STATE OF VERMONT

SUPERIOR COURT CIVIL DIVISION
CHITTENDEN UNIT

OTTER CREEK SOLAR LLC and PLH LLC, Plaintiffs, v. VERMONT PUBLIC UTILITY COMMISSION and THE STATE OF VERMONT, Defendants.	DOCKET NO. 99-1-20 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.	DOCKET NO. 169-2-20 Cncv

DECISION ON MOTIONS TO DISMISS

In these two cases, consolidated for hearing and this decision, Plaintiffs have launched an assault on selected aspects of the regime that governs the permitting of solar projects in Vermont. They aim a broad barrage of constitutional, statutory, and administrative law attacks at both discrete provisions of the statutory framework and the Public Utility Commission and Agency of Natural Resources, each of which has a role in interpreting and administering those provisions.[1] The State has moved to dismiss both cases, itself levying a broad barrage of attacks at Plaintiffs'

[1] In no. 99-1-20 Cncv, Plaintiffs named the Public Utility Commission ("PUC") and the State of Vermont; in no. 169-2-20 Cncv, they named the PUC, Agency of Natural Resources ("ANR") and the State. For purposes of brevity and clarity, going forward, the court refers to the first of these cases as the PUC case, and the second as the ANR case; when referring to all three Defendants, the court will do so collectively, as "the State."

claims. These attacks hit home; each of Plaintiffs' claims fails, some for a number of reasons. Thus, the court grants the motions to dismiss.

BACKGROUND

I. Facts alleged

On a motion to dismiss, the court treats all well-pleaded facts as true. *Sutton v. Vermont Reg'l Ctr.*, 2019 VT 71A, ¶ 20. Ordinarily, this is a simple exercise. Here, however, the court's task is complicated by the prolixity and bombastic nature of Plaintiffs' allegations. For example, the opening allegation of the PUC case boldly asserts:

> The planet is on fire and the Public Utility Commission ("PUC") and the State of Vermont act as if it is business as usual, fiddling while the planet burns. Instead of acting to combat such harm, the Defendants have willfully ignored, and continue to willfully ignore, this impending harm.

The second allegation of the ANR case states:

> 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.

Both complaints are replete with similarly sweeping, inflammatory assertions, in derogation of one of the more fundamental dictates of the Rules of Civil Procedure—the requirement that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim." V.R.C.P. 8(a). Such allegations do little to assist the court in determining whether Plaintiffs have stated cognizable claims for relief.

Reading the complaints as if well-pleaded, and so separating factual wheat from rhetorical chaff, yields the following simple statement of Plaintiffs' claims. In the PUC case, Plaintiffs allege simply that they are LLCs with offices in Shelburne. In the ANR case, they go a bit further, alleging that they are the developer and site owner, respectively, "of the Warner solar project in Bennington, Vermont." In both cases, they make identical assertions as to their corporate missions:

> 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.

With one exception, in neither case do Plaintiffs make concrete allegations of activities they have undertaken in Vermont or any actions taken against them by any state agency. Rather, they take aim at specific statutes and what they characterize as *de facto* rules. Even in this regard, however, their allegations are vague and conclusory.

In the PUC case, they allege first, "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." PUC Compl. ¶ 4, To support their assertion of standing, they then allege "that the challenged statutes, the challenged PUC *de facto* rules, and the PUC's disregard of the VAPA 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," *id.* ¶ 7; that "the challenged statues 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," *id.* ¶ 8; "that the challenged statutes and PUC's actions 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," *id.* ¶ 9; and finally, that "Plaintiffs are beneficiaries of rights under the public trust doctrine, . . . [and] are directly impacted by the Defendants' actions," *id.* ¶ 10. In the ANR case, they parrot these allegations. ANR Compl. ¶¶ 5, 17–20. They also make the one allegation of action with a direct impact on them: "ANR is attempting to enforce its *de facto* rules in order to require Plaintiffs to alter the proposed [Warner] solar project, increasing the cost of construction and operation, and reducing the revenue it [sic] would receive from the project by forcing a reduction in the number of solar modules." *Id.* ¶ 17.

II. Statutory Framework

Plaintiffs attack three statutory provisions and what they argue are *de facto* rules that ANR and the PUC have adopted to implement those provisions. The first two of these provisions are part of the "Certificate of Public Good" ("CPG") process required of any electric generation, storage, or transmission project in Vermont. Broadly speaking, "no company . . . no[r] person . . . 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 . . . 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." 30 V.S.A. § 248(a)(2). Before the PUC issues a certificate of public good, it "shall find" that the construction:

> 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 [and]
>
> . . .
>
> 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.

30 V.S.A. § 248(b)(1), (5).

The third provision at issue here pertains to the "standard-offer program," which was "established . . . as part of an effort to promote development of renewable energy in Vermont." *In re Investigation into Programmatic Adjustments to Standard-Offer Program*, 2018 VT 52, ¶ 2, 207 Vt. 496 (citing 30 V.S.A. §§ 8001, 8005, 8005a). The standard-offer statute gives the Public Utility Commission "authority to offer power-purchase contracts to new renewable-energy plants if the proposed plants satisfy certain requirements; for example, the plant must be located in Vermont, have a capacity of 2.2 megawatts or less, and comply with other restrictions." *In re Programmatic Changes to Standard-Offer Program & Investigation into Establishment of Standard-Offer Prices*, 2017 VT 77, ¶ 2, 205 Vt. 358 (citing 30 § 8005a(b)). "Once a plant owner executes a standard-offer contract, the [Commission] guarantees a set price for that plant's energy for the duration of the contract regardless of whether the market price changes." *Id.* (citing 30 V.S.A. § 8005a(f)(4)). Vermont electric utilities are "then required to purchase the electricity generated by these projects at that price." *Investigation into Programmatic Adjustments to Standard-Offer Program*, 2018 VT 52, ¶ 2 (citing 30 V.S.A. § 8005a(k)(2)). This program effectively encourages the development of smaller-capacity renewable energy plants by providing long-term contracts with stable pricing.

As used in the standard-offer program statute,

> "Plant" means an independent technical facility that generates electricity from renewable energy. A group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid. Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project.

30 V.S.A. § 8002(18). This definition provides criteria to determine whether multiple facilities might be considered one "plant" for purposes of determining plant capacity. That, in turn, could affect whether they qualify for the standard-offer program. *See In re Portland St. Solar LLC*, 2021 VT 67, ¶ 23 (Vt. Sept. 3, 2021) (noting that the Legislature's amendment of § 8002(18) adding factors for deciding whether facilities are part of the same project "suggests a legislative intent to prevent developers from realizing the benefits of statutory programs targeted at smaller projects by essentially splitting up larger projects into co-located smaller projects with redundant equipment").

III. Claims

While the two cases are distinct, their claims sound strikingly similar notes. In the PUC case, Plaintiffs allege that the term "project" in 30 V.S.A. § 8002(18), the term "aesthetics" in 30 V.S.A. § 248(b), and the criterion of "no unduly adverse effect on orderly development of the region" in 30 V.S.A. § 248(b)(1) are all unconstitutionally vague and standardless (PUC Counts I, V, and XII) and unconstitutional delegations of power (PUC Counts II, VI, and XIII), in violation of due process and equal protection rights under the Vermont Constitution, and that they all violate the Common Benefits Clause (PUC Counts III, VII, and XIV). They also allege that the PUC's announced criteria and tests regarding those same terms and criterion are invalid *de facto* rules because they were not issued in compliance with the Vermont Administrative Procedure Act (PUC Counts IV, X, XVI). Next, they claim that the "orderly development of the region" and "aesthetics" criteria are impermissible redelegations of power (PUC Counts VIII and XV) and result in selective enforcement (PUC Count XVII). They further allege that the PUC's test for "undue adverse effect on aesthetics" is also an impermissible redelegation (PUC Count IX) and violates 24 V.S.A. § 4413(b), which provides that zoning bylaws "shall not regulate public utility power generating plants and transmission facilities regulated under 30 V.S.A. § 248" (PUC Count XI). Finally, they claim that the aesthetics and orderly development criteria

constitute unlawful viewpoint discrimination in violation of their free speech rights (PUC PUC Count XIX).[2]

In the ANR case, Plaintiffs first allege that ANR's "three sets of *de facto* rules" are beyond the Agency's statutory authorization and violate the Vermont Endangered Species Law (ANR Count I), violate the Administrative Procedure Act (ANR Count II), and constitute an unlawful subdelegation (ANR Count III). Next, they claim that the "no undue adverse effect on the natural environment" criterion is unconstitutionally vague (ANR Count IV) and an unconstitutional delegation (ANR Count V). Lastly, as in the PUC case, they allege that the challenged *de facto* rules and section 248(b)(5) violate the public trust doctrine and their constitutional right to a stable climate (ANR Count VI).

ANALYSIS

As suggested above, Plaintiffs' claims are subject to a broad range of attacks. Some of these attacks apply to multiple claims, in both cases, others to one claim only. As the introduction above suggests, the sheer breadth of the claims defies simple organization; so too does analysis of their shortcomings. The court therefore begins its analysis by addressing concerns that apply to most, if not all of Plaintiffs' claims—the scope of the claims properly before the court and questions of standing. It then turns to Plaintiffs' specific claims, by category.

A. Scope of Claims

It bears observing at the outset that Plaintiffs' claims are properly before the court, if at all, only as facial challenges to the various statutes and "*de facto* rules" at issue. This observation flows in part from two related considerations: the propriety of raising as-applied claims in the first instance in this court and Plaintiffs' standing to assert those claims. More fundamentally, though, it flows from the observation that with perhaps one minor exception, Plaintiffs have failed to articulate as-applied claims.

> "The distinction between facial and as-applied challenges . . . goes to the breadth of the remedy . . . ." [Citation omitted.] In a facial challenge, a litigant argues that "no set of circumstances exists under which [a statute or

[2] While these motions were pending, the Supreme Court decided three cases that bore potentially on the issues in these cases. *See In re Apple Hill Solar LLC*, 2021 VT 69; *In re Portland St. Solar LLC*, 2021 VT 67; *In re Chelsea Solar LLC*, 2021 VT 27. The court therefore invited further briefing on the applicability of those cases. In response, Plaintiffs have conceded that the Court's decision in *Apple Hill Solar* requires dismissal of Counts X and XI of the PUC Complaint. The court therefore omits any consideration of those claims from the discussion below.

> regulation] [c]ould be valid." [Citation omitted.] The remedy in a successful facial challenge is that a court will invalidate the contested law. [Citation omitted.] In an as-applied challenge, however, a party claims that a statute or regulation is invalid as applied to the facts of a specific case. [Citation omitted.] The scope of the remedy in an as-applied challenge is narrower. [Citation omitted.] Although a court grants relief "to the parties before the Court," it does not necessary invalidate the contested law in its entirety. [Citation omitted.]

In re Mountain Top Inn & Resort, 2020 VT 57, ¶ 22. In these cases, it is abundantly obvious that Plaintiffs' ambitions are far greater than to assert mere as-applied challenges; they are climate warriors who would subject anything in their path to the broad sweep of their scythe, leaving the path open for all other solar developers. Thus, each of the 19 counts in the PUC case asks the court to declare the offending provision or criterion invalid and to enjoin the State from applying it. Similarly, Count I of the ANR case asks the court "to declare that ANR has no statutory authorization to regulate rare or very rare plants in Vermont . . . and enjoin the Defendants from attempting to regulate rare or very rare plants . . . ." The remaining counts of that case follow the pattern set in the PUC case, asking the court to declare various "*de facto* rules," criteria, or statutory provisions invalid and enjoin their application.

With the one exception noted above, in none of these counts do Plaintiffs attack a specific application of the challenged provisions.[3] Thus, they have failed to assert "as applied" challenges. That is just as well, as in the context of these cases, Plaintiffs must first bring such challenges in a CPG proceeding. Under the statutory regime, the legislature has clearly entrusted to the PUC the administration of the CPG laws, and the PUC has necessarily developed expertise in this administration. Accordingly, the doctrine of primary jurisdiction requires that Plaintiffs make any challenges to the application of the statutes before the PUC. *See Travelers Indem. Co. v. Wallis*, 2003 VT 103, ¶¶ 13–17, 176 Vt. 167. This means that only facial challenges to the various provisions at issue are properly before the court.

[3] That exception, to the extent that it could be read as an allegation of action, fails to state a claim. As will be discussed below, ANR has no regulatory or decision-making authority in the statutory CPG regime. Thus, any "attempt" by ANR to "enforce its *de facto* rules in order to require Plaintiffs to alter the proposed [Warner] solar project" as alleged in paragraph 17 of the ANR Complaint, is toothless; it has no such enforcement power. In short, viewed in the context of the statutory framework, this allegation does not set forth a legally cognizable harm.

B. Standing (PUC Counts I–III, V–IX, XII–XV, XVII, & XIX; ANR Counts IV-V)

However characterized, to survive a motion to dismiss, Plaintiffs' claims must still meet the "case or controversy" requirement. *See Town of Cavendish v. Vermont Pub. Power Supply Auth.*, 141 Vt. 144, 147 (1982) ("The 'actual controversy' requirement is jurisdictional, and may not be waived by either the parties or the tribunal.). One component of this requirement is standing. *Parker v. Town of Milton*, 169 Vt. 74, 77 (1999). "To meet this burden, a plaintiff 'must show (1) injury in fact [in the form of an invasion of a legally protected interest], (2) causation, and (3) redressability.' " *Turner v. State*, 2017 VT 2, ¶ 11, 204 Vt. 78 (quoting *Brod v. Agency of Nat. Res.*, 2007 VT 87, ¶ 9, 182 Vt. 234); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.") (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61).[4] Moreover, "[t]he requirement of an actual or justiciable controversy means that the consequences of the dispute must be so set forth that the court can see that they are not based upon fear or anticipation but are reasonably to be expected." *Anderson v. State*, 168 Vt. 641, 644 (1998) (quotation omitted). "A claim is not constitutionally ripe if the claimed injury is conjectural or hypothetical rather than actual or imminent." *Turner*, 2017 VT 2, ¶ 9; *see also Spokeo*, 578 U.S. at 338 (injury must be " 'actual or imminent, not conjectural or hypothetical,' ") (quoting *Lujan*, 504 U.S. at 560).

In the present posture, the court must read the allegations liberally. "In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief." *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1 (quotation omitted). A court need not accept as true, however, "conclusory allegations or legal conclusions masquerading as factual conclusions." *Id.* ¶ 10 (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir.2002)). Thus, at the pleading stage, a plaintiff still bears the burden of alleging facts that "plausibly" demonstrate each element of standing. *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 996 (11th Cir. 2020).

[4] The Vermont Supreme Court "has adopted the constitutional and prudential components of the standing doctrine enunciated by the United States Supreme Court." *Schievella v. Dep't of Taxes*, 171 Vt. 591, 592 (2000) (mem.). Thus, Vermont courts properly consider federal precedent in determining the contours of the doctrine.

Admittedly, at the pleading stage, "general factual allegations of injury" may suffice. *See Lujan*, 504 U.S. at 561. But this does not mean that any allegations of injury can push a plaintiff across the standing threshold. Rather, a plaintiff must set forth general factual allegations that "plausibly and clearly allege a concrete injury," *Thole v. U. S. Bank N.A.*, —– U.S. ——–, 140 S. Ct. 1615, 1621 (2020), and "mere conclusory statements[ ] do not suffice," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plaintiffs must make such a showing for each claim they pursue. *DaimlerChrysler Corp. v. Duno*, 547 U.S. 332, 352 (2006) ("[O]ur standing cases confirm that a plaintiff must demonstrate standing for each claim [it] seeks to press.").

Viewed through this lens, few of Plaintiffs' claims survive. Even when they allege injury or causation, their allegations are far too speculative and conclusory to establish standing. In the PUC case, in addition to the allegations described above, Plaintiffs allege that, without standard offer contracts, they "could not build their solar energy facilities causing concrete and particularized harm to Plaintiffs." PUC Compl., ¶ 17. They also allege that the challenged statutory provisions deny them "the ability 'to predict how discretion will be exercised and to develop proposed land uses accordingly.' " *Id.* ¶¶ 21, 29, 60, 65, 97, 103 (quoting *In re Handy*, 171 Vt. 336, 349 (2000)). Similarly, in the ANR case, they allege that the challenged statute and guidance documents "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," ANR Compl. ¶ 18; and "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" and contributes to "the dangerous risks of harm to human life, liberty, and property, including that of Plaintiffs," *id.* ¶ 19. With respect to the natural environment criterion, Plaintiffs claim it "denies [them] the ability 'to predict how discretion will be exercised and to develop proposed land uses accordingly.' " *Id.* ¶¶ 69, 74.

In Counts I, II, III, V, VI, VII, XII, XIII, and XIV of the PUC Complaint, Plaintiffs complain that the term "project," the orderly development criterion, and the aesthetics criterion in Title 30 are unconstitutionally vague, an unconstitutional delegation to the PUC, and violative of the Common Benefits clause. In Count XVII, they allege the orderly development and aesthetics criteria are selective enforcement. In Count XVIII, they allege that the various provisions and criteria violate the public trust doctrine. Their allegations of injury, however, are

both conclusory and speculative, falling well short of the standards discussed above. Moreover, their allegations of causation are similarly vague and conclusory; they do not sufficiently draw the line from the alleged violations to their injuries. *See Turner*, 2017 VT 2, ¶ 12 ("court must ask . . .whether the line of causation between the illegal conduct and injury [is] too attenuated") (quotation and citation omitted). These allegations fail to establish standing.[5]

Similarly, in Counts IV and V of the ANR Complaint, Plaintiffs complain the natural environment criterion under 30 V.S.A. § 248(b)(5) is unconstitutionally vague and an unconstitutional delegation to the PUC. Here, while they may have made sufficient allegations of injury, their allegations of causation are conclusory; they have not drawn the causal line between their purported injuries (increased costs and limited ability to build) and the criterion's purported vagueness or the delegation to the PUC. Thus, these allegations, too, fail to establish standing.

Finally, Counts VIII, IX, and XV of the PUC Complaint allege that the CPG's orderly development and aesthetics criteria and the PUC's *Quechee* test impermissibly redelegate authority to local and municipal bodies.[6] Plaintiffs have not alleged, however, any injury that purportedly flows from these redelegations, much less how the redelegations have caused or will foreseeably cause such injury. Thus, these allegations fall well short of the standard.

The result of this analysis is that Counts I–III, V–IX, XII–XV, XVII, and XIX of the PUC Complaint must be dismissed due to Plaintiffs' failure to establish standing. Counts IV and V of the ANR Complaint fail for the same reason. Counts IV, XVI, and XVIII of the PUC Complaint and Counts I–III and VI of the ANR Complaint remain.[7] As shown below, however, all of these claims fail for different reasons. In addition, each of the claims dismissed for lack of standing fails to state a claim for relief for one or more further reasons.

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[5] In the Supplemental Memorandum of Law Regarding Standing they filed in the ANR case (they filed no such paper in the PUC case), Plaintiffs make much of decisions from other jurisdictions finding that electricity generators had standing to challenge state schemes that regulate that industry. Their argument in this regard completely misses the point. Standing cannot be determined on the basis of an entity's status as a market participant; it is established instead by specific allegations that meet the standards discussed above.

[6] PUC Count XI makes a similar assertion. The reader will recall, however, that Plaintiffs have conceded that it must be dismissed, for reasons that have nothing to do with standing.

[7] Count XVIII of the PUC Complaint is a special case, at least to the extent that it asserts a facial First Amendment challenge. *See State v. Cantrell*, 151 Vt. 130, 133–34 (1989) (describing a prior case as "implicitly exempting from the normal standing rule challenges to statutes involving First Amendment rights"); 1 Treatise on Const. L. § 2.13(f)(iii)(2) ("In the First Amendment area, prudential barriers are lower."). Thus, this is one claim in which vague and conclusory allegations may nevertheless be sufficient to survive a standing challenge.

C. Vagueness (PUC Counts I, V, and XII; ANR Count IV)

In the PUC case, Plaintiffs allege that the term "project" in 30 V.S.A. § 8002(18), the term "aesthetics" in 30 V.S.A. § 248(b), and the criterion of "no unduly adverse effect on orderly development of the region" in 30 V.S.A. § 248(b)(1) are all unconstitutionally vague and standardless in violation of Plaintiffs' due process and equal protection rights under the Vermont Constitution (Counts I, V, and XII). In the ANR case, they challenge the "natural environment" criterion on the same grounds (Count IV). These allegations all fail as a matter of law.

"A statute is void for vagueness when it 'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Kimbell v. Hooper*, 164 Vt. 80, 88 (1995) (quoting *Zwickler v. Koota*, 389 U.S. 241, 249 (1967)); *see also Rutherford v. Best*, 139 Vt. 56, 60 (1980) (due process requires that person have fair warning of what conduct is prohibited). A statute, however, "need not detail every circumstance that would amount to a violation." *Kimbell*, 164 Vt. at 89; *see also State v. Pecora*, 2007 VT 41, ¶ 11, 181 Vt. 627 ("the fact that the statute does not enumerate 'every act that might constitute a violation' does not render it unconstitutionally vague.") (quoting *In re Illuzzi*, 160 Vt. 474, 481 (1993)). Indeed, a standard sufficient to save a statute from a vagueness challenge "can be general, and can be derived from historical usage, or other parts of the statutory scheme." *In re Handy*, 171 Vt. 336, 348–49 (2000) (citation omitted).

The vagueness doctrine is "based on the rationale that persons should not be chilled in their exercise of constitutional rights because of their fear of criminal sanctions." *Kimbell*, 164 Vt. at 88 (quotation omitted). Thus, generally, the U.S. Supreme Court has "expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Sessions v. Dimaya*, ___ U.S. ___, 138 S. Ct. 1204, 1212–13 (2018) (quotation omitted); *see also In re Snyder Grp., Inc.*, 2020 VT 15, ¶ 25. 212 Vt. 168 ("The test for vagueness is less strict when applied to regulations that affect economic interests, not constitutional rights, and when the aggrieved party can seek clarification of its meaning or resort to administrative processesMoreover, the court generally presumes statutes to be constitutional. *In re LaBerge NOV*, 2016 VT 99, ¶ 18, 203 Vt. ."). 98. A proponent of a constitutional vagueness challenge, therefore, "has a very weighty burden to overcome." *Id.* (quotation omitted).

The critical distinction in our Court's cases discussing vagueness in the land use and zoning context is whether the statute or ordinance provides "sufficient overall standards" or "sufficient conditions and safeguards to guide applicants and decisionmakers," or whether instead they "fail[] to provide any guidance to landowners as to what was expected of them" or "allow arbitrary and discriminatory enforcement" or "unbridled discrimination." *Snyder Grp.*, 2020 VT 15, ¶¶ 25, 27–28. All of the provisions challenged here clearly provide sufficient overall standards, conditions, and safeguards to guide applicants and landowners. Thus, all survive a facial vagueness challenge.

First, three statutory factors further clarify the term "project" in 30 V.S.A. § 8002(18): "Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project." *Id.* Their relevance is fairly obvious; if separate facilities are owned by the same person or entity, constructed around the same time, and in close proximity to each other, they are more likely to be considered part of the same project. As the State correctly points out, other related standards within the same subsection—the use of "common equipment and infrastructure such as roads, control facilities, and connections to the electric grid"—further illuminate the relevance and meaning of the three "project" standards. *See In re Handy*, 171 Vt. at 348–49 (standard sufficient to save a statute from vagueness challenge "can be general, and can be derived from . . . other parts of the statutory scheme"). Moreover, the various factors in § 8002(18) all plainly advance the goals of the standard offer program, including incentivizing smaller plants to promote more distributed renewable energy development. *See* 30 V.S.A. § 8001(7).

Similarly, numerous statutory factors support and inform the "no unduly adverse effect on orderly development of the region" criterion in 30 V.S.A. § 248(b)(1). Specifically, the Commission must give "due consideration" to recommendations of municipal and regional planning commissions and municipal legislative bodies, as well as "land conservation measures contained in the plan of any affected municipality." *Id.* Moreover, for electric facilities, the Commission must 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." 30 V.S.A. § 248(b)(1)(C). The statute goes on to specifically define "substantial deference." *Id.* Finally, Plaintiffs' protests to the contrary notwithstanding, the terms "unduly" and "adverse" are adequate guiding standards.

General, qualitative, or imprecise terms do not render a statute unconstitutionally vague, particularly if applied to "real world conduct" as opposed to a hypothetical "ordinary case." *Sessions v. Dimaya*, 138 S. Ct. at 1214–16 (2018) ("Many perfectly constitutional statutes use imprecise terms like 'serious potential risk' . . . or 'substantial risk' . . . ."); *see also In re Pierce Subdivision Application*, 2008 VT 100, ¶ 20, 184 Vt. 365 ("[W]e will uphold standards even if they are general.").

Plaintiffs next challenge the provision that proposed electric generation facilities "will not have an undue adverse effect on aesthetics." 30 V.S.A. § 248(b)(5). This criterion is neither vague nor standardless. The court notes first that this criterion is limited by the qualitative terms "undue" and "adverse," which provide useful guidance. *See Sessions*, 138 S. Ct. at 1214–16; *Pierce Subdivision*, 2008 VT 100, ¶ 20. For largely the same reason, the Environmental Division has upheld similar "aesthetics" language against a vagueness challenge. *See, e.g., Saxon Hill Corp. Sand Extraction Application*, No. 42311, 2014 WL 4796652, at *6 (Vt. Super. Ct. Envtl. Div. Sep. 17, 2014) (holding "aesthetically feasible" language in town regulations not unconstitutionally vague because it incorporates concepts of "unreasonable" and "adverse" and has guiding caselaw); *see also In re Rivers Dev.*, No. 68-3-07 Vtec, 2010 WL 1739426, slip copy at 49–50 (Vt. Envtl. Ct. Mar. 25, 2010) (citing *Re: Brattleboro Chalet Motor Lodge, Inc.*, No. 4C0581-EB, Findings of Fact, Conclusions of Law and Order at 5 (Vt. Envtl. Bd. Oct. 17, 1984)) (noting former Environmental Board's rejection of vagueness challenge to analogous criterion in Act 250).

The aesthetics criterion finds further support in historical usage in the form of the *Quechee* test, developed by the former Environmental Board to evaluate the aesthetic impact of Act 250 projects. *See In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶¶ 14, 18, 202 Vt. 59 (citing *In re Quechee Lakes Corp.*, Nos. 3W0411–EB, 3W0439–EB, slip op. at 19–20 (Vt. Envtl. Bd. Nov. 4, 1985)). Under this test, the PUC first asks "whether a project will have an adverse impact on scenic and natural beauty, and if so, whether the impact will be 'undue.'" *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 24, 185 Vt. 296 (quoting *In re Times & Seasons, LLC*, 2008 VT 7, ¶ 8, 183 Vt. 336). The test also provides specific criteria for when an adverse impact is considered "undue":

> (1) it violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area; or (2) it offends the

> sensibilities of the average person; or (3) the applicant has failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings.

Id.; *see also In re Cross Pollination*, 2012 VT 29, ¶ 10, 191 Vt. 631. This plainly provides sufficient guidance to applicants and decisionmakers.

Finally, in the ANR case, Plaintiffs also challenge the "natural environment" criterion as vague and standardless. Like the "aesthetics" criterion, the "natural environment" criterion also is limited by the qualitative terms "undue" and "adverse," which provide useful guidance. *See Sessions*, 138 S. Ct. at 1214–16; *Pierce Subdivision*, 2008 VT 100, ¶ 20. Furthermore, in determining undue adverse impacts, section 248(b)(5) requires the PUC to consider: (1) fourteen separate cross-referenced criteria relating to outstanding natural resource waters (10 V.S.A. § 1424a(d)); (2) more than thirty separate considerations incorporated from Act 250 (10 V.S.A. § 6086(a)(1)–(8), (9)(K)); (3) impacts to primary agricultural soils as defined in 10 V.S.A. § 6001; and (4) greenhouse gas impacts. Clearly, the "natural environment" criterion is neither vague nor standardless.

These statutes survive a vagueness challenge for the additional reason that Plaintiffs have recourse through the administrative permitting process. *See In re Snyder Grp., Inc.*, 2020 VT 15, ¶ 25 ("The test for vagueness is less strict . . . when the aggrieved party can seek clarification of [the regulation's] meaning or resort to administrative processes.").[8] Applicants may seek approval for building an electric generation facility through administrative proceedings. Before applying to the PUC for a CPG, an applicant must submit construction plans to the appropriate municipal and regional planning commissions, and those commissions may provide feedback. 30 V.S.A. § 48(f)(1)(C). As part of their CPG applications, applicants must submit "evidence (testimony and exhibits) that explains how the proposed project complies with each of the

[8] Plaintiffs take issue with the State's reliance on *Snyder*. They read *Snyder* as requiring an objective test in the form of a mathematical formula. This argument misreads *Snyder*. It is true that a bylaw at issue in *Snyder* established a "one-to-one relationship between the development rights acquired and used," and that this was relevant to the Court's analysis. *Snyder*, 2020 VT 15, ¶ 21. But the 1:1 ratio by itself was not determinative. Ultimately, the Court concluded that the statute was not unconstitutionally vague because it provided "sufficient overall standards" in that it "establish[ed] multiple conditions for the city attorney and the DRB to consider." *Id.* ¶ 27. Nowhere did the Court so much as imply that an objective, mathematical formula is required. To the extent Plaintiffs rely on other authorities to support their vagueness challenge, those authorities are either not binding, inapposite, or entirely unpersuasive. *See, e.g.*, *Epona v. Cty. of Ventura*, 876 F.3d 1214, 1223–25 (9th Cir. 2017) (holding that permitting scheme violated First Amendment "[i]n light of the specific nature of this case"); *see also Snyder*, 2020 VT 15, ¶ 25 ("The test for vagueness is less strict when applied to regulations that affect economic interests, not constitutional rights") (emphasis added).

separate criteria of 30 V.S.A. § 248(b).” 18-1-20 Vt. Code R. § 5.402(C)(1)(d). If the PUC deems the application deficient, it must notify the applicant, which may then remedy those deficiencies. *Id.* § 5.402(C)(4). This regulatory scheme gives applicants ample opportunity to resort to administrative process to clarify the meaning of any of the challenged provisions. *See, e.g.*, *Richards v. Nowicki*, 172 Vt. 142, 150–51 (2001) (ordinance governing standard for sewage disposal permits not unconstitutionally vague where standard’s “meaning . . . was clarified by the environmental engineering firm hired by the Town”).

Implicit in Plaintiffs’ arguments is the suggestion that applicants must be able to know with certainty that their proposed project will be approved before they apply. While such certainty might be nice for developers of any scale, it is not the law. *See In re LaBerge NOV*, 2016 VT 99, ¶ 25 (rejecting facial void-for-vagueness challenge, although “there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls”) (quotation omitted). Nor do Plaintiffs cite any persuasive authority remotely suggesting that such certainty is required. The vagueness doctrine seeks to prevent arbitrary and unbridled discrimination; it does not prohibit any discretion whatsoever, nor does it guarantee absolute certainty for developers.

Finally, but importantly, to succeed in a facial challenge, Plaintiffs must demonstrate that a challenged statutory provision is “is impermissibly vague in all its applications.” *Snyder*, 2020 VT 15, ¶ 27 (quotation omitted). Plaintiffs cannot do so for any of the provisions challenged here. Thus, the vagueness claims fail as a matter of law.

D. Unconstitutional Delegations (PUC Counts II, VI, & XIII; ANR Count V)

In the PUC case, Plaintiffs allege that the term “project” in 30 V.S.A. § 8002(18), the term “aesthetics” in 30 V.S.A. § 248(b), and the “no unduly adverse effect on orderly development of the region” criterion in 30 V.S.A. § 248(b)(1) are all unconstitutional delegations of power in violation of their due process and equal protection rights under the Vermont Constitution (Counts II, VI, and XIII). In the ANR case, Plaintiffs also challenge the “natural environment” criterion as an unlawful delegation (Count V). Plaintiffs contend that these provisions are unlawful delegations for the same reasons advanced in support of their vagueness claims. *See* Pls.’ Opp’n at 24 (PUC case).

The unlawful delegation doctrine stems from the separation of powers clause. Our Constitution provides that “[t]he Legislative, Executive, and Judiciary departments, shall be

separate and distinct, so that neither exercise the powers properly belonging to the others." Vt. Const. ch. II, § 5. Because of the inevitable overlapping of the separate branches' powers and the need for the government to act efficiently and effectively to deal with "complex challenges and problems," the Supreme Court has "referred to 'our separation-of-powers requirement as a relatively forgiving standard, tolerant of such overlapping institutional arrangements short of one branch virtually usurping from another its constitutionally defined function.' " *Athens Sch. Dist. v. Vermont State Bd. of Educ.*, 2020 VT 52, ¶ 38 (quoting *Hunter v. State*, 2004 VT 108, ¶ 21, 177 Vt. 339). "Thus, 'there can be no claim of unconstitutional delegation of legislative power where a statute establishes reasonable standards to govern the achievement of its purpose and the execution of the power which it confers.' " *Id.* (quoting *In re B&M Realty, LLC*, 2016 VT 114, ¶ 28, 203 Vt. 438); *see also Rogers v. Watson*, 156 Vt. 483, 493 (1991) (recognizing that delegation of discretionary authority is valid as long as Legislature provides "sufficient standard or policy to guide" agency's action). The U.S. Supreme Court has similarly recognized that as long as a legislative body "provides an administrative agency with standards guiding its actions such that a court could ascertain whether the will of [that body] had been obeyed, no delegation of legislative authority trenching on the principle of separation of powers has occurred." *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218 (1989) (quotations omitted); *see also Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (noting its repeated admonition that legislative body "must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform" (quotation and alteration omitted)).

For the same reasons discussed above concerning the vagueness claims, none of the provisions challenged here constitute unlawful delegations of power. *See In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 17 n.3, 203 Vt. 274 (observing that delegation analysis applied equally to vagueness claims). The term "project" in 30 V.S.A. § 8002(18) is supported by three factors—"[c]ommon ownership, contiguity in time of construction, and proximity of facilities to each other"—all of which plainly advance the goals of the standard offer program. *See* 30 V.S.A. § 8001. The "orderly development" criterion in 30 V.S.A. § 248(b)(1) is supported by general, qualitative standards and recommendations by local planning commissions. The "aesthetics" criterion in 30 V.S.A. § 248(b)(5) is supported by qualitative standards and historical usage. Finally, the natural environment criterion is supported by qualitative terms and numerous, specific, cross-referenced factors. *See* 30 V.S.A. § 48(b)(5). Thus, the legislature has provided

sufficient standards to the PUC and the ANR. *See MVP Health*, 2016 VT 111, ¶ 16 (upholding legislature's delegation to Green Mountain Care Board of insurance rate approval power where Board's statutory power was "curtailed by considerations of affordability, the promotion of quality care and access to care, insurer solvency, and fairness, as well as by the requirement that it consider the opinion of the Department of Financial Regulation").

E. Redelegation (PUC Counts VIII, IX, & XV)

Next, Plaintiffs claim that the "orderly development of the region" and "aesthetics" criteria are impermissible redelegations of power (PUC Counts VIII and XV). Specifically, they allege that the statutory criteria in 30 V.S.A. § 248(b)(1) and (5) allow municipalities to "define" undue adverse effects on "orderly development" and "aesthetics," which creates "different applications" and "varying meanings" in every town and region throughout Vermont. *See* PUC Compl. ¶¶ 72, 110. Again, their attack misses the mark.

Redelegation, or subdelegation, occurs when an entity to which a legislature has delegated statutory authority transfers that authority to another entity to which the legislature has not delegated statutory authority. *See U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004). There are two distinct forms of subdelegation in this context: internal (*i.e.*, subdelegation to a subordinate within the agency) and external (*i.e.*, subdelegation to outside entities, such as other federal or state agencies). *See generally* 4 Koch & Murphy, Admin. L. & Prac. § 11:13[8] (3d ed.). While internal subdelegations are presumptively valid, "the case law strongly suggests that subdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." *U.S. Telecom*, 359 F.3d at 565; *see also Vermont Dep't of Pub. Serv. v. Massachusetts Mun. Wholesale Elec. Co.*, 151 Vt. 73, 86 (1988) ("Legislative permission to redelegate granted authority must be specific . . . .").

As the State correctly points out, however, a statutory delegation of authority to an entity in the first instance is not a redelegation. *See* State's Mot. to Dismiss (PUC case) at 29 (citing *Massachusetts Mun. Wholesale Elec. Co. v. State*, 161 Vt. 346, 358–59 (1994)). Section 248 requires the PUC to make findings that the proposed construction of a solar facility will neither "unduly interfere with the orderly development of the region" nor "have an undue adverse effect on aesthetics." 30 V.S.A. § 248(b)(1), (5). With respect to its "orderly development" finding, the PUC must give due consideration to recommendations from "municipal and regional planning commissions" and "municipal legislative bodies," as well as "land conservation measures"

contained in municipal plans. *Id.* § 248(b)(1). Under this regime, the PUC has delegated nothing to local bodies; the Legislature has commanded that the PUC give due consideration to recommendations and plans from those bodies. This, bluntly, is not a redelegation. Had the PUC flouted its statutory role by, for example, outsourcing its duty to make findings to some external body, that would present a redelegation problem.

But that is not what Plaintiffs allege. Instead, they claim that the statute itself results in different meanings in different parts of the state. This appears to be an attempt to reframe the vagueness claims that Plaintiffs raise elsewhere in the complaint. In any event, this plainly fails to state a claim for an impermissible redelegation.

Plaintiffs further allege that the PUC's test for "undue adverse effect on aesthetics" in 30 V.S.A. § 248(b)(5) (the so-called "modified *Quechee* test") is also an impermissible redelegation (PUC Count IX).[9] The reader will recall that the court discussed the *Quechee* test in Section C above; the court need not repeat that discussion here. What is important for the present discussion is that the test asks, in part, whether a project's impact "violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area," *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 24; this is the only part of the *Quechee* test that could be said to defer in any way to another entity.

Preliminarily, Plaintiffs fail to explain how this court has jurisdiction to entertain their challenge to a decisional test developed and used by the PUC in adjudicative proceedings before that body. Rather, as noted in Section A above, the appropriate avenue for such a challenge is in the context of an adjudicative proceeding before the PUC. Second, even assuming this court had jurisdiction, "[s]ubdelegation of administrative authority to a sovereign entity is not per se improper. Nor must such a subdelegation rest on express statutory authority*." S. Pac. Transp. Co. v. Watt*, 700 F.2d 550, 556 (9th Cir. 1983) (citations omitted). Indeed, an "agency entrusted with broad discretion to permit or forbid certain activities may condition its grant of permission on the decision of another entity, such as a state, local, or tribal government, so long as there is a reasonable connection between the outside entity's decision and the federal agency's determination." *U.S. Telecom*, 359 F.3d at 567; *see also, e.g., United States v. Matherson,* 367 F.

[9] They also claim that the *Quechee* test violates 24 V.S.A. § 4413(b), which provides that zoning bylaws "shall not regulate public utility power generating plants and transmission facilities regulated under 30 V.S.A. § 248." PUC Compl. Count XI. Because Plaintiffs now concede that *Apple Hill Solar,* 2021 VT 69, requires dismissal of that count, the court need not address those allegations.

Supp. 779, 782 (E.D.N.Y. 1973), aff'd, 493 F.2d 1399 (2d Cir. 1974) (upholding decision of Fire Island National Seashore Superintendent to condition issuance of federal seashore motor vehicle permits on applicant's acquisition of analogous permit from adjacent town); *Watt*, 700 F.2d at 556 (sustaining Interior Secretary's conditioning of right-of-way permits across tribal lands on tribal government's approval). The D.C. Circuit has drawn a line between situations "where an agency with broad permitting authority had adopted an obviously relevant local concern as an element of its decision process," and the "delegat[ion] to another actor almost the entire determination of whether a specific statutory requirement [] has been satisfied." *U.S. Telecom*, 359 F.3d at 567.

Here, there is clearly such a "reasonable connection" between the PUC's determination and whether the adverse impact "violates a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area." The effect of a proposed solar facility on the aesthetics of its planned location is an "obviously relevant local concern" that the PUC properly and appropriately incorporates as an element of its decision process. A proposed energy plant's impact on aesthetics will necessarily vary greatly depending on location. For instance, building a solar facility in an urban area would have a totally different aesthetic impact than in a rural location. A community's aesthetics is an obviously relevant matter of local concern, and so the PUC understandably and expectedly considers "clear, written community standard[s]" related to aesthetics and scenic, natural beauty.

In any event, the modified *Quechee* test does not condition the PUC's approval of a CPG on a municipality's decision. Instead, the PUC retains ultimate authority to decide whether a proposed project would violate a "clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area." *See In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 18, 202 Vt. 59 ("the [PUC] has the final policy decision"); *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 41 ("the distinction between the application of the *Quechee* test in the context of Act 250 versus § 248 reflect[s] an acknowledgment of the primacy of PUC discretion over municipal requirements in the context of § 248 permitting"). In short, the modified *Quechee* test presents no redelegation problem.

F. Common Benefits Clause (PUC Counts III, VII, & XIV)

In Counts III, VII, and XIV of the PUC Complaint, Plaintiffs claim that the term "project" in 30 V.S.A. § 8002(18), the "orderly development of the region" criterion in 30

V.S.A. § 248(b)(1), and the term "aesthetics" in 30 V.S.A. § 248(b)(5) all violate the Common Benefits Clause of the Vermont Constitution. *See* Vt. Const. ch. I, art. 7. These claims miss the mark by a wide margin, for several reasons.

"The purpose of the Common Benefits Clause is to ensure that protections conferred by the State are for 'the common benefit of the community' and not just a part of the community." *Brown v. State*, 2018 VT 1, ¶ 16, 206 Vt. 394 (quoting *Baker v. State*, 170 Vt. 194, 212 (1999)).[10] In *Baker*, our Supreme Court "detailed the history of this constitutional provision, its historical context, the evolution of our caselaw interpreting this provision, and the relationship between our inquiry under this clause to that under the Fourteenth Amendment's Equal Protection Clause." *Badgley v. Walton*, 2010 VT 68, ¶ 21, 188 Vt. 367 (citing *Baker*, 170 Vt. at 202–11). The Court "rejected the rigid, multi-tiered analysis of the federal Equal Protection Clause analysis in favor of 'a relatively uniform standard, reflective of the inclusionary principle at [the Common Benefits Clause's] core.' " *Id.* (quoting *Baker*, 170 Vt. at 212).

> When a statute is challenged under Article 7, we first define that "part of the community" disadvantaged by the law. We examine the statutory basis that distinguishes those protected by the law from those excluded from the state's protection. . . .
>
> We next look to the government's purpose in drawing a classification that includes some members of the community within the scope of the challenged law but excludes others. Consistent with Article 7's guiding principle of affording the protection and benefit of the law to all members of the Vermont community, we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives.

Id. ¶ 21 (quoting *Baker*, 170 Vt. at 212–14). Ultimately, a court must "ascertain whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose." *Id.* (quoting *Baker*, 170 Vt. at 212–14). Considerations in this determination may include: "(1) the significance of the benefits and protections of the challenged law; (2) whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's

[10] *See* Vt. Const. ch. I, art. VII ("That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community . . . .").

stated goals; and (3) whether the classification is significantly underinclusive or overinclusive." *Id.* (quoting *Baker*, 170 Vt. at 214).

It bears emphasis at the outset that the "orderly development" criterion and the term, "aesthetics," do not create any legislative classification; nor do Plaintiffs allege one. Instead, they allege that these criteria result in "varying meanings" and "different applications" in different towns and regions throughout the state. PUC Compl. ¶¶ 69, 107. Nevertheless, all solar facilities seeking a certificate of public good are subject to the "orderly development" and "aesthetics" criteria. *See* 30 V.S.A. § 248(a)(2), (b)(1), (5). In short, neither of these criteria "includes some members of the community within the scope of the challenged law [while] exclud[ing] others." *Baker*, 170 Vt. at 213. For this simple reason, Counts VII and XIV do not even get out of the starting blocks; they fail altogether to allege any denial of a common benefit..

Turning to Count III, Plaintiffs allege that the term "project" as used in the definition of "plant" creates a class of "multiple-facility owners" who are less likely to be eligible for the standard-offer program. Specifically, Plaintiffs take issue with the "common ownership" factor that informs the determination whether multiple facilities constitute the "same project" and therefore "one plant" in 30 V.S.A. § 8002(18). If multiple facilities are considered one plant, they are obviously less likely to be eligible for the program because the total plant capacity will more likely exceed the program's 2.2 MW maximum plant capacity threshold. *See* 30 V.S.A. § 8005a(b).

The State urges the court to construe the "general benefit" at issue here more broadly as Plaintiffs' "right to build subject to reasonable restrictions—*i.e.*, to use their land for solar energy facilities." Mot. to Dismiss (PUC case) at 22 (citing PUC Compl. ¶ 141) (quotations omitted). The State argues that the "plant" definition does not restrict Plaintiffs' general ability to build solar facilities pursuant to other laws and requirements. Instead, the State asserts, the definition merely "helps to identify which projects qualify for the standard-offer program." *Id.* The State further contends that the standard-offer program is an incentive rather than a burden or infringement, and therefore does not implicate the Common Benefits Clause. *Id.*

The court need not reach this question, because even if the definition of "plant" draws a classification that implicates the Common Benefits Clause, there is no violation. Examining the *Baker* factors in order, the court notes first that the benefits and protections the standard offer program offers solar developers—economic profit and stable pricing—pale in comparison to the

marriage benefits at issue in *Baker*, which stemmed from "one of the vital personal rights." *Baker v. State*, 170 Vt. 194, 220 (1999). Thus, restricting some developers' access to these benefits weighs much less heavily in the balance than might denial of a more "vital" right. *See id.* at 214 ("this approach necessarily 'calls for a court to assess the relative 'weights' or dignities of the contending interests.' ") (citation omitted).

Looking next to the second *Baker* factor—"whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals"—the legislative purpose of the standard offer program is to "achieve the goals" of section 8001 of Title 30. 30 V.S.A. § 8005a(a). Those goals include: "Developing viable markets for renewable energy and energy efficiency projects"; "Providing support and incentives to locate renewable energy plants of small and moderate size in a manner that is distributed across the State's electric grid"; and "Promoting the inclusion, in Vermont's electric supply portfolio, of renewable energy plants that are diverse in plant capacity and type of renewable energy technology." 30 V.S.A. § 8001. Plainly, these are important and valid governmental interests. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 568–69 (1980) (holding that energy conservation and fair electric rates are "[p]lainly" and "clear[ly]" substantial government interests); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (holding that a state "retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources").

The PUC itself has aptly articulated how the standard offer program and the "plant" definition advance these interests:

> We have understood our task in evaluating the single-plant issue as one that gets to the core of the legislative intent behind § 8002: striking a balance between "the financial incentives and size limitations associated with the standard-offer program and the net-metering program" and "economies of scale gained by having facilities in close proximity" without permitting the development of projects that capitalize on both.

Petition of Norwich Techs., Inc., No. 18-2120-NMP, 2019 WL 4223370, at *7 (Vt. Pub. Util. Comm'n Aug. 28, 2019) (citation omitted). Effectively, the standard offer program incentivizes smaller plants that might not otherwise be financially viable in order to promote more distributed renewable energy development, while the "plant" definition together with its common ownership factor ensure that large energy-generation projects do not take advantage of this incentive by

splitting into multiple, smaller neighboring facilities. *See In re Chelsea Solar LLC*, 2021 VT 27, ¶ 40 ("The definition of 'plant' in § 8002 was written to ensure that large projects, which can gain economies of scale based on their large size, do not take advantage of incentives intended for small projects."); B. Sovacool, et. al., Innovations in Energy and Climate Policy: Lessons from Vermont, 31 Pace Envtl. L. Rev. 651, 682 (2014) ("standard offer is noted for incentivizing smaller projects" and "increasing distributed generation"). Clearly, the term "project" as used in the definition of "plant" promotes the stated goals of the standard offer program. *Cf. In re Portland St. Solar* LLC, 2021 VT 67, ¶¶ 23, 44, 59.

Turning to the final *Baker* factor—"whether the classification is significantly underinclusive or overinclusive"—the court cannot say that the common ownership factor in 30 V.S.A. § 8002(18) is significantly under- or overinclusive, and certainly not in all circumstances as required for a facial challenge. Moreover, "common ownership" is not the only factor in determining whether a group of facilities is part of the same "project" and, thus, one "plant" for purposes of standard offer program eligibility. Other factors include "contiguity in time of construction, and proximity of facilities to each other". *Id.* The PUC also considers whether a group of facilities "uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid." *Id.* Finally, and importantly, the definition of "plant" and ineligibility for the standard offer program do not prohibit anyone from building a solar facility.

Considering all of these factors, it is clear that the common ownership factor "bears a reasonable and just relation to the governmental purpose." *Badgley v. Walton*, 2010 VT 68, ¶ 21, 188 Vt. 367 (quotation omitted). Plaintiffs nevertheless argue that this factor is not a "necessary consequence of the most reasonable way of implementing" the standard offer program. Pls.' Opp'n at 31. This argument suffers from a fundamental misreading of the caselaw. Yes, the Supreme Court coined the phrase. *See State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261, 265 (1982). It also used similar language in *Baker*. 170 Vt. at 214 ("we examine the nature of the classification to determine whether it is reasonably necessary to accomplish the State's claimed objectives"). But the Court has since clarified that a literal reading of "reasonably necessary" is not the test:

> In reading *Baker* as a whole, we think that plaintiffs have placed too much emphasis on the word 'necessary.' *Baker* requires that a classification scheme be 'reasonable and just' in relation to the governmental purpose. Our subsequent decisions support this formulation of the Baker test. Indeed,

> an inquiry into necessity would contravene the deference which must control our inquiry and place us in the position of reviewing the wisdom of legislative choices.

Badgley, 2010 VT 68, ¶ 26 (citations omitted); *see also Baker*, 170 Vt. at 240 (Dooley, J., concurring) (criticizing majority's apparent use of "reasonably necessary" test, and observing that "[i]n our imperfect world, few legislative classifications are 'necessary,' and most legislation could be more narrowly tailored to the state's objective") (emphasis in original). In short, Plaintiffs' attempt to assign talismanic significance to the concept of reasonable necessity fails. Rather, evaluation of all the *Baker* considerations leads easily to the conclusion that any classification inherent in the "common ownership" factor "bears a reasonable and just relation to the governmental purpose." Thus, Count III fails to state a claim.

G. Vermont Administrative Procedures Act (PUC Counts IV & XVI)

Plaintiffs allege that the PUC's announced criteria and tests regarding the term "project" in 30 V.S.A. § 8002(18) and the "no unduly adverse effect on orderly development of the region" criterion in 30 V.S.A. § 248(b)(1) are invalid "*de facto* rules" because they were not issued in compliance with the Vermont Administrative Procedure Act (PUC Counts IV, XVI). *See* PUC Compl. ¶¶ 51, 84, 117.[11] Specifically, Plaintiffs challenge criteria and tests developed through PUC caselaw.[12] These challenges also fail.

The legislature has granted the PUC oversight of electric companies and electric-generation facilities. *See* 30 V.S.A. § 203. To exercise this function, the PUC has authority to promulgate rules governing such companies and facilities. *See id.* § 209(b). Separately, while the PUC "is not a court in the strict sense," the legislature has also "invested the Commission with the powers of a court of record . . . ." *In re SolarCity Corp.*, 2019 VT 23, ¶ 13, 210 Vt. 51 (citing 30 V.S.A. § 209) (quotation omitted). Thus, it is best described as "an administrative agency that possesses quasi-judicial powers." *Id.* In this role, the Commission "oversees many different types

[11] Plaintiffs made similar allegations with respect to the term "aesthetics" in 30 V.S.A. § 248(b). PCU Compl. Count X. They now concede that *In re Apple Hill Solar LLC*, 2021 VT 69, ¶¶ 54–56 requires dismissal of that count. Thus, the court need not address it.

[12] Plaintiffs cite to specific caselaw only in Count IV, *see* PUC Compl. ¶ 44 ("project" in 30 V.S.A. § 8002(18)), but not in Count XVI, *see id.* ¶¶ 112–17 ("orderly development"). Nor do those Counts indicate precisely the "announced criteria and tests" to which they refer. Plaintiffs' briefing, however, makes clear that they are referring to criteria and tests as developed in PUC caselaw, and provides some clarity as to what those tests are. *See* Pls.' Opp'n to Mot. to Dismiss (PUC case) at 33–34, 36.

of proceedings," including petitions for certificates of public good (CPGs). *Id.* In doing so, it necessarily has the power to interpret statutes. *Id.* ¶ 9; *In re Derby GLC Solar, LLC*, 2019 VT 77, ¶ 18 ("we defer to the PUC's interpretation of the statutes that it is charged with interpreting").

Before issuing a "rule," an agency must follow a specific notice-and-comment procedure, 3 V.S.A. § 386, which also includes a legislative veto power. 3 V.S.A. § 842. "Rule" means "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" Title 3, *i.e.*, VAPA. 3 V.S.A. § 801(9). Plaintiffs claim that the Commission's criteria and tests used to implement the terms "project," "aesthetics," and "orderly development" in adjudicative decisions are such "agency statement[s] of general applicability" that should have followed the statutory rulemaking procedure.

This claim fails to recognize the "fundamental[] distinct[ion]" in administrative law between rulemaking and adjudication. 1 Koch & Murphy, Admin. L. & Prac. § 2:11 (3d ed.). Rulemaking is a "determination of general applicability and predominantly prospective effect," while adjudication involves a "determination of individual rights or duties," that is, the "decisionmaking process for applying preexisting standards to individual circumstances." *Id.* While the "core facts" involved in adjudication are "predominantly specific or adjudicative facts . . . used to decide whether a given rule is applicable" and consequently "resol[ve] an individual controversy[,] . . . policy articulation is often a necessary part of adjudication. Thus adjudication may make 'rules' . . . in the same way courts make rules in deciding individual cases." *Id.* (footnote omitted); *see also In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 56 ("We expect the PUC to issue rulings in contested cases which will be applied consistently in other cases."). The structure and organization of the VAPA also implicitly recognize this distinction. *Compare* 3 V.S.A. §§ 809–816 (contested cases) *with id.* §§ 817–848 (rulemaking).

Plaintiffs' suggestion that these adjudicative "rules" are subject to administrative rulemaking requirements defies logic. As the State points out, this would result in the merger of an agency's quasi-judicial function with its rulemaking authority, invalidating countless administrative tribunal decisions for failure to follow the rulemaking procedure. *See* State's Mot. to Dismiss (PUC case) at 27. Plaintiffs fail to identify any statutory requirement for the Commission to comply with VAPA rulemaking procedures before rendering decisions on CPGs. Nor do they identify any case holding that adjudicative "rules" developed through caselaw must

be promulgated through the rulemaking process. Indeed, their assertion runs contrary to our Court's recent pronouncement that "[t]he PUC has quasi-judicial powers, and like a court, it can develop law, tests, and rules through its decisions." *Apple Hill Solar*, 2021 VT 69, ¶ 56 (holding that PUC's use of *Quechee* test was an "appropriate exercise of its quasi-judicial authority in ruling on a CPG petition, and it was not required to engage in rulemaking before applying this test"). Instead, it seems that Plaintiffs' strategy is merely to repeat the definition of "rule" over and over again, in the hope that enough repetition will somehow force the definition to encompass adjudicative "rules." *Cf.* L.Carroll, Through the Looking Glass, 117 (Harper & Bros. 1902) ("When *I* use a word, . . . it means just what I choose it to mean—neither more nor less.") That approach fails, particularly in light of *Apple Hill*.

H. ANR's "*De Facto* Rules" (ANR Counts I–III)

In the ANR case, Plaintiffs allege that ANR's "three sets of *de facto* rules" are beyond the Agency's statutory authorization and violate the Vermont Endangered Species Law (ANR Count I), violate the Administrative Procedure Act (ANR Count II), and constitute an unlawful subdelegation (ANR Count III). According to Plaintiffs, the first such set of "*de facto* rules"—contained in ANR's document titled "Guidance for Conducting Rare, Threatened, and Endangered Plant Inventories in Connection with Section 248 Projects"—prescribes when such plant inventories are warranted and their methodology, sets thresholds for determining when impacts to rare plants are "unduly adverse," and sets rules for mitigating impacts. ANR Compl. ¶ 37. The second set—contained in ANR's "Guidance for Non-Native Invasive Plant Species Monitoring and Control in Connection with Section 248 Projects"—establishes "best management practices for preventing the introduction and spread of non-native invasive species." *Id.* ¶ 38. The third set, according to Plaintiffs, "establish[es] a classification system for plants," ranking them from very common to very rare. *Id.* ¶ 39. The Agency ranks the White Arrow-Leaved Aster as "very rare" in Vermont. Plaintiffs' problem with all of this is, essentially, that ANR lacks statutory authority to regulate "rare" or "very rare" plant species that are not also deemed "endangered" or "threatened," ANR Compl. ¶ 46; thus, Plaintiffs assert, ANR cannot protect plants such as the White Arrow-Leaved Aster through the section 248 energy plant review process.

A review of the statutes in questions suggests that Plaintiffs might have a point—to some extent. Vermont's Endangered Species Law requires the Secretary of Natural Resources to

"adopt by rule a State endangered species list and a State threatened species list," but makes no mention of rare or very rare species. 10 V.S.A. § 5402(a). In deciding whether a proposed energy plant poses an undue adverse effect on the natural environment under 30 V.S.A. § 248(b)(5), the cross-referenced criteria from other statutes that the PUC must consider—to the extent it relates to plant species—consist of "the waters' value in providing or maintaining habitat for threatened or endangered plants or animals," 10 V.S.A. § 1424a(d)(5), and "necessary wildlife habitat or any endangered species." 10 V.S.A. § 6086(a)(8)(A). None of the referenced criteria mentions rare or very rare plant species.

On the other hand, while the Endangered Species Law requires ANR to make lists for endangered and threatened species, it does not preclude the Agency from doing the same for "rare" or "very rare" species. *See* 10 V.S.A. § 5402(a). Moreover, the statute pertaining to "outstanding resource waters" cross-referenced in § 248(b)(5) provides 14 factors that ANR "may consider, but shall not be limited to considering" in deciding whether to designate particular waters as outstanding resource waters. 10 V.S.A. § 1424a(d). This implies that additional factors, such as the impact on rare or very rare species, may be considered in the § 248 process. Still, the exact statutory source for such authority remains unclear. The Agency's guidance document (attached to the State's Reply in the ANR case) asserts that to meet the criteria cross-referenced in 30 V.S.A. § 248(b)(5), "a project cannot have an undue adverse effect on rare and irreplaceable natural areas and rare, threatened[,] or endangered species, including [rare, threatened, or endangered] plants." Guidance for Conducting . . . Plant Inventories, at 1. Similarly, in a discovery response in a case before the Public Utility Commission apparently involving Plaintiff's petition for a CPG for the "Warner Solar Project" (also attached to the State's Reply in the ANR case), when asked for the "legislative authority" to "list or protect rare or very rare species in Vermont" that are not threatened or endangered, the Agency responded that "[t]he Section 248 review process provides for the protection of rare and very rare species." Resps. of ANR to Otter Creek Solar's First Set of Inform. Requests at 5.

In any event, the State does not directly contest the merits of the assertion that ANR lacks statutory authority to regulate rare or very rare plant species. Instead, it relies on essentially procedural grounds for dismissal of these three claims. These arguments are persuasive and so obviate the need to delve into the substance of Plaintiffs' allegation or the challenged ANR "guidance" documents.

First, ANR's "guidance documents" by definition are not rules. *Compare* 3 V.S.A. § 801(b)(9) (defining "rule") *with id.* § 801(b)(14) (defining "guidance document" as a "written record that has not been adopted in accordance with sections 836-844 of this title and that is issued by an agency to assist the public by providing an agency's current approach to or interpretation of law or describing how and when an agency will exercise discretionary functions"). That the legislature provided a procedure for people to petition an agency "to adopt a guidance document as a rule or to amend or repeal [a] guidance document" further supports this conclusion. 3 V.S.A. § 806(b).

Second, ANR's guidance documents do not have the force of law. 3 V.S.A. § 835(b). In a Section 248 proceeding, the statute authorizes ANR to "appear as a party" and "provide evidence and recommendations concerning any findings" to be made under § 248(b)(5) (including the "natural environment" criterion). 30 V.S.A. § 248(a)(4)(E). ANR has no adjudicative authority, however; rather, it is the PUC's exclusive authority to issue, deny, make findings, or impose conditions in CPGs. *Id.* § 248(b)(5).

Finally, the proper forum to challenge these guidance documents is in the underlying PUC proceeding and subsequently by appeal to the Supreme Court. *See* 30 V.S.A. § 12. Plaintiffs could argue before the PUC that it should give the guidance documents little to no weight. Alternatively, as noted above, Plaintiffs could petition ANR to amend or repeal the documents. 3 V.S.A. § 806(b). Because the challenged "guidance documents" are not rules and do not have the force of law, and because this challenge is properly brought before the PUC in the first instance rather than this court, ANR Counts I, II, and III must be dismissed.

I. Selective Enforcement (PUC Count XVII)

In Count XVII of the PUC case, Plaintiffs assert that the "aesthetics" and "orderly development of the region" criteria 30 V.S.A. § 248(b) result in selective enforcement, violating the Common Benefits clause and Plaintiffs' due process rights under the Vermont Constitution. This assertion rests exclusively on the allegation that "the PUC has conceded that it considers denying a certificate of public good based on aesthetics and orderly development only if someone complains." PUC Compl., ¶ 119 (citing *In re Chelsea Solar LLC*, No. 8302, 2017 WL 1425504, at *12 (Apr. 14, 2017)). This claim fails for the simple reason that Plaintiffs have failed to allege any facts that would support a claim of selective enforcement.

To prove a constitutional violation due to selective enforcement, a plaintiff must prove that "(1) the person, compared with others similarly situated, was selectively treated; and (2) . . . such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *In re Letourneau*, 168 Vt. 539, 549 (1998) (quoting *Crowley v. Courville*, 76 F.3d 47, 52–53 (2d Cir. 1996)); *see Parker v. Town of Milton*, 169 Vt. 74, 81(1998) (denying selective enforcement claim where challenged decision was not based on "any suspect classification or illicit motive"). The PUC Complaint provides no clarity as to how any alleged selective enforcement of the aesthetics and orderly development criteria has harmed Plaintiffs, or will do so in the future. In short, any injury is speculative. As noted above, this failure defeats any standing argument. *Turner v. State*, 2017 VT 2, ¶ 9, 204 Vt. 78 ("A claim is not constitutionally ripe if the claimed injury is conjectural or hypothetical rather than actual or imminent."). Equally, it compels the conclusion that Plaintiffs have failed to state a claim.[13]

This claim suffers from another fundamental defect: its sole allegation is demonstrably false. Here, the specificity of Plaintiffs' allegation is their undoing. As support for their assertion that "the PUC has conceded that it considers denying a certificate of public good based on aesthetics and orderly development only if someone complains," they cite *In re Chelsea Solar LLC*, No. 8302, 2017 WL 1425504, at *12 (Apr. 14, 2017). As Plaintiffs have relied on this decision in their Complaint, the court may properly consider it on a motion to dismiss. *See Davis v. American Legion, Dep't of Vermont*, 2014 VT 134, ¶ 13, 198 Vt. 204 (quoting *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 10 n. 4, 186 Vt. 605 (mem.)) ("Where pleadings rely upon outside documents, those documents 'merge[ ] into the pleadings and the court may properly consider [them] under a Rule 12(b)(6) motion to dismiss.' "). The court searches in vain in that decision—at page 12 or elsewhere—for anything remotely approaching the "concession" Plaintiffs allege. Thus, even were Plaintiffs' allegation sufficient to state a claim of selective enforcement, the patent falseness of the allegation would defeat the claim.

[13] Also as noted above, if Plaintiffs felt that they had been harmed by the PUC's selective enforcement of these criteria, their remedy would not lie here, but before the PUC and on appeal, the Supreme Court. *See Travelers Indem. Co. v. Wallis*, 2003 VT 103, ¶¶ 10–18, 176 Vt. 167 (discussing primary jurisdiction doctrine).

J. First Amendment (PUC Count XVIII)

In the PUC case, Plaintiffs allege that the aesthetics criterion in 30 V.S.A. § 248(b)(5) and the orderly development criterion in § 248(b)(1) violate their free speech rights under the First Amendment (PUC Count XVIII).[14] They make the novel allegation that "a large solar farm is speech," PUC Compl. ¶ 123, bolstered by the assertion that "[s]olar facilities communicate hope for the future," *id.*, ¶ 124. While the second of these assertions is perhaps a matter of fact that the court is bound to accept for purposes of a motion to dismiss, the former is clearly a legal conclusion, entitled to no such deference. Rather, attention to the law makes clear that however much hope it might inspire, a solar energy facility is not protected speech.

The First Amendment guarantees an individual the right to free speech, "a term necessarily comprising the decision of both what to say and what not to say." *Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796–97 (1988). Generally, this means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 65 (1983) (quotation omitted). "Even dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (collecting cases). A restriction on nonspeech or nonexpressive conduct, however, does not implicate the First Amendment and receives only rational basis scrutiny. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

By Plaintiffs' reasoning, almost any form of human endeavor would be entitled to First Amendment protection, as long as the actor was creative enough to posit an expressive attribute to the activity. A coal plant would be protected because it expresses climate change skepticism; a petroleum refinery because it expresses a belief in the inexhaustibility of fossil fuels; an open-pit mine because it expresses disdain for aesthetics; an upscale downtown residential complex that replaces affordable housing because it expresses resistance to urban flight; the list is virtually infinite. The U.S. Supreme Court, however, has rejected the view that "an apparently limitless

[14] The heading for the count suggests that Plaintiffs also assert equal protection and due process protections. The allegations of the count, however, make no further mention of equal protection or due process rights.

variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). Instead, to fall within the scope of the First Amendment, the activity must be "sufficiently imbued with elements of communication . . . ." *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). The activity alleged here—building a solar facility—does not contain communicative elements sufficient to receive First Amendment protection. It is worlds apart from the type of non-verbal conduct traditionally recognized as or assumed to be protected speech, such as displaying an upside-down American flag with a peace symbol affixed, *Spence*, 418 U.S. at 414–15; cross-burning, *Virginia v. Black*, 538 U.S. 343, 357 (2003); flag-burning, *Texas v. Johnson*, 491 U.S. 397, 406 (1989); camping outside overnight at a public park during winter to demonstrate the plight of the homeless, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 291–93 (1984); wearing armbands to express disapproval of Vietnam War, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); or burning a draft card *O'Brien*, 391 U.S. at 376. Nor does it come close to the examples cited by Plaintiffs. *See* Pls.' Opp'n (PUC case) at 52–53; *see also Serra v. U.S. Gen. Servs. Admin.*, 847 F.2d 1045 (2d Cir. 1988) ("Tilted Arc" structure). Obviously, artwork and sculptures—including a sculpture of a middle finger directed toward a town—are imbued with significant communicative elements. Solar facilities plainly do not fall into this category. This conclusion obviates the necessity of wading further into Plaintiffs' First Amendment arguments.

K. Public Trust/Right to Stable Climate (PUC Count XIX; ANR Count VI)

In Count XIX of the PUC Complaint, Plaintiffs allege that the "fundamental rights" guaranteed by Article 1 of the Vermont Constitution include "a fundamental right to our country's life-sustaining and property sustaining climate system, which encompasses our atmosphere waters, oceans, and biosphere." PUC Compl., ¶ 140. They allege further: "Plaintiffs have a constitutional right and a right under the public trust doctrine to use their land to build solar facilities, and only a compelling overwhelming contrary state interest is allowed to curtail that right." *Id.*, ¶ 141. They seek a declaration that "the second and third sentences of the definition of plant, the aesthetics criterion [in] 30 V.S.A. § 248(b)(5) and the PUC's adopted modified *Quechee* test, and the orderly development criterion in 30 V.S.A. § 248(b)(l) individually and collectively unconstitutional[ly] burden Plaintiffs' constitutional rights and rights under the public trust doctrine." *Id.*, ¶ 142. They make similar allegations in Count VI of

the ANR Complaint; there they seek a declaration that "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." ANR Complaint, ¶ 88.

In its traditional formulation, the public trust doctrine provides that the State holds title to lands submerged beneath navigable waters "in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *State v. Cent. Vermont Ry., Inc.*, 153 Vt. 337, 341 (1989) (quoting *Illinois Central Railroad v. Illinois,* 146 U.S. 387, 452 (1892)). Our Court has recognized, however, that "[t]he 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." *Id*. at 342 (quotations and citations omitted). Here, Plaintiffs seek to extend the doctrine to the public's right to a stable climate. *See Juliana v. United States*, 947 F.3d 1159, 1164 (9th Cir. 2020) (plaintiffs argued violation of their right to a "climate system capable of sustaining human life"). The State does not appear to contest this extension. Instead, the State disputes Plaintiffs' standing for this claim, and argues further that the provisions in question do not violate either substantive due process or the public trust.

The court has already disposed of the standing argument, concluding that Plaintiffs lack standing to bring these claims. It need not retrace those steps, except to note that unlike the *Juliana* plaintiffs, who alleged injury such as flooding or lack of water, *id*. at 1168, Plaintiffs here allege no particularized harm. In the context of these claims, it also bears emphasis that the related requirements of standing and actual case or controversy stem in part from the constitutional requirement of separation of powers, and prevent the court from "presiding over broad-based policy questions" that are more appropriate for the legislature. *Parker*, 169 Vt. at 77. That, however, is precisely what Plaintiffs ask the court to do.

Even if Plaintiffs had established standing, their due process and public trust violation claims would fail. "Under substantive due process, if governmental action threatens a right deemed 'fundamental,' then courts 'must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation,' [. . .] and uphold the government action only if it is narrowly tailored to further a 'legitimate and compelling' governmental interest." *State v. Blackmer*, 160 Vt. 451, 464–65 (1993) (Johnson, J.,

dissenting) (quoting *Moore v. City of E. Cleveland, Ohio*, 431 U.S. 494, 499 (1977)). The State cites a string of cases to support its argument that provisions of this kind are subject to rational basis review, rather than strict scrutiny. *See Vill. Of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542, 548 (2005); *Walz v. Town of Smithtown*, 46 F.3d 162, 169 (2d Cir. 1995); *Galanes v. Town of Brattleboro*, 136 Vt. 235, 240 (1978). It bears noting that the Plaintiffs' claim, strictly speaking, is that the statutes in question curtail their ability to develop their land, not that the State has directly harmed the stable environment. Therefore, rational basis analysis is clearly the more appropriate lens through which to view their challenge. Equally clearly, these provisions are rationally related to a proper state purpose—as with Act 250, promoting orderly development in the energy sector and allowing the state to review and mitigate impacts from significant changes in land use. *Cf. In re N. E. Materials Grp. LLC Act 250 JO # 5-21*, 2015 VT 79, ¶ 15, 199 Vt. 577 ("Act 250 . . . was enacted 'to protect Vermont's lands and environment by requiring statewide review of large-scale changes in land utilization.' "). This observation defeats Plaintiffs' substantive due process claims.

Plaintiffs' public trust claims fail substantively as well. They do not allege that the State has abdicated its authority to enact laws and enforce regulations that protect the public's access to clean air and water and a stable climate from incursions by private actors. *See Central Vt. Ry.*, 153 Vt. at 345–46. Instead, they assert that the State has acted to impede their ability to enhance such access—in short, that "[t]he [State] needs to get out of the way . . . of people that are simply sick and tired of [its] direct and indirect support of the fossil fuel industry and its allies." ANR Compl. ¶ 2. This assertion would extend the public trust doctrine so far as to make it unrecognizable.

At its core, the doctrine recognizes the State's authority—indeed, duty—"to exercise a continuous supervision and control over [the public resources that are the subjects of the trust]." *Id.* at 345 (quoting *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 425–26 (1983)). Thus, the doctrine bars the legislature from "grant[ing] rights in public trust property for private purposes," or private parties from otherwise acquiring "private rights with respect to public waters." *Id.* at 344. Here, even if the public trust were extended to include clean air and water and a stable climate, the legislature has not acted to vest rights in those resources in anyone. In short, this claim quite simply comes nowhere close to a traditional public trust

doctrine claim, in which a member of the public alleges that the State has unlawfully relinquished title to resources in the public trust. Thus, even if our Supreme Court were willing to extend the doctrine to encompass a public right to a stable climate, this court cannot predict that the Court would go so much further as to extend it to a situation in which the State has not alienated any part of those rights.[15]

ORDER

As demonstrated above, each of Plaintiffs' claims, in both cases, suffers from one or more fatal defects. Accordingly, the court grants the State's motion to dismiss in each case. All claims are dismissed with prejudice.

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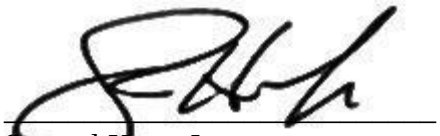

Samuel Hoar, Jr.
Superior Court Judge

[15] In supplemental briefing invited by the court on an entirely different question, Plaintiffs bring to the court's attention two cases they believe may bear on their public trust claims. In the first of these cases, an Alaska trial court dismissed the plaintiffs' request for injunctive relief based on climate change claims where the relief requested would amount to the court's bypassing the executive and legislature to make a policy judgment. *Sinnok v. State*, No. 3AN-17-09910 CI, 2018 WL 7501030, at *4 (Alaska Super. Oct. 30, 2018). That case is now on appeal to the Alaska Supreme Court. Even if that court were to reverse and recognize a judicially enforceable public trust right to a stable climate, however, the decision would not help Plaintiffs. Notably, the *Sinnok* plaintiffs alleged that the state violated the public trust by its actions, including issuing permits for mining and drilling—in other words, that it granted private rights in public trust resources. *See* Complaint at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2018/20180824_docket-3AN-17-09910_complaint.pdf. As noted above, Plaintiffs here make no such allegation.

In the second case, a Montana trial court denied dismissal of the plaintiffs' public trust doctrine claims. *Held v. State*, No. CDV-2020-307 (Mont. 1st Dist. Ct., Aug. 4, 2021). There, in contrast to this case, the allegation was not that the state's review of projects violated plaintiffs' right to a stable climate; instead the plaintiffs alleged harm stemming from the state's statutory proscription of review of "actual or potential impacts that are regional, national, or global in nature." Mont. Code Ann. § 75-1-201(2)(a). Thus, the claim that survived a motion to dismiss in that case is categorically different than Plaintiffs' claim here.