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VIA ELECTRONIC MAIL

DATE: March 26, 2021

TO: Petition 1395A Service List, dated November 19, 2020

FROM: Melanie A. Bachman, Executive Director MAB

RE: **PETITION NO. 1395A -** – Windham Solar LLC amended petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of one 1.0-megawatt (MW) and one 0.99 MW solar photovoltaic electric generating facilities located at 31 Benz Street, Ansonia, Connecticut.

On March 26, 2021, pursuant to the provisions of Connecticut General Statutes §4-181a(a), Windham Solar LLC filed a Motion to Vacate, and in the Alternative, to Reconsider the Connecticut Siting Council's (Council) March 12, 2021 decision to deny with prejudice a declaratory ruling to Windham Solar LLC for the above-referenced proposed solar photovoltaic electric generating facilities in the City of Ansonia.

The Motion to Vacate, and in the Alternative, to Reconsider the Council's March 12, 2021 final decision on the above-referenced matter will be placed on the April 22, 2021 Council meeting agenda for Council consideration.

Parties and intervenors are requested to submit comments or statements of position in writing to the Council with respect to whether the Motion to Vacate, and in the Alternative, to Reconsider should be granted or denied before the close of business on **April 9, 2021**.

MAB/RDM/laf

c: Council Members

STATE OF CONNECTICUT

BEFORE THE

CONNECTICUT SITING COUNCIL

Windham Solar LLC amended petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of one 1.0-megawatt (MW) and one 0.99 MW solar photovoltaic electric generating facilities located at 31 Benz Street, Ansonia, Connecticut	)	Docket No. 1395A March 26, 2021

MOTION TO VACATE, AND IN THE ALTERNATIVE, TO RECONSIDER THE DECISION OF MARCH 12, 2021

Windham Solar LLC ("Windham") hereby makes this motion to vacate, and in the alternative, to reconsider, the decision made on March 11, 2021 (embodied in a written decision of March 12, 2021) (the "Decision") of the Connecticut Siting Council ("CSC") in the above-captioned matter. The Decision is fundamentally flawed both procedurally and substantively, violates Windham's right to due process and equal protection, and under applicable Connecticut Supreme Court precedent must be vacated.

The brief Decision ignores the facts and the law. The Staff Report that was issued with the Decision concludes without reservation that the project

> ***meets air and water quality standards of the DEEP, and would not have a substantial adverse environmental effect***. The proposed project will not produce air emissions, will not utilize water to produce electricity, was designed to minimize environmental impacts, and furthers the State's energy policy by developing and utilizing renewable energy resources and distributed energy resources.
>
> Staff Report at 9 (emphasis added.)

Yet without factual analysis and without reasoned explanation, the Decision does a complete 180 from the Staff Report stating: "The Council considered and identified the following adverse effects on water quality … 1. Insufficient wetland buffers composed of undisturbed vegetation to maintain water quality of on-site wetlands, as recommended in the *2004 Connecticut Stormwater Quality Manual*; and 2. Insufficient information as to how the removal and processing of on-site ledge for use as fill material will affect on-site water hydrology, topographic settling and as a substrate to support vegetation."

Procedural Background

On June 23, 2020, pursuant to CGS §4-176 and §16-50k, Windham submitted an amended petition for a declaratory ruling for the construction, maintenance and operation of one 1.0 MW and one 0.99 MW solar photovoltaic electric generating facilities at the proposed 31 Benz Street site in Ansonia. On June 25, 2020, the CSC sent correspondence to Windham noting a deficiency in the notice requirements of Petition 1395A. Windham submitted correspondence to the CSC on June 30, 2020 evidencing compliance with the notice requirements. On July 2, 2020, the CSC acknowledged Windham's compliance with the notice requirements and rendered Petition 1395A complete.

Pursuant to RCSA §16-50j-40, on or about June 29, 2020, Windham notified City of Ansonia ("City") officials, state officials and agencies, the property owner, and abutting property owners of the proposed project. Pursuant to CGS §4-176(e) of the Connecticut Uniform Administrative Procedure Act ("UAPA"), an administrative agency is required to take action on a petition within 60 days of receipt. August 22, 2020 was the deadline for action on Petition 1395A under CGS §4-176(e). In response to the Coronavirus pandemic, on March 25, 2020, Governor Lamont issued Executive Order No. 7M that provides for a 90-

day extension of statutory and regulatory deadlines for administrative agencies thus extending the deadline for action to November 21, 2020. On November 19, 2020, the CSC voted to set the date by which to render a decision on Petition 1395A by no later than March 20, 2021. This was the 180-day final decision deadline for Petition 1395A.

On June 29, 2020, Windham notified City officials of the amended project by certified mail. On June 26, 2020, the CSC sent correspondence to the City stating that the CSC has received the amended Petition and invited the City to contact the CSC with any questions or comments by July 23, 2020. The CSC did not receive any comments from the City by July 23, 2020.

The CSC issued its first set of interrogatories which totaled 58 interrogatories (some with subparts) to Windham on August 10, 2020. On September 30, 2020, Windham submitted responses to the CSC's first set of interrogatories, one of which included photographic documentation of site-specific features intended to serve as a "virtual" field review of the project.

On November 5, 2020, the City requested party status which the CSC granted on November 20, 2020. Also, on November 20, 2020, the CSC developed a schedule for the exchange of interrogatories among participants listed on the Petition 1395A service list. No interrogatories were issued or exchanged among the participants on the service list prior to the December 3, 2020 deadline.

On November 30, 2020, the CSC issued its second set of interrogatories to Windham, which consisted of seven additional interrogatories, one with multiple subparts. Windham submitted responses to the CSC's second set of interrogatories on December 20, 2020.

On February 22, 2021, the City submitted a request for permission from the CSC to issue interrogatories to Windham. On the same date, the CSC forwarded the City's interrogatories to Windham and asked for responses as soon as practicable. Windham submitted responses to the City's interrogatories on March 1, 2021.

State Agency Comments

On February 26, 2020, the Council sent correspondence requesting comments on Petition 1395 from the following state agencies by March 27, 2020: DEEP; DOAg; Department of Public Health (DPH); Council on Environmental Quality (CEQ); Public Utilities Regulatory Authority (PURA); Office of Policy and Management (OPM); Department of Economic and Community Development (DECD); Department of Emergency Services and Public Protection (DESPP); Department of Consumer Protection (DCP); Department of Labor (DOL); Department of Administrative Services (DAS); Department of Transportation (DOT); the Connecticut Airport Authority (CAA); and the State Historic Preservation Office (SHPO).

Comments on Petition 1395 were received from CEQ on March 26, 2020. No other state agencies commented on Petition 1395.

On June 26, 2020, the CSC sent correspondence to the above-referenced state agencies requesting comments on Petition 1395A by July 23, 2020. No comments were received.

Under §4-176(h) "A declaratory ruling shall be effective when personally delivered or mailed or on such later date specified by the agency in the ruling, shall have the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of section 4-183."

I. There is No Authority to Deny A Petition With Prejudice.

The Decision purports to deny the request for a declaratory ruling "with prejudice." There is nothing in either the CSC's enabling statute or regulations that allow the CSC to close the door to a project. Nor is there such language in the UAPA. The plain language of the UAPA states exactly the opposite. CGS §4-176(a) states: "Any person may petition an agency … for a declaratory ruling as to … the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." The language of that section does not deny a person the right to submit a petition because a previous petition regarding the same subject may have been submitted and ruled upon.

CGS §4-176(b) provides: "Each agency shall adopt regulations, in accordance with the provisions of this chapter, that provide for (1) the form and content of petitions for declaratory rulings, (2) the filing procedure for such petitions and (3) the procedural rights of persons with respect to the petitions." The CSC has adopted regulations, and no regulation denies a person the right to submit a petition because a previous petition regarding the same subject may have been submitted and ruled upon.

The Decision's attempt to close the door to the project is simply unlawful.

II. Windham's Due Process and Equal Protection Rights Were Violated.

A. Windham's Rights Under CGS §4-179(a) Were Violated.

Section 4-179(a) requires that if in "an agency proceeding, a majority of the members of the agency who are to render the final decision have not heard the matter or read the record, the decision, if adverse to a party, shall not be rendered until a proposed final decision is served upon the parties, and an opportunity is afforded to each party adversely affected to file

exceptions and present briefs and oral argument to the members of the agency who are to render the final decision."

Section 4-179(b) further provides that a "proposed final decision … shall be in writing and contain a statement of the reasons for the decision and a finding of facts and conclusion of law on each issue of fact or law necessary to the decision, including the specific provisions of the general statutes or of regulations adopted by the agency upon which the agency bases its findings."

The declaratory ruling process is a "proceeding." It is not a "contested case" but it is a "proceeding." *See,* Sec. 4-176(a): "Any person may petition an agency, or an agency may on its own motion initiate a *proceeding*, for a declaratory ruling." (emphasis added.) See also, 4-176(g) ("If the agency conducts a hearing *in a proceeding for a declaratory ruling*, the provisions of subsection (b) of section 4-177c, section 4-178 and section 4-179 shall apply to the hearing.") (emphasis added.)

The CSC staff provided a report for the members of the CSC. There is no statement in the record that a majority of the members "read the record." There was no hearing so no member "heard the matter." No proposed adverse decision was issued.

Under the statute's plain language, a majority of the CSC members must have either heard the case or read the record, if it issues a final decision without first issuing an adverse proposed decision to Windham, *and* providing the right to file briefs and present oral argument on the issues being decided adversely to Windham. Here, no CSC member heard the case. And there is no evidence that a majority of the CSC members "read the record."

Section 4-179(a) is based upon the Revised Model State Administrative Procedure Act ("APA"). The 1961 changes to the Model State APA, which substituted "heard the case or read

the record," for "heard or read the evidence," were intended to raise the bar "to make certain that those persons who are responsible for the decision shall have mastered the record." *Bowing v. Bd. of Trs.*, 85 Wn.2d 300, 310 (Wash. 1975) (emphasis added) ("the burden upon the officer is greater under the new act, for the 'record' includes many things which are not strictly 'evidence.' It contains motions, pleadings, proposed findings, exceptions, decisions, reports -- all of the proceedings in fact.")[1]

It should also be no surprise that courts have addressed the issue, as here, of what to do when the record does not affirmatively show whether agency officials read the entire record and, if some did, which ones did. The leading case is from the Connecticut Supreme Court. In *Pet v. Department of Health Servs*., 228 Conn. 651, 681 (Conn. 1994), the Connecticut Supreme Court held that it *cannot be assumed* that agency officials read the record. If the record does not

[1] *See also, Bice v. Taylor*, 157 So. 3d 161 (Ala. Civ. App. 2014) ("a decision-maker who did not hear the case or read the record [is required] to prepare a proposed order and circulate that order to the adversely affected party in order that he or she may challenge the proposed order by filing exceptions and presenting briefs and oral arguments."); *Doe v. Bd. of Med. Examiners*, 2006 Haw. LEXIS 186 (Haw. 2006) (agency erred by reversing the hearing officer's recommended order and by rejecting the hearing officer's findings of fact and fact-based conclusions of law without first providing party adversely affected with a copy of its proposed final decision and order); *Lampe v. Zamzow's, Inc.*, 102 Idaho 126, 127 (Ida. 1981) ("an opportunity of oral argument before a final decision is entered [must be provided] in those instances where 'a majority of the officials . . . who are to render the final decision have not heard the case or read the record. . . .'") (internal citations omitted.); *Walker v. Okla. Dep't of Human Servs*., 2001 OK CIV APP 107, P2 (Okla. Civ. App. 2001) ("if the agency head had not heard the case or read the record, then before a final agency order adverse to a party is made, a copy of the proposed order shall be sent to the parties at least fifteen days before the hearing or meeting. At the hearing or meeting, parties may file exceptions, present briefs and oral argument concerning the proposed order."); *In re Zar*, 434 N.W.2d 598, 601 (S.D. 1989) (Even when a hearing examiner is appointed, the agency's failure prior to rendering a decision adverse to a party to allow the party adversely affected "to present briefs and [oral] arguments before making its final decision not only contravened the clear language of SDCL 1-26-24, but also denied [party adversely affected] due process of law."); *Citizens Bank of Bryan v. First State Bank*, 580 S.W.2d 344, 347-348 (Tex. 1979) ("cases before administrative bodies will not be decided by agency officials who had neither heard the case nor read the record" unless "a proposal for decision [is] served on the parties, and an opportunity …afforded the adversely affected parties to file exceptions and briefs prior to the final decision."); *Accord, Bowing v. Bd. of Trs.*, 85 Wn.2d 300, 310 (Wash. 1975).

affirmatively indicate that a majority of the agency officials read the record, then the agency decision must be vacated.[2]

The CSC's decision must therefore be vacated.

B. Even If Windham's Rights Under CGS §4-179(a) Were Not Violated, Windham Has Been Denied Due Process and Equal Protection.

1. Windham Was Denied Due Process.

Windham was sandbagged. A reviewing court must not hesitate to examine the conduct of the government to ensure it "comports with the highest standard of fairness." *United States v. Vaval*, 404 F. 3d 144, 152 (2d Cir. 2005). The CSC had nearly 9 months to review the petition and raise issues. Not once did it raise an objection based upon water quality or lack of information. Nor was water quality or lack of information an issue raised by the staff report. The CSC issued 65 interrogatories to Windham, some with multiple subparts, for two small solar projects. That was 17 more interrogatories than the CSC issued in Docket 470B, which led to the approval of the climate-destroying 650MW Killingly Energy Center. One would have thought that if the CSC had additional questions or an issue that it would have asked and not simply rejected the project. Simply deciding the matter on grounds not raised by anyone prior to March 11th without giving Windham an opportunity to address them is plainly unfair.

Windham would receive more process in South Dakota—a coal friendly state. There, the South Dakota Supreme Court has held that an agency's failure to allow a party adversely affected

[2] *Accord*, *Morgan City v. Louisiana Dep't of Environmental Quality*, 604 So. 2d 144, 149 (La. App. 1992) (vacating agency decision because "the record does not establish [which officials] either heard the case or read the record"); *Citizens Bank of Bryan v. First State Bank,* 580 S.W.2d 344, 347-348 (Tex. 1979) (vacating agency decision for failure to issue a proposed decision and give a party adversely affected the right to file briefs and present oral argument on those adverse issues when one of the two agency officials issuing the final decision did not hear the case or read the record); *See also, Doe v. Bd. of Med. Examiners*, 2006 Haw. LEXIS 186 (Haw. 2006) (agency erred by reversing the hearing officer's recommended order without first providing party adversely affected with a copy of its proposed adverse final decision.)

to present briefs and oral arguments before making its final decision not only contravened the clear language of South Dakota's equivalent APA, but also denied the party adversely affected due process of law under the State's Constitution. *See, e.g., In re Zar*, 434 N.W.2d 598, 601 (S.D. 1989) (the agency's failure prior to rendering a decision adverse to a party to allow the party adversely affected "to present briefs and [oral] arguments before making its final decision not only contravened the clear language of SDCL 1-26-24, but also denied [party adversely affected] due process of law."). So too here. Sandbagging Windham violated Windham's rights to a fair process.

Federal courts have not hesitated in finding a due process violation in such circumstances. That is because the agency decision-makers must master, and base their decision on, the *entire record*. That rule requires the agency decision-makers to provide notice of, and an opportunity to respond to, the specific alleged bases for an adverse decision because the record must include "***the evidence and argument that the [adversely affected party] could have presented if he had been given adequate notice of the potential causes [and the] chance to present his side of the story [otherwise it] is the essence of arbitrariness***." *Friedler v. GSA*, *supra* at *57. (internal quotations and citations omitted). That due process requirement applies with rigor here. The CSC's Decision is the "essence of arbitrariness."

2. The CSC Has Engaged In Unconstitutional Discrimination.

Windham has been discriminated against as compared to other applicants for project approvals to the CSC. *See, Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (recognizing a constitutional claim as a "class of one" by showing that plaintiff had "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment."); *Del Monte Dunes at Monterey, Ltd v. City of Monterey*, 920 F.2d

1496, 1508 (9th Cir. 1990) (recognizing constitutional claim for denial of a permit "motivated, not by legitimate regulatory concerns, but by political pressure from neighbors and other residents.")

Here, many other projects have been approved by the CSC that have not complied with the *2004 Connecticut Stormwater Quality Manual*. Treating Windham differently violates Windham's rights to equal protection under the law. For example, the site plan from Petition No. 1159 shows the lack of wetland buffers composed of undisturbed vegetation, including close to vernal pools.[3] The Decision letter also says an existing wetland crossing was widened to accommodate an 18' access road, and there would be 2,445 square feet of wetland fill. Petition No. 1181 notes in the decision letter that a small (415sf) wetland would be filled as it was within the facility footprint. Both of those projects were approved without the construction general permit in hand, and had direct impact to wetlands, whereas here, there is no basis to conclude there would be any impacts to wetlands.

III. The Decision Is Clearly Erroneous, Arbitrary And Capricious And Not Based Upon Substantial Evidence.

In the case of findings of fact, an agency's findings are clearly erroneous unless based upon substantial evidence. Under the substantial evidence standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983). An agency must take a "hard look" at the salient issues and the evidence. *Motor Vehicle Mfrs.,* 463 U.S. at 42-43.

An agency's decision and finding must also not be arbitrary and capricious. It is arbitrary and capricious if an agency fails to exercise its discretion or does not provide an adequate

[3] https://portal.ct.gov/lib/csc/pending_petitions/1_petitions_1144through1200/pe1159-revisedsiteplan_sh3overallsite.pdf.

explanation for its decision. *See, e.g.*, *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 350 (7th Cir. 2001). If an agency is required to balance factors in reaching its decision and it fails to do so, such failure is also an abuse of discretion. *See, e.g., Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006) ("the failure to balance, by itself, justifies a vacatur"). An agency decision must be based upon the entire record, which must include examination of reasonable alternatives, *Motor Vehicle Mfrs.,* 463 U.S. at 48, and relevant evidence that a party could have presented if it had notice of possible causes being considered by the agency for an adverse decision. *Friedler v. GSA*, No. 15-cv-2267, 2017 U.S. Dist. LEXIS 153573, *57 (D.D.C. September 21, 2017).

The relevant statutory provision is Conn. Gen. Stat. § 16-50k which provides that:

> "the council shall … approve by declaratory ruling … (B) the construction or location of … any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as: (i) Such project meets air and water quality standards of the Department of Energy and Environmental Protection, [and] (ii) the council does not find a substantial adverse environmental effect."

The Decision states the "[CSC] considered and denied with prejudice the above-referenced petition for a declaratory ruling … on the bases that the proposed project would have substantial adverse environmental effects, particularly with regard to water quality." The Decision then states the

> [CSC] identified the following adverse effects on water quality that include, but are not limited to: 1. Insufficient wetland buffers composed of undisturbed vegetation to maintain water quality of on-site wetlands, as recommended in the *2004 Connecticut Stormwater Quality Manual;* and 2. Insufficient information as to how the removal and processing of on-site ledge for use as fill material will affect on-site water hydrology, topographic settling and as a substrate to support vegetation.

The proposed two facilities are "any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts." That means that the CSC must approve the projects if the projects meet the air and water quality standards of DEEP, which they do, unless the CSC finds (as it did here) that there is a substantial adverse environmental effect.

A. The Decision Fails The Requirements of RCSA Sec. 16-50j-40(d).

RCSA sec. 16-50j-40(d) requires a declaratory ruling to state "the particular facts on which it is based, and the reasons for its conclusion." Usually, the Staff Report provides the basis and reasons for a CSC action. But where, as here, the CSC finding rejects the Staff Report, then RCSA sec. 16-50j-40(d) imposes on the CSC to do the hard work of stating the particular facts and reasons for the CSC's conclusions. The bar is even higher when as here, the Staff Report lays out a position contrary to the Decision. The Decision's one-sentence attempt to comply with the requirements of RCSA Sec. 16-50j-40(d) simply does not pass muster.

B. The Decision Is The "*essence of arbitrariness*."

Windham was sandbagged. The CSC had nearly 9 months to review the petition and raise issues. Not once did it raise an objection based upon water quality or lack of information. Nor was water quality or lack of information an issue raised by the Staff Report. Indeed, the contrary is true. The CSC issued 65 interrogatories to Windham, some with multiple subparts, for two small solar projects. That was 17 more interrogatories than the CSC issued in Docket 470B, which led to the approval of the climate-destroying 650MW Killingly Energy Center. Based upon the petition and the interrogatory responses, the Staff

Report concluded that with its recommended conditions, the CSC had all the information needed to make a positive ruling, and a positive ruling was what should be issued.

Agency decision-makers must master, and base their decision on, the *entire record*. That rule requires the agency decision-makers to provide notice of and an opportunity to respond to the specific alleged bases for adverse decision because the record must include "***the evidence and argument that the [adversely affected party] could have presented if he had been given adequate notice of the potential causes [and the] chance to present his side of the story [otherwise it] is the essence of arbitrariness***." *Friedler v. GSA*, *supra* at *57. (internal quotations and citations omitted). That due process requirement applies with rigor here. The four CSC members that voted "no" not only unfairly sandbagged Windham, but tried to close the door to Windham by imposing a "with prejudice" label to the CSC's denial. The CSC's failure to provide Windham with the opportunity to tell its "side of the story" is the "essence of arbitrariness," requiring the Decision to be vacated and overturned. The further attempt to try to close the door to Windham by the four members raises the specter that something else was going on behind the scenes, wholly unrelated to the evidence presented.

C. The Decision's Conclusion Regarding Water Quality Is Wrong.

One of the conditions of approval recommended in the Staff Report was: "[s]ubmit a copy of the DEEP Stormwater Permit prior to the commencement of construction." One of the requirements in Conn. Gen. Stat. § 16-50k is that the "project meets air and water quality standards of the Department of Energy and Environmental Protection."

In respect to water quality, the Staff Report reached the following conclusions:

Water Quality

The site parcel is also not located within a DEEP-designated Aquifer Protection Area. Groundwater in the site area is classified GA which is presumed to be suitable for direct human consumption without the need for treatment. Designated uses are existing private and potential public drinking water supply. Rock removal to develop the site would occur at the surface and impacts to adjacent drinking water wells are not anticipated. Project work would be performed in accordance with the *2002 Connecticut Guidelines for Soil Erosion and Sediment Control.*

The Staff Report on "Stormwater" states:

Stormwater

Pursuant to CGS Section 22a-430b, DEEP retains final jurisdiction over stormwater management and administers permit programs to regulate stormwater pollution. DEEP regulations and guidelines set forth standards for erosion and sedimentation control, stormwater pollution control and best engineering practices. The DEEP Individual and General Permits for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities (Stormwater Permit) requires implementation of a Stormwater Pollution Control Plan to prevent the movement of sediments off construction sites into nearby water bodies and to address the impacts of stormwater discharges from a project after construction is complete. A DEEP-issued Stormwater Permit is required prior to commencement of construction.

WS has designed the stormwater management system with documents prepared by a licensed Connecticut Professional engineer. The facility was designed to comply with the *2002 Connecticut Guidelines for Soil Erosion and Sedimentation Control*, the *2004 Stormwater Quality Manual* and the hydraulic modeling requirements outlined in DEEP's draft Appendix I, Stormwater Management at Solar Array Construction Projects document. WS submitted a Stormwater Permit application for the project to DEEP on December 30, 2020. WS has not met with DEEP to discuss the Project.

Two post-construction stormwater basins are proposed. Stormwater Basin 1 is a linear basin that extends along the northwest side of the solar field, outside of the perimeter fence. A single rip-rap spillway discharges towards the on-site wetlands. Stormwater Basin 2 is a linear basin located along the south edge of the site. A single rip-rap spillway discharges towards Benz Street. Excess discharge would be captured by a catch basin on Benz Street. Peak flow rates from the sub-watershed

that drains to Benz Street are reduced due to the installation of the stormwater basin.[4]

In addition, the statement that there was "Insufficient information as to how the removal and processing of on-site ledge for use as fill material will affect on-site water hydrology, topographic settling and as a substrate to support vegetation" is simply incorrect. The hydraulic modeling of the site, and curve numbers chosen (the style of land and runoff from the land) accurately represent the existing *and proposed* conditions of the site. The proposed conditions include the removal and processing of on-site ledge. Moreover, further information was provided in the response to interrogatory #57. Thus, Windham did submit sufficient information. The fact that the four members that voted no erroneously believed otherwise, shows that those members did not read the entire record.

D. The Decision's Finding Based Upon An "Absence" Of Evidence Is Untenable And Fails The Substantial Evidence Requirement And Is Arbitrary And Capricious.

Remarkably, the Decision confesses that its conclusion regarding substantial adverse environmental effect is based upon the absence of evidence, plainly illustrating the unreasoned and unlawful nature of the Decision. *See*, Decision at 1 ("Insufficient information as to how the removal and processing of on-site ledge for use as fill material will affect on-site water hydrology, topographic settling and as a substrate to support vegetation.")

A decision based upon the absence of evidence, *by definition*, cannot be supported by substantial evidence. The Decision must therefore be vacated.

[4] *See also*, Staff Report at 7 ("The groundwater discharge to the vernal pool and wetland would not be adversely impacted as the size of the contributing watershed would remain the same. Proposed Stormwater Basin 1 is located higher in elevation than the vernal pool and wetland and is designed to capture rainfall events, allowing infiltration and groundwater recharge. The basin would be seeded with a wetland plant seed mix.")

The Decision's assertion regarding "insufficient information" is also incorrect. The hydraulic modeling of the site and curve numbers chosen (the style of land and runoff from the land) accurately represent the existing *and proposed* conditions of the site. The proposed conditions include the removal and processing of on-site ledge. Further information was provided in the response to interrogatory #57. Thus, Windham did submit sufficient information. The fact that the four members that voted no erroneously believed otherwise shows that those members did not read the entire record.

E. Nowhere Does The Decision Support Its Conclusion Of Substantial Adverse Environmental Effect.

The Decision states that the "Council considered and identified the following *adverse effects* on water quality." Then the Decision lists two items (one of which is the lack of evidence.) But finding that something is an "adverse effect" falls far short of the requirement that the CSC find the adverse effect is "*substantial*."

The Decision's failure to provide any explanation as to substantiality is arbitrary and capricious. *See, e.g.*, *Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of Interior*, 255 F.3d 342, 350 (7th Cir. 2001) (it is arbitrary and capricious if an agency fails to exercise its discretion or does not provide an adequate explanation for its decision.) The Decision's failure to weigh the purported adverse effects to determine whether they are substantial is also an abuse of discretion, requiring vacatur. *See, e.g., Huang v. INS*, 436 F.3d 89, 99 (2d Cir. 2006) ("the failure to balance, by itself, justifies a vacatur")

The Decision failed to make a proper finding, and failed to provide a proper explanation and must therefore be vacated.

F. The CSC's Use Of The *2004 Connecticut Stormwater Quality Manual* Is Wrong As A Matter Of Law.

The Decision states that there would be an adverse effect as a result of "Insufficient wetland buffers composed of undisturbed vegetation to maintain water quality of on-site wetlands, as recommended in the *2004 Connecticut Stormwater Quality Manual*." The Decision, however, fails to state what the CSC believes was not met in that Manual that is an enforceable and consistently applied standard.

One of the requirements in Conn. Gen. Stat. § 16-50k is that the "project meets air and water quality standards of the Department of Energy and Environmental Protection." The *2004 Connecticut Stormwater Quality Manual* is not the DEEP legally enforceable standard. Section I.2 of the Manual disclaims that it is an enforceable standard.

> *The information and recommendations in this Manual are provided for guidance and are intended to augment, rather than replace, professional judgement. The design practices described in this Manual should be implemented by individuals with a demonstrated level of professional competence, such as professional engineers licensed to practice in the State of Connecticut. Design engineers, as well as those responsible for operation and maintenance, are ultimately responsible for the long-term performance and success of these practices. However, the use of this Manual is not restricted to engineers or technical professionals*

Similarly, section I.4 of the Manual states:

> *This Manual is intended for use as a guidance document to assist developers and the regulated community in complying with existing local, state, and federal laws and regulations. The Manual itself has no independent regulatory authority*.

The CSC's attempt to turn the *2004 Connecticut Stormwater Quality Manual* into a regulatory enforcement standard is clearly erroneous, and in any event beyond its jurisdiction. The CSC's role regarding water quality is to receive substantial evidence that the water quality

standards of the Department of Energy and Environmental Protection would be met. Windham's detailed hydrology report satisfied that requirement. Neither the Staff Report nor anyone else raised a specific issue with the expert opinion embodied in the Staff Report. Moreover, one of the Staff Report's recommended conditions was that Windham submit its registration under the DEEP general permit.

CONCLUSION

The Staff Report concludes that the projects would "meet[] air and water quality standards of the DEEP, and would not have a substantial adverse environmental effect … will not utilize water to produce electricity, was designed to minimize environmental impacts, and furthers the State's energy policy by developing and utilizing renewable energy resources and distributed energy resources." For the reasons, stated above, the CSC's split 4-3 vote finding to the contrary must be vacated. The Decision violates Windham's due process and equal protection rights, is clearly erroneous, is arbitrary and capricious and is not supported by substantial evidence.

Dated: March 26, 2021

Respectfully submitted,

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Certificate of Service

I certify the attached petition has been served this day, March 26, 2021, via e-mail on the following with one paper copy via U.S. mail.

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