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April 27, 2020

VIA EMAIL TO MELANIE.BACHMAN@CT.GOV and SITING.COUNCIL@CT.GOV

Melanie A. Bachman, Esq.
Executive Director/Staff Attorney
State of Connecticut Siting Council
Ten Franklin Square
New Britain, CT 06051

RE: Petition No: 1312
Candlewood Solar, LLC – 20 MW Solar Photovoltaic Project
New Milford Assessor's Map Parcels 26/67.1, 9.6, and 34/31.1
Candlewood Mountain Road, New Milford, Connecticut

Dear Ms. Bachman:

Enclosed, for filing with the Siting Council, please find an original of the following:

- Parties/Intervenors' Motion for Stay Pursuant to C.G.S. § 4-183(f);
- Memorandum of Law in Support of Parties/Intervenors' Motion for Stay;
- Affidavit of Daniel E. Casagrande, Esq.

Copies of this filing are being provided via electronic mail to the parties on the service list.

Very truly yours,

CRAMER & ANDERSON, LLP

By _____
Daniel E. Casagrande, Esq., Partner

DEC/smc
Enclosures

STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IN THE MATTER OF:	:	**PETITION NO: 1312**
Candlewood Solar, LLC	:	
20 MW Solar Photovoltaic Project	:	
New Milford Assessor's Map	:	
Parcels 26/67.1, 9.6, and 34/31.1	:	
Candlewood Mountain Road	:	
New Milford, Connecticut	:	**APRIL 27, 2020**

MOTION FOR STAY PURSUANT TO CONN. GEN. STAT. § 4-183(f)

Parties/Intervenors, Rescue Candlewood Mountain ("Rescue") and the Town of New Milford ("Town"), respectfully move the Connecticut Siting Council ("Council") for a stay pursuant to Conn. Gen. Stat. § 4-183(f) of any construction activities relating to the solar project at issue in this proceeding (the "Project") until the final determination by the Superior Court of plaintiffs' administrative appeal from the Council's December 21, 2017 declaratory ruling approving the Project ("Rescue Appeal"). (Dkt No. HHB-CV-18-6042335-S). The trial of the Rescue Appeal is currently pending before Judge Henry Cohn in the Judicial District of New Britain at New Britain. In the alternative, Rescue and the Town move for a temporary stay of construction activities until the Court decides whether to issue a stay as sought by plaintiffs in their Motion for Stay and associated filings, dated April 21, 2020, in the Rescue Appeal (Docket ID ## 164.00 – 173.00).

As explained more fully in Rescue's and the Town's Memorandum of Law and the Affidavit of Daniel E. Casagrande, Esq. (the "Casagrande Affidavit") filed herewith, an immediate stay of construction activities is warranted under the "balancing of the equities" test applicable to § 4-183(f) stay motions. Without a stay, the Rescue Appeal will be rendered instantly moot, causing irreparable harm to Rescue, the Town, and Rescue's co-plaintiffs from the destruction of over 54 acres of core forestland and additional harms to downgradient wetlands and watercourses. The Siting Council's failure to preserve the status quo by not staying construction will essentially dispose of the Rescue Appeal in Candlewood Solar's favor without its merits being heard and decided by the Court. Fundamental fairness and due process compel a stay of construction by the Siting Council until the Court finally determines the merits of the Rescue Appeal, or at least until the Court can consider and rule on plaintiffs' Motion for Stay in the Rescue Appeal.

The Town and Rescue respectfully ask the Siting Council to schedule an expeditious hearing on the instant motion to stay, and further request that such a hearing be held by telephonic, videoconference, in-person, or other available means before the Council issues its decision on the Revised D&M Plan for the Project filed with the Council by Candlewood Solar on April 14, 2020. Expedited consideration is necessary under the circumstances because if Candlewood Solar obtains DEEP approval of its stormwater and erosion-control plans and the Council thereafter approves the Revised D&M Plan, clear-cutting would start shortly thereafter, causing irreparable harm to Rescue, the Town, and Rescue's co-plaintiffs while rendering the meritorious claims raised in the Rescue Appeal moot. At this critical juncture, the Council should

exercise its lawful discretion to balance the equities by preserving the status quo, especially in view of the important environmental issues at stake that Rescue and the Town seek to protect.

PARTIES/INTERVENORS,
RESCUE CANDLEWOOD MOUNTAIN AND
TOWN OF NEW MILFORD

By: _____

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CERTIFICATION OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on April 27, 2020, to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

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STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IN THE MATTER OF:	:	**PETITION NO: 1312**
Candlewood Solar, LLC	:	
20 MW Solar Photovoltaic Project	:	
New Milford Assessor's Map	:	
Parcels 26/67.1, 9.6, and 34/31.1	:	
Candlewood Mountain Road	:	
New Milford, Connecticut	:	**APRIL 27, 2020**

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR STAY BY PARTIES/INTERVENORS TOWN OF NEW MILFORD AND RESCUE CANDLEWOOD MOUNTAIN

Parties/Intervenors, Town of New Milford ("Town") and Rescue Candlewood Mountain ("Rescue"), submit this memorandum of law in support of their motion for an immediate stay of any construction relating to the project that is the subject of this appeal ("Project"). The motion seeks two alternative forms of relief. First, the motion seeks a stay of such activities pending the Superior Court's final determination of Rescue's administrative appeal of the Siting Council's December 21, 2017 approval of a declaratory ruling for the Project. Second, and in the alternative, the motion seeks a temporary stay of such activities until the Superior Court decides whether to grant the Plaintiffs' Motion for Stay, dated April 21, 2020, in the pending Rescue Appeal. The instant motion is filed pursuant to C.G.S. § 4-183(f), and seeks a stay of all activities permitted by the Siting Council's ("Council") December 21, 2017 approval of the Project, including but not limited

to the clear-cutting, stumping and grubbing of the over 54 acres of core forestland whose destruction and related environmental damage the appeal seeks to prevent.[1]

I. RELEVANT FACTS.

Accompanying the Motion to Stay is an affidavit (with exhibits) by Daniel E. Casagrande, Esq., undersigned counsel to Plaintiffs ("Casagrande Affidavit"). The Casagrande Affidavit sets forth the following relevant facts.

A. Summary of Proceedings Before the Siting Council and DEEP.

On December 21, 2017, the Council issued a declaratory ruling approving the Project. Rescue, an association of individuals concerned about the destruction of core forest and other environmental impacts to be caused by the Project, intervened in the Council proceeding pursuant to C.G.S. § 22a-19 to oppose the Project due to its significantly adverse effect on the natural resources of the State. The Town also intervened as a party to the Council proceeding to raise similar concerns. Rescue and other plaintiffs adversely affected by the Project (the "Rescue Plaintiffs")[2] timely filed an administrative appeal from the Council's approval pursuant to C.G.S. § 4-183 (the "Rescue Appeal"). (Dkt. No. HHB-CV-18-6042335-S (J.D. New Britain at New Britain)). Trial of the Rescue Appeal before the Court (Cohn., J.) commenced on December 4, 2018, and is ongoing. (Casagrande Affidavit, ¶ 2)

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[1] Due to the COVID-related closure of the Siting Council's office, this motion and accompanying documents are being electronically filed with the Siting Council. See R.C.S.A. § 16-50j-12.

[2] In addition to Rescue, the plaintiffs in the Rescue Appeal are Lisa Ostrove, Michael Ostrove, Candlelight Farms Aviation, LLC and Carl M. Dunham, Jr., pro se.

The Council's approval of the Project was conditioned on the approval by the Department of Energy and Environmental Protection ("DEEP") of a stormwater pollution control plan ("SWPCP"), and the approval by the Council of a development and management plan ("D&M Plan" or "DMP"). Under the Council's approval, construction of the Project may not commence until Candlewood Solar receives both approvals. (Casagrande affidavit, ¶ 3)

On September 17, 2018, Candlewood Solar filed with DEEP a SWPCP together with an application ("First Application") for registration of the Project under DEEP's General Permit for the Discharge of Stormwater and Dewatering Wastewaters (the "General Permit"). (Casagrande Affidavit, ¶ 4)

On October 18, 2018, DEEP rejected the First Application, citing numerous "major" deficiencies in the SWPCP submitted by Candlewood Solar. (Casagrande affidavit, ¶ 5)

On or about January 2, 2019, Candlewood Solar filed a second General Permit registration application with DEEP (the "Second Application"). (Casagrande Affidavit, ¶ 6)

On January 16, 2019, the Town filed with DEEP a petition for declaratory ruling which requested, in part, that DEEP reject the Second Application. The Town's petition attached a January 14, 2019 affidavit by two professional engineers and members of Milone & MacBroom, Inc., an engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut. The Milone & MacBroom affidavit set forth numerous and significant inadequacies in the SWPCP filed with the Second

Application. The Milone & MacBroom affiants recommended that DEEP reject the Second Application, and that the Commissioner of DEEP exercise her discretion under C.G.S. §22a-430b(c) to require the filing of an application for an individual permit to discharge, due to the magnitude of the proposed solar facility and its location "on steep slopes ... where a significant area of core forest will be removed .... " (Casagrande Affidavit, ¶ 7)

On March 14, 2019, DEEP's Bureau of Management and Compliance Assurance ("Bureau") rejected the Second Application. For detailed reasons including those set forth in the Milone & MacBroom affidavit, the Bureau found substantial flaws in Candlewood Solar's stormwater analysis, and determined that the SWPCP "lack[s] elements necessary to demonstrate the effectiveness and appropriateness of the proposed construction and post-construction stormwater management measures." (Casagrande Affidavit, ¶ 8)

Also on March 14, 2019, DEEP Commissioner Katie Dykes issued a decision not to grant the Town's January 16, 2019 request for declaratory ruling. (Casagrande Affidavit, ¶ 9, Tab 1) Commissioner Dykes' decision rested on the Bureau's rejection of the Second Application. Her decision noted substantial deficiencies in the Second Application, and expressed doubt that Candlewood Solar would submit a revised registration. As Commissioner Dykes found:

> I am also, in this declaratory ruling proceeding, declining to exercise my authority to require that Candlewood Solar obtain an individual discharge permit for the Project, although not for any of the reasons cited in Candlewood Solar's objections.

> I recognize that with the rejection of Candlewood Solar's registration, nothing prevents Candlewood Solar from resubmitting a revised registration seeking coverage under the General Permit. Nevertheless, with the rejection of Candlewood Solar's registration, there is no longer anything pending before the Department and it remains unclear, especially given the substantial nature and extent of the deficiencies in the last registration it submitted, if Candlewood Solar will make any resubmission – either in the form of a registration or an application for individual permit. Moreover, the Petitioner is seeking a hearing regarding the exercise of my authority under Conn. Gen. Stat. § 22a-430b(c), yet nothing in this section 22a-430b(c) would require that I hold a hearing to exercise the discretion afforded by that statute. I am reluctant to expend limited Department resources on a hearing, especially when section 22a-430b(c) does not require a hearing and when it is not clear whether Candlewood Solar will even submit a revised registration or an application for an individual permit.
>
> Having so concluded, I also want to make unmistakably clear that my decision in this matter does not, and is not intended to, foreclose the possibility that I may indeed exercise my authority under Conn. Gen. Stat. § 22a-430b(c) and require that Candlewood Solar obtain an individual discharge permit for the Project. I remain concerned about a number of the issues raised by the Petitioner and Rescue Candlewood Mountain. I have decided, however, not to exercise this authority in this context, at this time.

(Footnote omitted; emphasis added.) (Casagrande Affidavit, ¶ 9, Tab 1, pp. 3-4)

On January 28, 2019, Candlewood Solar filed a D&M Plan with the Council. The D&M Plan was based on the same SWPCP that the Bureau later rejected in its March 14, 2019 denial of the Second Application. The Town then requested the Council to deny the D&M Plan on this basis. On April 25, 2019, the Council approved the D&M Plan, but conditioned the approval on Candlewood Solar's resubmission of a new SWPCP to DEEP, and DEEP's approval of that submission. (Casagrande Affidavit, ¶ 10) The Town thereafter filed an administrative appeal from the Council's approval of the DMP (the "Town's Appeal"). That appeal is now pending before the Superior Court, but counsel

intends to withdraw the appeal without prejudice pursuant to an agreement with defendants' counsel. (Dkt. No. HHB-CV-19-6053213-S) (Casagrande Affidavit, ¶ 10)

In a January 21, 2020 status conference in the Town's Appeal, Judge Cohn asked Candlewood Solar's counsel about its plan to submit a new SWPCP to DEEP. Counsel represented that Candlewood Solar intended to file the new SWPCP as part of a new request for registration under the General Permit ("Third Application"). Counsel also reported to the Court that Candlewood Solar had been meeting privately with DEEP staff regarding the planned filing of the Third Application. (Casagrande Affidavit, ¶ 11)

On February 27, 2020, the Town filed a new petition for a declaratory ruling with DEEP ("Town's Second Petition"). This petition noted that Candlewood Solar was about to file its Third Application for authorization of the Project under the General Permit. The Town's Second Petition requested the DEEP Commissioner to require Candlewood Solar to submit an individual permit application that will afford the Town, Rescue, and other interested persons a reasonable time to prepare a careful and thorough response to Candlewood Solar's revised SWPCP--a revision that Candlewood Solar had taken almost a year to develop. The Town noted to the Commissioner that the individual permit process would trigger a public hearing to allow an open and robust vetting of the stormwater and erosion control impacts of the Project and their consequences to the water and other natural resources of the State. (Casagrande Affidavit, ¶ 12)

On March 3, 2020, Candlewood Solar submitted its Third Application to DEEP for registration under the General Permit. (Casagrande Affidavit, ¶ 13)

On March 25, 2020--within the fifteen day window provided by DEEP's rules on General Permit registrations and 15 days after Governor Lamont declared public health and civil preparedness emergencies throughout the State -- the Town submitted its preliminary comments on the Third Application. The comments included a supplemental affidavit by Milone & MacBroom, in which its engineers found, based on their preliminary review of the Third Application (some 1,800 pages long), that the SWPCP still suffers from substantial deficiencies which, in Milone & MacBroom's professional judgment, warrant the Commissioner's exercise of discretion to require an individual permit application. (Casagrande Affidavit, ¶ 14)

On April 7, 2020, Candlewood Solar submitted to DEEP a "sur-reply" to the Town's March 25, 2020 comments, in which it admitted to a series of closed door meetings with DEEP staff over the last year to discuss revisions to the SWPCP, and claimed that the Third Application meets current DEEP guidelines for "large" solar projects. The sur-reply made evident that there is a serious disagreement between Milone & MacBroom and Candlewood Solar's engineers as to the Project's compliance with DEEP standards. (Casagrande Affidavit, ¶ 15)

On April 9, 2020, the Town submitted to DEEP its response to Candlewood Solar's sur-reply. The Town pointed out that the disagreement over the sufficiency of the SWPCP between the Town's and Candlewood Solar's engineers is in and of itself a reason to require an individual permit process in which these opposing conclusions, and the

credibility of the experts, can be assessed in an open and impartial forum. (Casagrande Affidavit, ¶ 16)

As of the filing of this Motion for Stay, DEEP has not yet ruled on the Third Application or on the Town's Second Petition, but the parties expect such rulingsimminently. (Id., ¶ 16)

B. Facts Demonstrating Candlewood Solar's Intent to Commence Clear-Cutting of the Core Forest Immediately Upon Receipt of Favorable Rulings From DEEP and the Siting Council.

On April 14, 2020, the Court held a telephonic status conference in both the Town's Appeal and the Rescue Appeal. Present on the call were the Court, undersigned counsel to Rescue and the Town, Robert Marconi, counsel to the Council, Jeffrey Mirman, counsel to Candlewood Solar, Melanie Bachman, Executive Director of the Council, and Carl M. Dunham, Jr., pro se plaintiff in the Rescue Appeal. (Casagrande Affidavit, ¶ 17)

The Court initiated the call by asking the status of the proceeding before DEEP. Attorney Mirman responded that he had spoken with DEEP counsel, that DEEP was at that time actively reviewing the various submissions to it, and that DEEP should be issuing a decision within a matter of days (i.e. as of April 14, 2020). (Casagrande Affidavit, ¶ 18)

The Court then asked what would happen if DEEP approved the Third Application. The undersigned responded that the Town and Plaintiffs would pursue all available appellate remedies. Ms. Bachman then stated that the Council had determined that it would review any DEEP-approved SWPCP pursuant to an "internal staff review" of a

revised D&M Plan, which she asserted would take only a matter of days. (Casagrande Affidavit, ¶ 19)

Undersigned counsel responded that his understanding was the opposite of Ms. Bachman's. Undersigned counsel reported to the Court, and reminded the others on the call, that at a May 14, 2019 hearing before the Council on this Court's remand on the visibility issue in this appeal, the Council's acting Chair, in limiting undersigned counsel's questioning of Candlewood Solar's witnesses on the SWPCP, had assured undersigned counsel that, if and when DEEP approved a SWPCP, the SWPCP would come back to the Council as part of a revised D&M Plan, thereby affording the Town, Rescue and other persons the opportunity to review and comment on the revised plan. As Ms. Bachman stated, however, that is not the Council's current plan; its intention now is to have its staff approve or recommend approval of the revised D&M Plan almost immediately after DEEP's approval, with little to no opportunity for the Town, Rescue and other interested persons to review the revised plan. (Casagrande Affidavit, ¶ 20)

Also during the April 14, 2020 telephonic conference call with the Court, Mr. Dunham reported that, just prior to the call that morning, he had observed from his property on 195 Candlewood Mountain Road that Candlewood Solar had positioned machines on the Project site, had commenced construction surveying and staking, and appeared ready to start clearcutting operations. (Casagrande Affidavit, ¶ 21)

At the end of the telephonic status conference, undersigned counsel asked the attorneys for Candlewood Solar and the Council if they would agree to stay the

commencement of the proposed clear-cutting, stumping and grubbing until after all appeals from DEEP's and the Council's approvals are finally resolved. Attorney Mirman responded adamantly that Candlewood Solar would not agree to such a stay. At this point, the Court suggested that the Town and Rescue would have to seek a stay in order to preserve the status quo pending the outcome of the appeals. (Casagrande Affidavit, ¶ 22)

As further evidence of Candlewood Solar's intent to begin the destruction of this forest land as soon as possible, on April 13, 2020, Candlewood Solar filed its revised D&M Plan with the Council, without waiting for DEEP's decision on the Third Application. Candlewood Solar's manifest intent is to have the Council complete its staff review parallel to DEEP's review of the SWPCP, so that the Council will approve the revised D&M Plan within a few days after anticipated favorable action by DEEP. (Casagrande Affidavit, ¶ 23)

Notably, prior to this latest submission of a D&M Plan to the Council, Candlewood Solar had agreed, and the Council had found, that no clear cutting of trees would occur between April 1 and October 31, in order to protect wildlife species. (See Council's Revised Findings of Fact, ¶ 296 (June 7, 2019).) The revised D&M Plan, however, now proposes clearcutting from the date the Council approves the plan through June 1 of this year, a two-month pause from June 1 through July 31,[3] and then continuing until the entire

[3] The record of Council proceedings in support of the Council's December 21, 2017 declaratory ruling approving the Project includes DEEP correspondence (i.e. a letter prohibiting clearcutting operations during the seven-month period between April 1st and October 31st of any given calendar year.

acreage is razed, in order to enable Candlewood Solar to complete construction of the Project within an apparent current deadline of September 30, 2021. (Casagrande Affidavit, ¶ 24, Tab 2 (Revised D&M Plan, Att. 3, p.6)) This is perhaps the most compelling proof that Candlewood Solar intends to start and finish the tree clearing in an intensive campaign beginning literally days from now.

These facts lead to one conclusion—Candlewood Solar's plan is to destroy this massive acreage of forest land as soon as possible after it receives what it expects to be an imminent approval of the SWPCP from DEEP and then, days later, gets the Council to sign off on a revised D&M Plan.

The facts also demonstrate that the Town and Rescue will be irreparably harmed if Candlewood Solar destroys this forest before any meaningful appellate review can occur. The sole purpose of the Rescue Appeal is to save these trees and prevent associated harms to downgradient wetlands and watercourses. If the Council does not issue a stay before it (presumably) approves the revised D&M Plan, the destruction of the forest will move forward rapidly, and the forest soon will be gone and these harms will occur. Candlewood Solar will then (correctly) proclaim that the Rescue Appeal is moot and should be dismissed. Rescue and the Town have no adequate remedy at law, and the equities clearly favor preserving these tens of thousands of trees until the Rescue Appeal is finally resolved.

C. Rescue's April 21, 2020 Motion to Stay filed with the Court.

On April 21, 2020, Rescue filed a Motion for Stay with the Court in the Rescue Appeal pursuant to Practice Book §4-183(f) (i.e. Docket ID ## 164.00 – 173.00. (Casagrande Affidavit, ¶ 25)

On April 22, 2020, the Court entered an order indicating that in light of the COVID-related court closures, oral argument and rulings on pending motions have been stayed. The order stated that "once the regular business of the Court has been reinstated," oral argument would be immediately scheduled. (Casagrande Affidavit, ¶ 26, Tab 3)

Also on April 22, 2020, in an email exchange with undersigned counsel, the Court stated that Rescue has the right to ask for a stay from the Council before any work is done pursuant to the Council's permit. The Court indicated that it would not act on any §4-183(f) motions "until such time as the Siting Council has ruled on [Rescue's] motion." (Casagrande Affidavit, ¶ 27, Tab 4)

II. STANDARD FOR DETERMINING MOTION TO STAY.

The filing of an appeal pursuant to C.G.S. § 4-183 does not automatically stay enforcement of an agency decision. Under the statute, "[a]n application for a stay may be made to the agency to the court or both." C.G.S. § 4-183(f).[4] See Griffin Hospital v. Commission on Hospitals and Health Care, Inc., 196 Conn. 451, 455 (1985). "In the analogous situation of a temporary injunction to preserve the status quo until the rights of

[4] C.G. S. § 4-183(f) provides:
The filing of an appeal shall not, of itself, stay enforcement of an agency decision. An application for a stay may be made to the agency, to the court or to both. Filing of an application with the agency shall not preclude action by the court. A stay, if granted, shall be on appropriate terms.

the parties can be determined after a full hearing on the merits, we have said that the court is called upon to balance the results which may be caused to one party or the other, and if it appears that to deny or dissolve it may result in great harm to the plaintiff and little to the defendant, the court may well exercise its discretion in favor of granting or continuing it, unless indeed, it is very clear that the plaintiff is without legal right." (Emphasis in original; citation and internal quotation marks omitted.) Id. at 456. In determining whether to grant a stay, the tribunal employs a "balancing of the equities" test. The considerations include the probability of success on the merits, whether the movant will suffer irreparable loss unless the status quo is preserved, and the likely harm to be sustained by other parties as well as the public from preservation of the status quo. Id. at 458. "It is not possible to reduce all of the considerations involved in stay orders to a rigid formula ...." Id. "The [agency] has a large measure of discretion in determining whether to issue a stay." Id. at 459.

Section 4-183(f) provides that motions to stay may be made to the court, the agency whose ruling is being challenged, or both. The Court's actions on April 22, 2020 make clear that the Court expects the Council to rule on this motion for stay before the Court determines whether to impose a stay.

We should also note that the Council has the authority to issue the stay pursuant to § 4-183(f) even though it has not yet determined whether to approve the revised D&M Plan. Under the express terms of § 4-183(f), the Council's jurisdiction to consider a stay

of construction during the Rescue Appeal was triggered upon the commencement of that appeal.

III. ARGUMENT.

A. Rescue is reasonably likely to succeed on the merits of its claims in the Rescue Appeal, and even if the merits are debatable, the irreparable loss which Rescue and the Town will suffer if the status quo is not preserved clearly favors a stay.

The parties to the Rescue Appeal have fully briefed the merits of the appeal to the Court.[5] Rescue and the Town respectfully submit that each of the Rescue Plaintiffs' assertions of error by the Council are reasonably likely to succeed, or at the least raises colorable claims for appellate review. We will not burden the Council by reiterating these allegations in detail here. The claims may be summarized as follows:

i. The Siting Council's Error of Law in Failing to Apply Public Act 17-218.

The Rescue Plaintiffs allege that the Council acted illegally and in excess of its statutory authority by denying the motions by DEEP and the Department of Agriculture ("DOA") to dismiss Candlewood Solar's petition for a declaratory ruling based on P.A. 17-218, and instead to require Candlewood Solar to apply for a Certificate of Public Convenience and Necessity ("Certificate"), which would trigger a more intensive environmental review of the Project. The plain language of P.A. 17-218 is that a statutory

[5] See Rescue Plaintiffs' Brief dated August 9, 2018 (Filing No. 128.00); Defendant Candlewood Solar's Brief dated September 24, 2018 (Filing No. 131.00); Defendant Connecticut Siting Council's Brief dated September 24, 2018 (Filing No. 132.00); Rescue Plaintiffs' Reply Brief dated October 26, 2018 (Filing No. 136.00).

bid for a solar project rejected by DEEP prior to July 1, 2017 does not qualify for declaratory ruling treatment under C.G.S. § 16-k(a) unless DEEP represents to the Council that the project will not materially adversely affect core forestland of the state. The Project was rejected by DEEP prior to July 1, 2017, and DEEP affirmatively represented to the Council that the Project will have a materially adverse effect on core forestland. The Council's and Candlewood Solar's argument that P.A. 17-218 does not apply because Candlewood Solar's application for declaratory ruling approval was filed three days before the statute's effective date ignores the plain language and purpose of P.A. 17-218, and disregards the fact that the statute is procedural in nature and thus applies retroactively to Candlewood Solar's petition. (Plaintiffs' August 9, 2018 Brief, pp. 13 - 23 ("Rescue Plaintiffs' Brief"))

As to the likelihood the Rescue Plaintiffs will prevail on this claim, two state agencies--DEEP and DOA--took the same position as Plaintiffs before the Council. While the position of DEEP--the state agency charged with advising on an energy project's effect on the state's core forests in Council proceedings--does not in and of itself demonstrate that the Rescue Plaintiffs likely will succeed, it certainly warrants serious consideration of the issue on its merits. Moreover, where, as here, denial of the motion to stay will cause irreparable harms to Rescue and the Town and effectively moot the case, the Council should exercise its discretion in favor of preserving the status quo "unless indeed, it is very clear that the plaintiff is without legal right." (Emphasis in original; internal quotation marks and citations omitted.) Griffin Hospital, 196 Conn. at 457. At the

very least, the applicability of P.A. 17-218 to the Project is a novel issue with considerable support from both the language and purpose of the statute, and the weight of two state agencies behind it. Neither the Council nor Candlewood Solar can credibly assert in these circumstances that it is "very clear that [Rescue is] without legal right" in asserting the claim.[6]

ii. The absence of substantial evidence to support the approval of the Project given the inadequacy of data showing the Project's effect on several vernal pools and critical terrestrial habitats to be destroyed along with the core forest.

The hearing record demonstrates the wholesale inadequacy of Candlewood Solar's efforts to document the existence of protected species that will be endangered by

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[6] The Siting Council and Candlewood Solar have argued that the Rescue Plaintiffs are not aggrieved by the Siting Council's refusal to deny the petition for declaratory ruling for noncompliance with P.A. 17-218. The Rescue Plaintiffs have demonstrated, however, that they are classically aggrieved and have § 22a-19 standing to challenge the Siting Council's ruling. As to classical aggrievement, but for this error, the petition or declaratory ruling would have been denied; therefore the error was harmful because it directly affected the outcome of the proceeding. Plaintiffs are accordingly burdened by the Siting Council's decision in this regard. (Plaintiffs' Brief on Aggrievement, p. 19 (February 11, 2019) (Filing No. 140.00) ("Plaintiffs' Aggrievement Brief"). Plaintiffs' standing under § 22a-19 also allows them to pursue this error. P.A. 17-218 unquestionably imposes standards of environmental review, and the Siting Council's disregard of the statute gives rise to a reasonable inference that "the conduct causes unreasonable pollution." Fairwindct, Inc. v. Connecticut Siting Council, 313 Conn. 669, 713 (2014); see Plaintiffs' Aggrievement Brief, pp. 19-20). Even if the Siting Council's asserted violation of P.A. 17-218 is deemed a procedural error, the Rescue Plaintiffs' claim is that the error resulted in a decision by the Siting Council "that did not give adequate consideration to environmental issues." Fairwindct, 313 Conn. at 713. The Siting Council's conclusion that P.A. 17-218 does not apply, and that a Certificate is not required for the Project, precluded the more intense environmental review of a Certificate proceeding, and thereby could or did result in an inadequate review of environmental issues. This is all Fairwindct requires for § 22a-19 standing. (Plaintiffs' Aggrievement Brief, pp. 20-21)

the Project. Despite the insufficiency of the data that the Council needed in order to make an informed decision on the effect of the Project on the critical terrestrial habitats ("CTHs") of several indicator species that depend on the site's vernal pools for their survival, Candlewood Solar refused to withdraw the petition, conduct the necessary studies, and then resubmit the application the next year. The sole reason given by Candlewood Solar's representatives was that they had to meet contract deadlines for its purchase of the Project site. (Rescue Plaintiffs' Brief, pp.23–33)

As Council member Dr. Michael Klemens, a respected expert on CTHs and vernal pools, put it during the hearing, the petition was "a hasty compilation to meet administrative deadlines rather than well-planned studies of the site that maximizes seasonal opportunities for the detection of significant species." (R. 1053) The petition was filed to come in under the wire of P.A. 17-218 and to get around the need for the more comprehensive environmental review required under an application for a Certificate. Candlewood Solar's concern about meeting its contract deadlines is no excuse for its failure to conduct the necessary environmental assessments in appropriate seasons of the year.

The Council itself recognized the paucity of this critical data. (See Rescue Plaintiffs' Brief, pp. 31-32) The Council's willingness nevertheless to overlook the absence of evidence showing the effect of the proposed massive destruction of core forest on the state's CTHs and protected species was arbitrary and an abuse of discretion. Any

suggestion that the Rescue Plaintiffs are "very clearly" without legal rights in asserting this claim of the invalidity of the Council's decision would ignore the record facts.

iii. The absence of substantial evidence to support the Siting Council's approval conditioned on an unsecured and undefined decommissioning plan.

The Council conditioned its approval of the Project on a purported "decommissioning plan" that would require removal of the panel array after the 20-year life of the Project. There was no evidence as to 1) how the plan would restore the destroyed forest, 2) whether the owner of the Project property would agree to such a plan, or 3) how and when the plan would be funded. No proof was submitted that Candlewood Solar had commitments from sureties to secure the plan, an especially glaring omission given the fact that Candlewood Solar is a single-purpose entity created solely to operate the Project for its expected 20-year life. Indeed the Council violated its own regulations by failing to require a detailed decommissioning plan with financial assurances. See R.C.S.A. § 16-50j-93. (Rescue Plaintiffs' Brief, pp. 33-35)

iv. The absence of substantial evidence to support the Siting Council's approval of the declaratory ruling in the hope that Candlewood Solar would provide an undefined conservation easement.

The Opinion portion of the Council's approval noted that the Project property's then owner "would deed approximately 100 aces of the property to a local land conservation trust," and "encourage[d]" Candlewood Solar to work with the Town, DEEP and local conservation groups to "prepare and finalize the conservation easement." (Rescue

Plaintiffs' Brief, p.35) The record, however, is devoid of any proof that the owner of the property would agree to a conservation easement, that any land trust would agree to accept the easement, or that the easement, to be located generally in the northern portion of the Property, would be effective in mitigating the destruction of CTHs and other environmental damage on the southern portion. The Council erred as a matter of law in approving the declaratory ruling on the assumption that a conservation easement would come to fruition in the absence of any evidence that necessary third-party approvals of the easement would be obtained. (Id., pp. 35-39; see Gerlt v. Planning & Zoning Comm'n, 290 Conn. 313, 323-28 (2009).) The error was not harmless, because the record is clear that both Candlewood Solar and the Council viewed the easement as an important vehicle to mitigate the substantial environmental impacts that the forest clearing would impose on the southern portion of the property. Here again, no credible contention can be made that this claim of error "very clearly" lacks merit. Griffin Hospital, 196 Conn. at 457.

v. The Siting Council's abuse of its discretion in approving a petition that was substantially incomplete and lacked essential information.

For all the above reasons, Rescue and the Town respectfully submit that the Council acted arbitrarily and capriciously in approving the petition for declaratory ruling despite the absence of critical data necessary for an informed analysis of the environmental effects of the destruction of 54 acres of core forest and the resulting impacts on downgradient wetlands and watercourses. An administrative agency abuses its discretion when it approves an application that is not in substantial compliance with

the essential requirements of the governing statutes or regulations sufficient to assure adherence to their objectives. See, e.g., Montigny et al. v. Vernon Inland Wetlands Comm'n, 2004 WL 2440078, *4-5 (J.D. Rockville) (citing cases). When an agency acts without essential required information, or defers such consideration to a date after approval, it not only acts without substantial evidence but violates the fundamental due process rights of the parties involved. See Gustafson v. East Haven Inland Wetlands & Watercourses Comm'n, 2004 WL 1327084 (J.D. New Haven) (commission's deferral of resolution of the contested issue of existence of vernal pools on site after application was approved and without opportunity for plaintiffs to be heard violated fundamental due process).

Any one of the deficiencies discussed in subparts i) through iv) above would warrant the Court's reversal of the Council's decision in the Rescue Appeal. But when viewed together, the inadequacy and absence of critical data and information regarding the environmental impacts of this massive project on a vital natural resource of the State make clear that the hearing and decision process was made subservient to Candlewood Solar's overriding goal of razing the forest and installing the solar panels within its contractual deadlines. This manifest rush to judgment – especially in a matter that never should have proceeded as a declaratory ruling – stands on its head the Council's statutory mandate to balance the state's energy needs with the preservation and protection of our ever-diminishing natural resources. (Rescue Plaintiffs' Brief, pp. 40-46)

B. Rescue and the Town will suffer irreparable harm if the stay is not granted.

If the Council denies the stay, or delays in considering it, Candlewood Solar will quickly destroy the 54 acres of core forest, resulting in harms to downgradient wetlands and watercourses. The preservation of the forest is the primary goal of this appeal, along with prevention of the numerous and serious secondary environmental harms. That goal--and the Rescue Appeal itself--will be rendered moot if the forest is destroyed. There is no adequate remedy at law that would substitute for the preservation of this vital natural resource. It cannot be disputed that Rescue and the Town will suffer irreparable loss unless the status quo is preserved for the stay periods sought herein. Griffin Hospital, 196 Conn. at 458.

C. The harm to Rescue, the Town and the general public by denial of the stay greatly outweighs the harm to Candlewood Solar if construction is delayed until the final determination of the litigation.

Along with Rescue and the Town, the general public will be irreparably harmed by the destruction of the core forest before this litigation is concluded. There is no dispute that trees and forest land are a vital natural resource of the state, as are downgradient wetlands, watercourses and CTHs. See C.G.S. § 22a-16; Paige v. Town Plan & Zoning Commission, 235 Conn. 448, 457-58 (1995). Anyone is entitled to bring an action under § 22a-19 upon a factual showing that conduct is reasonably likely to destroy a natural resource of the State. The loss of the forest acreage at issue is inimical to the state's

goal of preserving core forestland, andwill also have adverse effects upon wetlands, watercourses, vernal pools, and CTHs on the site, while destroying the scenic vistas of this part of Candlewood Mountain that the public currently enjoys. Money damages cannot render Plaintiffs, the Town, or the public whole.

By contrast, if the implementation of the Council's approval of the Project is delayed until the final outcome of the Rescue Appeal, Candlewood Solar will not be able to profit during that time from production and sale of electricity from the proposed 20 megawatt facility. If Candlewood Solar ultimately prevails, it will begin generation of electricity at that time. Even if delay caused by a stay results in termination of the Project, Candlewood Solar assumed that business risk. It insisted on prosecuting its case before the Council as a declaratory ruling petition, knowing that two state agencies, Rescue, the Town, and other parties vigorously argued the applicability of P.A. 17-218. It insisted on an expedited public hearing in order to meet contract deadlines even though it failed to supply essential environmental data requested by the Council and other parties. By pushing the Council to approve the Project despite these issues, Candlewood Solar effectively invited the Rescue Appeal and the attendant delay in implementation of the Project.

Moreover, Candlewood Solar has submitted to DEEP two inadequate SWPCPs, and it took it a year to prepare and present the third SWPCP and the Third Application now before DEEP. Simply put, Candlewood Solar is itself largely to blame for the delay in readying the Project for construction. Under these circumstances, Candlewood Solar

cannot credibly argue that the harm to it from a further delay caused by preservation of the status quo outweighs the irreparable harm to the Town, Rescue and the public from destruction of the core forest and resulting harms that the Rescue Appeal seeks to prevent.

* * *

In sum, the balancing of the equities clearly scales in Rescue's and the Town's favor. They have raised several meritorious claims that the Council erred in approving the Project. Potential financial loss to the developer caused by a delay in construction of this small-scale solar electricity generation project cannot outweigh the irreparable harm to Rescue, the Town and the general public if construction moves forward before the Court can decide the appeal, and a significant span of the state's core forest is lost.

CONCLUSION

For the foregoing reasons, pursuant to C.G.S. § 4-183(f), Rescue and the Town respectfully request the Council to immediately stay construction activities pursuant to the Council's approval of the declaratory ruling for the Project until the Court's final determination of the Rescue Appeal. Specifically the Council should order Candlewood Solar not to commence destruction of any of the 54 acres of core forest at issue or to begin any other construction-related activities until a final judgment enters in the Rescue Appeal. Alternatively, Rescue and the Town request the Council toorder a temporary stay of such activities until the Court decides whether to issue a full stay pending the entry of final judgment in the Rescue Appeal. We ask that the Council set this motion down for

expedited consideration as soon as possible, because taking no action on the motion, thereby allowing the clear-cutting to commence as soon as a D&M Plan is approved, will impose the same irreparable harm to Rescue and the Town as denying the motion.

Dated: Danbury, Connecticut
April 27, 2020

PARTY/INTERVENORS,
RESCUE CANDLEWOOD MOUNTAIN
AND TOWN OF NEW MILFORD

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CERTIFICATION OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on April 27, 2020, to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Tolland at Rockville.

Glenn J. MONTIGNY et al.
v.
VERNON, TOWN OF, Inland Wetlands Commission.

No. CV030081630S.
|
Sept. 30, 2004.

Attorneys and Law Firms

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Opinion

KLACZAK, J.T.R.

*1 This is an appeal from the decision of the defendant, the Vernon inland wetlands commission (commission), granting in part and denying in part, an application for the amendment of wetland boundaries filed by the defendant, W/S Development Associates, LLC (applicant), relating to properties at 65 and 75 Reservoir Road in Vernon, Connecticut. The plaintiffs, Glenn J. Montigny, Norma J. Marchesani, Karen A. Lynch and Michael B. Lynch, (plaintiffs) appeal pursuant to General Statutes § 22a-19.

On January 19, 2003, the applicant filed an application with the commission requesting redesignation of three specific wetland boundaries at the subject properties, two abutting parcels of land, known as 65 and 75 Reservoir Road in the town of Vernon, Connecticut. (Return of Record [ROR], Exhibit A.) The applicant requested that the commission take the following action: (1) establish formal boundaries for "wetlands B" by including recently created wetlands that were previously approved by the commission ("wetlands B request"); (2) remove the watercourse designation from an area known as the Swale ("Swale request"); and (3) reduce the boundaries for "wetlands E" ("wetlands E request"). (ROR, Exhibit HHH, pp. 32-34.)

On January 28, 2003, the applicant submitted the application at the commission's regular meeting. (ROR, Exhibit GGG.) The commission held a public hearing commencing on February 25, 2003; (ROR, Exhibit HHH); and continued on March 25, 2003 and April 15, 2003. (ROR, Exhibits III, JJJ.) At the April 15, 2003 meeting, the commission closed the public hearing and approved the wetlands B and Swale requests, but denied the wetlands E request. (ROR, Exhibit JJJ.) The plaintiffs now appeal the commission's decision in regard to the approval of the wetlands B request.

General Statutes § 22a-43 governs an appeal from a decision of an inland wetlands agency. "It is fundamental that appellate jurisdiction in administrative appeals is created only by statute and can be acquired and exercised only in the manner prescribed by statute." *Munhall v. Inland Wetlands Commission,* 221 Conn. 46, 50, 602 A.2d 566 (1992).

Aggrievement

"Pleading and proof that the plaintiffs are aggrieved within the meaning of the statute is a prerequisite to the trial court's jurisdiction over the subject matter of the appeal." *Munhall v. Inland Wetlands Commission, supra,* 221 Conn. at 50. All of the plaintiffs assert standing as intervenors pursuant to General Statutes § 22a-19.[1] (Amended Complaint, ¶¶ 13, 14.)

"[S]ection 22a-19 ... authorizes any person to intervene in any administrative proceeding and to raise therein environmental issues." (Internal quotation marks omitted.) *Connecticut Coalition Against Millstone v. Rocque,* 267 Conn. 116, 131, 836 A.2d 414 (2003). "An intervening party under § 22a-19(a), however, may raise only environmental issues." *Red Hill Coalition, Inc. v. Conservation Commission,* 212 Conn. 710, 715, 563 A.2d 1339 (1989). Individuals, such as the plaintiffs here, who file notices of intervention at the underlying agency hearing pursuant to § 22a-19 have standing to appeal from the commission's decision for that limited purpose. *Id.; Branhaven Plaza, LLC v. Inland Wetlands Commission,* 251 Conn. 269, 276 n. 9, 740 A.2d 847 (1999).

*2 In the present case, plaintiffs Glenn Montigny, Karen Lynch and Michael Lynch filed verified petitions to intervene that were approved by the commission at the February 25, 2003 public hearing. (ROR, Exhibit HHH, pp. 5-26.) The remaining plaintiff, Norma Marchesani, filed a verified petition to intervene that was denied at the March 25, 2003 public hearing; (ROR, Exhibit III, pp. 39-41); but was subsequently approved at the April 15, 2003 public hearing. (ROR, Exhibit JJJ, pp. 4-10.) In filing such petitions, all of the plaintiffs allege the likelihood of unreasonable pollution or destruction of the public trust in natural resources of the state as a result of the applicant's proposal. The plaintiffs are found to be statutorily aggrieved pursuant to § 22a-19(a), and have standing to bring this appeal.

Timeliness and Service of Process

Section 22a-43(a) provides, in pertinent part, that an appeal may be commenced "within the time specified in subsection (b) of section 8-8 from the publication of such regulation, order, decision or action ..." General Statutes § 8-8(b) provides, in part, that an "appeal shall be commenced by service of process ... within fifteen days from the date that notice of the decision was published ..." Section 22a-43(a) provides that "[n]otice of such appeal shall be served upon the inland wetlands agency and the commissioner ..."

The plaintiffs allege that legal notice of the commission's decision approving in part, and denying in part, the applicant's redesignation application was duly published in the *Journal Inquirer* on April 21, 2003 (Amended Complaint, ¶¶ 17, 18); and the commission admits the same in its answer. (Commission's Answer, ¶¶ 11, 18.)[2] Subsequently, on May 5, 2003, this appeal was commenced by service of process on (1) the applicant's agent for service of process; (2) Arthur J. Rocque, the commissioner of environmental protection; (3) the town clerk of Vernon; and (4) Ralph B. Zahner, the chairman of the commission.[3] (Marshal's Return.) Accordingly, the appeal was commenced timely by service on the proper parties.

SCOPE OF REVIEW

"The [Inland Wetlands and Watercourses Act] was designed to protect and preserve the 'indispensable and irreplaceable but fragile natural resource' of inland wetlands 'by providing an orderly process to balance the need for the economic growth of the state and the use of its land with the need to protect its environment and ecology ...' General Statutes § 22a-36. Instead of banning all economic activities on wetlands, the legislature realized that a balance had to be struck between economic activities and preservation of the wetlands." *Samperi v. Inland Wetlands Agency,* 226 Conn. 579, 591, 628 A.2d 1286 (1993).

"In reviewing an inland wetlands agency decision made pursuant to the act, the reviewing court must sustain the agency's determination if an examination of the record discloses evidence that supports any one of the reasons given ... The evidence, however, to support any such reason must be substantial; [t]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency ... This so-called substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred ... The reviewing court must take into account [that there is] contradictory evidence in the record ... but the possibility of drawing

two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence ..." (Internal quotation marks omitted.) *Tarullo v. Inland Wetlands & Watercourses Commission*, 263 Conn. 572, 584, 821 A.2d 734 (2003).

*3 When challenging the decision of an inland wetlands agency, the plaintiffs bear the burden of proof in establishing "that substantial evidence does not exist in the record as a whole to support the agency's decision." *Samperi v. Inland Wetlands Agency, supra*, 226 Conn. at 587. If the trial court finds that the decision of the agency is "arbitrary, illegal or not reasonably supported by the evidence," the court may sustain the plaintiffs' appeal. (Internal quotation marks omitted.) *Red Hill Coalition, Inc. v. Conservation Commission, supra*, 212 Conn. at 718. As indicated above, however, this court cannot substitute its judgment for that of the commission where the record contains substantial evidence to support the commission's decision and where appropriate procedures were followed.

DISCUSSION

The plaintiffs appeal on the ground that the commission acted illegally, arbitrarily and in abuse of its discretion when it approved the applicant's wetlands B request. Specifically, the plaintiffs allege that (1) the commission failed to follow its own regulations in that it approved the wetlands B request even though the application was incomplete; (2) the decision to approve the wetlands B request is not supported by substantial evidence; and (3) the proceedings as a whole failed to accord fundamental fairness to the plaintiffs as § 22a-19 intervenors.

As indicated, the plaintiffs only oppose the commission's approval of the wetlands B request. The commission unanimously approved the wetlands B request on the basis that: "1. the application is complete per the Town of Vernon Inland Wetlands Regulations Section 4.3.4; 2. the re-designation approved amends the Town of Vernon Wetlands Map per Regulations Sections 3.7; [and] 3. the Commission considers the amendment of the Town of Wetlands Map not to cause an unreasonable pollution, impairment or destruction of the public trust in the watercourses and wetlands per Connecticut General Statutes, Section 22a-19." (ROR, Exhibit NN.)

A.

Whether the Commission Failed to Follow Its Own Regulations by Accepting and Approving, in Part, an Allegedly Incomplete Application.

The plaintiffs assert that it was improper, and in violation of relevant regulations, for the commission to accept and approve, in part, an allegedly incomplete application. Section 4.3.4 of the Inland Wetlands and Watercourses Regulations of the town of Vernon, Connecticut sets forth the information that must be included in a permit application to undertake an activity that is likely to impact or affect a wetland or watercourse. (ROR, Exhibit FFF.) Section 4.3.5.2 of Vernon's regulations provides that: "Petitions requesting changes or amendments to the Inland Wetlands and Watercourses Map, Vernon, Connecticut shall contain the information outlined in Section 4.3.4." (ROR, Exhibit FFF.)

The plaintiffs argue that the applicant "failed to comply with application requirements in several material ways. Specifically, [the plaintiffs assert that] (i) [the applicant] failed to provide all of the information enumerated in Section 4.3.4 as required by Section 4.3.5.2. of [Vernon's] Regulations; (ii) [the applicant] failed to request redesignation of the entire wetland boundary on the Properties notwithstanding more changes to the 2000 plan than were reflected in [the applicant's] three-part request in the 2003 Application; and (iii) [the applicant] failed to identify the wetlands limits and buffer associated with the watercourse (a brook), showing only its centerline (Record Exhibits A, CCC)." (Plaintiffs' Brief, p. 19.)

*4 The applicant, as well the commission,[4] directly counters the plaintiffs' assertions. The applicant contends that when applying for a wetlands boundary designation an applicant is (1) not required to supply all the information that is necessary when applying for a grant of a regulated activity permit; (2) not

required to redesignate the boundaries of its entire parcel; and (3) not required to show detailed limits and buffers for watercourses that are not the subject of the redesignation application. (Applicant's Brief, pp. 8-20.)

Although Vernon's regulations enumerate the application requirements for both wetland boundary delineation and wetland activity requests in § 4.3.4, the applicant argues that a close reading of this section reveals that some of the requirements listed do not apply to applications for wetland boundary delineation requests. The applicant asserts that the express language of several requirements in § 4.3.3 makes such requirements inapplicable to redesignation of wetlands. For example, the applicant argues that the requirement of "[a] detailed description of the activity or use for which a permit is required," pursuant to Vernon's Regulations § 4.3.4.5, applies only to an "activity or use" permit and not to a wetland boundary delineation request. [5]

Unfortunately, the plaintiffs do not specify in their brief which of the § 4.3.4 requirements are missing from the application in question. The plaintiffs also fail to provide any legal basis for their other two arguments in regard to the application; namely, their arguments that the application is incomplete because the applicant (1) did not request redesignation of the entire wetland boundary and (2) only identified a brook by its centerline. This court could not find any support in Connecticut case law, Connecticut General Statutes or Vernon's regulations for either argument.

Moreover, Connecticut courts are not obligated to overturn an inland wetlands commission's decision even if it is found that the application was incomplete. See *Oppenheimer v. Redding Conservation Commission,* Superior Court, judicial district of Danbury, Docket No. CV 01 0343722S (December 16, 2003, Moraghan, J.T.R.) ("Assuming, without deciding, for the sake of argument, that [the inland wetlands] application was, in fact, incomplete, this does not necessitate that the court find that the commission abused its discretion when it approved the application"); *Brander v. Inland-Wetlands Commission,* Superior Court, judicial district of Litchfield, Docket No. CV 98 00763565 (September, 11, 1998, Pickett, J.) (holding that an allegation that the application is incomplete is not a valid basis for appeal); *Santini v. Inland Wetlands Commission,* Superior Court, judicial district of Tolland at Rockville, Docket No. CV 96 61840S, 19 Conn. L. Rptr. 180 (February 7, 1997, Rittenband, J.) ("The court finds that the allegations of an incomplete application is not an intervening consideration which materially affects the merits of the matter decided"); *DeAngelis v. Inland Wetlands & Watercourses Commission,* Superior Court, judicial district of Waterbury, Docket No. CV 96 132755 (May 16, 1997, Pellegrino, J.) ("While the IWC has the discretion to deny an incomplete application ... the rule is that [an application] must be in substantial compliance with the applicable regulations").

***5** An application for an inland wetlands permit need only be in substantial compliance with the applicable regulations. See, e.g., *Michel v. Planning & Zoning Commission,* 28 Conn.App. 314, 324, 612 A.2d 778, cert. denied, 223 Conn. 923, 614 A.2d 824 (1992); T. Tondro, Connecticut Land Use Regulation (2d Ed.1992) pp. 431-33. "Substantial compliance with a statute or regulation is such compliance with the essential requirements of the statute or regulation as is sufficient to assure its objectives. What constitutes a substantial compliance is a matter depending on the facts of each particular case." *DeAngelis v. Waterbury Inlands Wetlands & Watercourses Commission,* Superior Court, judicial district of Waterbury, Docket No. CV 96 132755 (May 16, 1997, Pellegrino, J.). See also *Sorrow v. Zacchera,* Superior Court, judicial district of Hartford, Docket No. CV 98 580072, 24 Conn. L. Rptr. 19 (December 23, 1998, Teller, J.).

The present application contains an application form, a check for required fees, a statewide inland wetlands activity reporting form, the applicant's letter of interest, the owner's letter of authorization, deed descriptions of the properties, a list of abutters, a boundary and topographic survey, a supplemental wetlands report, a soils report, routine wetland determination data forms, a letter from an independent professional soil scientist, mailing labels for the abutters, a boundary and topographic survey plan, a general location and wetland re-designation plan, a wetlands mitigation plan, a project narrative, and a re-designation proposal.

(ROR, Exhibit A.) This record reflects that the application is, at least, in substantial compliance with Vernon's regulations.

Furthermore, "[c]ourts must be scrupulous not to hamper the legitimate activities of civic administrative boards by indulging in a microscopic search for technical infirmities in their actions ... This cautionary advice is especially apt whenever the Court is reviewing a decision of a local commission composed of lay persons." (Citation omitted; internal quotation marks omitted.) *Samperi v. Inland Wetlands Agency, supra,* 226 Conn. at 596. The record indicates that the plaintiffs raised the issue of whether the application was complete several times during the public hearing and that the commission examined this issue extensively. (ROR, Exhibits HHH, pp. 15-19, 21-24, 48-50; III, pp. 43-45.) In fact, both the town engineer and the town planner reported to the commission that the application was complete. (ROR, Exhibit HHH, pp. 22, 49.)

For the foregoing reasons, the plaintiffs' appeal cannot be sustained on this ground.

B.

Whether the Decision to Approve the Wetlands B Request Is Supported by Substantial Evidence

The plaintiffs also appeal on the ground that the commission's decision to approve the wetlands B request is not supported by substantial evidence. The plaintiffs argue that the commission (1) improperly failed to employ the participation of an outside reviewer despite conflicting information; (2) improperly ignored the plaintiffs' experts; and (3) failed to provide a reason for its wetlands B decision.

*6 Connecticut case law is clear on the plaintiffs' first two contentions on this matter. In regard to the plaintiffs' first argument, inland wetland commissions have complete discretion over whether an outside reviewer should be involved with an application. *Tarullo v. Inland Wetlands & Watercourses Commission, supra,* 263 Conn. at 587. See also *Norooz v. Inland Wetlands Agency,* 26 Conn.App. 564, 570, 602 A.2d 613 (1992) ("[T]here are a number of cases which have approved the consideration of information by a local administrative agency supplied to it by its own technical or professional experts outside the confines of the administrative hearing"). Thomas Joyce, Vernon's town planner, specifically addressed this issue at the public hearing. "[I]n regard to this issue of second opinions or independent opinions we rely upon the judgment of licensed certified professionals who with their seals attest to the [veracity] of their testimony and that is true whether they are civil engineer, a traffic engineer or a soil scientist or an architect or structural engineer and the fact that people may challenge their opinions does not mean that you ... then would automatically go saying well because someone disagrees with someone else we go hiring our own party." (ROR, Exhibit HHH, pp. 49-50.) The fact that the commission did not seek the assistance of an outside reviewer/expert in considering the wetlands B request is irrelevant as to whether there is substantial evidence supporting the commission's approval of such request.

The plaintiffs' second argument on this matter also has been addressed by case law. A commission shall not be deemed to have ignored expert testimony when it has simply accepted the testimony of certain experts over the testimony of opposing experts. *Samperi v. Inland Wetlands Agency, supra,* 226 Conn. at 597-98. As in *Samperi,* "the evidence before the agency in this case did not involve uncontroverted expert testimony. Unlike the situation in *Feinson v. Conservation Commission,* 180 Conn. 421, 429 A.2d 910 (1980), in which the agency disregarded testimony on a technically complex matter by the only expert who appeared at the hearing, without affording the expert an opportunity to rebut the agency's concerns, the present case included testimony by a myriad of experts." *Samperi v. Inland Wetlands Agency, supra,* 226 Conn. at 597.

Here, the applicant provided testimony from three experts, soil scientist Philip London (ROR, Exhibit HHH, pp. 37-46); professional engineer and licensed land surveyor Rohan Freeman (ROR, Exhibits HHH, pp. 34-37, 46-49; JJJ, pp. 15-19); and professional wetland scientist/biologist Bud Titlow (ROR, Exhibit JJJ, pp. 20-22); while the plaintiffs presented testimony

from two experts: professional engineer Marc Goodin (ROR, Exhibit III, pp. 41-50); and soil scientist Martin Brogie (ROR, exhibit III, pp. 50-57). The experts disagreed over whether wetland boundaries were improperly changed by the applicant.

*7 While the plaintiffs' experts mostly focused on an on-site brook and on wetlands E when making their argument that the applicant improperly changed wetland boundaries (ROR, Exhibit III, pp. 43-47, 50-51); Goodin, the plaintiffs' professional engineer, also applied this argument to the wetlands B request (ROR, Exhibit III, pp. 48-50). For example, Goodin argued: "It's difficult to see but here's wetlands B and wetlands D. As you can see, there's two different colors there. And what they represent is the January 2003 wetlands in one color and that's the wetlands that they're asking for right now; but the other flag numbers and flag locations represent their previous October and September wetlands. In other words, the wetlands has changed from October and September to the January 6 application." (ROR, Exhibit III, p. 48.) As explained by the plaintiffs' other expert, soil scientist Martin Brogie, Goodin "took the maps from the earlier applications and the January 2003 application and digitized the wetland flag locations to scale and he came up with these colorized maps that he's generated that demonstrates that the wetland boundaries that were initially to represent the accepted inland/wetland boundary, the boundary that was not the subject of this redesignation and it demonstrated that they'd actually changed." (ROR, Exhibit III, pp. 50-51.)

The main flaw in the plaintiffs' argument is that despite numerous entreaties by the commission's chairman, Ralph Zahner,[6] the plaintiffs' experts continued to rely heavily on applications that, although related to the same property, were irrelevant to the redesignation request. Roland Freeman, one of the applicant's experts, exposed this flaw and convincingly challenged the credibility of Goodin's argument by pointing out that Goodin never discussed the accuracy of the maps he created, nor the methodology he used. (ROR, Exhibit JJJ, p. 16.) Freeman also explained that Goodin likely digitized and blew up irrelevant maps and thus distorted the boundary lines. (ROR, Exhibit JJJ, pp. 16-17.)

That the commissioners assessed these various expert opinions with care, and did not ignore the plaintiffs' arguments, is demonstrated by the denial of the wetlands E request. "Furthermore ... an administrative agency is not required to believe any witness, even an expert, nor is it required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair." *Samperi v. Inland Wetlands Agency, supra,* 226 Conn. at 597. The argument that the commission ignored the plaintiff's experts is unpersuasive.

The plaintiffs' last argument, asserting that the commission failed to provide reasons for its wetlands B decision, is also without merit. As indicated above, the commission did provide reasons for such decision. The commission stated the following reasons for approving the applicant's wetlands B request: "1. the application is complete per the Town of Vernon Inland Wetlands Regulations Section 4.3.4; 2. the re-designation approved amends the Town of Vernon Wetlands Map per Regulations Sections 3.7; [and] 3. the Commission considers the amendment of the Town of Wetlands Map not to cause an unreasonable pollution, impairment or destruction of the public trust in the watercourses and wetlands per Connecticut General Statutes, Section 22a-19." (ROR, Exhibit NN.) Thus, the plaintiffs' assertion that the commission did not provide a reason for its wetlands B decision is unfounded.

*8 The plaintiffs generally assert that the commission's approval of the wetlands B request is not supported by substantial evidence in the record. Despite such argument, however, the record contains (1) expert testimony in support of the wetlands B request; (ROR, Exhibits HHH, pp. 34-49; JJJ, pp. 15-22); (2) the application which contains various expert reports and surveys supporting the wetlands B request; (ROR, Exhibit A); and (3) several detailed maps that support the wetlands B request. (ROR, Exhibits CCC, DDD, EEE.) "[T]he credibility of witnesses and the determination of factual issues are matters within the province of the administrative agency." (Internal quotation marks omitted.) *River Bend Association v. Conservation and Inland Wetlands,* 269 Conn. 57, 70, 848 A.2d 395 (2004). While the plaintiffs have submitted some

evidence in opposition to the applicant's experts' analyses (ROR, Exhibit III, pp. 48-50); it was within the commission's discretion to determine how much weight to accord such evidence and, more importantly, whether it amounted to substantial evidence. Therefore, because the record supports a determination that the applicant presented sufficient evidence with respect to the wetlands B request, the plaintiffs' appeal cannot be sustained on this ground.

C.

Whether the Proceedings Were Fundamentally Fair

Finally, the plaintiffs appeal on the ground that they did not receive the "fundamentally fair" treatment that they deserved as environmental intervenors. Specifically, the plaintiffs argue that "they were denied access to the Properties to confront the evidence upon which the Commission was being asked to make a decision, and under the circumstances, their inability to view the site was a denial of fundamental fairness in the proceedings." (Plaintiffs' Brief, p. 28.) The plaintiffs assert that because "[n]o public meeting attended by a quorum of the Commissioners afforded the Plaintiffs access to the site and ... the Applicant staunchly rejected all of Plaintiffs' requests" the validity of the proceedings were undermined. (Plaintiffs' Brief, p. 30.)

"A challenge to fairness of the hearing process in a zoning or planning appeal and an inland wetlands appeal would be the same, and similar considerations would apply to wetlands appeals under subsection (4) or section 4-183(j) as with land use appeals under section 8-8. While hearings do not have to follow strict rules of evidence, they must be conducted so as not to violate fundamental rules of natural justice." R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (2d. Ed.1999), § 33.9, p. 180, citing *Huck v. Inland Wetlands & Watercourses Agency,* 203 Conn. 525, 536, 525 A.2d 940 (1987). "Fundamentals of natural justice require that there must be due notice of the hearing, and at the hearing no one may be deprived of the right to produce relevant evidence or to cross-examine witnesses produced by his adversary ... Put differently, due process of law requires that the parties involved have an opportunity to know the facts on which the commission is asked to act and ... to offer rebuttal evidence." (Citations omitted; internal quotation marks omitted.) *Grimes v. Conservation Commission,* 243 Conn. 266, 274, 703 A.2d 101 (1997).

*9 The plaintiffs rely heavily on *Grimes v. Conservation Commission, supra,* especially for their contention that "[a] site visit is an appropriate investigative tool" (Plaintiffs' Brief, p. 29); the Connecticut Supreme Court in *Grimes,* however, also held that a site visit is not "an integral part of an evidentiary hearing" and is "merely an investigative measure." *Grimes v. Conservation Commission, supra,* 243 Conn. at 271, 277-78. The plaintiffs contend that "[w]hile the *Grimes* court expressly refrained from exploring the boundaries of the common-law right to due process in administrative proceedings, it plainly suggests that the boundaries of fundamental fairness have not yet been defined [*Id.,* at 274 n. 11] ... [and the plaintiffs allege] that the facts in the case at bar warrant that examination." (Plaintiffs' Brief, p. 27.) Essentially, the plaintiffs ask this court to create new law that establishes that environmental intervenors under § 22a-19(a) shall always have the express right to enter the subject property in question without the land owner's consent. This court declines to do so.

The superior court, Tobin, J., in response to a similar claim, stated that: "The plaintiffs claim that they were denied due process in that the Commission should have assisted plaintiffs and their experts in obtaining limited access to the property is without merit. The property owner (BHC) exercised its rights in denying access to its property." *Mulvey v. Environmental Commission,* Superior Court, judicial district of Stamford, Docket No. CV 97 0156976 S, 22 Conn. L. Rptr. 665 (August 26, 1998, Tobin, J.). Like the *Mulvey* court, this court upholds the long-standing right of a property owner to deny access to his or her property. Accordingly, the plaintiffs' appeal cannot be sustained on this ground.

CONCLUSION

Based on the foregoing reasons, the court finds that the commission did not act illegally, arbitrarily or in abuse of discretion when it approved the applicant's wetlands B request. The appeal is dismissed.

All Citations

Not Reported in A.2d, 2004 WL 2440078

Footnotes

1 General Statutes § 22a-19 provides in relevant part: "In any administrative, licensing or other proceeding, and in any judicial review thereof ... any person ... may intervene as a party on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." General Statutes § 22a-19(a).

2 The record does not contain an affidavit of publication, however, it should be noted that in the April 21, 2003 legal notice the commission requested that the affidavit of publication be sent to the town planner. (ROR, Exhibit TT.)

3 John J. Muirhead, Jr., the agent of service for co-defendant MJDR Real Estate LLC, and Amanda D. Upchurcb, the agent of service for co-defendant Lee & Lamont Realty, were also served on May 5, 2003. (Marshal's Return.)

4 The commission, instead of submitting its own brief, adopted the applicant's brief and the commissioner of environmental protection's brief. See "Notice of Adoption of Briefs by Defendant, Town of Vernon Inland Wetlands Commission" dated April 22, 2004.

5 See also the following sections of Vernon's regulations: 4.3.4.6 ("A map of the proposed use or activity ..."); 4.3.4.7 ("If the extent of the proposed regulated activity ..."); and 4.3.4.10 ("measures which would mitigate the impacts of the regulated activity ...").

6 Chairman Zahner continuously explained: "We're not discussing a new application. We're discussing strictly this information that has been presented to us ... We are not referring to [other applications]. We are referring to this application ... We're talking about a redesignation. Stick to the subject please." (ROR, Exhibit III, pp. 45-46.)

End of Document

2004 WL 1327084

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of New Haven.

Gary GUSTAFSON et al.
v.
EAST HAVEN INLAND WETLANDS AND WATERCOURSES COMMISSION et al.

No. CV030476072S.
|
June 2, 2004.

Attorneys and Law Firms

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Niki Whitehead, East Haven, pro se.

Gesmonde Pietrosimone & Sgrignari, Hamden, for East Haven Inland Wetland and Water Co.

William Cote, East Haven, for Clemente Estates LLC.

AAG David Wrinn, Atty. Gen-Environment, Hartford, for Arthur J. Rocque.

Opinion

DEVLIN, J.

**1 This is an administrative appeal from a decision of the East Haven Inland Wetlands and Watercourses Commission (Commission) approving the application of Clemente Estates LLC to conduct a regulated activity within an inland wetland or watercourse area. The activity concerned the proposed construction of the Wheaton Road Subdivision-an eight-lot residential development. Trial of this appeal took place on May 17, 2004. Prior to that date, all parties including the Commissioner of the Department of Environmental Protection (DEP Commissioner) filed briefs setting forth their respective positions.

For the reasons set forth below, the court finds that the Commission acted on an incomplete application regarding the existence of regulated resources, i.e. vernal pools, on the subject property. Accordingly, the appeal is ordered sustained and the matter is remanded to the Commission for further proceedings.

FACTS

On October 28, 2002, Clemente Estates filed Application No. 02-13 Wheaton Road Subdivision. The Commission accepted the application at its meeting on November 13, 2002 and set the matter down for a public hearing on January 8, 2003. On January 8, 2003, prior to the hearing, both plaintiffs intervened in the proceedings pursuant to General Statutes § 22a-19. [1]

At the January 8, 2003 hearing, Clemente Estates made a presentation in support of the application. The subject parcel of land consists of 6.68 acres of which 1.2 acres are wetlands. The proposal was for an eight-lot subdivision serviced by a proposed road-Victoria Drive. The applicant through a civil engineer, Victor Benni, described the details of the proposal that included an open-space lot, a twenty-foot buffer area adjacent to the existing wetlands and storm water drainage system. Although the alternative of a bridge was mentioned, the applicant sought permission to fill a portion of the wetlands in order to construct Victoria Drive.

At the January 8th hearing, several persons spoke in opposition to the application out of concern that the proposed construction would impact vernal pools. [2] The plaintiff, Ms. Whitehead, commented on the application and introduced some documentation in support of her objections. Ms. Whitehead requested that the Commission keep the record open so that she could produce additional reports/documentation regarding vernal pools. The applicant objected to this on the ground that its civil engineer and soil scientist were available for questioning by Ms. Whitehead. After discussion, the Commission implemented the following schedule (1) intervenors must submit questions to applicant by January 15, 2003; (2) applicant must respond to the questions by January 22, 2003; (3) intervenor must submit comments by January

29, 2003; and (4) applicant must submit comments/ rebuttal by February 5, 2003. The hearing was recessed to February 13, 2003.

On February 13, 2003, the Commission accepted the correspondence exchanged between the applicant and intervenors but took no further action. Thereafter, on March 12, 2003, the Commission granted the application subject to a condition. The Commission required the applicant to produce a "Supplemental Wetland Investigation" within sixty days to deal with vernal pools.[3] At its meeting on July 9, 2003, the Commission accepted the report submitted by the applicant from David Lord, a soil scientist. Mr. Lord's report was dated July 5, 2003 and noted his observation that there were "no sightings of any vernal pool obligate species within or around the shallow pool areas on this site."

DISCUSSION

*2 The plaintiffs claim that they are aggrieved by the Commission's decision and appeal asserting (1) the Commission's procedures violated their right to due process; and (2) the decision to grant the application prior to a full investigation regarding the existence of vernal pools violated General Statutes § 22a-41.

A.

Aggrievement

The plaintiffs claim statutory aggrievement on two grounds. Both plaintiffs assert that as intervenors in the administrative proceeding pursuant to General Statutes § 22a-19, they have statutory standing to appeal. *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission,* 212 Conn. 727, 734 (1989). In addition, Gary Gustafson asserts that as a person owning land that is within 90 feet of the watercourse involved in a regulation, he is aggrieved pursuant to General Statutes § 22a-43.

In the present case, both plaintiffs intervened in these proceedings prior to the Commission's January 8, 2003 hearing. Through that intervention, they both became parties to the administrative proceeding with standing to appeal for the limited purpose of raising environmental issues. *Red Hill Coalition, Inc. v. Town Plan & Zoning Commission, supra* 212 Conn. at 734. Moreover, this court credits the testimony of both Gary Gustafson and George Logan, a wetlands expert, that a watercourse runs from the subject property to and through Gustafson's property.

Accordingly, the court finds that both plaintiffs are statutorily aggrieved. Ms. Whitehead pursuant to § 22a-19 and Mr. Gustafson pursuant to § 22a-19 and § 22a-43.

B.

Due Process/Conditional Approval

The Commission correctly points out that the duty of a reviewing court in a wetlands appeal is to uphold the agency's decision unless the action was arbitrary, illegal or not reasonably supported by the evidence. *Bain v. Inland Wetlands Commission,* 78 Conn.App. 808, 813 (2003). The plaintiff must establish that substantial evidence does not exist in the record as a whole to support the agency's decision. *Samperi v. West Haven Inland Wetlands Agency,* 226 Conn. 579, 587 (1993).

On the other hand, the plaintiffs correctly assert that although proceedings before an administrative board are informal and not subject to the strict rules of evidence, it is required that hearings provide to the parties involved fundamental due process. *Parsons v. Board of Zoning Appeals,* 140 Conn. 290, 293 (1953), overruled on other grounds; *Ward v. Zoning Board of Appeals,* 153 Conn. 141, 146-47 (1965). In the administrative context, due process of law requires not only that there be due notice of the hearing but also that at the hearing the parties involved have the right to: produce relevant evidence, an opportunity to know the facts on which the agency is asked to act, to cross-examine witnesses and to offer rebuttal evidence. *Connecticut Fund for the Environment, Inc. v. City of Stamford,* 192 Conn. 247, 249 (1984); *Huck v.*

Inland Wetlands and Watercourses Agency, 203 Conn. 525, 536 (1987); *Pizzola v. Planning & Zoning Commission,* 167 Conn. 202, 207 (1974). Moreover, a municipal agency may not use information supplied on an ex parte basis. *Norooz v. Inland Wetland Agency,* 26 Conn.App. 564, 569 (1992).

*3 In the present case, whether vernal pools existed on the subject property and whether they would be affected by the proposed activity were matters that the applicant was required to address in its application, and that the Commission was required to consider in its decision. See General Statutes § 22a-41(a)(1) (local inland wetland agency must take into account environmental impact of proposed activity on the regulated area); see also *Connecticut Fund for the Environment v. Stamford, supra* 192 Conn. at 250 (same). When the Commission rendered its decision on March 12, 1999, the existence of vernal pools on the property was in dispute. Because vernal pools are only present during springtime, it was not possible to resolve the issue in either January when the hearing was conducted or early March when the decision was announced. The Commission handled this issue by making the approval conditional on a future determination of the existence of vernal pools. As the DEP Commissioner points out, this approach amounted to acting on an incomplete application and deferring consideration of essential required information. Memorandum of Defendant Commissioner of Environmental Protection, p. 3. An application is not deemed complete until all information required by statutes or regulations has been submitted in proper form. *Newtown v. Keeney,* 234 Conn. 312, 322 (1995).

The Commission's reliance on *AvalonBay Communities, Inc. v. Inland Wetlands Commission,* 266 Conn. 150, 163, 171 (2003), is unpersuasive. It is true that our Supreme Court in *AvalonBay* made clear that Connecticut's inland wetlands act protects the wetlands and not the wildlife. *Id.* Unlike *AvalonBay,* however, the present application involved proposed activity that affected the wetlands. Whether the filling of wetlands as approved by the Commission impacts vernal pools is in doubt, but such filling clearly involves a physical impact not present in *AvalonBay.*

The procedure adopted by the Commission also affected the plaintiff's due process rights. Allowing a contested issue at the hearing-the existence of vernal pools-to be resolved by the preparation of a report to be done after the application was approved and without an opportunity for the plaintiffs to be heard, is not consistent with the due process principles described above. Moreover, the report submitted by the applicant is ambiguous with respect to the issue of vernal pools on the property. David Lord's report notes no observation of relevant species, but also confirms the existence of "shallow pool areas" on the site. The plaintiffs, as intervenors, should have an opportunity to respond to this report.

The court's decision is not intended to substitute its judgment for that of the Commission. To the contrary, this court makes no finding as to whether vernal pools do or do not exist on the subject property, or whether, even if they do exist, the proposed filling is permissible. This court does find, however, that the applicant did not submit a complete application to the Commission prior to its decision.

CONCLUSION

*4 The appeal is sustained. The matter is referred back to the Commission for a further hearing to consider whether vernal pools exist on the subject property and, if they do, what (if any) impact the proposed activity will have on them. At such hearing, the plaintiffs should be given a fair opportunity to be heard.

So Ordered at New Haven, Connecticut this 1st day of June 2004.

All Citations

Not Reported in A.2d, 2004 WL 1327084, 37 Conn. L. Rptr. 189

Footnotes

1 In relevant part, § 22a-19 provides: "In any administrative ... proceeding ... any person ... may intervene as a party ... asserting that the proceeding ... involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."

2 Vernal pools are shallow bodies of water that appear in springtime. They are used by wildlife species-particularly salamanders, for breeding.

3 The condition stated:

> A "Supplemental Wetland Investigation" is to be supplied to the Commission within a maximum period of sixty (60) days of the March 2003 Meeting Date. The report will deal with Vernal Pools (if any) on the site, their quality in terms of ability to support amphibians, wildlife, flora and fauna, etc. Based on these findings the Commission may impose additional measures that it deems appropriate to protect said wetlands shown on this "Supplemental Report and Map" or modify its decision if appropriate.

End of Document

STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IN THE MATTER OF:	:	**PETITION NO: 1312**
Candlewood Solar, LLC	:	
20 MW Solar Photovoltaic Project	:	
New Milford Assessor's Map	:	
Parcels 26/67.1, 9.6, and 34/31.1	:	
Candlewood Mountain Road	:	
New Milford, Connecticut	:	**APRIL 27, 2020**

AFFIDAVIT OF
DANIEL E. CASAGRANDE, ESQ.

Daniel E. Casagrande, Esq. being duly sworn, deposes and says:

1. I am an attorney licensed to practice in the State of Connecticut. I am counsel to Parties/Intervenors, Rescue Candlewood Mountain ("Rescue") and the Town of New Milford (Town"). I make this affidavit in support of Rescue's and the Town's Motion for Stay pursuant to C.G.S. §4-183(f). The Motion for Stay seeks two alternative forms of relief: 1) a stay of any construction of the solar energy project at issue (the "Project"), including but not limited to the proposed clearcutting, stumping and grubbing of approximately 54 acres of core forestland, pending a final determination of Rescue's pending appeal of the Siting Council's December 21, 2017 approval of a declaratory ruling for the Project now pending in the Superior Court for the Judicial District of New Britain at

New Britain (the "Rescue Appeal"), or, in the alternative, 2) a temporary stay of construction activities until the Superior Court decides whether to issue a stay as sought in the Rescue Appeal in plaintiffs' Motion for Stay and associated filings, dated April 21, 2020 (Docket ID ## 164.00 – 173.00). If the Siting Council ("Council") does not stay construction or delays its consideration of this motion, Candlewood Solar, LLC ("Candlewood Solar") will begin removal of the core forest immediately after it receives what it expects to be the apparently imminent approval by DEEP of its General Permit registration, and the Council's apparently soon-to-follow approval of Candlewood Solar's revised D&M Plan. Rescue and the Town will be irreparably harmed if Candlewood Solar succeeds in removing the trees before resolution of the court appeal, because their preservation, as well as prevention of associated environmental harms, are the sole objects of Plaintiffs in the Rescue Appeal. Rescue's and the Town's interests in preserving the status quo clearly outweigh Candlewood Solar's interest in destroying the trees and rendering the appeal moot. All exhibits attached hereto are incorporated herein by reference.

RELEVANT FACTS.

A. Summary of Proceedings Before the Siting Council and DEEP.

2. On December 21, 2017, the Council issued a declaratory ruling approving the Project. Rescue, an association of individuals concerned about the destruction of

core forest and other environmental impacts to be caused by the Project, intervened in the Council's proceeding pursuant to C.G.S. § 22a-19 to oppose the Project due to its significantly adverse effect on the natural resources of the State. The Town also intervened as a party to the Council's proceeding to raise similar concerns. Rescue and certain other persons adversely affected by the Project timely filed an administrative appeal pursuant to C.G.S. § 4-183 from the Council's approval (Dkt. No. HHB-CV-18-6042335-S). Trial of that appeal (the "Rescue Appeal") before the Court (Cohn, J.) commenced on December 4, 2018, and is ongoing.

3. The Council's approval of the Project was conditioned on the approval by the Department of Energy and Environmental Protection ("DEEP") of a stormwater pollution control plan ("SWPCP"), and the approval by the Council of a development and management plan ("D&M Plan"). Under the Council's approval, construction of the Project may not commence until Candlewood Solar receives both approvals.

4. On September 17, 2018, Candlewood Solar filed with DEEP a SWPCP as part of an application ("First Application") for registration of the Project under DEEP's General Permit for the Discharge of Stormwater and Dewatering Wastewaters (the "General Permit").

5. On October 18, 2018, DEEP rejected the First Application, citing numerous "major" deficiencies in the SWPCP submitted by Candlewood Solar.

6. On or about January 2, 2019, Candlewood Solar filed a second General Permit registration application with DEEP (the "Second Application").

7. On January 16, 2019, the Town filed with DEEP a petition for declaratory ruling which requested, in part, that DEEP reject the Second Application. The Town's petition attached a January 14, 2019 affidavit by Milone & MacBroom members Edward Hart, P.E. and Ryan McEvoy, P.E. ("Milone & MacBroom affidavit'). Milone & MacBroom is a professional engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut. The Milone & MacBroom affidavit set forth numerous and significant inadequacies in the stormwater pollution control plan ("SWPCP") with the Second Application. The Milone & MacBroom affiants recommended that DEEP reject the Second Application and require the filing of an application for an individual permit to discharge, due to the magnitude of the proposed solar facility and its location "on steep slopes ... where a significant area of core forest will be removed .... "

8. On March 14, 2019, DEEP's Bureau of Management and Compliance Assurance ("Bureau") rejected the Second Application. For detailed reasons including those set forth in the Milone & MacBroom affidavit, the Bureau found substantial flaws in Candlewood Solar's stormwater analysis, and determined that the SWPCP "lack[s] elements necessary to demonstrate the effectiveness and appropriateness of the proposed construction and post-construction stormwater management measures."

9. Also on March 14, 2019, DEEP Commissioner Katie Dykes issued a decision not to grant the Town's January 16, 2019 request for declaratory ruling. (Tab 1) Commissioner Dykes' decision rested on the Bureau's rejection of the registration under the General Permit in the Second Application. Her decision noted the substantial deficiencies in the Second Application, and expressed doubt that Candlewood Solar would submit a revised registration. As Commissioner Dykes found:

> I am also, in this declaratory ruling proceeding, declining to exercise my authority to require that Candlewood Solar obtain an individual discharge permit for the Project, although not for any of the reasons cited in Candlewood Solar's objections. I recognize that with the rejection of Candlewood Solar's registration, nothing prevents Candlewood Solar from resubmitting a revised registration seeking coverage under the General Permit. Nevertheless, with the rejection of Candlewood Solar's registration, there is no longer anything pending before the Department and it remains unclear, especially given the substantial nature and extent of the deficiencies in the last registration it submitted, if Candlewood Solar will make any resubmission – either in the form of a registration or an application for individual permit. Moreover, the Petitioner is seeking a hearing regarding the exercise of my authority under Conn. Gen. Stat. § 22a-430b(c), yet nothing in this section 22a-430b(c) would require that I hold a hearing to exercise the discretion afforded by that statute. I am reluctant to expend limited Department resources on a hearing, especially when section 22a-430b(c) does not require a hearing and when it is not clear whether Candlewood Solar will even submit a revised registration or an application for an individual permit.
>
> Having so concluded, I also want to make unmistakably clear that my decision in this matter does not, and is not intended to, foreclose the possibility that I may indeed exercise my authority under Conn. Gen. Stat. § 22a-430b(c) and require that Candlewood Solar obtain an individual discharge permit for the Project. I remain concerned about a number of the issues raised by the Petitioner and Rescue Candlewood Mountain. I have decided, however, not to exercise this authority in this context, at this time.

(Footnote omitted; emphasis added.) (Tab 1, pp.3-4)

10. On January 28, 2019, Candlewood Solar filed a development and management plan ("D&M Plan") with the Council. The D&M Plan was based on the same SWPCP that the Bureau later rejected in its March 14, 2019 denial of the Second Application. The Town then requested the Council to deny the D&M Plan on this basis. On April 25, 2019, the Council approved the D&M Plan, but conditioned the approval on Candlewood Solar's resubmission of a new SWPCP to DEEP and DEEP's approval of that submission. The Town thereafter filed an administrative appeal from the Council's approval of the D&M Plan (the "Town Appeal"). (Dkt. No. HHB-CV-19-6053213-S) That appeal is now pending before the Superior Court, but the Town intends to withdraw the appeal without prejudice pursuant to an agreement with counsel to Candlewood Solar and the Council.

11. In a January 21, 2020 status conference in the Town Appeal, Judge Cohn asked Candlewood Solar's counsel about its plan to submit a new SWPCP to DEEP. Counsel represented that Candlewood Solar intended to file the new SWPCP as part of a new request for registration under the General Permit ("Third Application"). Counsel also reported to the Court that Candlewood Solar had been meeting privately with DEEP staff regarding the planned filing of the Third Application.

12. On February 27, 2020, the Town filed a new petition for a declaratory ruling with DEEP ("Town's Second Petition"). This petition noted that Candlewood Solar was about to file its Third Application for authorization of the Project under the General Permit. The Town's Second Petition requested the DEEP Commissioner to require Candlewood Solar to submit an individual permit application that will afford the Town, Rescue, and other interested persons a reasonable time to prepare a careful and thorough response to Candlewood Solar's revised SWPCP--a revision that Candlewood Solar had taken almost a year to develop. The Town noted to the Commissioner that the individual permit process also would trigger a public hearing to allow an open and robust vetting of the stormwater and erosion control impacts of the Project and their impacts on the water and other natural resources of the State.

13. On March 3, 2020, Candlewood Solar submitted its Third Application to DEEP for registration under the General Permit.

14. On March 25, 2020 -- within the fifteen-day window provided by DEEP's rules on General Permit registration and 15 days after Governor Lamont declared public health and civil preparedness emergencies throughout the State -- the Town submitted its preliminary comments on the Third Application. The Towns' preliminary comments included a supplemental affidavit by Milone & MacBroom, in which its engineers found, based on their preliminary review of the Third Application (some 1,800 pages long), that

the SWPCP still suffers from substantial deficiencies which, in Milone & MacBroom's professional judgment, warranted the Commissioner's exercise of discretion to require an individual permit application.

15. On April 7, 2020 Candlewood Solar submitted to DEEP a "sur-reply" to the Town's March 25, 2020 comments, in which it admitted to a series of closed-door meetings with DEEP staff over the last year to discuss revisions to the SWPCP, and claimed that the Third Application met current DEEP guidelines for "large" solar projects. The sur-reply made evident that there are serious differences between Milone & MacBroom and Candlewood Solar's engineers as to the Project's compliance with DEEP standards.

16. On April 9, 2020, the Town submitted its response to Candlewood Solar's sur-reply. The Town pointed out that the disagreement over the sufficiency of the SWPCP between the Town's and Candlewood Solar's engineers is of itself a reason to require an individual permit process in which these opposing conclusions, and the credibility of the experts, can be assessed in an open and impartial forum. As of the filing of this Motion for Stay, DEEP has not yet ruled on the Third Application or the Town's Second Petition, but the parties expect such rulings imminently.

B. Facts Demonstrating Candlewood Solar's Intent to Commence Clear-Cutting of the Core Forest Immediately Upon Receipt of Favorable Rulings From DEEP and the Siting Council.

17. On April 14, 2020, the Court (Cohn, J.) held a telephonic status conference in both the Town's Appeal and the Rescue Appeal. Present on the call were the Court, undersigned counsel to Rescue and the Town, Robert Marconi, counsel to the Council, Jeffrey Mirman, counsel to Candlewood Solar, Melanie Bachman, Executive Director of the Council, and Carl M. Dunham, Jr., pro se plaintiff in the Rescue Appeal.

18. The Court initiated the call by asking the status of the proceeding before DEEP. Attorney Mirman responded that he had spoken with DEEP counsel, that DEEP is actively reviewing the various submissions to it, and that DEEP should be issuing a decision within a matter of days (i.e. as of April 14, 2020).

19. The Court then asked what would happen if DEEP approved the Third Application. Undersigned counsel responded that the Town and Plaintiffs in the Rescue Appeal would pursue all available appellate remedies. Ms. Bachman then stated that the Council had determined that it would review the DEEP-approved SWPCP pursuant to "internal staff review" of a revised D&M Plan, which she asserted would take only a matter of days.

20. Undersigned counsel responded that his understanding was the opposite of Ms. Bachman's. Undersigned counsel reported to the Court, and reminded the others on the call, that at a May 14, 2019 hearing before the Council on this Court's remand on the visibility issue in the Rescue Appeal, the Council's acting Chair, in limiting

undersigned counsel's questioning of Candlewood Solar's witnesses on the SWPCP, assured undersigned counsel that, if and when DEEP approved a SWPCP, the SWPCP would come back to the Council as part of a revised D&M Plan, thereby affording the Town the opportunity to review and comment on the revised plan at that time. Quite clearly, as Ms. Bachman noted, that is not the Council's current plan; its intention now is to have its staff approve or recommend approval of the revised D&M Plan almost immediately after DEEP's approval, with little to no opportunity for the Town and other interested persons to review the revised plan.

21. Also during the April 14, 2020 the telephonic conference call with the Court, Mr. Dunham reported that, just prior to the call that morning, he had observed from his property on 195 Candlewood Mountain Road that Candlewood Solar had positioned machines on the Project site, had commenced construction surveying and staking, and appeared ready to start clearcutting operations.

22. At the end of the telephonic status conference, the undersigned counsel asked the attorneys for Candlewood Solar and the Council if they would agree to stay the commencement of the proposed clear-cutting, stumping and grubbing until after all appeals from DEEP's and the Council's approvals are finally resolved. Attorney Mirman responded adamantly that Candlewood Solar would not agree to such a stay. At this

point, the Court suggested that the Town and the Rescue Plaintiffs would have to seek a stay in order to preserve the status quo pending the outcome of the appeals.

23. As further evidence of Candlewood Solar's intent to begin the destruction of this forest as soon as possible, on April 13, 2020, Candlewood Solar filed its revised D&M Plan with the Council, without waiting for DEEP's decisions on the Town's Second Petition or the Third Application. Candlewood Solar's obvious intent is to have the Council complete its staff review parallel to DEEP's review of the SWPCP, so that the Council will approve the revised D&M Plan expeditiously after DEEP's action.

24. Notably, prior to this latest submission of a revised D&M Plan to the Council, Candlewood Solar had agreed, and the Council had found, that no clear cutting of trees would occur between April 1 and October 31, in order to protect wildlife species. (See Revised Findings of Fact, ¶ 296 (June 7, 2019).) The revised D&M Plan, however, now proposes clearcutting from the date the Council approves the revised D&M Plan through June 1 of this year, with a two-month pause from June 1 through July 31,[1] and then continuing until the entire acreage is cleared, in order to enable Candlewood Solar to complete construction of the Project within an apparent current construction-completion deadline of September 30, 2020. (Tab 2 (Revised D&M Plan, Att. 3, p. 6) This is perhaps

[1] The record of Council proceedings in support of the Council's December 21, 2017 declaratory ruling approving the Project includes DEEP correspondence prohibiting clearcutting operations during the seven-month period between April 1st and October 31st of any given calendar year.

the most compelling proof that Candlewood Solar intends to start and finish the tree clearing in an intensive campaign beginning literally days from now.

25. These facts lead to one conclusion -- Candlewood Solar's plan is to destroy this massive acreage of forest land as soon as possible after it receives what it expects to be an imminent approval of the SWPCP from DEEP and then, a few days later, the Council approves a revised D&M Plan.

26. The facts also demonstrate that Rescue and the Town will be irreparably harmed if Candlewood Solar destroys this forest before any meaningful appellate review can occur. The main purpose of the Rescue Appeal is to save these trees and prevent associated harms to downgradient wetlands and watercourses. If the Council does not immediately issue a stay, the forest will be gone and these harms will occur. Candlewood Solar will then (correctly) proclaim that the Rescue Appeal is moot and should be dismissed. Rescue and the Town have no adequate remedy at law, and the equities clearly favor preserving these tens of thousands of trees until all appeals are resolved.

C. Rescue's April 21, 2020 Motion to Stay filed with the Court.

27. On April 21, 2020, Rescue and the other plaintiffs in the Rescue Appeal filed with the Court a Motion for Stay of all activities approved in the Council's December 21, 2017 declaratory ruling until the Court's final determination of the Rescue Appeal, pursuant to Practice Book § 4-183(f) (i.e. Docket ID ## 164.00 – 173.00).

28. On April 22, 2020, the Court entered an order indicating that in light of the COVID-related court closures, oral argument and rulings on pending motions have been stayed. The order stated "once the regular business of the court has been reinstated," oral argument would be immediately scheduled. (Tab 3)

29. Also on April 22, 2020, in an email exchange with undersigned counsel, the Court stated that Rescue has the right to ask for a stay from the Council before any work is done pursuant to the Council's permit. The Court indicated that it would not act on any §4-183(f) motion "until such time as the Siting Council has ruled on [Rescue's] motion." (Tab 4)

Dated at Danbury, Connecticut, this 27th day of April, 2020.

Daniel E. Casagrande

Subscribed and sworn to before me this 27th day of April, 2020.

Jessica A. Cavalier
Notary Public
My Commission Expires:

JESSICA A. CAVALIER
NOTARY PUBLIC
MY COMMISSION EXPIRES SEP. 30, 2020

CERTIFICATION OF SERVICE

I certify that a copy of the above was or will immediately be mailed or delivered electronically or non-electronically on April 27, 2020, to all attorneys and self-represented parties of record and that written consent for electronic delivery was received from all attorneys and self-represented parties of record who received or will immediately be receiving electronic delivery.

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Daniel E. Casagrande, Esq.

TAB 1

IN THE MATTER OF :

THE TOWN OF NEW MILFORD, :

PETITION FOR DECLARATORY RULING : MARCH 14, 2019

DECISION NOT TO ISSUE DECLARATORY RULINGS

Pursuant to Conn. Gen. Stat. § 4-176(e) and R.C.S.A. § 22a-3a-4(c)(3), I am issuing this decision in response to a Petition for Declaratory Ruling submitted by the Town of New Milford.

A. BACKGROUND. Candlewood Solar, LLC ("Candlewood Solar") is proposing to construct a 20 MW solar photovoltaic array on Candlewood Mountain Road in New Milford, Connecticut ("the Project"). In connection with the Project, on January 2, 2109, Candlewood Solar submitted a registration with the Department of Energy and Environmental Protection ("the Department") seeking coverage under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities ("the General Permit").[1]

B. THE PETITION. On January 16, 2019, the Town of New Milford ("the Petitioner") submitted a Petition for Declaratory Ruling ("the Petition") to the Commissioner of Energy and Environmental Protection. The Petition seeks two rulings: one, that I exercise my authority under Conn. Gen. Stat. § 22a-430b(c)[2] and require that Candlewood Solar obtain an individual

[1] Candlewood Solar had previously submitted a registration seeking coverage under the General Permit for the Project on September 17, 2018. This earlier registration was rejected by the Department on October 18, 2018.

[2] Conn. Gen. Stat. § 22a-430b(c) provides in pertinent part that:

> Subsequent to the issuance of a general permit, the commissioner may require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430 if the commissioner determines that an individual permit would better protect the waters of the state from pollution.... The commissioner may require an individual permit

discharge permit under Conn. Gen. Stat. § 22a-430 for the Project; and two, that I extend the public comment period regarding Candlewood Solar's registration under the General Permit.[3] In addition, pursuant to Conn. Gen. Stat. § 22a-19, the Petitioner has requested party or intervenor status in the declaratory ruling proceeding and Candlewood Solar's registration seeking coverage under the General Permit.

On January 18, 2019, Rescue Candlewood Mountain, a voluntary association, submitted comments in support of the Petition and also, pursuant to Conn. Gen. Stat. § 22a-19, seeks to intervene as a party in the declaratory ruling proceeding and Candlewood Solar's registration seeking coverage under the General Permit.

Both the Petitioner and Rescue Candlewood Mountain have requested a hearing.

On February 5, 2019, Candlewood Solar submitted objections to the Petition and to the Petitioner's and Rescue Candlewood Mountain's requests to intervene. On February 13, 2019, the Petitioner submitted its response to Candlewood Solar's objections.

C. THE DECISION NOT TO ISSUE THE REQUESTED RULINGS. Conn. Gen. Stat. § 4-176(e) requires that "[w]ithin sixty days after receipt of a petition for a declaratory

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under this subsection in cases that include but are not limited to the following: (1) When the discharger is not in compliance with the conditions in the general permit; (2) when a change has occurred in the availability of a demonstrated technology or practice for the control or abatement of pollution applicable to the discharge; (3) when effluent limitations and conditions are promulgated by the United States Environmental Protection Agency or established by the commissioner under section 22a-430 for discharges covered by the general permit; (4) when a water quality management plan containing requirements applicable to such discharges is approved by the United States Environmental Protection Agency; (5) when circumstances have changed since the issuance of the general permit so that the discharger is no longer appropriately controlled under the general permit, or a temporary or permanent reduction or elimination of the authorized discharge is necessary; (6) when the discharge is a significant contributor of pollution, provided the commissioner, in making this determination, may consider the location of the discharge with respect to waters of the state, the size of the discharge, the quantity and nature of the pollution discharged to waters of the state, cumulative impacts of discharges covered by the general permit and other relevant factors; or (7) when the requirements of subsection (a) of this section are not met.... Any interested person or municipality may petition the commissioner to take action under this subsection.

[3] The public comment for Candlewood Solar's January 2, 2109 registration was fifteen days, or from January 2, 2019 to January 17, 2019.

ruling" an agency must take one of five specified options.[4] The last option under section 4-176(e), and the one I have decided to take in this case, is to decide not to issue a declaratory ruling and state the reasons for my action.

On March 14, 2019, the Department rejected the January 2, 2019 registration submitted by Candlewood Solar seeking coverage under the General Permit. (Copy attached). As such, there is no longer a registration pending with the Department. There being no registration, there is no reason to extend the public comment period regarding this registration. As such, I am deciding not to issue a ruling regarding that portion of the Petition seeking an extension to the public comment period for Candlewood Solar's registration.

I am also, in this declaratory ruling proceeding, declining to exercise my authority to require that Candlewood Solar obtain an individual discharge permit for the Project, although not for any of the reasons cited in Candlewood Solar's objections.[5] I recognize that with the

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[4] Conn. Gen. Stat. § 4-176(e) provides that:

> Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

The Department's Rules of Practice also require compliance with section 4-176(e), see R.C.S.A. § 22a-3a-4(c)(3).

[5] Candlewood Solar claims that the Petition is premature since its registration is still pending. I do not agree. The first sentence of section 22a-430b(c) states that "[s]ubsequent *to the issuance of a general permit*, the commissioner may require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430...." (Italics added for emphasis). The language and plain meaning of this statute authorize me to require an individual permit anytime after the General Permit was issued, which in this case is October 1, 2018. *See* Conn. Gen. Stat. § 1-2z. Candlewood Solar's claim confuses the submission of a registration with the issuance of a General Permit. Section 22a-430b(c) does not mention and does not require that I wait until a registration has been acted upon before I can require an individual permit. Indeed, provided a general permit has been issued, section 22a-430b(c) allows me to require an individual permit before or after a registration has been submitted. I can also require an individual permit even when a general permit does not require the submission of a registration. In short, I conclude that under Conn. Gen. Stat. § 22a-430b(c), as long as a general permit has been issued, I may require that an individual permit be

rejection of Candlewood Solar's registration, nothing prevents Candlewood Solar from resubmitting a revised registration seeking coverage under the General Permit. Nevertheless, with the rejection of Candlewood Solar's registration, there is no longer anything pending before the Department and it remains unclear, especially given the substantial nature and extent of the deficiencies in the last registration it submitted, if Candlewood Solar will make any resubmission – either in the form of a registration or an application for individual permit. Moreover, the Petitioner is seeking a hearing regarding the exercise of my authority under Conn. Gen. Stat. § 22a-430b(c), yet nothing in section 22a-430b(c) would require that I hold a hearing to exercise the discretion afforded by that statute. I am reluctant to expend limited Department resources on a hearing, especially when section 22a-430b(c) does not require a hearing and when it is not clear whether Candlewood Solar will even submit a revised registration or an application for an individual permit.

Having so concluded, I also want to make unmistakably clear that my decision in this matter does not, and is not intended to, foreclose the possibility that I may indeed exercise my authority under Conn. Gen. Stat. § 22a-430b(c) and require that Candlewood Solar obtain an individual discharge permit for the Project. I remain concerned about a number of the issues raised by the Petitioner and Rescue Candlewood Mountain. I have decided, however, not to exercise this authority in this context, at this time.

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obtained, even if a registration is not required, a registration has been submitted, a registration is awaiting approval, or a registration has been approved.

Finally, given my decision not to issue the rulings requested in the Petition and the rejection of Candlewood Solar's registration, there is no longer any proceeding into which the Petitioner or Rescue Candlewood Mountain can intervene.[6] As such, I am denying the Petitioner's and Rescue Candlewood Mountain's request for party or intervenor status.

D. CONCLUSION. For the reasons noted above, I have decided not to issue the declaratory rulings requested by the Petitioner and am denying the Petitioner's and Rescue Candlewood Mountain's request for party or intervenor status.

Katherine S. Dykes
Commissioner of Energy and Environmental Protection

[6] Candlewood Solar had challenged the adequacy of the affidavits submitted by the Petitioner and Rescue Candlewood Mountain regarding intervention under Conn. Gen. Stat. § 22a-19. Given my decision in this matter any ruling on this issue is unecessary.

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TAB 2

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September 23, 2019

VIA ELECTRONIC MAIL: deep.nddbrequest@ct.gov

Connecticut Department of Energy & Environmental Protection Natural Diversity Data Base
79 Elm Street
Hartford, CT 06106-5127
Attn: Ms. Dawn McKay

Subject: Request for Natural Diversity Data Base (NDDB) State Listed Species Review
Candlewood Solar, LLC
20 MW Solar Photovoltaic Project
Candlewood Mountain Road
New Milford, CT
NDDB Final Determination No.: 201703524

Dear Ms. McKay:

On November 15, 2018, a Final Determination was issued by the Connecticut Department of Energy & Environmental Protection Natural Diversity Data Base ("DEEP NDDB") for the Candlewood Solar Project in New Milford, Connecticut (NDDB Final Determination No. 201703524) ("Final Determination"). In accordance with NDDB's Final Determination, on behalf of Candlewood Solar, LLC ("Candlewood Solar"), Wood Environment & Infrastructure Solutions, Inc. ("Wood") is filing this Request for NDDB State Listed Species Review as the scope of work has changed since the issuance of the November 15, 2018 Final Determination on the Project.

The completed, signed Request for Natural Diversity Data Base (NDDB) State Listed Species Review Form (DEEP-REQ-APP-007; Rev. 11/08/17) ("Form") is attached to this letter. The required supplemental information is included as **Attachments A through C** as outlined in Part VI of the Form. **Attachments A through C** include:

- Attachment A: Overview Map
- Attachment B: Detailed Site Map
- Attachment C, Section i. A.: Site Photographs
- Attachment C, Section i. B.: October 27, 2017 Amec Foster Wheeler Environment & Infrastructure, Inc. Filing
- Attachment C, Section i. C.: February 9, 2018 Incidental Take Report for the State Threatened *Plethodon glutinosus* (slimy salamander) ("Incidental Take Report")
- Attachment C, Section i. D.: July 8, 2019 Oxbow Pre-construction Survey Summary of Findings for the State Threatened *Plethodon glutinosus* (slimy salamander) including NDDB Special Animal Survey Form
- Attachment C, Section ii: Annotated Site Plans

Additionally, copy of the November 15, 2018 Final Determination is included as **Attachment D.**

In addition to the completed Form and required supplemental information, the purpose of this letter is to:

- Identify and describe all changes from the previously approved scope of work and why the changes are necessary, and
- Identify and describe any changes to potential impacts to known State Listed Species and their habitat and any changes to all mitigation measures included in the Final Determination including any new proposed mitigation measures.

Project Design and Layout Changes:

Since the issuance of the Final Determination for the Candlewood Solar Project in New Milford, Connecticut on November 15, 2018, there have been several updates to the Project design and changes to the Project layout. The following section summarizes the updates and changes to the Project design and layout since the issuance of the Final Determination ("approved design").

I. Candlewood Solar and Wood have been coordinating with the DEEP Water Permitting and Enforcement Division regarding the registration for the Project under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities ("General Permit"). Based on input from DEEP, Candlewood Solar re-evaluated the design to avoid construction of solar photovoltaic ("PV") panels on slopes of 15% or greater. The Project design approved in the November 15, 2018 Final Determination ("approved design") includes development on slopes of 15% or greater. Under the approved design, development areas containing slopes of 15% or greater are primarily located in the northwest area of the array. In order to reduce development in areas containing slopes that are 15% or greater, solar PV panels from the northwest will be relocated to the east side of the site, which provides flatter topography (see **Figure 1** and **Attachment C, Section ii**, Project Plans). The layout and associated stormwater design have been revised to avoid development of the array on slopes 15% or steeper.

II. Candlewood Solar has incorporated a 50-foot vegetated setback from the property lines to the proposed limit of work ("LOW") (see **Figure 1** and **Attachment C, Section ii**, Project Plans).

III. As a result of the changes to the solar PV panel layout, the northern access road within the array was shifted to the east by approximately 150 feet to allow for access to the solar PV panels within the northern quadrant of the Project site.

IV. Based on further evaluation and consultation with First Light Hydro Generating Company ("First Light"), owner of the two adjacent parcels (9/6 and 34/31.1), the electric interconnection route has been modified. The proposed electric interconnection route will exit the Facility parcel from the southeastern portion of the Solar PV Facility and cross the two adjacent Project Area parcels to the east, however, from the Solar PV Facility, the electric interconnection route heads northeast along the eastern side of Candlewood Mountain and ultimately leads to Route 7 where it will interconnect with the Eversource Energy Rocky River Substation. The revised linear electric interconnection route is approximately 6,425 feet in length, approximately 159 feet shorter than the route described in the Incidental Take Report (see **Figures 1 and 2**). The proposed electric interconnection will include an access road that will be used during construction and operation/maintenance. The majority of the revised electric interconnection route is undeveloped forest with wooded upland, wetlands, and watercourses. Natural features including wetlands, watercourses, wildlife habitat and floodplains where the interconnection is proposed to be located is described in the following sections and depicted on **Figures 1 - 3**.

As a result of the above noted changes to the Project design and layout, the number of panels has been reduced from approximately 60,000 to 57,240, of which the Facility will occupy approximately 49.6 acres of

the 163.5-acre Facility Parcel under the current design compared to 54.55 acres under the approved design. It should be noted that the LOW for the current design is 70.24 acres compared to 67.9 acres under the approved design. The increase in area under the current design is a result of area required for stormwater features. The Project includes tree clearing for the Facility, to eliminate shading around the Facility, for implementation of stormwater features, and for the electric interconnection route. Table 1 below outlines tree clearing under the approved design and layout and the current design and layout. The current design will result in an additional approximate 0.43 acres of tree clearing.

There have been no changes to the installation of the Facility aside from some re-grading of the site to avoid solar PV panel installation on slopes of 15% or steeper and stumps will be removed in the area between the fence line and the limits of work and tree clearing. Panel racking will consist of one-inch to two-inch diameter pilot holes to depths specified by the solar panel manufacturer will be augered into the soil for the installation of the Facility. Consistent with the approved design, the top height of the panels will be approximately 7 feet above ground and the bottom edge of the lowest panel will be approximately 2 to 3 feet above ground. Additionally, the Facility will be completely surrounded by a counter-sunk 7-foot high chain-link fence (see **Attachment C, Section i. C**, Incidental Take Report footnote 2 for additional information).

Table 1. Comparison of Impacts by Project Layout

Component	Approved Total Area (Acres)*	Approved Forested Area to be Cleared (Acres)**	Current Total Area (Acres)	Current Forested Area to be Cleared (Acres)
Solar Array Limit of Work (LOW)	67.9	51.55	70.24	49.41
Solar Array	54.55	38.92	49.6	32.43
Additional Cleared Area (Shading and Stormwater Features)		12.63	20.64	16.98
Interconnect	4.83	4.52	10.80	7.09
Total Area of Disturbance	***78.16***	***56.07***	***81.04***	***56.5***

* Revised Total Area (Acres) in Table 2 of Incidental Take Report.
** Revised Forested Area to be Cleared (Acres) in Table 2 of Incidental Take Report.

The following sections describe potential impacts to known State Listed Species and their habitat as a result of the design modifications described above.

Wetlands and Vernal Pools:

The Incidental Take Report notes:

> *The Project Area contains five (5) plant community types (a.k.a. key habitats) as classified in the 2015 Connecticut Wildlife Action Plan (WAP) and depicted on Figure 2; upland forest, upland herbaceous, forested inland swamp, shrub inland wetlands, and unique (vernal pool) and man-made habitats (utility corridors and access roads).*
>
> ***Facility Parcel:** As noted above, the Facility Parcel is undeveloped and partially wooded with four (4) hay fields/horse pastures in the southern portion of the Parcel. Five (5) wetlands and associated watercourses were delineated within the Facility Parcel (Wetlands I through V). Watercourses are*

associated with each of the wetlands except Wetlands II and III, all of which are intermittent. All delineated wetlands consist of at least a portion of forested inland wetland, the majority of which are the key sub-habitat red maple swamp. Wetlands I and II also contain shrub inland wetland and sub-habitat shrub swamp. One naturally occurring vernal pool (VP) which is also a forested inland wetland (Wetland V), was identified and delineated in the northeast portion of the Facility Parcel. Two (2) cryptic vernal pools were also delineated within Wetland I. Areas of steep slope and rock outcrops are primarily located in the northern and eastern portions of the Facility Parcel with a small area of steep slope and rock outcrops located in the southwestern portion of the Facility Parcel, north of the existing access road. See Figure 1.

***Electric Interconnection Route:** The electric interconnection route passes through forested areas down a steep slope to the east of the solar array, leading to forested areas adjacent to existing access roadways and an existing cleared fiber line ROW to its terminus at Kent Road/Route 7. Four (4) wetlands and associated watercourses were delineated within the two Project Area parcels crossed by the electric interconnection route (Wetlands VI through IX). Intermittent watercourses are associated with each of these wetlands except the Rocky River which flows out of Wetland VI. All delineated wetlands consist of at least a portion of forested inland wetland, the majority of which are the key sub-habitat red maple swamp.*

Electric Interconnection Route: As described above, the electric interconnection route will exit the Facility parcel from the southeastern portion of the Solar PV Facility and cross the two adjacent Project Area parcels to the east, however, from the Solar PV Facility, the electric interconnection route heads northeast along the eastern side of Candlewood Mountain and heads to Route 7 and the Eversource Energy Rocky River Substation (see **Figure 1**). A wetland delineation of the new areas crossed by the revised electric interconnection route was conducted in June and July 2019. The wetland delineation resulted in the identification of wetland areas, a perennial watercourse (the Rocky River), and intermittent watercourses. It should be noted that the 2019 wetland delineation extended previously delineated boundaries to account for the new study area and now identifies wetlands VII and VIII as a single, large wetland complex. Under the current design, the electric interconnection route crosses over the Rocky River in two locations (see **Figures 1 - 3**). Utility poles and guy wires will be sited to avoid impacts to the Rocky River. The electric interconnection route will continue to avoid impacts to wetlands and watercourses and no direct impacts to wetlands or watercourses will be required to install the utility poles and guy wires associated with the overhead electric interconnection. In addition, a portion of the electric interconnection route will be installed using a trenchless crossing technique (horizontal directional drilling ("HDD")) to install the line beneath wetlands to avoid wetland impacts. Under the approved design, approximately 2,322 sq. ft. (0.05 acres) of Wetlands VI, VII, VIII, and IX will be converted from forested wetlands to emergent and/or shrub wetlands to provide vertical clearance for the overhead utility lines. Under the current design, Wetlands VI, VII, VIII, and IX will be avoided and no wetlands will be converted from forested wetlands to emergent and/or shrub wetlands.

Vernal Pools: During the NDDB's initial review of the Project (NDDB No. 201703524), management goals pertaining to development within vernal pool depressions, 100-foot envelopes, and the critical terrestrial habitat (CTH), as well as potential impacts were presented and discussed. As described in Amec Foster Wheeler's Report, dated October 27, 2017 (see **Attachment C, Section i. B.**), two (2) cryptic vernal pools were identified in Wetland I and one (1) vernal pool was identified in Wetland V (see **Figure 1**). Wetland I is located east of the development area and Wetland V is located north/northeast of the development area.

The approved design included avoidance of the vernal pool depressions and the 100-foot vernal pool envelopes, along with development of 31.6% (29.91 acres) of the CTH area within a single combined CTH system associated with the two (2) cryptic vernal pools in Wetland I and the one (1) vernal pool in Wetland

V. Specifically, as noted in the DEEP NDDB filing dated October 27, 2017, "Based on the overlapping, continuous, unfragmented system between the CTHs, these areas likely function as a single, mutually supportive system and therefore, should be assessed together. As a single system, the CTH totals approximately 94.57 acres and the development area (tree clearing area and solar array development) within the single combined CTH system totals approximately 29.91 acres or 31.6 percent." It should further be noted that approximately two (2) percent of the CTH (1.36 acres) is currently altered field area and the proposed condition will largely mimic the existing condition in that area in that it will remain field. Additionally, "...unlike more conventional development (commercial, residential) when completed, the array field will not have many of the legacy mortality sources (to vernal pool wildlife) that result from conventional projects built in close proximity to vernal pools. Specifically, there will be no ongoing road mortality to frogs, toads or salamanders. Similarly, no animals will be captured in storm gutters and deep sump catch basins. Although the array field will not provide terrestrial habitat, it will impede, but not prevent movement by salamander species and will do little to impede nocturnal migration by wood frogs." (see **Attachment C, Section i. B.**)

As noted above, DEEP Water Permitting and Enforcement Division requested that Candlewood Solar re-evaluate the design to relocate the solar PV panels sited within areas of 15% or steeper slopes to flatter slopes. Based on Candlewood Solar's evaluation, in order to reduce development in areas containing slopes that are 15% or greater, solar PV panels from the northwest will be relocated to the east side of the site near Wetland I and the two cryptic vernal pools within Wetlands I (see **Figure 1** and **Attachment C, Section ii**, Annotated Project Plans). The proposed panel relocation and current design will increase development within the CTH from 31.6% (29.91 acres) to 32.0% (30.22 acres), which is an increase of 0.31 acres. The proposed revised design will have a minimal increase in development of the CTH over what was previously reviewed and approved by NDDB. Stormwater features to be located within the CTH include three (3) surface sand filters and an infiltration basin. Stormwater features are shown on **Figure 1** and on the Annotated Project Plans included in **Attachment C, Section ii**.

State Listed Species and Mitigation Measures:

In its Final Determination dated November 15, 2018, NDDB determined that there are extant populations of State Listed Species known to occur within or close to the boundaries of the project site. The species include:

Birds
Vermivora chrysoptera (Golden-winged warbler) – State Endangered

Mammals
Myotis lucifugus (Little brown bat) – State Endangered
Lasiurus borealis (Red bat) – State Special Concern
Lasionycteris noctivagans (Silver-haired bat) – State Special Concern
Lasiurus cinereus (Hoary bat) – State Special Concern

Reptiles
Plethodon glutinosus (slimy salamander) – State Threatened
Ambystoma jeffersonianum (Jefferson salamander "complex") – State Special Concern
Glyptemys insculpta (Wood turtle) – State Special Concern
Terrapene carolina (Eastern box turtle) – State Special Concern

State Endangered *Vermivora chrysoptera* (Golden-winged warbler):

As noted in the Final Determination, the habitat assessment completed for the Project by Oxbow Associates, Inc. ("Oxbow") in September 2017 "concluded that suitable breeding habitat for golden-winged warbler is wholly absent from the premises due to a lack of open canopy habitat in a suitable early to mid-successional seral stage to support the species, and no protective measures were needed." In the Final Determination, NDDB concurred with Oxbow's conclusion and noted that no further conservation actions are necessary (see **Attachment D**).

The project changes described above do not change the results of the habitat assessment completed by Oxbow (see **Attachment C, Section i. B.**). The results of the September 2017 assessment remain unchanged, no protective measures are needed, and no further conservation actions are necessary.

Tree Roosting Bat Protection:

Three tree roosting bat protection measures were outlined in NDDB's November 15, 2018 Final Determination. These measures included:

1. Tree clearing should be completed during the hibernation or winter range period for bats. Tree clearing should be limited to between November 1 and March 30.
2. Large diameter coniferous and deciduous trees and wooded buffers adjacent to wetland areas will be maintained whenever possible. Based on the site plan layout, forested buffer areas vary by wetland.
3. Bat houses should be installed in the area where trees will be removed and will help in the conservation of tree roosting bats. Candlewood Solar will mount between 20 and 30 bat houses on east facing, mature tree trunks, not less than 12 feet from the ground in areas where trees are removed.

Changes or alterations to these measures are summarized as follows:

1. Based on the revised Project design, the Project will require the clearing of approximately 56.5 acres of forest for the construction of the Project, an increase of 0.43 acres of forest over that which was approved. Table 1 above provides a summary of changes by Project component. For comparison purposes, Table 1 is consistent with Table 2 included in the Incidental Take Report dated February 9, 2018.

   As a result of delays to project permitting, construction of the Project has been delayed by more than one year and Candlewood Solar continues to work with the DEEP Water Permitting and Enforcement Division and the DEEP Dam Safety Program to obtain the required permits and approvals. These permits and approvals are required in advance of construction activities, including tree clearing. Tree clearing will commence as soon as possible following receipt of all required permits and approvals, however, depending on when all permits and approvals are received, Candlewood Solar proposes to extend the tree clearing window to August 1 to May 31 in order to meet the project schedule which requires completion of construction by September 30, 2020. To continue to be protective of bats, Candlewood Solar proposes to avoid tree clearing between June 1 and July 31, which will avoid the most critical time, the pup season. In order to do this, Candlewood Solar will implement the following additional conservation measures 1) install an additional 20 – 30 bat boxes in the 100-acre conservation easement area either on free standing poles or on east facing, mature tree trunks, not less than 12 feet from the ground before April to improve the chance of occupancy (DEEP: Bat Fact Sheet)[1] and 2) perform a post-construction bat

[1] https://www.ct.gov/deep/cwp/view.asp?a=2723&q=325964&deepNav_GID=1655

survey for eight (8) detector nights over the course of at least 2 calendar nights. This data will enhance the DEEP bat database in the area.

2. As described above, implementing a 50-foot setback from the property line to the limit of work and relocating PV panels from steep areas of the site to flatter areas of the site resulted in a revised solar array layout and limit of work. Consistent with conservation measure 2, large diameter coniferous and deciduous trees and wooded buffers adjacent to wetland areas will be maintained whenever possible. Based on the revised site plan layout and limit of work, a larger forested buffer area near wetland V will be maintained and a slightly smaller buffer area near wetland I will be maintained. Additionally, changes to the electric interconnection route will result in no impacts to Wetlands VI, VII, VIII, and IX and these wetlands will remain unchanged. Further, the electric transmission line will be installed beneath wetland VIII via HDD to avoid wetland impacts.
3. Consistent with conservation measure 3, bat houses will be installed in the area where trees will be removed and will help in the conservation of tree roosting bats. Candlewood Solar will mount between 20 and 30 bat houses on east facing, mature tree trunks, not less than 12 feet from the ground in areas where trees are removed.

State Special Concern Ambystoma jeffersonianum (Jefferson salamander "complex"):

As noted in the Final Determination, the state special concern Jefferson salamander "complex" will benefit from the vernal pool protection strategies that will be implemented. The revised design changes will not result in any changes to these conservation measures. The Project will adhere to and implement the following vernal pool protection strategies:

- No impacts will occur to the vernal pool depressions or 100-foot envelope.
- The total length of roads within the 750-foot critical terrestrial habitat (CTH) will be the minimum required to access the northern portion of the array for maintenance or emergency activities.
- Any ruts or artificial depressions created as part of the Project will be refilled to grade to avoid creation of decoy vernal pools.
- Erosion and sediment control Best Management Practices (BMPs) will be implemented per the required Connecticut General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities.
- Impervious surfaces will be minimized within vernal pool habitat area.
- No artificial lighting will be installed for the Project.

Recommended Protection Strategies for Wood and Box Turtles:

As described in Section 3.0 i of the Incidental Take Report:

> *Eastern box turtles may inhabit the premises. However, this species typically occurs in rarefied numbers in montane habitats with shallow soils and pervasive bedrock. No persistent indicators (carapace remains, etc.), nor live animals were encountered during repeated site visits under suitable conditions. We therefore conclude that the species is either absent or at low detectable densities on the mountain. It is more probable that animals inhabit the mesic deciduous forest to the east in a portion of the electric interconnection corridor, where protective measures are proposed during the interconnection construction period (if during the active season).*

There is no supporting aquatic habitat for wood turtle within or adjacent to the Array Parcel. There is a small, intermittent drainage from the vernal pools in Wetland I that does not provide aquatic habitat. Near the northern terminus of the interconnection alignment, Rocky River comes within approximately 300 feet of the interconnection corridor. The interconnection is at the service road edge and we do not anticipate any impacts to the species, if present, due to the installation of poles and conductors in this area.

As described above under Project Design and Layout Changes, solar PV panels will not be constructed on 15% or greater steep slopes, moving development away from typical Eastern box turtle habitat (montane habitats with shallow soils and pervasive bedrock).

Under the current design, from the Solar PV Facility, the electric interconnection route heads northeast along the eastern side of Candlewood Mountain and ultimately connects to the existing utility infrastructure on Route 7. Under the new design, the electric interconnection route avoids Area 1, the highest quality habitat observed for Eastern box turtle, as described in Oxbow Associates, Inc. report, included as Attachment E to Amec Foster Wheeler Environment & Infrastructure, Inc.'s October 27, 2017 Filing (see **Attachment C, Section i. B.** and **Figure 2**). A description of the area where the revised interconnection is proposed is discussed above. A portion of the electric interconnection route is in an area of extreme topography and as such, is not preferable for hibernation or provide preferable habitat. Protection measures are described below.

"Wood turtles rely on perennial streams with high to moderate water quality and a terrestrial summer range typically including old field habitat, open woodlands and area of exposed soils for nesting... The Rocky River lies east of Candlewood Mountain and emanates from seasonal outflow from Wetland 1 by way of a steep escarpment and the Candlewood Reservoir water control structure at the northwestern foot of the dam. The river meanders approximately 4000 feet to the north to a confluence with the Housatonic River after crossing Route 7. Along most of its run, the Rocky River is greater than 1000 horizontal feet from project activity. The exception is an elbow of the brook where it is approximately 300 feet west of the proposed interconnection alignment." (see Attachment E included in **Attachment C, Section i. B.**). Under the current design, the proposed electric interconnection route will cross the Rocky River in two new locations in areas of undeveloped forest (see **Figure 2**).

The Project will be constructed in accordance with all recommended measures included in NDDB's Final Determination for Wood and Box turtles. These measures include:

- Hiring a qualified herpetologist to be onsite to ensure these protection guidelines remain in effect and prevent turtles from being taken when moving heavy equipment. This is especially important in the month of June when turtles are selecting nesting sites.
- Exclusionary practices will be implemented to prevent any turtle access into construction areas. These measures will be installed at the limits of disturbance.
- Exclusionary fencing will be at least 20 inches tall and will be secured to and remain in contact with the ground and be regularly maintained (at least bi-weekly and after major weather events) to secure any gaps or openings at ground level that may let animals pass through. Plastic web or netted silt-fence will not be used.
- All staging and storage areas, regardless of the duration of time they will be utilized, will be reviewed to remove individuals and exclude them from re-entry.
- All construction personnel working within the turtle habitat will be apprised of the species description and the possible presence of a listed species and instructed to relocate turtles found inside work areas or notify the appropriate authorities to relocate individuals.

- Any turtles encountered within the immediate work area will be carefully moved to an adjacent area outside of the excluded area and fencing will be inspected to identify and the remote access point.
- In areas where silt fence is used for exclusion, it will be removed as soon as the area is stable to allow for reptile and amphibian passage to resume.
- No heavy machinery or vehicles will be parked in any turtle habitat.
- Avoid degradation of wetland habitats including any wet meadows and seasonal pools.
- The Contractor and consulting herpetologist will search the work area each morning prior to any work being done.
- When felling trees adjacent to brooks and streams, trees will be cut to fall away from the waterway and trees will not be dragged across the waterway and stumps will not be removed from banks.
- Avoid and limit any equipment use within 50 feet of streams and brooks.
- Any confirmed sightings of box, wood or spotted turtles will be reported and documented with the NDDB (nddbrequestdep@ct.gov) on the appropriate special animal form found at (http://www.ct.gov/deep/cwp/view.asp?a=2702&q=323460&depNav_GID=1641)

Additionally, during operation of the Facility, the mowing schedule outlined in the October 27, 2017 Report will be adhered to (see **Attachment C, Section i. B.**).

State Threatened Plethodon glutinosus (slimy salamander):

The October 15, 2018 NDDB Final Determination No. 201703524 states:

> *In Connecticut the state threatened slimy salamander is restricted to mature mesic forest habitat with rocky talus slopes, numerous fallen logs along with a thick layer of leaf litter and forest debris. The subject area (this property) was identified as providing suitable habitat for the slimy salamander. With that in mind, on September 11, 2018 The Connecticut Office of Policy and Management (OPM), in consultation with The Connecticut Department of Energy and Environmental Protection (DEEP), determined that that the proposed Installation and Operation of a 20 Megawatt (MW) AC (MWac) Solar Photovoltaic (PV) Electric Generating Facility at 197 Candlewood Mountain Road (Candlewood Solar, LLC) in New Milford, Connecticut would result in an incidental taking of the State Threatened Plethodon glutinosus (slimy salamander) pursuant to Section 26-310 of the Connecticut General Statutes (CGS).*
>
> *Pursuant to CGS Sec. 26-310(d), the Commissioner of Energy and Environmental Protection is required to provide Candlewood Solar, LLC with specific feasible and prudent measures and alternatives that must be implemented as part of the proposed project in order to ensure that the action does not appreciably reduce the likelihood of the recovery of the species. The proposed actions have been planned to avoid, minimize and mitigate impacts to the "take" of northern slimy salamander. These specific measures include:*
>
> - *Limiting tree clearing impacts and the overall footprint of the project*
> - *Providing a 100-acre conservation easement*
> - *Three-year monitoring and reporting*
> - *Addition of grassy strips to roadways*

A discussion of each of these measures included in the NDDB Final Determination along with a description of changes to these measures as a result of the change in scope of work is provided below.

Limiting tree clearing impacts and the overall footprint of the project:

The October 15, 2018 NDDB Final Determination No. 201703524 states:

> *Tree clearing and grading are required as part of this Solar PV project. The revised plan configuration limits the impact to 1.3 acres (of the 49 +/-acres) of high quality forested salamander habitat. Furthermore, the overall footprint of the Solar PV project was reduced through an alternative design utilizing higher capacity solar panels. The changes to the panels and the reduction of the overall footprint of the project reduced the total amount of tree clearing and work within the prime northern slimy salamander habitat. In addition, the layout of the Solar PV array was shifted away from two wetlands and these changes netted further avoidance of undisturbed northern slimy salamander habitat. This will ultimately increase the size of the undisturbed buffer around cryptic vernal pools in this area as well.*

Tree clearing and grading will continue to be required as part of this Solar PV project. The currently proposed plan limits the impact to 1.3 acres (of the 49 +/-acres) of high quality forested salamander habitat, which equals the area of the project design approved in the November 15, 2018 Final Determination. As described above, DEEP Water Permitting and Enforcement Division requested that Candlewood Solar re-evaluate the design to move the PV panels sited within areas of 15% or steeper slopes to flatter slopes. As noted in the Incidental Take Report for the State Threatened *Plethodon glutinosus* (slimy salamander) dated February 9, 2018, "...the species is likely to persist at this locus, and particularly in the higher quality, older growth, steep rocky forested sections. Areas exhibiting both at least a 35% grade, rocky limestone slopes and mature, predominantly deciduous forest were mapped via a raster analysis in October 2017 (see Appendix D). These zones match the documented habitat preferences by this species at the extreme of its currently documented eastern range (excepting historic occurrence in southern New Hampshire)." The project design approved in the November 15, 2018 Final Determination includes development on slopes of 15% or greater. Development areas containing slopes of 15% or greater are primarily located in the northwest area of the array. Under the current design, panels from approximately 8.8 percent of the total array area have been removed from steep slopes (15% or greater) and relocated to flatter areas of the site. **Figure 1** depicts the approved project design and the current project design. **Figure 1** also includes the results of the raster analysis and shows that the current project design has been moved away from areas of steep slope and preferred slimy salamander habitat. Specifically, the current design will result in approximately 0.43 acres more of tree clearing and no change in the total area of work within prime northern slimy salamander habitat.

As described in more detail above, under the current design, solar PV panels were moved from areas of steep slope to flatter areas of the project site. The relocation of solar PV panels from areas of steep slope to flatter areas moved solar PV panels further away from Wetland V, but closer to Wetland I.

Providing a 100-acre conservation easement:

The October 15, 2018 NDDB Final Determination No. 201703524 states:

> *Candlewood Solar, LLC identified a 100-acre area that will be set aside for permanent conservation as mitigation for unavoidable impacts to the northern slimy salamander. Candlewood Solar, LLC will deed this 100-acre parcel to a local conservation trust or similar entity as permanently conserved land. The 100 acres includes contiguous, steep, sloping, mature forest. It also includes wetlands and vernal pools. The conservation easement will outline and limit the types of activities allowed within the mitigation area in order to protect its natural resource value especially for the northern slimy salamander.*

As described in the Incidental Take Report, a 100-acre, contiguous, steep slope, mature forest perpetual conservation parcel will be created to preserve slimy salamander habitat, conserve existing unfragmented

forest, and protect existing wetlands, vernal pools, and archaeological resources. The approved 100-acre conservation easement is depicted in Figure 1 in the Incidental Take Report (see **Attachment C, Section i. C.).** Based on updates to the Project design and changes to the Project layout, the current limits of work overlap portions of the approved 100-acre conservation easement to the northwest and along almost the entire eastern side of the Solar PV Facility. As depicted in **Figure 1**, the majority of the overlap is associated with the implementation of stormwater features. To compensate for the proposed areas within the approved 100-acre conservation easement to be removed from the conservation restriction (see **Figure 1**), Candlewood Solar proposes to include a portion of the northern tip, where solar PV panels were previously located, an additional area east of Wetland I that includes a portion of Wetland VI and the Rocky River, as well as the southeastern corner of the Facility parcel. The northern tip contains preferred slimy salamander habitat and based on the pre-construction monitoring survey that was completed in June 2019, multiple slimy salamander were identified in this area (see **Attachment C, Section i. D.** and **Figure 1**). As noted above, the area east of Wetland I includes a portion of Wetland VI and the Rocky River which provides habitat for a variety of species. Habitat in the southeastern corner of the Facility parcel is a continuation of the preferred slimy salamander habitat included in the approved 100-acre conservation easement to the north and west and provides for additional contiguous, steep slope, mature forest to preserve slimy salamander habitat. With the inclusion of these additional areas, the proposed conservation restriction area totals approximately 102 acres.

Section 5.0 n of the Incidental Take Report noted:

> *Course woody debris is an associated feature with the occurrences of slimy salamander in Connecticut. There is also the potential for microclimatological impacts (due to site clearing) permeating the remaining, intact bordering woodlands. In view of this potential, we propose to distribute approximately 125 5 to 8-inch diameter log sections, four feet in length, harvested from the Project area within the 100-foot zone beyond the shade management area. These course woody debris items will be distributed in the northern portion of the conservation area (north over Wetland 1 and to a similar point west of the Project) at an effective density of approximately 1 object per 2,500 square feet of bordering forested habitat. Distribution will be done using multiwheel, low-impact vehicles and by hand and the locations of all objects will be mapped using GPS.*

Based on discussions between Oxbow and DEEP during the course of obtaining the Permit to Collect Wildlife for Scientific & Educational Purposes ("Collection Permit"), DEEP noted that at this time, they were not interested in having course woody debris distributed within the 100-foot zone beyond the shade management area in the northern portion of the conservation area (north over Wetland 1 and to a similar point west of the Project). Candlewood Solar continues to be amenable to implementing this measure to mitigate for potential microclimatological impacts.

Three-year monitoring and reporting:

The October 15, 2018 NDDB Final Determination No. 201703524 states:

> *Candlewood Solar, LLC will also conduct three years of monitoring for the northern slimy salamander. Surveys will be conducted in the pre-construction period and continue post- construction for two additional years. Reporting will be made to CTDEEP NDDB within 7 days of field surveys and will include survey dates and duration; description and maps of surveyed areas; site photographs; species photographs; species lists; locations of salamanders identified and assessments. There will also be an annual summary report prepared and submitted. Candlewood Solar, LLC will ensure and be responsible for contracting with the qualified herpetologist and their reporting efforts. The qualified herpetologist will obtain and maintain a valid scientific collector's permit to work with northern slimy salamander populations.*

Following receipt of the Permit to Collect Wildlife for Scientific & Educational Purposes (Collection Permit) effective June 5, 2019 (Permit No. 1920004), pre-construction northern slimy salamander surveys were conducted between June 17 and June 26, 2019 consistent with the Collection Permit and the Protocol for Surveying Northern Slimy Salamander (*Plethodon glutinosus*) – Candlewood Solar LLC, New Milford, Connecticut by Oxbow Associates. The results of the surveys were submitted within 7 business days of field survey and a report was filed with DEEP (Ms. Carol Morris-Scata at carol.morris-scata@ct.gov) on July 8, 2018 (see **Attachment C, Section i. D.).** The inspection identified slimy salamanders within steep, rocky sloped areas (see **Figure 1** and **Attachment C, Section i. D.)**.

As depicted on **Figure 1**, slimy salamanders were not identified within the area of the proposed panel relocation area or within the current design array area or electric interconnection route covered by the surveys. A copy of the July 8, 2019 pre-construction northern slimy salamander survey report is attached to this Request for NDDB State Listed Species Review as **Attachment C, Section i. D**.

In accordance with the October 15, 2018 NDDB Final Determination, an annual summary report for 2019 will be prepared and submitted to CTDEEP NDDB. Additionally two (2) years of post-construction monitoring will be conducted. Post construction survey reporting will be made to CTDEEP NDDB within 7 business days of field surveys and will include survey dates and duration; description and maps of surveyed areas; site photographs; species photographs; species lists; locations of salamanders identified and assessments. Two annual post construction summary reports will also be prepared and submitted. Candlewood Solar, LLC will ensure and be responsible for contracting with the qualified herpetologist and their reporting efforts. The qualified herpetologist will obtain and maintain a valid scientific collector's permit to work with northern slimy salamander populations.

Addition of grassy strips to roadways:

The October 15, 2018 NDDB Final Determination No. 201703524 states:

> *The original proposal had many of the access roads being improved with crushed stone and gravel. However, these improved roads would be a barrier to migration or travel by northern slimy salamanders. Candlewood Solar, LLC has agreed to add grassed strips, approximately 20 feet wide, along the proposed project access roadways to mitigate for these improved access roads. The 20 foot wide grassed strips will replace the gravel for the full width of the roadway at the approximate locations. The locations of these grassed strips were based on proximity to forested habitat areas from where the salamanders would presumably be emanating.*

As discussed above under Project Design Updates and Layout Changes, III, to maintain access to all solar PV panels within the northern portion of the Solar PV Facility, the access road within this portion of the array was shifted to the east by approximately 150 feet (see **Figure 1**). Grassy strips along the northern access road are proposed in the same approximate location along its new alignment. The current location of the northern access road, approximately 150 feet to the east is closer to forested habitat areas from where the salamanders will presumably be emanating. The other access roads remain unchanged from the approved design. The grass strips will be 20 feet wide and will replace the gravel for the full width of the roadway at the approximate locations. **Figure 1** depicts the location of the approved access roads and grassy strips and the location of the revised northern access road and grassy strips.

State Special Concern Panax quinquefolius (American ginseng):

During the pre-construction northern slimy salamander surveys conducted between June 17 and June 26, 2019, Oxbow identified one occurrence of the state special concern *Panax quinquefolius* (American Ginseng) (see **Figure 1** and **Attachment C, Section i. D.**). The plant is located outside of the LOW. No additional occurrences of American ginseng were identified during the survey of the Facility site or Conservation

Easement area. As this was a single occurrence and the plant is located outside of the LOW, no protective measures are needed.

Candlewood Solar appreciates DEEP NDDB's review of this information. Should you have any questions, please contact Rob Bukowski at (978) 392-5307 or rob.bukowski@woodplc.com.

Sincerely,

Wood Environment & Infrastructure Solutions, Inc.

Robert J. Bukowski, P.E.
Project Manager

Danielle A. Ahern, P.E.
Associate Civil Engineer

Enclosures

Request for Natural Diversity Data Base (NDDB) State Listed Species Review Form
Figures
Attachments
Attachment A: Overview Map
Attachment B: Detailed Site Map
Attachment C, Section i. A. Site Photographs
Attachment C, Section i. B. October 27, 2017 Amec Foster Wheeler Environment & Infrastructure, Inc. Filing
Attachment C, Section i. C. February 9, 2018 Incidental Take Report for the State Threatened *Plethodon glutinosus* (slimy salamander) ("Incidental Take Report")
Attachment C, Section i. D. July 8, 2019 Pre-construction Survey Summary of Findings for the State Threatened Plethodon glutinosus (slimy salamander) including NDDB Special Animal Survey Form
Attachment C, Section ii: Annotated Site Plans
Attachment D: November 15, 2018 Final Determination

TAB 3

ORDER 414022

DOCKET NO: HHBCV186042335S

SUPERIOR COURT

RESCUE CANDLEWOOD MOUNTAIN Et Al
V.
CONNECTICUT SITING COUNCIL Et Al

JUDICIAL DISTRICT OF NEW BRITAIN
AT NEW BRITAIN

4/22/2020

ORDER

ORDER REGARDING:
04/21/2020 164.00 CASEFLOW REQUEST (JD-CV-116)

The foregoing, having been considered by the Court, is hereby:

ORDER:

At the direction of the Chief Administrative Judge for the Civil Division, in light of the court closures, oral argument and rulings on pending motions or a hearing on the merits in the above caption matter has been stayed. As soon as the regular business of the court has been re-instated, the oral argument will be immediately calendared on any pending matter.

Judicial Notice (JDNO) was sent regarding this order.

414022

Judge: HENRY COHN
Processed by: Colleen Jalowiec

This document may be signed or verified electronically and has the same validity and status as a document with a physical (pen-to-paper) signature. For more information, see Section I.E. of the *State of Connecticut Superior Court E-Services Procedures and Technical Standards* (https://jud.ct.gov/external/super/E-Services/e-standards.pdf), section 51-193c of the Connecticut General Statutes and Connecticut Practice Book Section 4-4.

TAB 4

From: Cohn, Henry <Henry.Cohn@jud.ct.gov>
Sent: Wednesday, April 22, 2020 12:08 PM
To: Daniel E. Casagrande <dcasagrande@crameranderson.com>
Cc: robert.marconi@ct.gov; jmirman@hinckleyallen.com; seth.hollander@ct.gov; Paul Michaud <pmichaud@mlgcleanenergy.com>
Subject: Re: Rescue

You are incorrect. Attorney Mirman stated in the conference that his client would not take any action pending the determinations by DEEP and the Citing Council. Were Citing Council to approve the DEEP plan, you have the right to ask for a stay from the Siting Council before any work is done pursuant to the Siting Council's permit. Under Section 4-183 (f) of the Administrative Procedure Act, the court will not act on any motion until such time as the Siting Council has ruled on your motion. As I previously indicated, you should be discussing this matter with Attorney Mirman, not the court. In any event, the court will not take any action, as it has set forth in the order issued today, until such time as the Siting Council as ruled in the Rescue case and the New Milford case, both on further orders regarding their permit and any stay requested.

From: Daniel E. Casagrande <dcasagrande@crameranderson.com>
Sent: Wednesday, April 22, 2020 10:56 AM
To: Cohn, Henry
Cc: robert.marconi@ct.gov; jmirman@hinckleyallen.com; seth.hollander@ct.gov; Paul Michaud
Subject: RE: Rescue

Your Honor: In the last phone conference las week, Attorney Mirman actually **refused** to agree to delay construction until this litigation is over. All he agreed to was that Candlewood Solar would not start construction until after it gets approvals from DEEP and the Siting Council. Those approvals are imminent as I understand it. Therefore Candlewood Solar intends to start the forest clearing immediately after receiving those approvals. Unless this Court enters the requested temporary ex parte stay and sets the full motion for stay down for a hearing, Candlewood Solar's plan is to destroy the forest and not wait until the courts re-open. If Attorney Mirman has changed his mind and will represent to the Court that no activity will occur until the Court resolves the litigation, that will make it unnecessary for Plaintiffs to pursue the stay. If he will not, Plaintiffs have no choice but to respectfully ask the Court to issue the temporary stay immediately pending a hearing on the full stay motion.

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From: Cohn, Henry <Henry.Cohn@jud.ct.gov>
Sent: Wednesday, April 22, 2020 10:07 AM
To: Daniel E. Casagrande <dcasagrande@crameranderson.com>
Cc: robert.marconi@ct.gov; jmirman@hinckleyallen.com; seth.hollander@ct.gov; Paul Michaud <pmichaud@mlgcleanenergy.com>
Subject: Re: Rescue

The court has sent an order to court in each case that oral argument and rulings are stayed until the courts re-open in full. I do not understand that this type of civil motion where testimony would be required falls under priority #1. In any event, you have a statement in writing from Candlewood Solar regarding no action at the site. I suggest you discuss this further with Attorney Mirman, as we were informed in the last conference.

From: Daniel E. Casagrande <dcasagrande@crameranderson.com>
Sent: Wednesday, April 22, 2020 9:58 AM
To: Cohn, Henry
Cc: robert.marconi@ct.gov; jmirman@hinckleyallen.com; seth.hollander@ct.gov; Paul Michaud; Daniel E. Casagrande
Subject: RE: Rescue

Yes Your Honor. RCM has no issue if the Court takes no action until the courts reopen, but only if Candlewood Solar agrees not to commence construction unless and until the Court does rule on Yes Your Honor. RCM has no issue if the Court takes no action until the courts reopen, but only if Candlewood Solar agrees not to commence construction unless and until the Court does rule on RCM's ex parte motion for stay. Otherwise there is a dangerous and imminent possibility that Candlewood will get its approvals from DEEP and the Siting Council (actions by both agencies are expected imminently) and will then destroy the trees before the Court rules on RCM's ex parte motion for stay. Will Candlewood Solar agree not to take any construction activity until the court rules on RCM's ex parte motion for stay? If not Plaintiffs will be irreparably harmed if the Court does not at least grant the temporary, ex parte stay and set the full motion down for a hearing after the courts reopen. I also respectfully note that ex parte requests are on the list of Priority 1 matters that the courts currently may hear.

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From: Cohn, Henry <Henry.Cohn@jud.ct.gov>
Sent: Wednesday, April 22, 2020 9:38 AM
To: Daniel E. Casagrande <dcasagrande@crameranderson.com>
Subject: Rescue

Please let Attorney Mirman know of my reply re: a new conference.

Henry Cohn