STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION

CHITTENDEN UNIT — Docket No. 169-2-20 Cncv

OTTER CREEK SOLAR LLC and PLH LLC Plaintiffs, v. VERMONT AGENCY OF NATURAL RESOURCES, VERMONT PUBLIC UTILITY COMMISSION and the STATE OF VERMONT, Defendants.	**COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF**

NATURE OF THE ACTION

"The nine most terrifying words in the English language are:
I'm from the Government, and I'm here to help."

~~President Ronald Reagan, August 12, 1986

1. Agency overreach and a government that unlawfully issues rules expressly targeted at making it more difficult to build solar energy facilities in Vermont, thus consciously choosing to have more fossil fuel burned and CO2 pumped into the atmosphere, is not the kind of "help" that is needed.

2. The Defendants need to get out of the way and stop their "business as usual" practice of throwing roadblock after roadblock in the way of people that are simply sick and tired of the Defendants' direct and indirect support of the fossil fuel industry and its allies.

3. Last November, a new report by 11,258 scientists in 153 countries from a broad

range of disciplines warned that the planet "clearly and unequivocally faces a climate emergency."[1] The planet is on fire and the Public Utility Commission ("PUC"), the Agency of Natural Resources ("ANR") and the State of Vermont act as if it is business as usual. Instead of acting to combat such harm, the Defendants have willfully ignored, and continue to willfully ignore, this impending harm. Making matters worse, the Defendants make it increasingly difficult for those, such as Plaintiffs, to take action to reduce the climate-destroying fossil fuel use that the Defendants have supported for decades, and still support.

4. The Defendants simply "press[] ahead toward calamity. It is as if an asteroid were barreling toward Earth and the government decided to shut down our only defenses." *Juliana v. United States*, No. 18-36082 (9th Cir. January 17, 2020) at 32 (Staton, J., dissenting).

5. The Plaintiffs challenge ANR's *de facto* issuance of rules without compliance with the Vermont Administrative Procedure Act ("VAPA"). The Plaintiffs seek to have those rules declared unlawful and void. The Plaintiffs also seek to have the related provision in the 30 V.S.A. §248 permitting process, which aids the climate destruction of the fossil fuel industry and its allies, declared unconstitutional because that statute is unconstitutionally vague; the power delegated is an unconstitutional delegation of legislative authority; the statute infringes on and unduly burdens Plaintiffs' rights to due process and equal protection, and it infringes on and unduly burdens Plaintiffs' right to a stable climate. The challenged statute and *de facto* rules support the fossil fuel industry by inhibiting solar energy development, and also result in *ad hoc*, standard-less, and inconsistent decision-making by the state agencies: harming Plaintiffs' ability to develop, build, operate and maintain solar electric energy facilities in Vermont.

[1] "*More than 11,000 scientists from around the world declare a 'climate emergency*.'" Washington Post, November 5, 2019, https://www.washingtonpost.com/science/2019/11/05/more-than-scientists-around-world-declare-climate-emergency/.

6. One of the findings that is required for a solar energy project to obtain a certificate of public good under 30 V.S.A. § 248 is that the facility "will not have an undue adverse effect on … the natural environment … with due consideration having been given to the criteria specified in 10 V.S.A. §§ … 6086(a)(1) through (8) and (9)(K) .. and greenhouse gas impacts."

7. Title 10, Ch. 123, 10 V.S.A. § 5401 *et seq*. establish statutory criteria for the Secretary of ANR to adopt, by rule, lists of threatened and endangered species to be protected from takings.

8. There is no legislative authorization given to the Secretary of ANR to list nor protect rare or very rare species in Vermont that do not fit within the criteria to be classified as threatened or endangered.

9. The Defendant ANR has adopted several *de facto* rules in an effort to expand its authority beyond what has been granted by the Legislature. ANR's rules seek to define the meaning of undue adverse effect on the natural environment in a section 248 proceeding. The medium that it has chosen for that expansion is styled as "guidance," but that guidance is, in reality, an agency statement of general applicability that implements, interprets, or prescribes law or policy. Besides not having statutory authorization for the expansion of its portfolio, ANR has issued its *de facto* rules to protect rare and very rare plants without adherence to the requirements of the VAPA.

10. ANR's *de facto* rare plant rules are based upon an *ad hoc* method for classifying species as rare or very rare. These *de facto* rules also purport to establish criteria for when a solar facility has an undue effect on the natural environment under 30 V.S.A. §248(b)(5).

11. At the heart of this litigation is the arrow white-leaved aster (*Symphyotrichum urophyllum*), a plant that is *abundant* in the United States. Its range extends from the Midwest:

Ontario to Arkansas and east to the Carolinas, Pennsylvania, and New York, but does not normally occur across Vermont.

12. ANR's basis for its "listing" of the arrow white-leaved aster is that it is, like palm trees and likely thousands of other species, purportedly "rare" in Vermont—a term undefined by either ANR or statute.

13. The arrow white-leaved aster, however, is now abundant along the State of Vermont's rail corridor in Bennington, Vermont, where the railway simply brush-hogs the plants, and neither ANR nor the State of Vermont are doing anything about it.

PARTIES

14. Plaintiff Otter Creek Solar LLC ("Otter Creek") is a Vermont limited liability company with its office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, Vermont 05482, and the developer of the Warner solar project in Bennington, Vermont. Plaintiff PLH LLC ("PLH") is an Indiana limited liability company with its office located at 145 Pine Haven Shores, Suite 1000A, Shelburne, Vermont 05482, and is the owner of the site of the Warner solar project. Plaintiffs' corporate mission includes combating climate change, enforcing laws that benefit developers of solar energy, and challenging state policies that impede solar energy development and that support the fossil fuel industry and its allies. Plaintiffs' mission includes fighting the devastating environmental impacts from burning fossil fuels, including without limitation the adverse effects that continued use of fossil-fuel generation will have on endangered species. *See, e.g.*, *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. 2019) (declaring California's implementation of PURPA under its Re-MAT program invalid); *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390 (D. Mass. 2016) *aff'd* 875 F.3d 64 (1st Cir. 2017) (declaring Massachusetts' implementation of PURPA invalid); *Windham Solar LLC*, 156 FERC ¶ 61,042

(2016), *Windham Solar LLC*, 157 FERC ¶61,134 (2016) (declaring Connecticut's implementation of PURPA invalid); *Windham Solar LLC v. Pub. Utils. Regulatory Authority*, Docket HHD-CV-HHD-CV19-6119928-S (Conn. Sup. Ct. filed November 13, 2019) (challenging the approval of incentives for fossil fuel generation under the Connecticut public trust doctrine). The statutes and PUC's *de facto* rules challenged herein have substantial adverse impacts on the development of solar electric generation in Vermont and by Plaintiffs. The adverse impacts, in turn, cause harm to the Plaintiffs, the environment, endangered species, and the good of the State of Vermont.

15. The Defendants are the State of Vermont, the Agency of Natural Resources, an agency of the State of Vermont, and the Public Utility Commission, also an agency of the State of Vermont.

VENUE

16. Venue is appropriate in this Court under 12 V.S.A § 402 as the Plaintiffs reside in Chittenden County.

STANDING

17. The constitutional requirements for standing in Vermont are actual injury or threat of actual injury, caused by the party against whom relief is sought, redressable by the court. *Parker v. Town of Milton*, 169 Vt. 74, 77, 726 A.2d 477, 480 (1998). Plaintiffs allege three forms of injury. First, Plaintiffs allege that the challenged ANR *de facto* rules, the ANR's disregard of the VAPA, and the standardless criterion on 30 V.S.A. §248(b)(5) related to the "natural environment," cause a direct financial harm to the Plaintiffs because they limit the amount of solar facilities that they can build, and increase the costs of operation and of seeking and obtaining approval to build solar facilities. For example, in the case of the Warner solar project, ANR is attempting to enforce its *de facto* rules in order to require Plaintiffs to alter the proposed solar

project, increasing the cost of construction and operation, and reducing the revenue it would receive from the project by forcing a reduction in the number of solar modules.

18. Second, the challenged rules and the standardless criterion on 30 V.S.A. §248(b)(5) related to the "natural environment" interfere with or impair, or threaten to interfere with or impair, the legal rights or privileges of the Plaintiffs, and raise the costs to Plaintiffs of exercising their rights and trying to use their land to build solar projects and combat climate destruction.

19. Third, Plaintiffs allege that the challenged rules and the standardless 6 in 30 V.S.A. §248(b)(5) related to the "natural environment" cause a direct harm to the environment by limiting the amount of renewable electricity that can be generated in the State of Vermont, which, in turn, causes harm to the Plaintiffs. The Defendants have known that carbon dioxide ("CO2") pollution from burning fossil fuels has been causing global warming and dangerous climate change, and that continuing to burn fossil fuels and purchasing electricity from such energy sources would destabilize the climate system on which present and future generations of our nation depend for their well-being and survival, and the economy depends. Defendants know of the unusually dangerous risks of harm to human life, liberty, and property that would be caused by continued burning of fossil fuels. Instead of acting to combat such harm, the Defendants have willfully ignored this impending harm, and by their hostile actions against Plaintiffs and other solar project developers are contributing to the dangerous risks of harm to human life, liberty, and property, including that of Plaintiffs.

20. Plaintiffs are beneficiaries of rights under the public trust doctrine, and have a constitutional right to a stable climate system, or at least one that is not intentionally, willfully, and wantonly, further destabilized by the Defendants. These rights include the protection of the right to enjoy property and the rights of present and future generations to vital natural resources such as

the air (atmosphere), water, and a stable climate. The overarching public trust resource is our country's life-sustaining and property sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere. Defendants must exercise their governmental power consistent with protecting those trust resources. Plaintiffs have standing because they are directly impacted by the Defendants' actions.

THE VERMONT ENDANGERED SPECIES LAW

21. Title 10, Ch. 123, 10 V.S.A. § 5401 et seq. (the "Vermont Endangered Species Law") establishes statutory criteria for the protection of threatened and endangered species by the Secretary of ANR.

22. Under the Vermont Endangered Species Law, the Secretary of ANR is granted the authority to develop a State endangered species list and a State threatened species list. 10 V.S.A. § 5402(a).

23. The statute prescribes the characteristics of endangered species to be a plant or animal species that "*normally occurs in the State* and its continued existence as a sustainable component of the State's wildlife or wild plants is in jeopardy." 10 V.S.A. § 5402(b) (emphasis added).

24. A species may be listed as threatened only if the following are present: "(1) it is a *sustainable component of the State's wildlife or wild plants*; (2) it is reasonable to conclude based on available information that its numbers are declining; and (3) unless protected, it will become an endangered species." 10 V.S.A. § 5402(c) (emphasis added).

25. Endangered and threatened species lists may be adopted only by administrative rulemaking. 10 V.S.A. § 5402(a).

26. In determining whether a species is threatened or endangered, the ANR Secretary

must "use the best scientific, commercial, and other data available," and "at least 30 days prior to commencement of rulemaking, notify and consult with appropriate officials in Canada, appropriate State and federal agencies, other states having a common interest in the species, affected landowners, and any interested persons". 10 V.S.A. § 5402(e).

27. The Vermont Endangered Species Law directs the Secretary of ANR to issue general permits to utilities to conduct vegetation management in utility rights-of-way that permit the taking of threatened or endangered species if such takings would not affect the continued survival of the species. 10 V.S.A. § 5402(l)(1), (5). As used in the statute, the term "utility" "means an electric company, telecommunication company, pipeline operator, or railroad company. 10 V.S.A. § 5402(l)(5).

28. The Vermont Endangered Species Law does not mention nor authorize the Secretary of ANR to list and protect rare species, by rule, guidance, or otherwise.

SCOPE OF ANR'S ADMINISTRATIVE POWERS;
THE VERMONT ADMINISTRATIVE PROCEDURE ACT

29. The Vermont Constitution divides power among the legislative, executive, and judiciary branches of government, requiring that they "shall be separate and distinct, so that neither exercise the powers properly belonging to the others." *In re D.L.*, 164 Vt. 223, 228, 669 A.2d 1172 (1994) (citing Vt. Const. ch. II, § 5; *Trybulski v. Bellows Falls Hydro-Elec. Corp.*, 112 Vt. 1, 6-7, 20 A.2d 117, 119 (1941)). "The logic of this provision is deceptively simple … the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them." *Id.*

30. "[U]nder our constitutional system, administrative agencies are subject to the same checks and balances which apply to our three formal branches of government. An agency must operate for the purposes and within the bounds authorized by its enabling legislation … ." *In re*

Agency of Admin., 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982).

31. As an administrative body, ANR "has only 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." *Perry v. Med. Practice Bd.*, 169 Vt. 399, 403, 737 A.2d 900, 903 (1999) (quotations omitted).

32. In addition to these substantive limitations on the powers of a state agency, the VAPA also prescribes the procedural powers of Vermont agencies to implement the statutory mandates that they do have.

33. Under the VAPA, 3 V.S.A. § 835(b), an agency "procedure or guidance document *shall not* have the force of law." 3 V.S.A. § 835(b) (emphasis added).

34. The VAPA, 3 V.S.A. §801(b)(9), defines a "rule" as "each agency statement of general applicability that implements, interprets, or prescribes law or policy and that has been adopted in the manner provided by sections 836-844 of this title."

35. The VAPA requires that prior to issuing a "rule," the agency must follow a specific notice and comment procedure. 3 V.S.A. §836.

36. Part of that procedure also gives a veto power to the Legislature. 3 V.S.A. §842. While "there is no bright line between exempt procedures and those rules requiring adoption pursuant to rulemaking requirements," *King v. Gorczyk*, 2003 VT 34, P23, here ANR's "guidance" constitutes "the creation of a rule consisting of an 'agency statement of general applicability which implements, interprets, or prescribes law or policy.'" *In re Woodford Packers Inc.*, 2003 VT 60, P15.

ANR'S THREE SETS OF *DE FACTO* RULES

37. Styled as "guidance," ANR's first set of *de facto* rules are contained within its

"Guidance for Conducting Rare, Threatened, and Endangered Plant Inventories in Connection with Section 248 Projects." That "guidance" sets forth rules for when an inventory for rare, threatened, or endangered plants is warranted and the timing and methodology of an inventory. The guidance document also sets forth the thresholds promulgated by ANR for determining when impacts to rare and very rare plants are considered unduly adverse (establishing a threshold of less than 10% impact to an S1 plant population and less than 20% impact to an S2 plant population), and sets forth rules relating to avoidance, minimization and mitigation of deemed adverse impacts. ANR has not published any definition for what it considers a "population."

38. Styled as "guidance," ANR's second set of *de facto* rules are contained within its "Guidance for Non-Native Invasive Plant Species Monitoring and Control in Connection with Section 248 Projects."[2] This "guidance" purports to establish best management practices for preventing the introduction and spread of non-native invasive species ("NNIS").

39. ANR has adopted a third set of *de facto* rules establishing a classification system for plants, ranking them from S1 to S5. Under ANR's rule, plants ranked S4 and S5 are common or very common, respectively. Those ranked as S3 are considered uncommon and typically have between 30 and 100 known populations in the state. ANR does not attempt to regulate species in categories S3-S5. The next two categories include species that occur in low numbers throughout the state. Plants ranked as S2 are considered as rare and are typically known from between 6 and

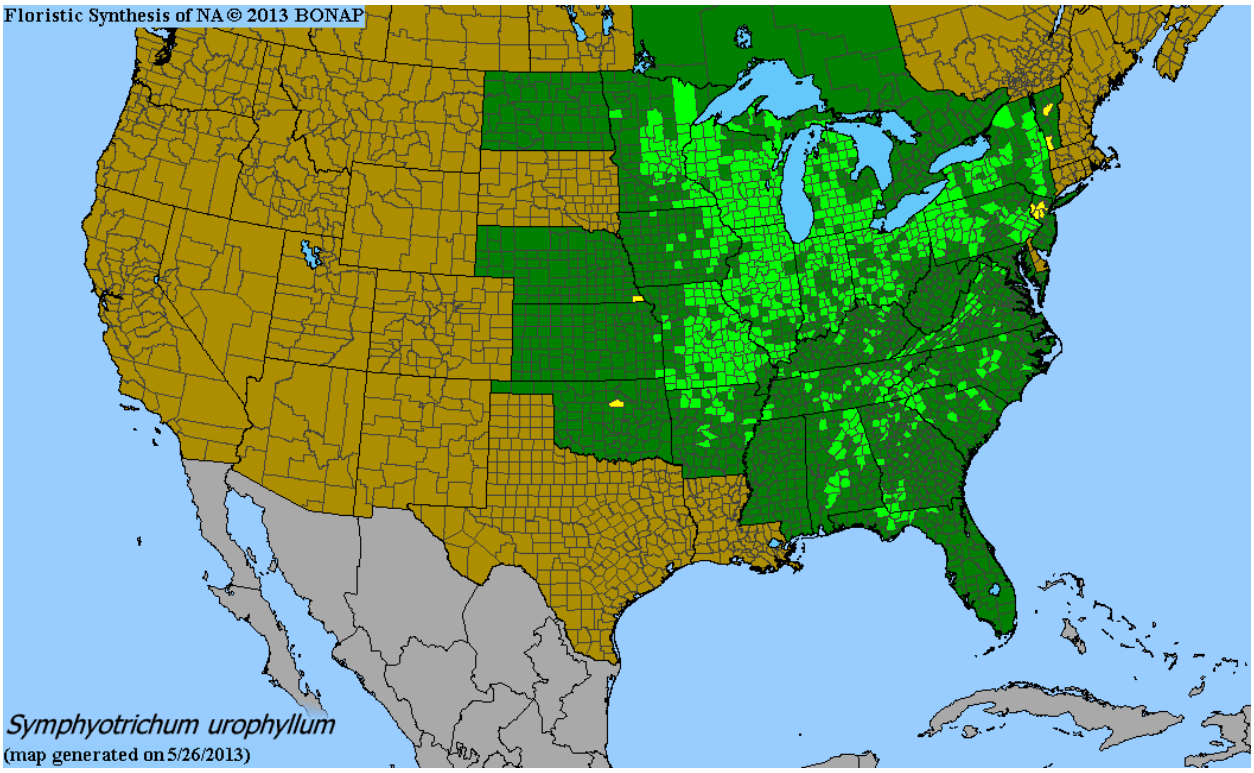
[2] ANR's unlawful attempt to expand its jurisdiction is reinforced by the fact that the Legislature expressly incorporated that due consideration be given to the Act 250 criterion (incorporated under 248(b)(5) – criterion 8(A)) which excludes rare and threatened species. Only "Necessary wildlife habitat and endangered species" are relevant, and even then only if (i) a "development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species; and (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species."

20 populations. Plants ranked as S1 are considered very rare and typically occur at five or fewer locations throughout the state or are facing a severe threat and/or a significant decline. Again, ANR has not published any definition for what it considers a "population" or an "occurrence".

THE WHITE ARROW-LEAVED ASTER

40. ANR ranks the White Arrow-Leaved Aster as S1 (very rare) in Vermont. Its range extends from the Midwest: Ontario to Arkansas and east to the Carolinas, Pennsylvania, and New York.

41. The distribution of the White Arrow-Leaved Aster is shown in the map below.



Source: https://www.minnesotawildflowers.info/flower/arrowleaf-aster

42. Hundreds of white arrow-leaved asters have been found on the Plaintiffs' Warner solar project site.

43. Well over a thousand exist in the State of Vermont railway corridor adjoining the Warner solar project site.

44. ANR is seeking to force Plaintiffs to adhere to the requirements of ANR's unlawfully issued *de facto* rules, through the standardless criterion under 30 V.S.A. §248(b)(5) related to undue adverse effect on the natural environment.

COUNT I

DECLARATION THAT ANR'S THREE SETS OF *DE FACTO* RULES ARE VOID, UNENFORCEABLE, BEYOND ANR'S STATUTORY AUTHORIZATION, AND IN VIOLATION OF THE VERMONT ENDANGERED SPECIES LAW

45. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

46. The Vermont Endangered Species Law limits the scope of ANR's regulatory jurisdiction to endangered and threatened species; there is no legislative authorization, express or implied, given to the Secretary of ANR to list, protect or regulate rare or very rare plant species in Vermont.

47. "To determine the scope of authority vested in an administrative agency by a statutory grant of power, we look to its enabling legislation." *Id.* (citing *Lemieux v. Tri-State Lotto Comm'n*, 164 Vt. 110, 113, 666 A.2d 1170, 1172-73 (1995)).

48. As an administrative body, ANR "has only 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." *Perry v. Med. Practice Bd.*, 169 Vt. 399, 403, 737 A.2d 900, 903 (1999) (quotations omitted).

49. "It is axiomatic that an administrative body may promulgate only those rules within the scope of its legislative grant of authority." *In re Vermont Verde Antique Int'l*, 174 Vt. 208 (2002) (citing *In re Agency of Admin.*, 141 Vt. 68, 76, 444 A.2d 1349, 1352 (1982) (an agency "must operate for the purposes and within the bounds authorized by its enabling legislation").

50. Further, restrictions on development of real property "are in derogation of the common law." *In re Willey*, 120 Vt. 359, 365 (1958). Such restrictions must be strictly construed. *Id*. "[E]xemptions should be construed in favor of the owner." *Id*.

51. Under the Vermont Endangered Species Law, the Legislature granted ANR the authority to list and regulate only threatened and endangered species, not rare plants nor very rare plants, such as the white arrow-leaved aster. This is clear from the plain language of the statute, which does not mention rare nor very rare plants. "In construing a statute, our paramount goal is to discern and implement the intent of the Legislature." *State v. Berard*, 2019 VT 65, ¶ 12 (citing *Miller v. Miller*, 2005 VT 89, ¶ 14, 178 Vt. 273, 882 A.2d 1196. "If the intent of the Legislature is apparent on the face of the statute because the plain language of the statute is clear and unambiguous", courts must implement the statute according to that plain language. *Id.* (citation omitted). *See also Levine v. Wyeth*, 2006 VT 107, ¶ 31, 186 Vt. 76 (deference to an agency to interpret a statute is appropriate where a statutory term or phrase the agency is charged with applying is undefined and ambiguous) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984)); *Town of Killington v. State*, 172 Vt. 182, 189, 192 (2001)).

52. ANR cannot do an end run around its lack of authority under the guise of a "guidance" document.

53. Each of the *de facto* rules also impermissibly exceeds the legislative grant of authority because ANR may list only endangered species that "normally occur[] in the State" and threatened species that are "a sustainable component of the State's wildlife or wild plants." 10 V.S.A. §§ 5402(a), (c). The white arrow-leaved aster does not normally occur in Vermont, but is rather a non-native plant species to Vermont.

54. Each of the *de facto rules* also violates the Vermont Endangered Species Law

because the listing of protected species must be adopted by rulemaking, with advance notification and consultation with appropriate officials in Canada, appropriate State and federal agencies, other states having a common interest in the species, affected landowners, and any interested persons. 10 V.S.A. §§ 5402(a), (e). The *de facto* rules were not implemented in accordance with this required procedure (which in any event, is limited to listings of endangered and threatened species).

55. Wherefore, Plaintiffs respectfully ask this Court to declare that ANR has no statutory authorization to regulate rare or very rare plants in Vermont through 30 V.S.A. §248 proceedings or otherwise and enjoin the Defendants from attempting to regulate rare or very rare plants through 30 V.S.A. §248 proceedings or otherwise.

COUNT II

DECLARATION THAT ANR'S THREE SETS OF *DE FACTO* RULES ARE VOID, UNENFORCEABLE, AND IN VIOLATION OF THE VAPA.

56. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

57. Each of ANR's three sets of *de facto* rules violates VAPA because they constitute a "statement of general applicability that implements, interprets, or prescribes law or policy."

58. ANR's adoption of its various criteria and rules falls "within the ambit of rulemaking under VAPA, because it 'both prescribed and implemented a policy intended to apply generally to a class of [renewable energy facilities].'" *In re Woodford Packers Inc*., 2003 VT 60 at P16 quoting *In re Diel*, 158 Vt. 549, 550, 614 A.2d 1223 (1992).

59. ANR was therefore required to follow the VAPA procedures prior to adoption. It did not.

60. ANR has not complied with the procedural requirements of the VAPA for adopting

its *de facto* rules. ANR cannot simply promulgate and implement *de facto* rules without following the requirements for adoption of rules under the VAPA.

61. Wherefore, Plaintiffs respectfully ask this Court to declare ANR's three sets of *de facto* rules void, and enjoin the Defendants from applying those criteria and rules.

COUNT III

DECLARATION THAT ANR'S THREE SETS OF *DE FACTO* RULES ARE AN UNLAWFUL SUBDELEGATION

62. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

63. Even if the Secretary of ANR had the authority to issue its *de facto* rules or guidance, each *de facto* rule was not issued by the Secretary but rather by subordinates to whom there was no delegation of authority, and even if there were a delegation, it would violate 3 V.S.A. 214.

64. Wherefore, Plaintiffs respectfully ask this Court to declare ANR's three sets of *de facto* rules void, and enjoin the Defendants from applying those criteria and rules.

COUNT IV

DECLARATION THAT THE CRITERION OF NO UNDUE ADVERSE EFFECT ON THE NATURAL ENVIRONMENT IN 30 V.S.A. §248(b)(5) IS UNCONSTITUTIONALLY VAGUE AND STANDARDLESS, THUS VIOLATING PLAINTIFFS' DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE VERMONT CONSTITUTION.

65. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

66. Under 30 V.S.A. §248(b)(5) prior to issuing a certificate of public good for an electric generating facility, the PUC must find that the facility "will not have an undue adverse effect on … the natural environment … 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) … and greenhouse gas impacts."

67. 30 V.S.A. §248(b)(5) due consideration reference provides for four specific criterion related to the natural environment—10 V.S.A. §§ 1424a(d) (relating to "Outstanding resource waters"), 10 V.S.A. §6086(a)(1)(related to undue water or air pollution), 10 V.S.A. §6086(a)(4) (related unreasonable soil erosion), 10 V.S.A. §6086(a)(8) (related destroying or significantly imperiling necessary wildlife habitat or any endangered species unless that effect is outweighed by other considerations).

68. The natural environment criterion is unconstitutionally vague and standard-less and invalid on its face and as-applied.

69. The criterion denies Plaintiffs the ability "to predict how discretion will be exercised and to develop proposed land uses accordingly."

70. The meaning of undue adverse effect on the natural environment is simply left to the *ad hoc* discretion of the then current PUC commissioners, making it essentially arbitrary.

71. Wherefore, Plaintiffs respectfully ask this Court to declare the natural environment criterion requirement in 30 V.S.A. §248(b)(5) invalid and enjoin the Defendants from applying that criterion.

COUNT V

DECLARATION THAT THE CRITERION OF NO UNDUE ADVERSE EFFECT ON THE NATURAL ENVIRONMENT IN 30 V.S.A. §248(b)(5) IS AN UNCONSTITUTIONAL DELEGATION, THUS VIOLATING PLAINTIFFS' DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE VERMONT CONSTITUTION.

72. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

73. The natural environment criterion in 30 V.S.A. §248(b)(5) is also unconstrained delegation, without any standards at all. It is therefore an unconstitutional delegation of legislative authority.

74. The criterion denies Plaintiffs the ability "to predict how discretion will be exercised and to develop proposed land uses accordingly."

75. The meaning of undue adverse effect on the natural environment is simply left to the *ad hoc* discretion of the then current PUC commissioners, making it essentially arbitrary.

76. Wherefore, Plaintiffs respectfully ask this Court to declare the natural environment criterion requirement in 30 V.S.A. §248(b)(5) invalid and enjoin the Defendants from applying that criterion.

COUNT VI

THE CHALLENGED *DE FACTO* RULES AND STATUTE—SECTION 248(b)(5)—VIOLATE ARTICLE 1 OF THE VERMONT CONSTITUTION, THE PUBLIC TRUST DOCTRINE AND PLAINTIFFS' DUE PROCESS RIGHTS.

77. Plaintiffs repeat and re-allege the allegations contained in each and every preceding paragraph of this Complaint.

78. Article 1 of the Vermont Constitution enshrines certain fundamental rights—"That all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." Article 7 provides that "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community." These rights incorporate fundamental protections required to sustain life itself. "[A] stable climate system is quite literally the foundation 'of society, without which there would be neither civilization nor progress.'" *Juliana v. United*

States, 217 F. Supp. 3d 1224, 1250 (D. Ore. 2016)[3] quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).[4]

79. Avoiding the most catastrophic impacts of climate change will require *unprecedented* action over the next decade. But the political and administrative process is broken, not only at the National level but in Vermont as well. The ANR's de facto rules and the natural environment criterion challenged herein continue to prop up the fossil fuel industry and its allies and the *status quo* of climate destruction.[5]

80. The Vermont Supreme Court has recognized the ongoing vitality of the public trust doctrine. *See, State v. Central V. Ry*., 153 Vt. 337, 342 (1989):

> Despite its antediluvian nature, however, the public trust doctrine retains an undiminished vitality. The doctrine is not "'fixed or static,' but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit.'" *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 326, 471 A.2d 355, 365 (1984) (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 N.J. 296, 309, 294 A.2d 47, 54 (1972)). The very purposes of the public trust have "evolved in tandem with the changing public perception of the values and uses of waterways." *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419, 434, 658 P.2d 709, 719, 189 Cal. Rptr. 346, 356

[3] Reversed on justiciability grounds in a 2-1 opinion by the Ninth Circuit Court of Appeals, No. No. 18-36082 (9th Cir. January 17, 2020). *But see, id*. at 14-16 ("Copious expert evidence establishes that this unprecedented rise stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked… caus[ing] sea levels to rise 15 to 30 feet by 2100. The problem is approaching 'the point of no return.' Absent some action, the destabilizing climate will bury cities, spawn life-threatening natural disasters, and jeopardize critical food and water supplies…The record also establishes that the government's contribution to climate change is not simply a result of inaction. The government affirmatively promotes fossil fuel use in a host of ways.")

[4] *But see, Juliana v. United States*, No. 18-36082 (9th Cir. January 17, 2020) at 21 ("Reasonable jurists can disagree about whether the asserted constitutional right exists. *Compare Clean Air Council v. United States*, 362 F. Supp. 3d 237, 250–53 (E.D. Pa. 2019) (finding no constitutional right), with *Juliana*, 217 F. Supp. 3d at 1248–50; *see also In re United States*, 139 S. Ct. at 453 (reiterating "that the 'striking' breadth of plaintiffs' below claims 'presents substantial grounds for difference of opinion'").")

[5] "[C]ourts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it." *Juliana v. U.S.*, 217 F. Supp. 3d 1224, 1262 (D. Ore. 2016).

(1983) (en banc). Nor is the doctrine fixed in its form among jurisdictions, as "there is no universal and uniform law upon the subject." *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

81. The Massachusetts Supreme Judicial Court has recognized that tidelands (the most frequent focus of the public trust doctrine) are like "air and light," which are also held for the common good. *Boston Waterfront Development Corp. v. Commonwealth*, 378 Mass. 629, 633 (1979) ("By the law of all civilized Europe, before the feudal system obtained in England, there was no such thing as property in tide waters. Tide waters were res omnium, that is, they were for the common use, like air and light.") (internal citations and quotations omitted).

82. As a moral matter, protecting the climate for future generations is a value deeply rooted in this nation's history and tradition, and is mirrored in the religious teachings of many faiths, including Christianity, Judaism, Islam, Hinduism, and Buddhism.[6] In the papal encyclical, *Laudato Si'*, Pope Francis issued a clarion call for climate action.[7] Speaking at the White House in 2015, Pope Francis urged action: "[C]limate change is a problem which can no longer be left to a future generation. When it comes to the care of our 'common home,' we are living at a critical moment in history."[8]

83. Similarly, the Framers recognized each generation's fundamental obligation to

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[6] *See, e.g.*, "To the Jewish People, to all Communities of Spirit, and to the World: A Rabbinic Letter on the Climate Crisis," signed by 425 Rabbis of all streams of Judaism, originally published May 2015, *available at* https://theshalomcenter.org/RabbinicLetterClimate; *Islamic Declaration on Global Climate Change*, International Islamic Climate Change Symposium, August 2015, *available at* http://islamicclimatedeclaration.org/islamic- declaration-on-global-climate-change; *Hindu Declaration on Climate Change*, November 23, 2015, *available at* http://www.hinduclimatedeclaration2015.org; *see also*, Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* at 279-280 (citing multiple faiths as recognizing public trust obligations to present and future generations).

[7] *Laudato Si'*, ¶ 53.

[8] Transcript of Pope Francis White House Welcoming Ceremony, *available at* http://www.popefrancisvisit.com/pope-francis-u-s-visit-speechtranscripts/#whitehouse.

preserve the value and integrity of natural resources for later generations. The most succinct, systematic treatment of intergenerational principles is provided by Thomas Jefferson to James Madison:

> The question [w]hether one generation of men has a right to bind another . . . is a question of such consequence as not only to merit decision, but place among the fundamental principles of every government . . . . I set out on this ground, which I suppose to be self-evident, 'that the earth belongs in usufruct to the living' . . . [.][9]

84. The writings of Theodore Roosevelt also furnish powerful expressions of the duty to future generations as the foundation of the American conservation ethic:

> The "greatest good of the greatest number" applies to the number within the womb of time, compared to which those now alive form but an insignificant fraction. Our duty to the whole including the unborn generations, bids us restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the conservation of . . . all our natural resources [is] essentially democratic in spirit, purpose, and method.[10]

85. As the preeminent climatologist, Dr. James Hansen, has warned, "Failure to act with all deliberate speed in the face of the clear scientific evidence of the long term dangers posed is the functional equivalent of a decision to eliminate the option of later generations and their legislatures to preserve a habitable climate system."[11] Allowing excessive carbon dioxide emissions to imperil the climate system jeopardizes the fundamental rights of all and of future generations. If fossil fuel emissions are not rapidly abated, then our children, grand-children and future generations will confront an inhospitable future.

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[9] Jefferson to James Madison, September 6, 1789, *Papers of Thomas Jefferson*, Julian Boyd ed., XV at 392-98 (1950).

[10] Theodore Roosevelt, *A Book-lover's Holidays in the Open* 299-300 (1916).

[11] James E. Hansen et al., *Scientific Case for Avoiding Dangerous Climate Change to Protect Young People and Nature*, NASA (Jul. 9, 2012), *available at* http://pubs.giss.nasa.gov/abs/ha08510t.html.

86. The Plaintiffs have a fundamental right to our country's life-sustaining and property sustaining climate system, which encompasses our atmosphere, waters, oceans, and biosphere. The Legislature, ANR and the PUC must exercise governmental power consistent with protecting those trust resources. As sovereign trustees, the Legislature, ANR and the PUC have a duty to refrain from actions which further impair these essential natural resources and which inhibit or interfere with action of Plaintiffs and others to combat the destructive effects of fossil fuel electric generation.

87. Plaintiffs have a constitutional right and a right under the public trust doctrine to use their land to build solar facilities, and only an overwhelmingly compelling contrary state interest is allowed to curtail that right. Standardless natural environment criteria and ANR's *de facto* rules do not rise to the level of a sufficient state interest to restrict and prevent Plaintiffs from using their land for solar energy facilities.

88. Wherefore, Plaintiffs respectfully ask this Court to declare that (i) Articles 1 and 7 of the Vermont Constitution establish a constitutional right to a stable climate, (ii) Articles 1 and 7 of the Vermont Constitution establish a constitutional right of all persons and property owners to use their property to reduce climate-destroying fossil fuel use, and (iii) the natural environment criterion in 30 V.S.A. §248(b)(5) and the ANR's *de facto* rules, individually and collectively unconstitutionally burden Plaintiffs' constitutional rights and rights under the public trust doctrine and are therefore void and unlawful, and enjoin the Defendants from applying the same.

RELIEF REQUESTED

1. For the reasons stated, Plaintiffs respectfully requests the following relief:

   a. Grant judgment in favor of Plaintiffs and against Defendants;

   b. Issue the declarations requested herein by Plaintiffs;

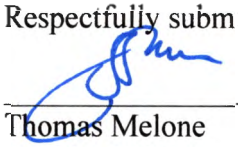
c. Grant all appropriate requested injunctive relief;

d. Award Plaintiffs' attorneys' fees and the costs of bringing this action; and

e. Grant Plaintiffs such other relief as is just and appropriate.

Dated: February 19, 2020

Respectfully submitted,



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