rare plant species--is a "substantial" violation. [55] It also demonstrates "conscious wrongdoing." [56] Allco was aware of the fact that it needed approval from the Commission before it could undertake site preparation, and Allco in fact sought approval for the very work it began undertaking here, but the Commission denied that approval on May 7, 2020, when we issued a final order that denied the motion to amend the petition to reflect grazing sheep at the project site. [57] Allco nevertheless went forward with that work. Further, Allco continued to do site preparation on the morning of June 27, 2021, a day after the Commission issued a TRO explicitly prohibiting that work, because, at best, Allco failed to communicate the TRO to its contractor before that work began. [58]

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considered so insubstantial that it would be inequitable to foreclose the unpermitted use).

[55] *Carpenter*, 155 Vt. 126, 131, 582 A.2d 145, 149 (1990).

[56] *Id.*

[57] *Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility at 1133 Willow Road in Bennington, Vermont*, Docket 8454, Order of 5/7/20 (denying petition for CPG after remand from Vermont Supreme Court) (second appeal pending).

[58] *See* Findings 12-16 (explaining that the TRO was issued from the bench at 1:30 PM on June 26, 2021, with a written order

Even applying the more stringent standard of Commission Rule 2.406, the likelihood that a substantial immediate and irreparable injury will result is all that is required under Commission Rule 2.406 to warrant the issuance of a temporary restraining order or a preliminary or permanent injunction. And that harm exists here in the form of the harm to the regulatory process by violating 30 V.S.A. § 248(a)(2), the harm to the rare and very rare plants, and the harm to the trees that would be cleared.

Furthermore, even if we were to also look at all of the factors that apply to an injunction under Vermont Rules of Civil Procedure Rule 65, those factors also weigh in favor of granting injunctive relief here. The Vermont Supreme Court has held that four factors are considered in determining whether to grant injunctive relief after an evidentiary hearing: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." [59]

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following that evening, and yet Allco did not tell its contractor until the afternoon of June 27, 2021).

[59] *Taylor v. Town of Cabot*, 2017 VT 92, P 19, 205 Vt. 586, 596, 178 A.3d 313, 319 (2017). The U.S. Supreme Court has held that these same factors "are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008); *see also Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 546, 107 S. Ct. 1396, 1404, 94 L. Ed. 2d 542 (1987) ("The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that

First, ANR and the Intervenors have established a threat of irreparable harm. In fact, they have established a substantial immediate and irreparable injury. This is the immediate harm to the regulatory oversight process and the public trust reflected in Allco's conducting site clearing without a CPG, an immediate harm to the rare and very rare plants on the site, and an immediate harm to the trees that would be cleared.

As for harm to rare plant species, rare and very rare species are found in areas on the site that are currently slated for clearing. [60] Allco's forester admitted that he is not contracted to avoid rare species and is relying on a 2018 survey and on his untrained understanding of the appearance of these rare plants, and that, although he and others visited the site in 2020 to look at the flagging that is currently in place, that visit did not include walking the 27 acres to look for new locations of rare plants. It is therefore likely that rare plants will be destroyed if this area is cleared. This creates the likelihood that a substantial immediate and irreparable harm will result.

Allco has sought to challenge ANR's classification system for rare and threatened plant species. However, this classification system involves the application of complex methodologies, and the

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the plaintiff must show a likelihood of success on the merits rather than actual success.").

[60] Findings 3, 4, and 15-22, above.

Vermont Supreme Court requires deference to ANR's "determinations regarding complex methodologies." [61] The only exception is when the agency decision is "wholly irrational and unreasonable in relation to its intended purpose." [62] While Allco's own natural resources consultant disagreed with ANR's species expert as to his conclusions, he acknowledged that ANR's system was a rational way of classifying these plants. [63] We therefore must defer to ANR's classification system, and we find that Allco's activities have caused--and would continue to cause--substantial and immediate irreparable harm to rare and very rare species.

The proposed tree clearing also constitutes substantial immediate and irreparable harm because once those trees are cut, they cannot be restored. Thus, courts routinely hold that the logging of trees constitutes irreparable harm: "The logging of mature trees, if indeed incorrect in law, cannot be remedied easily if at all. Neither the planting of new seedlings nor the paying of money damages can normally remedy such damage." [64] Consequently, the logging of

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[61] *In re Korrow Real Est., LLC Act 250 Permit Amend. Application*, 2018 VT 39, P 21, 207 Vt. 274, 284, 187 A.3d 1125, 1132 (2018) (quoting *Plum Creek Me. Timberlands, LLC*, 2016 VT 103, P 28, 203 Vt. 197, 155 A.3d 694).

[62] *Id.*

[63] Finding 21, above.

[64] *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014).

trees "is irreparable for the purposes of the preliminary injunction analysis." [65]

Second, the record demonstrates that there is little, if any, harm to Allco from being enjoined at this time. The only possible harm to Allco is a delay in its site-clearing activities, if it is ultimately allowed to undertake those activities. Further, even if there were a delay, other courts have held that when the "anticipated revenues from the logging" are "delay[ed]" due to an injunction, the harm is "at most the time value of the profit component of that revenue, a value which no one has bothered to quantify and which probably is trivial." [66] The same could be said here.

Third, regarding the merits of the underlying claim, we find that 30 V.S.A. § 248(a)(2) precludes Allco from site-clearing activities while it is still pursuing--and has not yet received--CPGs. As explained above, Vermont law explicitly prohibits site preparation for electric generation without a CPG, there are no CPGs for this site, and Allco admits that it continues to seek to place electric generation facilities at this site.

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[65] *Id.*; *see also, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (holding that the logging of trees "satisfies the 'likelihood of irreparable injury' requirement"); *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990) (holding that "trees cut down this fall will not have grown back to their present height" during the lifetime of most of the plaintiffs).

[66] *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 445 (7th Cir. 1990).

Fourth, the public interest favors an injunction here. As other courts have noted, there is a "well-established public interest in preserving nature and avoiding irreparable environmental injury." [67] Further, "once those acres are logged, the work and recreational opportunities that would otherwise be available on that land are irreparably lost." [68]

Additionally, Allco's activities challenge the integrity of the Section 248 permitting process. The Commission issued an order on May 7, 2020, denying Allco's request to amend a pending application for a certificate of public good. [69] Although Allco sought reconsideration of that order, we denied that motion for reconsideration, and although Allco has appealed our rulings to the Vermont Supreme Court, Allco has not obtained a stay of our orders. Thus, our decisions remain binding on Allco unless and until the Vermont Supreme Court overrules them. Yet, Allco has gone ahead with making the very same permanent changes to the landscape that we told it not to make when we denied its amendment request. And Allco continued making those changes even after the TRO issued. As ANR correctly notes, this is an affront to the Section

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[67] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (quotation omitted); *see also, e.g., F.T.C. v. Staples, Inc.*, 970 F. Supp. 1066, 1091 (D.D.C. 1997) (finding a public interest in "the need to preserve meaningful relief" throughout all stages of the litigation).

[68] *Id.* at 1137.

[69] Docket 8454, Order of 5/7/2020 at 23-25.

248 permitting process. [70] It creates a significant risk that undue adverse effects on the environment will occur before the Commission has had a chance to review the proposed project. This does not comply with the applicable statutes or serve the public interest.

The Vermont Supreme Court has recognized that injunctive relief is appropriate to avoid "irreparable damage during the pendency of the action" where "the injunction is required to preserve [the] status quo." [71] A temporary restraining order or injunction "preserves the status quo." [72] This type of relief is particularly appropriate to prevent actions that "cannot be undone through monetary remedies." [73] The Vermont Supreme Court has thus denied injunctive relief when the challenged action "can be 'undone.'" [74] On the other hand, when there is no way to undo something at a later time, a stay is necessary to avoid irreparable harm. [75]

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[70] ANR Reply Brief at 7-8.

[71] *State v. Glens Falls Ins. Co.*, 134 Vt. 443, 450, 365 A.2d 243, 247 (1976).

[72] *Bank of New York Co. v. Ne. Bancorp, Inc.*, 9 F.3d 1065, 1067 (2d Cir. 1993).

[73] *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

[74] *Taylor v. Town of Cabot*, 2017 VT 92, P 42, 205 Vt. 586, 606, 178 A.3d 313, 326.

[75] We observe here that the penalty phase of these proceedings, pursuant to 30 V.S.A. § 30, that will punish Allco for violating Section 30 is not designed to result in a damages fund that can

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We have reviewed Allco's remaining arguments and, to the extent those arguments have not already been addressed in this or related dockets, we find them either outside the scope of this proceeding or without merit.

Conclusion

In this Order we restate our conclusion that Allco's site-clearing activity without a CPG is a violation of 30 V.S.A. § 248(a)(2)(A), and we enjoin any further site-clearing activity at this time. In our findings, we establish a factual basis for issuing a civil penalty for that violation. To further substantiate the extent of that civil penalty, additional proceedings are required to document the factual basis for the amount of that penalty using the criteria addressed in 30 V.S.A. § 30. The parties are therefore directed to confer and Allco is directed to propose a schedule for the penalty phase of this proceeding by no later than the close of business on Friday, April 16, 2021.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission ("Commission") of the State of Vermont that:

1. Allco initiated site preparation at Apple Hill in Bennington, Vermont, for electric generation in violation of 30 V.S.A. § 248(a)(2)(A).

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be used to remediate the harm caused by Allco's unpermitted site clearing. The Commission has no jurisdiction to order damages.

2. The Commission extends its Order of June 26, 2020, enjoining Allco Renewable Energy Limited, Chelsea Solar LLC, Apple Hill Solar LLC, PLC Vineyard Sky LLC, and PLH LLC, and their affiliates, subsidiaries, and contractors from conducting site preparation on the parcels on Apple Hill in Bennington, Vermont, identified in Docket 8454 and Case No. 17-5024-PET, including both the 27-acre site of the two solar facilities and the adjacent 5-acre site indentified in both petitions as mitigating the aesthetic impacts of those proposed facilities. This permanent injunction is temporally limited and shall remain in place only until one of the following occurs: (1) the Developer receives a CPG for constructing an electric generation facility on this site, or (2) final orders from the Vermont Supreme Court or the Commission deny both of the CPG petitions in Docket 8454 and Case No. 17-5024-PET, any appeal periods or time limits for moving for reconsideration have expired, and both of the Developer's standard-offer contracts have expired or been voluntarily relinquished.

3. The parties are directed to confer and Allco is directed to file a proposed schedule for the penalty phase of this investigation by no later than the close of business on Friday, April 16, 2021.

Dated at Montpelier, Vermont, this 1st day of April, 2021.

PUBLIC UTILITY COMMISSION OF VERMONT
Anthony Z. Roisman
Margaret Cheney
Sarah Hofmann

APPENDIX D

U.S. Const. Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

APPENDIX E

Title 30: Public Service

Chapter 00 : Appointment, General Powers, and Duties

(Cite as: 30 V.S.A. § 30)

- § 30. Penalties; affidavit of compliance

(a)(1) A person, company, or corporation subject to the supervision of the Commission or the Department of Public Service, who refuses the Commission or the Department of Public Service access to the books, accounts, or papers of such person, company, or corporation within this State, so far as may be necessary under the provisions of this title, or who fails, other than through negligence, to furnish any returns, reports, or information lawfully required by it, or who willfully hinders, delays, or obstructs it in the discharge of the duties imposed upon it, or who fails within a reasonable time to obey a final order or decree of the Commission, or who violates a provision of chapter 2, 7, 75, or 89 of this title, or a provision of section 231 or 248 of this title, or a rule of the Commission, shall be required to pay a civil penalty as provided in subsection (b) of this section after notice and opportunity for hearing.

(2) A person who violates a provision of chapter 3 or 5 of this title, except for the provisions of section 231 or 248 of this title, shall be required to pay a civil penalty after notice and opportunity for hearing. If the Commission determines that the violation substantially harmed or might have substantially

harmed the public health, safety, or welfare; the interests of utility customers; the environment; the reliability of utility service; or the financial stability of the company, the Commission may impose a civil penalty as provided in subsection (b) of this section. If the Commission determines that the violation did not cause or was not likely to cause such harm, the Commission may impose a civil penalty of not more than $42,500.00, in addition to any financial benefit to the violator resulting from the violation.

(b) The Commission may impose a civil penalty under subsection (a) of this section of not more than $85,000.00, in addition to any financial benefit to the violator resulting from the violation. In the case of a continuing violation, an additional fine of not more than $42,500.00 per day may be imposed. In no event shall the total fine exceed the larger of:

(1) $170,000.00, in addition to any financial benefit to the violator resulting from a violation; or

(2) in the case of a company that pays gross receipt taxes under section 22 of this title, one-tenth of one percent of the gross Vermont revenues from regulated activity of the person, company, or corporation in the preceding year, in addition to any financial benefit to the violator resulting from a violation.

(c) In determining the amount of a fine under subsection (a) of this section, the Commission may consider any of the following factors:

(1) the extent that the violation harmed or might have harmed the public health, safety, or welfare, the

environment, the reliability of utility service, or the other interests of utility customers;

(2) whether the respondent knew or had reason to know the violation existed and whether the violation was intentional;

(3) the economic benefit, if any, that could have been anticipated from an intentional or knowing violation;

(4) the length of time that the violation existed;

(5) the deterrent effect of the penalty;

(6) the economic resources of the respondent;

(7) the respondent's record of compliance; and

(8) any other aggravating or mitigating circumstance.

(d) After notice and an opportunity to be heard, the Commission may order any person, company, or corporation subject to the supervision of the Commission or the Department of Public Service who negligently fails to furnish any returns, reports, or information lawfully required by it to pay a civil penalty of not more than $42,500.00, in addition to any financial benefit to the violator resulting from a violation.

(e) A person who knowingly, under oath, makes a false return or statement or who knowingly, under oath, when required by law, gives false information to the Commission, or the Department of Public Service, or who knowingly testifies falsely in any material matter before either of them, shall be deemed to have committed perjury and shall be punished accordingly.

(f) Violations of the rules of procedure for the determination of cases heard by the Public Utility Commission shall not be subject to the provisions of subsection (a), (b), or (c) of this section.

(g) At any time, the Commission may require a person, company, or corporation to file an affidavit under oath or affirmation that the person, company, or corporation or any facility or plant thereof is in compliance with the terms and conditions of an order, approval, certificate, or authorization issued under this title or rules adopted under this title. A request for an affidavit of compliance under this subdivision may be delivered by hand or by certified mail. Failure to file such an affidavit within the period prescribed by the Commission or the material misrepresentation of a fact in an affidavit shall be a violation subject to civil penalty under subdivision (a)(1) of this section and shall also be grounds for revocation or rescission of the order, approval, certificate, or authorization as to which the Commission required the affidavit.

(h) In accordance with the process set forth in this subsection, the Department may issue an administrative citation to a person the Department believes after investigation violated section 246, 248, 248a, or 8010 of this title, any rule adopted pursuant to those sections, or any certificate of public good issued pursuant to those sections.

(1) An administrative citation, whether draft or final, shall:

(A) state each provision of statute and rule and each condition of a certificate of public good alleged to have been violated;

(B) include a concise statement of the facts giving rise to the alleged violation and the evidence supporting the existence of those facts;

(C) request that the person take the remedial action specified in the notice or pay a civil penalty of not more than $5,000.00 for the violation, or both; and

(D) if remedial action is requested, state the reasons for seeking the action.

(2) The Department shall initiate the process by issuing a draft administrative citation to the person and sending a copy to each municipality in which the person's facility is located, each adjoining property owner to the facility, the complainant if any, and, for alleged violations of the facility's certificate of public good, each party to the proceeding in which the certificate was issued.

(A) At the time the draft citation is issued, the Department shall file a copy with the Commission and post the draft citation on its website.

(B) Commencing with the date of issuance, the Department shall provide an opportunity of 30 days for public comment on the draft citation. The Department shall include information on this opportunity in the draft citation.

(C) Once the public comment period closes, the Department:

(i) Shall provide the person and the Commission with a copy of each comment received.

(ii) Within 15 days following the close of the comment period, may file a revised draft citation with the Commission. The revised draft citation may be accompanied by a stipulation or agreed settlement between the person and the Department with a request for Commission approval.

(D) The Commission may on its own initiative open a proceeding to investigate the violation alleged in the draft citation. The Commission shall take any such action within 25 days following the close of the public comment period or the filing of a revised draft citation, whichever is later. The Commission proceeding shall supersede the draft citation.

(3) If the Commission has not opened a proceeding pursuant to subdivision (2)(D) of this subsection, the Department may issue a final administrative citation to the person. Within 30 days following receipt of a final administrative citation, the person shall respond in one of the following ways:

(A) Request a hearing before the Commission on the existence of the alleged violation, the proposed penalty, and the proposed remedial action.

(B) Pay any civil penalty set forth in the notice and agree to undertake such remedial action as is set forth in the notice and submit to the Department for its approval a plan for compliance. In such a case, the final administrative citation shall be enforceable in the same manner as an order of the Commission.

(C) Decline to contest the existence of the alleged violation and request a hearing on either the proposed penalty or remedial action, or both. When exercising

this option, a person may agree to either the proposed penalty or remedial action and seek a hearing only on the penalty or action with which the person disagrees.

(4) When a person requests a hearing under subdivision (3) of this subsection, the Commission shall open a proceeding and conduct a hearing in accordance with the provisions of this section on the alleged violation and such remedial action and penalty as are set forth in the notice. Notwithstanding any contrary provision of this section, a penalty under this subdivision (4) shall not exceed $5,000.00.

(5) If a person pays the civil penalty set forth in a final administrative citation, then the Department shall be precluded from seeking and the Commission from imposing additional civil penalties for the same alleged violation unless the violation is continuing or is repeated.

(6) If a person agrees to undertake the remedial action set forth in a final administrative citation, failure to undertake the action or comply with a compliance plan approved by the Department shall constitute a separate violation.

(7) The Commission may approve disposition of a final administrative citation by stipulation or agreed settlement submitted before entry of a final order.

(8) Penalties assessed under this subsection shall be deposited in the General Fund except for any amounts the Commission directs to be used for the benefit of ratepayers generally. (Amended 1959, No. 329 (Adj. Sess.), § 39(b), eff. March 1, 1961; 1979, No. 204 (Adj.

Sess.), § 16, eff. Feb. 1, 1981; 1995, No. 99 (Adj. Sess.), § 1; 2009, No. 146 (Adj. Sess.), § F29; 2011, No. 47, § 10, eff. May 25, 2011; 2013, No. 89, § 13; 2017, No. 53, § 8; 2021, No. 42, § 4; 2023, No. 85 (Adj. Sess.), § 347, eff. July 1, 2024.)

APPENDIX F

Title 30: Public Service

Chapter 005: State Policy; Plans; Jurisdiction and Regulatory Authority of Commission and Department

Subchapter 001: GENERAL POWERS

(Cite as: 30 V.S.A. § 248)

- § 248. New gas and electric purchases, investments, and facilities; certificate of public good

(a)(1) No company, as defined in section 201 of this subchapter, may:

(A) in any way purchase electric capacity or energy from outside the State:

(i) for a period exceeding five years, that represents more than three percent of its historic peak demand, unless the purchase is from a plant as defined in section 8002 of this title that produces electricity from renewable energy as defined under section 8002; or

(ii) for a period exceeding 10 years, that represents more than 10 percent of its historic peak demand, if the purchase is from a plant as defined in section 8002 of this title that produces electricity from renewable energy as defined under section 8002; or

(B) invest in an electric generation facility, energy storage facility, or transmission facility located outside this State unless the Public Utility

Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.

(2) Except for the replacement of existing facilities with equivalent facilities in the usual course of business and except for electric generation or energy storage facilities that are operated solely for on-site electricity consumption by the owner of those facilities and for hydroelectric generation facilities subject to licensing jurisdiction under the Federal Power Act, 16 U.S.C. chapter 12, subchapter 1:

(A) no company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may begin site preparation for or construction of an electric generation facility, energy storage facility, or electric transmission facility within the State that is designed for immediate or eventual operation at any voltage; and

(B) no such company may exercise the right of eminent domain in connection with site preparation for or construction of any such transmission facility, energy storage facility, or generation facility, unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.

(3) No company, as defined in section 201 of this title, and no person, as defined in 10 V.S.A. § 6001(14), may in any way begin site preparation for or commence construction of any natural gas facility, except for the replacement of existing facilities with equivalent facilities in the usual course of business, unless the Public Utility Commission first finds that the same

will promote the general good of the State and issues a certificate to that effect pursuant to this section.

(A) For the purposes of this section, the term "natural gas facility" shall mean any natural gas transmission line, storage facility, manufactured-gas facility, or other structure incident to any such line or facility. For purposes of this section, a "natural gas transmission line" shall include any feeder main or any pipeline facility constructed to deliver natural gas in Vermont directly from a natural gas pipeline facility that has been certified pursuant to the Natural Gas Act, 15 U.S.C. § 717 et seq.

(B) For the purposes of this section, the term "company" shall not include a "natural gas company" (including a "person which will be a natural gas company upon completion of any proposed construction or extension of facilities"), within the meaning of the Natural Gas Act, 15 U.S.C. § 717 et seq.; provided however, that the term "company" shall include any "natural gas company" to the extent it proposes to construct in Vermont a natural gas facility that is not solely subject to federal jurisdiction under the Natural Gas Act.

(C) The Public Utility Commission shall have the authority to, and may in its discretion, conduct a proceeding, as set forth in subsection (h) of this section, with respect to a natural gas facility proposed to be constructed in Vermont by a "natural gas company" for the purpose of developing an opinion in connection with federal certification or other federal approval proceedings.

(4)(A) With respect to a facility located in the State, in response to a request from one or more members of the public or a party, the Public Utility Commission shall hold a nonevidentiary public hearing on a petition for such finding and certificate. The public hearing shall either be remotely accessible or held in at least one county in which any portion of the construction of the facility is proposed to be located, or both. The Commission in its discretion may hold a nonevidentiary public hearing in the absence of any request from a member of the public or a party. From the comments made at a public hearing, the Commission shall derive areas of inquiry that are relevant to the findings to be made under this section and shall address each such area in its decision. Prior to making findings, if the record does not contain evidence on such an area, the Commission shall direct the parties to provide evidence on the area. This subdivision (4) does not require the Commission to respond to each individual comment.

(B) The Public Utility Commission shall hold evidentiary hearings at locations that it selects in any case conducted under this section in which contested issues remain or when any party to a case requests that an evidentiary hearing be held. In the event a case is fully resolved and no party requests a hearing, the Commission may exercise its discretion and determine that an evidentiary hearing is not necessary to protect the interests of the parties or the public, or for the Commission to reach its decision on the matter.

(C) Within two business days following notification from the Commission that the petition is complete,

the petitioner shall serve copies of the complete petition on the Attorney General and the Department of Public Service and, with respect to facilities within the State, the Department of Health; Agency of Natural Resources; Historic Preservation Division; Agency of Transportation; Agency of Agriculture, Food and Markets and to the chair or director of the municipal and regional planning commissions and the municipal legislative body for each town and city in which the proposed facility will be located.

(D) Notice of the public hearing shall be published and maintained on the Commission's website for at least 12 days before the day appointed for the hearing. Notice of the public hearing shall be published once in a newspaper of general circulation in the county or counties in which the proposed facility will be located, and the notice shall include an internet address where more information regarding the proposed facility may be viewed.

(E) The Agency of Natural Resources shall appear as a party in any proceedings held under this subsection, shall provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section, and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding.

(F) The following shall apply to the participation of the Agency of Agriculture, Food and Markets in proceedings held under this subsection (a):

(i) In any proceeding regarding an electric generation facility that will have a capacity greater than 500 kilowatts or an energy storage facility that will have

a capacity greater than 1 megawatt and will be sited on a tract containing primary agricultural soils as defined in 10 V.S.A. § 6001, the Agency shall appear as a party and provide evidence and recommendations concerning any findings to be made under subdivision (b)(5) of this section on those soils and may provide evidence and recommendations concerning any other matters to be determined by the Commission in such a proceeding.

(ii) In a proceeding other than one described in subdivision (i) of this subdivision (4)(F), the Agency shall have the right to appear and participate.

(G) The regional planning commission for the region in which the facility is located shall have the right to appear as a party in any proceedings held under this subsection (a). The regional planning commission of an adjacent region shall have the same right if the distance of the facility's nearest component to the boundary of that planning commission is within 500 feet or 10 times the height of the facility's tallest component, whichever is greater.

(H) The legislative body and the planning commission for the municipality in which a facility is located shall have the right to appear as a party in any proceedings held under this subsection (a). The legislative body and planning commission of an adjacent municipality shall have the same right if the distance of the facility's nearest component to the boundary of that adjacent municipality is within 500 feet or 10 times the height of the facility's tallest component, whichever is greater.

(I) When a person has the right to appear as a party in a proceeding before the Commission under this chapter, the person may exercise this right by filing a letter with the Commission stating that the person appears through the person's duly authorized representative, signed by that representative.

(J) This subdivision (J) applies to an application for an electric generation facility with a capacity that is greater than 50 kilowatts and to an application for an energy storage facility that is greater than 1 megawatt, unless the facility is located on a new or existing structure the primary purpose of which is not the generation of electricity. In addition to any other information required by the Commission, the application for such a facility shall include information that delineates:

(i) the full limits of physical disturbance due to the construction and operation of the facility and related infrastructure, including areas disturbed due to the creation or modification of access roads and utility lines and the clearing or management of vegetation;

(ii) the presence and total acreage of primary agricultural soils as defined in 10 V.S.A. § 6001 on each tract to be physically disturbed in connection with the construction and operation of the facility, the amount of those soils to be disturbed, and any other proposed impacts to those soils;

(iii) all visible infrastructure associated with the facility; and

(iv) all impacts of the facility's construction and operation under subdivision (b)(5) of this section,

including impacts due to the creation or modification of access roads and utility lines and the clearing or management of vegetation.

(5) The Commission shall adopt rules regarding standard conditions on postconstruction inspection and maintenance of aesthetic mitigation and on decommissioning to be included in certificates of public good for in-state facilities approved under this section. The purpose of these standard conditions shall be to ensure that all required aesthetic mitigation is performed and maintained and that facilities are removed once they are no longer in service.

(6) In any certificate of public good issued under this section for an in-state plant as defined in section 8002 of this title that generates electricity from wind, the Commission shall require the plant to install radar-controlled obstruction lights on all wind turbines for which the Federal Aviation Administration (FAA) requires obstruction lights, if the plant includes four or more wind turbines and the FAA allows the use of radar-controlled lighting technology.

(A) Nothing in this subdivision (6) shall allow the Commission to approve obstruction lights that do not meet FAA standards.

(B) The purpose of this subdivision (6) is to reduce the visual impact of wind turbine obstruction lights on the environment and nearby properties. The General Assembly finds that wind turbine obstruction lights that remain illuminated through the night create light pollution. Radar-controlled obstruction lights are only illuminated when aircraft are detected in the

area, and therefore the use of these lights will reduce the negative environmental impacts of obstruction lights.

(7) When a certificate of public good under this section or amendment to such a certificate is issued for an in-state electric generation or energy storage facility with a capacity that is greater than 15 kilowatts, the certificate holder within 45 days shall record a notice of the certificate or amended certificate, on a form prescribed by the Commission, in the land records of each municipality in which a facility subject to the certificate is located and shall submit proof of this recording to the Commission. The recording under this subsection shall be indexed as though the certificate holder were the grantor of a deed. The prescribed form shall not exceed one page and shall require identification of the land on which the facility is to be located by reference to the conveyance to the current landowner, the number of the certificate, and the name of each person to which the certificate was issued and shall include information on how to contact the Commission to view the certificate and supporting documents.

(b) Before the Public Utility Commission issues a certificate of public good as required under subsection (a) of this section, it shall find that the purchase, investment, or construction:

(1) With respect to an in-state facility, will not unduly interfere with the orderly development of the region with due consideration having been given 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. However:

(A) With respect to a natural gas transmission line subject to Commission review, the line shall be in conformance with any applicable provisions concerning such lines contained in the duly adopted regional plan; and, in addition, upon application of any party, the Commission shall condition any certificate of public good for a natural gas transmission line issued under this section so as to prohibit service connections that would not be in conformance with the adopted municipal plan in any municipality in which the line is located.

(B) With respect to a ground-mounted solar electric generation facility, the facility shall comply with the screening requirements of a municipal bylaw adopted under 24 V.S.A. § 4414(15) or a municipal ordinance adopted under 24 V.S.A. § 2291(28), and the recommendation of a municipality applying such a bylaw or ordinance, unless the Commission finds that requiring such compliance would prohibit or have the effect of prohibiting the installation of such a facility or have the effect of interfering with the facility's intended functional use.

(C) With respect to an in-state electric generation facility, the Commission shall give substantial deference to the land conservation measures and specific policies contained in a duly adopted regional and municipal plan that has received an affirmative determination of energy compliance under 24 V.S.A. § 4352. In this subdivision (C), "substantial deference" means that a land conservation measure or specific policy shall be applied 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. The term shall not include consideration of whether the determination of energy compliance should or should not have been affirmative under 24 V.S.A. § 4352.

(2) Is required to meet the need for present and future demand for service that could not otherwise be provided in a more cost-effective manner through energy conservation programs and measures and energy-efficiency and load management measures, including those developed pursuant to the provisions of subsection 209(d), section 218c, and subsection 218(b) of this title. In determining whether this criterion is met, the Commission shall assess the environmental and economic costs of the purchase, investment, or construction in the manner set out under subdivision 218c(a)(1) (least cost integrated plan) of this title and, as to a generation facility, shall consider whether the facility will avoid, reduce, or defer transmission or distribution system investments.

(3) Will not adversely affect system stability and reliability.

(4) Will result in an economic benefit to the State and its residents.

(5) With respect to an in-state facility, will not have an undue adverse effect on aesthetics, historic sites, 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) and (9)(K), impacts to primary agricultural soils as defined in 10 V.S.A. § 6001, and greenhouse gas impacts.

(6) With respect to purchases, investments, or construction by a company, is consistent with the principles for resource selection expressed in that company's approved least-cost integrated plan.

(7) Except as to a natural gas facility that is not part of or incidental to an electric generating facility, is in compliance with the electric energy plan approved by the Department under section 202 of this title, or that there exists good cause to permit the proposed action.

(8) Does not involve a facility affecting or located on any segment of the waters of the State that has been designated as outstanding resource waters by the Secretary of Natural Resources, except that with respect to a natural gas or electric transmission facility, the facility does not have an undue adverse effect on those outstanding resource waters.

(9) With respect to a waste to energy facility:

(A) is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a, which is consistent with the State Solid Waste Management Plan; and

(B) is included in a solid waste management plan adopted pursuant to 24 V.S.A. § 2202a for the municipality and solid waste district from which 1,000 tons or more per year of the waste is to originate, if that municipality or district owns an

operating facility that already beneficially uses a portion of the waste.

(10) Except as to a natural gas facility that is not part of or incidental to an electric generating facility, can be served economically by existing or planned transmission facilities without undue adverse effect on Vermont utilities or customers.

(11) With respect to an in-state generation facility that produces electric energy using woody biomass, will:

(A) comply with the applicable air pollution control requirements under the federal Clean Air Act, 42 U.S.C. § 7401 et seq.;

(B) achieve the highest design system efficiency that is commercially available, feasible, and cost-effective for the type and design of the proposed facility; and

(C) comply with harvesting procedures and procurement standards that ensure long-term forest health and sustainability. These procedures and standards at a minimum shall be consistent with the guidelines and standards developed pursuant to 10 V.S.A. § 2750 (harvesting guidelines and procurement standards) when adopted under that statute.

(c)(1) Except as otherwise provided in subdivision (j)(3) of this section, in the case of a municipal plant or department formed under local charter or chapter 79 of this title or a cooperative formed under chapter 81 of this title, any proposed investment, construction, or contract subject to this section shall be approved by a majority of the voters of a municipality or the members of a cooperative voting

upon the question at a duly warned annual or special meeting to be held for that purpose. However, in the case of a cooperative formed under chapter 81 of this title, an investment in or construction of an in-state electric transmission facility shall not be subject to the requirements of this subsection if the investment or construction is solely for reliability purposes and does not include new construction or upgrades to serve a new generation facility.

(2) The municipal department or cooperative shall provide to the voters or members, as the case may be, written assessment of the risks and benefits of the proposed investment, construction, or contract that were identified by the Public Utility Commission in the certificate issued under this section. The municipal department or cooperative also may provide to the voters an assessment of any other risks and benefits.

(d) Nothing in this section shall be construed to prohibit a company from executing a letter of intent or entering into a contract before the issuance of a certificate of public good under this section, provided that the company's obligations under that letter of intent or contract are made subject to compliance with the requirements of this section.

(e)(1) Before a certificate of public good is issued for the construction of a nuclear energy generating plant within the State, the Public Utility Commission shall obtain the approval of the General Assembly and the Assembly's determination that the construction of the proposed facility will promote the general welfare. The Public Utility Commission shall advise the General Assembly of any petition submitted under

this section for the construction of a nuclear energy generating plant within this State, by written notice delivered to the Speaker of the House of Representatives and to the President of the Senate. The Department of Public Service shall submit recommendations relating to the proposed plant and shall make available to the General Assembly all relevant material. The requirements of this subsection shall be in addition to the findings set forth in subsection (b) of this section.

(2) No nuclear energy generating plant within this State may be operated beyond the date permitted in any certificate of public good granted pursuant to this title, including any certificate in force as of January 1, 2006, unless the General Assembly approves and determines that the operation will promote the general welfare, and until the Public Utility Commission issues a certificate of public good under this section. If the General Assembly has not acted under this subsection by July 1, 2008, the Commission may commence proceedings under this section and under 10 V.S.A. chapter 157, relating to the storage of radioactive material, but may not issue a final order or certificate of public good until the General Assembly determines that operation will promote the general welfare and grants approval for that operation.

(f) However, plans for the construction of such a facility within the State must be submitted by the petitioner to the municipal and regional planning commissions no less than 45 days prior to application for a certificate of public good under this section,

unless the municipal and regional planning commissions shall waive such requirement.

(1) The municipal or regional planning commission may take one or more of the following actions:

(A) Hold a public hearing on the proposed plans. The planning commission may request that the petitioner or the Department of Public Service, or both, attend the hearing. The petitioner and the Department each shall have an obligation to comply with such a request. The Department shall consider the comments made and information obtained at the hearing in making recommendations to the Commission on the application and in determining whether to retain additional personnel under subdivision (1)(B) of this subsection.

(B) Request that the Department of Public Service exercise its authority under section 20 of this title to retain experts and other personnel to review the proposed facility. The Department may commence retention of these personnel once the petitioner has submitted proposed plans under this subsection (f). The Department may allocate the expenses incurred in retaining these personnel to the petitioner in accordance with section 21 of this title. Granting a request by a planning commission pursuant to this subdivision shall not oblige the Department or the personnel it retains to agree with the position of the commission.

(C) Make recommendations to the petitioner within 40 days following the petitioner's submittal to the planning commission under this subsection (f).

(D) Once the petition is filed with the Public Utility Commission, make recommendations to the Commission by the deadline for submitting comments or testimony set forth in the applicable provision of this section, Commission rule, or scheduling order issued by the Commission.

(2) The petitioner's application shall address the substantive written comments related to the criteria of subsection (b) of this section received by the petitioner within 45 days following the submittal made under this subsection and the substantive oral comments related to those criteria made at a public hearing under subdivision (1) of this subsection.

(g) Notwithstanding the 45 days' notice required by subsection (f) of this section, plans involving the relocation of an existing transmission line within the State must be submitted to the municipal and regional planning commissions no less than 21 days prior to application for a certificate of public good under this section.

(h) The position of the State of Vermont in federal certification or other approval proceedings for natural gas facilities shall be developed in accordance with this subsection.

(1) A natural gas facility requiring federal approval shall apply to the Public Utility Commission for an opinion under this section (on or before the date on which the facility applies for such federal approval in the case of a facility that has not applied for federal approval before January 16, 1988). Any opinion issued under this subsection shall be developed based

upon the criteria established in subsection (b) of this section.

(2) If the Commission conducts proceedings under this subsection, the Department shall give due consideration to the Commission's opinion as to facilities of a natural gas company, and that opinion shall guide the position taken before federal agencies by the State of Vermont, acting through the Department of Public Service under section 215 of this title.

(3) If the Commission conducts proceedings under this subsection, it may consolidate them, solely for purposes of creating a common record, with any related proceedings conducted under subdivision (a)(3) of this section.

(i)(1) No company, as defined in sections 201 and 203 of this chapter, without approval by the Commission, after giving notice of such investment or filing a copy of that contract with the Commission and the Department at least 30 days prior to the proposed effective date of that contract or investment:

(A) may invest in a gas-production facility located outside this State; or

(B) may execute a contract for the purchase of gas from outside the State, for resale to firm-tariff customers, that:

(i) is for a period exceeding five years; or

(ii) represents more than 10 percent of that company's peak demand for resale to firm-tariff customers.

(2) The Department and the Commission shall consider within 30 days whether to investigate the proposed investment or contract.

(3) The Commission, upon its own motion or upon the recommendation of the Department, may determine to initiate an investigation. If the Commission does not initiate an investigation within such 30-day period, the contract or investment shall be deemed to be approved. If the Commission determines to initiate an investigation, it shall give notice of that decision to the company proposing the investment or contract, the Department, and such other persons as the Commission determines are appropriate. The Commission shall conclude its investigation within 120 days following issuance of its notice of investigation, or within such shorter period as it deems appropriate, unless the company consents to waive the 120-day requirement. Except when the company consents to waive the 120-day requirement, if the Commission fails to issue a decision within that 120-day period, the contract or investment shall be deemed to be approved. The Commission may hold informal, public, or evidentiary hearings on the proposed investment or contract.

(4) Nothing in this subsection shall prohibit a company from negotiating or adjusting periodically the price of other terms of supply through a supplement to such a contract, provided that the supplement falls within the terms specified in such a contract, as approved. The Commission's authority to investigate such adjustments under other authorities of this title shall not be impaired. Such a company shall file with the Department and the Commission a

copy of any such supplement to the contract or other documentation that states any terms that have been renegotiated or adjusted by the company at least 30 days prior to the effective date of the renegotiated or adjusted price or other terms.

(5) Nothing in this subsection shall be construed to prohibit a gas company from executing a development contract, a contract for design and engineering, a contract to seek regulatory approvals for a gas-production facility, or a letter of intent for such purchase of gas that makes the company's obligations under that letter of intent subject to the requirements of this subsection, prior to the filing with the Commission and Department of such notice or proposed contract or pending any investigation under this subsection.

(j)(1) The Commission may, subject to such conditions as it may otherwise lawfully impose, issue a certificate of public good in accordance with the provisions of this subsection and without the notice and hearings otherwise required by this chapter if the Commission finds that:

(A) approval is sought for construction of facilities described in subdivision (a)(2) or (3) of this section;

(B) such facilities will be of limited size and scope;

(C) the petition does not raise a significant issue with respect to the substantive criteria of this section; and

(D) the public interest is satisfied by the procedures authorized by this subsection.

(2) Any party seeking to proceed under the procedures authorized by this subsection shall file a proposed certificate of public good and proposed findings of fact with its petition. Within two business days following notification by the Commission that the filing is complete, the party shall serve copies of the complete filing on the parties specified in subdivision (a)(4)(C) of this section and the party shall give written notice of the proposed certificate and of the Commission's determination that the filing is complete to those parties, to any public interest organization that has in writing requested notice of applications to proceed under this subsection, and to any other person found by the Commission to have a substantial interest in the matter. The notice shall request comment within 30 days following the date of service of the complete filing on the question of whether the petition raises a significant issue with respect to the substantive criteria of this section. If the Commission finds that the petition raises a significant issue with respect to the substantive criteria of this section, the Commission shall hear evidence on any such issue.

(3) The construction of facilities authorized by a certificate issued under this subsection shall not require the approval of voters of a municipality or the members of a cooperative, as would otherwise be required under subsection (c) of this section.

(k)(1) Notwithstanding any other provisions of this section, the Commission may waive, for a specified and limited time, the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility, a generation facility, or an energy storage facility as necessary to ensure the

stability or reliability of the electric system or a natural gas facility, pending full review under this section.

(2) A person seeking a waiver under this subsection shall file a petition with the Commission and shall provide copies to the Department of Public Service and the Agency of Natural Resources. Upon receiving the petition, the Commission shall conduct an expedited preliminary hearing, upon such notice to the governmental bodies listed in subdivision (a)(4)(C) of this section as the Commission may require.

(3) An order granting a waiver may include terms, conditions, and safeguards, including the posting of a bond or other security, as the Commission deems proper, considering the scope and duration of the requested waiver.

(4) A waiver shall be granted only upon a showing that:

(A) good cause exists because an emergency situation has occurred;

(B) the waiver is necessary to provide adequate and efficient service or to preserve the property of the public service company devoted to public use;

(C) measures will be taken, as the Commission deems appropriate, to minimize significant adverse impacts under the criteria specified in subdivisions (b)(5) and (8) of this section; and

(D) taking into account any terms, conditions, and safeguards that the Commission may require, the waiver will promote the general good of the State.

(5) Upon the expiration of a waiver, if a certificate of public good has not been issued under this section, the Commission shall require the removal, relocation, or alteration of the facilities subject to the waiver, as it finds will best promote the general good of the State.

(l) Notwithstanding other provisions of this section, and without limiting any existing authority of the Governor, and pursuant to 20 V.S.A. § 9(10) and (11), when the Governor has proclaimed a state of emergency pursuant to 20 V.S.A. § 9, the Governor, in consultation with the Chair of the Public Utility Commission and the Commissioner of Public Service or their designees, may waive the prohibitions contained in this section upon site preparation for or construction of an electric transmission facility, a generation facility, or an energy storage facility as necessary to ensure the stability or reliability of the electric system or a natural gas facility. Waivers issued under this subsection shall be subject to such conditions as are required by the Governor and shall be valid for the duration of the declared emergency plus 180 days or such lesser overall term as determined by the Governor. Upon the expiration of a waiver under this subsection, if a certificate of public good has not been issued under this section, the Commission shall require the removal, relocation, or alteration of the facilities, subject to the waiver, as the Commission finds will best promote the general good of the State.

(m) In any matter with respect to which the Commission considers the operation of a nuclear energy generating plant beyond the date permitted in any certificate of public good granted under this title, including any certificate in effect as of January 1, 2006, the Commission shall evaluate the application under current assumptions and analyses and not an extension of the cost benefit assumptions and analyses forming the basis of the previous certificate of public good for the operation of the facility.

(n)(1) No company as defined in section 201 of this chapter and no person as defined in 10 V.S.A. § 6001(14) may place or allow the placement of wireless communications facilities on an electric transmission or generation facility located in this State, including a net metering system, without receiving a certificate of public good from the Public Utility Commission pursuant to this subsection. The Public Utility Commission may issue a certificate of public good for the placement of wireless communications facilities on electric transmission and generation facilities if such placement is in compliance with the criteria of this section and Commission rules or orders implementing this section. In developing such rules and orders, the Commission:

(A) may waive the requirements of this section that are not applicable to wireless telecommunication facilities, including criteria that are generally applicable to public service companies as defined in this title;

(B) may modify notice and hearing requirements of this title as it deems appropriate;

(C) shall seek to simplify the application and review process as appropriate; and

(D) shall be aimed at furthering the State's interest in ubiquitous mobile telecommunications and broadband service in the State.

(2) Notwithstanding subdivision (1)(B) of this subsection, if the Commission finds that a petition filed pursuant to this subsection does not raise a significant issue with respect to the criteria enumerated in subdivisions (b)(1), (3), (4), (5), and (8) of this section, the Commission shall issue a certificate of public good without a hearing. If the Commission fails to issue a final decision or identify a significant issue with regard to a completed petition made under this section within 60 days following its filing with the Clerk of the Commission and service to the Director of Public Advocacy for the Department of Public Service, the petition is deemed approved by operation of law. The rules required by this subsection shall be adopted within six months of June 9, 2007 and rules under this section may be adopted on an emergency basis to comply with the dates required by this section. As used in this subsection, "wireless communication facilities" include antennae, related equipment, and equipment shelter but do not include equipment used by utilities exclusively for intra- and inter-utility communications.

(o) The Commission shall not reject as incomplete a petition under this section for a wind generation facility on the grounds that the petition does not specify the exact make or dimensions of the turbines and rotors to be installed at the facility as long as the petition provides the maximum horizontal and

vertical dimensions of those turbines and rotors and the maximum decibel level that the turbines and rotors will produce as measured at the nearest residential structure over a 12-hour period commencing at 7:00 p.m.

(p) An in-state generation facility receiving a certificate under this section that produces electric energy using woody biomass shall annually disclose to the Commission the amount, type, and source of wood acquired to generate energy.

(q)(1) A certificate under this section shall be required for a plant using methane derived from an agricultural operation as follows:

(A) With respect to a plant that constitutes farming pursuant to 10 V.S.A. § 6001(22)(F), only for the equipment used to generate electricity from biogas, the equipment used to refine biogas into natural gas, the structures housing such equipment used to generate electricity or refine biogas, and the interconnection to electric and natural gas distribution and transmission systems. The certificate shall not be required for the methane digester, the digester influents and non-gas effluents, the buildings and equipment used to handle such influents and non-gas effluents, or the on-farm use of heat and exhaust produced by the generation of electricity, and these components shall not be subject to jurisdiction under this section.

(B) With respect to a plant that does not constitute farming pursuant to 10 V.S.A. § 6001(22)(F) but that receives feedstock from off-site farms, for all on-site components of the plant, for the transportation of

feedstock to the plant from off-site contributing farms, and the transportation of effluent or digestate back to those farms. The certificate shall not regulate any farming activities conducted on the contributing farms that provide feedstock to a plant or use of effluent or digestate returned to the contributing farms from the plant.

(2) Notwithstanding 1 V.S.A. § 214 and Commission Rule 5.408, if the Commission issued a certificate to a plant using methane derived from an agricultural operation prior to July 1, 2013, such certificate shall require an amendment only when there is a substantial change, pursuant to Commission Rule 5.408, to the equipment used to generate electricity from biogas, the equipment used to refine biogas into natural gas, the structures housing such equipment used to generate electricity or refine biogas, or the interconnection to electric and natural gas distribution and transmission systems. The Commission's jurisdiction in any future proceedings concerning such a certificate shall be limited pursuant to subdivision (1) of this subsection.

(3) This subsection shall not affect the determination, under section 8005a of this title, of the price for a standard offer to a plant using methane derived from an agricultural operation.

(4) As used in this section, "biogas" means a gas resulting from the action of microorganisms on organic material such as manure or food processing waste.

(r) The Commission may provide that, in any proceeding under subdivision (a)(2)(A) of this section

for the construction of a renewable energy plant, a demonstration of compliance with subdivision (b)(2) of this section, relating to establishing need for the plant, shall not be required if all or part of the electricity to be generated by the plant is under contract to one or more Vermont electric distribution companies and if no part of the plant is financed directly or indirectly through investments, other than power contracts, backed by Vermont electricity ratepayers. In this subsection, "plant" and "renewable energy" shall be as defined in section 8002 of this title.

(s) This subsection sets minimum setback requirements that shall apply to in-state ground-mounted solar electric generation facilities approved under this section, unless the facility is installed on a canopy constructed on an area primarily used for parking vehicles that is in existence or permitted on the date the application for the facility is filed.

(1) The minimum setbacks shall be:

(A) From a State or municipal highway, measured from the edge of the traveled way:

(i) 100 feet for a facility with a plant capacity exceeding 150 kW; and

(ii) 40 feet for a facility with a plant capacity less than or equal to 150 kW but greater than 15 kW.

(B) From each property boundary that is not a State or municipal highway:

(i) 50 feet for a facility with a plant capacity exceeding 150 kW; and

(ii) 25 feet for a facility with a plant capacity less than or equal to 150 kW but greater than 15 kW.

(2) This subsection does not require a setback for a facility with a plant capacity equal to or less than 15 kW.

(3) On review of an application, the Commission may:

(A) require a larger setback than this subsection requires;

(B) approve an agreement to a smaller setback among the applicant, the municipal legislative body, and each owner of property adjoining the smaller setback; or

(C) require a setback for a facility constructed on an area primarily used for parking vehicles, if the application concerns such a facility.

(4) In this subsection:

(A) "kW" and "plant capacity" shall have the same meaning as in section 8002 of this title.

(B) "Setback" means the shortest distance between the nearest portion of a solar panel or support structure for a solar panel, at its point of attachment to the ground, and a property boundary or the edge of a highway's traveled way.

(t) Notwithstanding any contrary provision of the law, primary agricultural soils as defined in 10 V.S.A. § 6001 located on the site of a solar electric generation facility approved under this section shall remain classified as such soils, and the review of any change

in use of the site subsequent to the construction of the facility shall treat the soils as if the facility had never been constructed. Each certificate of public good issued by the Commission for a ground-mounted solar generation facility shall state the contents of this subsection.

(u) A certificate under this section shall only be required for an energy storage facility that has a capacity of 100 kW or greater, unless the Commission establishes a larger threshold by rule. The Commission shall establish a simplified application process for energy storage facilities subject to this section with a capacity of up to 1 MW, unless it establishes a larger threshold by rule. For facilities eligible for this simplified application process, a certificate of public good will be issued by the Commission by the 46th day following filing of a complete application, unless a substantive objection is timely filed with the Commission or the Commission itself raises an issue. The Commission may require facilities eligible for the simplified application process to include a letter from the interconnecting utility indicating the absence or resolution of interconnection issues as part of the application. (Added 1969, No. 69, § 1, eff. April 18, 1969; amended 1969, No. 207 (Adj. Sess.), § 12, eff. March 24, 1970; 1971, No. 208 (Adj. Sess.), eff. March 31, 1972; 1975, No. 23; 1977, No. 11, §§ 1, 2; 1979, No. 204 (Adj. Sess.), § 31, eff. Feb. 1, 1981; 1981, No. 111 (Adj. Sess.); 1983, No. 45; 1985, No. 48, § 1; 1987, No. 65, § 1, eff. May 28, 1987; 1987, No. 67, § 14; 1987, No. 273 (Adj. Sess.) § 1, eff. June 21, 1988; 1989, No. 256 (Adj. Sess.), § 10(a), eff. Jan. 1, 1991; 1991, No. 99, §§ 3, 4; 1991, No. 259 (Adj. Sess.), §§ 6, 7; 1993, No. 21, §

10, eff. May 12, 1993; 1993, No. 159 (Adj. Sess.), § 1a, eff. May 19, 1994; 2003, No. 42, § 2, eff. May 27, 2003; 2003, No. 82 (Adj. Sess.), §§ 2, 3; 2005, No. 160 (Adj. Sess.), §§ 2, 3; 2007, No. 79, § 16, eff. June 9, 2007; 2009, No. 6, §§ 1, 2, 3, eff. April 30, 2009; 2009, No. 45, § 7, eff. May 27, 2009; 2009, No. 146 (Adj. Sess.), § F30; 2011, No. 47, § 5; 2011, No. 62, § 26; 2011, No. 138 (Adj. Sess.), § 27, eff. May 14, 2012; 2011, No. 170 (Adj. Sess.), § 12, eff. May 18, 2012; 2013, No. 24, § 4, eff. May 13, 2013; 2013, No. 88, § 1; 2015, No. 23, § 151; 2015, No. 40, § 31; 2015, No. 51, § F.9, eff. June 3, 2015; 2015, No. 56, §§ 19, 20; 2015, No. 56, §§ 26a, 26b, 26c, eff. June 11, 2015; 2015, No. 174 (Adj. Sess.), § 11, eff. June 13, 2016; 2017, No. 53, §§ 1, 3, 4; 2017, No. 74, § 125; 2017, No. 163 (Adj. Sess.), § 1; 2019, No. 31, §§ 17, 25; 2021, No. 42, § 6; 2021, No. 54, § 9, eff. Dec. 31, 2022; 2023, No. 33, § 1, eff. July 1, 2023; 2023, No. 85 (Adj. Sess.), § 384, eff. July 1, 2024; 2023, No. 142 (Adj. Sess.), § 6, eff. May 30, 2024.)