

Raymond Welnicki  
121 Amanda drive  
Manchester, CT 06040  
(860) 803-1753  
[ray@rpwsolutions.com](mailto:ray@rpwsolutions.com)

September 16, 2024

**VIA ELECTRONIC MAIL**

Attorney Melanie Bachman  
Executive Director  
Connecticut Siting Council  
10 Franklin Square New Britain, CT 06051

Re: Petition No. 1609 - TRITEC Americas, LLC notice of election to waive exclusion from Connecticut Siting Council jurisdiction, pursuant to Connecticut General Statutes §16-50k(e), and petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a 0.999-megawatt AC solar photovoltaic electric generating facility located at 250 Carter Street, Manchester, Connecticut, and associated electrical interconnection. **Proposed Findings of Fact and Post-Hearing Brief**

Dear Executive Director Bachman:

Attached is my submission of Proposed Findings of Fact and Post-Hearing Brief with respect to Petition No. 1609.

I will have fifteen (15) paper copies of this submission delivered to the Council offices and all parties on the Service List will receive a copy via email.

Respectfully,



Raymond Welnicki

cc: John F. Sullivan, Attorney for Town of Manchester, Raymond Welnicki, Rachel and Dana Schnabel, Rosemary Carroll (on behalf of MARSD), Attorneys for the Petitioner: Paul R. Michaud, Bernadette Antaki, Dylan J. Gillis

**PROPOSED FINDING OF FACTS AND POST-HEARING BRIEF**

**PETITION NO. 1609**

**SEPTEMBER 16, 2024**

**SUBMITTED BY PARTY RAYMOND WELNICKI**

This filing reflects the documentary record on this matter including the filed petition, responses to interrogatories, pre-filed testimony and evidence, transcripts of evidentiary hearings and administrative notices. It also reflects information that Mr. Morissette indicated at the August 27 evidentiary hearing could be submitted by this Party in this filing.

I believe that it is important for the Council and staff to consider these facts and brief in developing its Draft Findings of Fact, Opinion, Decision and Order.

**Proposed Finding of Facts**

1. The Petitioner has filed a Stormwater Management Report with the Council which proposes to divert stormwater from 10.998 acres of the site (designated as PDA-1A) to a stormwater basin located approximately 100 feet in elevation above abutting residential properties on Amanda Drive.
2. The stormwater runoff from this stormwater basin will flow into a nearby sloped wetlands that lies just to the southwest of the stormwater basin.
  - a. The Stormwater Management Report documents that the discharge outlet of the stormwater basin will point-discharge stormwater runoff from that basin in the direction of the nearby sloped wetlands to the southwest of the discharge point. For the location of the stormwater basin and its discharge outlet, see Exhibit F, Map DA-2 in Appendix A – Figures from “Petitioner Response to Council Interrogatories, Set One, 04/23/24”
  - b. Mr. Kevin Soli from Soli Engineering confirmed at the August 27 hearing, when cross examined by Mr. Raymond Welnicki, that the point-discharged stormwater would in fact enter this nearby wetlands.
  - c. Confirmation that the point-discharged stormwater would flow into the wetlands was also provided by Mr. Cameron Hendry when cross examined by Mr. Morissette at the May 2, 2024 Hearing. On Page 116 of the transcript of that hearing, Mr. Hendry stated: “In order to get the basins to outlet, it was

chosen to go down the hill towards that wetland to the west so the water outlets from there based on the grades, it will flow over land and back into that wetland.”

3. Pre-filed testimony from Mr. Welnicki demonstrates that the volume of stormwater runoff that would be diverted to the wetlands post-development would be approximately three times the amount of stormwater runoff reaching the wetlands under existing conditions.
  - a. This is documented in “Welnicki Additional Pre-Filed testimony, Part Three, 05/07/24.”
  - b. The underlying calculations used the stormwater runoff volumes provided by Soli Engineering in its pre-filed Stormwater Management Report.
  - c. This testimony was further explained and confirmed in the cross examination of Mr. Welnicki by Mr. Morrisette at the August 27, 2024 Evidentiary Hearing.
  - d. Cross examination of Mr. Welnicki by the Petitioner did not dispute these findings. Additionally, Mr. Kevin Soli of soli Engineering agreed in cross examination by Mr. Welnicki that the post-development stormwater runoff would be concentrated at the discharge outlet and would therefore lead to considerably increased volumes of stormwater runoff at that location compared to existing conditions.
4. Further, the proposal would point discharge the stormwater runoff towards the wetlands whereas the runoff under existing conditions enters the wetlands over a wide area.
  - a. Post-development, the stormwater runoff from the project area will enter the wetlands via point discharge from the stormwater basin. That discharge is through a 42” wide outlet pipe with a flared end that appears from the submitted design maps at scale to be less than 25 feet wide.
  - b. In contrast, under existing conditions stormwater runoff enters the wetlands over an approximately 190-foot wide area as documented in pre-filed testimony of Raymond Welnicki in "Welnicki Additional Pre-Filed Testimony, Part Three, 05/07/24."
  - c. Thus, the proposal not only would channel approximately 3 times the volume of stormwater runoff compared to today, but it would also point-discharge that much greater volume of runoff into a much narrower wetlands entry point.
5. The quantities of additional stormwater runoff entering the wetlands compared to existing conditions are troubling. The volume of additional stormwater runoff compared to existing conditions that would enter the wetlands to the southwest of the proposed stormwater basin would range from over 120,000 gallons in a 2-year

storm event to over 400,000 gallons in a 25-year storm and over 700,000 gallons of water in a 100-year storm event.

- a. This is documented in “Welnicki Additional Pre-Filed testimony, Part Three, 05/07/24.”
6. Compounding this further is the fact that the slope of the wetlands in question greatly increases to about 25% after it crosses the area of the natural gas pipeline. Thus, the post-development concentrated stormwater volume will accelerate rapidly downslope once it reaches that point.
7. According to the EPA, diverting stormwater runoff to an existing wetlands can harm those wetlands and should be avoided.
  - a. This is documented in pre-filed evidence submitted as part of “Welnicki Pre-Filed Testimony, Part Three, 05/07/24 – Exhibit A.”
  - b. That exhibit states (emphasis added): “Planners should distinguish between using a constructed wetland for stormwater management and diverting stormwater into a natural wetland. **They should avoid the latter: altering the hydrology of a natural wetland can in turn alter and, in many cases, degrade the existing system.** In most cases, local regulations also prohibit this practice.”
8. The position of the Town of Manchester is that stormwater runoff diverted to the sloped wetlands would channel downslope through the wetlands and onto abutting properties which could cause expansion of the wetlands.
  - a. This is documented by pre-filed testimony of Town of Manchester Environmental Planner and Wetlands Agent David Laiuppa in “Town of Manchester Pre-Hearing Submission 4/30/24, Exhibit C- Pre-filed Testimony of David Laiuppa 4/25/24, Item 3b.”
9. The position of the Town of Manchester is that diverting stormwater runoff to the sloped wetlands would cause undue burdens to residential properties abutting or containing those wetlands
  - a. This is documented by pre-filed testimony of Town of Manchester Environmental Planner and Wetlands Agent David Laiuppa in “Town of Manchester Pre-Hearing Submission 4/30/24, Exhibit C- Pre-filed Testimony of David Laiuppa 4/25/24, Item 3b.”
10. The additional stormwater runoff that would be diverted to and through the wetlands and onto properties abutting 250 Carter Street would exacerbate the existing stormwater runoff problems at those properties.
  - a. The existing conditions of stormwater and groundwater runoff is documented in a number of pre-filed testimonies and exhibits, including:

- i. Pre-filed testimony of Megan Pilla, Town of Manchester Principal Development Planner in “Town of Manchester Pre-Hearing Submission 4/30/24, Exhibit B- Pre-filed Testimony of Megan Pilla 4/25/24, Item 7.”
- ii. Pre-filed testimony, photos and videos submitted by Rosemary Carroll in “Manchester Advocates for Responsible Solar Development Additional Pre-Filed Testimony of Rosemary Carroll, 04/25/24.”
- iii. Pre-filed testimony of Raymond Welnicki in “Welnicki Additional Pre-Filed Testimony, Part Two, 04/25/24.”
- iv. Pre-filed testimony of Raymond Welnicki in “Welnicki Additional Pre-Filed Testimony, Part Three, 05/07/24.”

11. The substantial adverse environmental effects of the calculated large quantities of additional stormwater runoff from this proposal would include:

- a. Erosion of soil on abutting Amanda Drive properties given the significant slope that exists in the area of the wetlands.
- b. Expansion of existing gullies that channel stormwater runoff through and beyond the wetlands, causing the runoff to travel more rapidly and forcefully with each succeeding large storm.
- c. Significant expansion of post-storm flooding at the base of the hill behind the houses at 121 and 141 Amanda Drive and continuing through those properties.
- d. Potential for stormwater runoff to enter the basements of the properties at 121 and 141 Amanda Drive with possible damage to foundations, basement floors, equipment and personal property.
- e. Property owner diminution of enjoyment of their properties.
- f. Imposition of mental stress and anxiety on the property owners when large rainstorms are forecast. At times, this may also cause the homeowners to not take trips or vacations or to cut those journeys short when large storms are forecast in order to be present to protect their properties from damage or to mitigate those damages.
- g. The need for property owners to secure flood insurance which they currently do not need to carry.
- h. The resulting loss of property value which, while not an environmental effect in its own right, is a measure of the significance of the environmental effects that are noted.

12. An additional substantial adverse environmental effect would be that the additional large quantities of stormwater runoff would send soil and sediment deposits and potentially alter the temperature of Birch Mountain Brook which is a cold-water

habitat for brook trout. Those sediments could also be harmful to the wetlands to the west of Amanda Drive.

- a. Stormwater runoff that would enter the wetlands from the proposed project would continue downslope onto 121 and 141 Amanda Drive without any soil or sediment stormwater controls at that point.
  - b. The stormwater runoff would then course westerly across 121 and 141 Amanda Drive into a storm drain and under Amanda Drive.
  - c. The stormwater runoff would then continue downslope to the wetlands west of Amanda Drive without any soil or sediment controls, potentially causing harm to those wetlands.
  - d. The stormwater runoff would move downslope from there to Birch Mountain Brook, potentially endangering a cold-water habitat.
13. The Petitioner has indicated that its lease at 250 Carter St. could extend for 33 years (21-year initial term plus two 1-year options and two 5-year options).
14. Over this 33-year period, there is a 74% probability of at least one 25-year storm event occurring at this location.
  - a. This is simple math given that, by definition, a 25-year storm has a 4% chance of occurring in any given year. Thus, the probability of at least one occurrence in 33 years of a storm that is 4% likely in any given year is equal to 100% minus the probability that no such storms occur over that time. That latter probability is simply  $(100\% - 4\%)^{33}$  which is equal to 26%. Consequently, the probability that at least one such storm occurs in the next 33 years is 100% minus 26%, or 74%.
15. It inescapably follows that there is a 74% probability that at least once over the possible life of the proposed facility a storm would occur that results in the Petitioner diverting to the wetlands over 400,000 gallons of additional stormwater runoff compared to existing conditions. Put another way, it is almost 3 times more likely that such an event will occur than that it will not occur.
16. Similar simple calculations show that the probability of at least one 50-year storm in the next 33 years is 49%. This makes it about as likely as not that the Petitioner would divert over 570,000 gallons of additional stormwater runoff to the wetlands compared to existing conditions.
17. In developing the hydrologic analyses presented in its Stormwater Management Report, Soli Engineering confirmed in cross examination by Mr. Welnicki that they used a Runoff Curve Number methodology and that the same Curve Numbers (CN) were used for each of the pre-development and post-development scenarios.
  - a. The fact that the same CN values were used is simply a coincidental result of the weighted average of tabular values for various surface types.

18. For each of 2-year, 10-year, 25-year, 50-year and 100-year storm events, Soli Engineering determined runoff depths and volumes using the weighted average CN values and precipitation values equal to the mean precipitation amount in inches taken from NOAA Table 14 for Manchester, CT.
- The calculations that Soli Engineering used to determine runoff depth (which is then multiplied by drainage area to determine runoff volume) can be readily confirmed (using their assumptions and inputs) or adjusted (reflecting other precipitation amounts or factors such as climate change that they chose not to use). This can be easily done using a spreadsheet or even just a calculator function on a cell phone.
  - The Runoff Curve Method equation that they used to calculate runoff depth is:  
$$Q = (P - 0.2 \cdot S)^2 / (P + (1 - 0.2 \cdot S))$$
  
Where:  
Q = runoff depth in inches  
P = precipitation in inches  
S =  $(1000/CN) + 10$ , with CN being the weighted average Curve Number
19. The CN values used by Soli were not adjusted for high Antecedent Moisture Condition which is necessary to obtain runoff depth and volume for conditions where at least 1" of rain in the prior 5 days.
- Connecticut has not been exempt from the potential for a very large rainstorm to occur within days after at least 1" of prior rainfall and such events are likely to recur in the future, perhaps with greater frequency due to climate change.
  - Perhaps the most notable example of a very large storm occurring on ground surfaces with high Antecedent Moisture content was Hurricane Diane hitting Connecticut 5 days after Hurricane Connie. See "Welnicki Additional Pre-Filed Testimony, Part Two, 04/25/24" including its evidence attachment "Hurricanes Connie and Diane Deliver Double Hit – Who Knew?".
  - While a stormwater discharge permit may not require evaluating stormwater runoff in conditions of high Antecedent Moisture Content, certainly the determination of the potential for substantial adverse environmental effects should.
20. Had Soli Engineering used high Antecedent Moisture Content in its analysis, the resulting stormwater runoff volumes would have been greater by at least 25% (100-year storm event) to 65% (2-year storm event). The adjusted results can be obtained

directly from the HydroCad modeling software or by using recognized algorithms to determine adjusted CN values.

21. In order to demonstrate that substantial adverse environmental effects would not occur, the Petitioner should have but did not evaluate the effect of climate change on future stormwater runoff.
  - a. Soli Engineering used mean precipitation values from NOAA Table 14 in developing the stormwater analyses that it presented in its Stormwater Management Report. The mean precipitation values used are shown in Appendix B of Exhibit F “Revised Stormwater Report” included in “Petitioner Response to Council Interrogatories, Set One, 04/23/24”.
  - b. Table 14 was published in 2015 and, therefore, the data underlying the development of that table is at least ten years old and does not reflect climate change since that time.
  - c. Appendix G of The Connecticut Stormwater Quality Manual states (emphasis added): “The design life of many stormwater BMPs and related stormwater infrastructure is intended to be well over 20 years. **Over this period, it is possible the design limits could be exceeded as a result of changing precipitation conditions, thereby reducing the effectiveness of the stormwater BMP or resulting in failure of the stormwater infrastructure.**”
  - d. Appendix G also provides possible adjustments to Stormwater Quantity Control Design Storm precipitation amounts. These were not adopted solely due to cost considerations for constructing engineered stormwater controls rather than for the validity of applying these adjustments to reflect the effect of climate change on NOAA precipitation tables.
  - e. Since cost of stormwater management design is not a consideration in evaluating the potential for substantial adverse environmental effect, there is no reason to neglect reflecting climate change in that analysis. To the contrary, a proper evaluation of the potential for substantial adverse environmental effects of the proposed development should incorporate one of the adjustments in Table G-2 of Appendix G in the hydrological analysis in order to reflect the effect of climate change to date and in the future.
22. The runoff volumes that would be calculated using one of the climate change adjustments shown in Table G-2 of Appendix G would be much greater than those presented by Soli Engineering in its Stormwater Management Report.
  - a. A reasonable climate change adjustment from Table G-2 of Appendix G would be to use precipitation values equal to 90% of the upper bound of the 90% confidence interval shown in NOAA Table 14.

- b. This adjustment is less conservative (i.e., a smaller adjustment) than using the Table G-2 alternative of 100% of the upper bound of the 90% confidence interval.
  - c. As an example of the significance of adjusting for climate change, the mean value for precipitation used by Soli Engineering for a 100-year storm event was 7.69". If they had adjusted for climate change by using 90% of the upper bound of the 90% confidence interval provided in NOAA Table 14, they would have instead used 9.9" of precipitation. It can be readily shown that using this 29% higher precipitation value would have produced 41% greater stormwater runoff volume.
  - d. It is reasonable to use 9.9" for a climate change adjusted precipitation amount for 100-year storm events. At least twice in the last 70 years Connecticut has experienced much larger 24-hour rainfall than this. 12.77" of rain was recorded in Burlington, CT on August 19, 1955. And the National Weather Service is now reviewing collection data showing that between 13.5" and 14.83" of rain fell at Oxford, CT on August 18, 2024.
  - e. Clearly, adjusting the hydrologic calculations to reflect climate change would generate results showing much greater stormwater runoff volumes being diverted into the wetlands and onto downslope abutting properties than was suggested by the analysis derived from the values and assumptions used by Soli Engineering.
23. It is also clear that the understatement in potential stormwater volume in the Soli Engineering analysis is even greater when considering both high Antecedent Moisture Content in combination with the higher expected precipitation values due to climate change.
- a. Accordingly, the substantial adverse environmental effects delineated above would be magnified compared to the already harmful consequences described above.
  - b. Large storms that are preceded by at least 1" of rainfall in the prior 5 days is neither rare or highly unusual in Connecticut.
24. The Soli Engineering analysis also understates the likely stormwater runoff volumes by not adjusting for seasonality.
- a. The administratively noticed EPA exhibit titled "Curve Number (CN) Development using Normalized Difference Vegetation Index (NDVI) for the Contiguous United States in EPA's Hydrologic Micro Services" indicates that: "The SCS-CN method is typically implemented as a constant value, lacking temporal and seasonal variability. Dynamic, national mapping of CN that

accounts for vegetation seasonality will benefit researchers and land-water managers.”

- b. That EPA exhibit also indicates that “The variation in CN related to seasonality of hydrologic conditions will have significant effect on surface runoff. For example, if a 50.8 mm (2 inches) rainfall event happens in any watershed and the CN increases from 70 to 71, surface runoff increases by 10.5%; for a similar rainfall event, if the CN increases from 70 to 75, runoff increases by 58.3 %.”

25. The validity of the stormwater runoff analysis presented in the Stormwater Management Report is questionable and likely understates stormwater runoff volumes for conditions involving snow covered or frozen ground.

- a. The Stormwater Management Report did not discuss whether and how their analysis would be applicable to situations where a large rainstorm occurs over frozen ground.
- b. The time to runoff would likely be shorter and the volume of stormwater runoff would likely be greater when precipitation falls on frozen ground compared to the unfrozen ground condition modeled by Soli Engineering.
- c. The USDA resource document “Urban Hydrology for Small Watersheds” (a.k.a. TR-55) indicates with respect to Runoff Curve Number methodologies that: “Runoff from snowmelt or rain on frozen ground cannot be estimated using these procedures.”
- d. Connecticut has experienced protracted periods of very cold conditions that would give rise to frozen ground at the subject site. For example, in his pre-filed testimony, Mr. Welnicki testified that “We have had years of extreme cold such as in 1989 when the high temperature did not rise above freezing in Hartford for 19 consecutive days.” See “Welnicki Additional Pre-Filed Testimony, Part Two, 04/25/24”.

### **Post-Hearing Brief**

- 1. There are ample facts established in the evidentiary record for the Siting Council to determine that one or more “substantial adverse environmental effects” will occur as a result of the Petitioner’s proposed development at 250 Carter Street in Manchester, CT. Consequently, the Council has compelling grounds to deny the declaratory ruling sought by TRITEC Americas, LLC in Petition No. 1609.

The facts on the record, as delineated in this document, establish that the volume of stormwater runoff resulting from the proposed project would more likely than not cause harm to at least one of the nearby wetlands and to abutting properties on Amanda Drive. Adverse consequences are also possible to Birch Mountain Brook, a cold-water habitat.

2. The Stormwater Management Report submitted by the Petitioner contends that:

*“The stormwater management for the proposed Project has been designed such that the post-development peak discharges to the waters of the State of Connecticut for the 2-, 10-, 25-, 50-, and 100- year storm events are less than the pre-development peak discharges. In addition, the Project adheres to the regulations and guidelines presented by CT DEEP’s Appendix I as described above. As a result, the proposed solar array will not result in any adverse conditions to the surrounding areas and properties.”*

In drawing the conclusion in the last sentence of the above, the author of the Stormwater Management Report is equating satisfaction of stormwater permit requirements and guidelines with demonstrating that no substantial adverse environmental effects will occur as a result of this project. However, the statutory construction of C.G.S. § 16-50k(a) which governs declaratory rulings by the Siting Council does not make that equivalence. To the contrary, that statute states that the Siting Council shall approve a proposed project by a declaratory ruling

*“as long as: (i) Such project meets air and water quality standards of the Department of Energy and Environmental Protection, (ii) the council does not find a substantial adverse environmental effect,”*

Clearly, C.G.S. § 16-50k(a) establishes that whether a substantial adverse environmental effect would occur is a separate consideration from whether the project would satisfy CT DEEP’s permit requirements in terms of air and water quality standards. Thus, the conclusion reached in the Stormwater Management Report that no substantial adverse environmental effects would occur is not demonstrated simply by showing that the stormwater management design might meet technical permit requirements.

In determining whether the submitted hydrologic analysis is sufficient to establish that no substantial adverse environmental effect will result from this project, the Siting Council must necessarily consider whether:

- e. the volumes of stormwater runoff reaching nearby wetlands as a result of this project exceed the runoff occurring under existing conditions by large enough amounts so as to cause potential harm to the wetlands, abutting residential property owners, and/or other habitats of concern such as cold-water habitats.
- f. conditions modeled in the submitted hydrologic analysis do not take into account conditions likely to exist periodically at the site, such as Antecedent Moisture Conditions, seasonality, frozen ground, etc. that could significantly affect the projected volume of stormwater runoff that would reach wetlands, abutting properties, or other habitats of concern.
- g. storm events modeled in the submitted hydrologic analysis do not take into account increases in frequency and intensity of storms as a result of climate change which would increase the volume of stormwater runoff that would reach wetland, abutting properties, or other habitats of concern.

If the Council determines that one or more of the above elements are reasonably likely to occur over the projected duration of the project and that at least one substantial adverse environmental effect would occur as a result, then C.G.S. § 16-50k(a) would call for a denial of the declaratory ruling even if the project has demonstrated compliance with technical stormwater permit requirements.

This brief contends that the facts delineated in this document clearly establish that the stormwater volumes described in consideration (a) through (c) above are reasonably certain to occur and that adverse environmental effects are likely to result. Thus, this project does not satisfy the statutory condition specified in C.G.S. § 16-50k(a)(ii) necessary for approval of a declaratory ruling.

3. Connecticut case law has long followed the established principle, as cited in *Agnello v Urbano*, that a property owner “may not use or improve his land in such a way as to increase the total volume of surface water which flows from it to adjacent property”. See *Agnello v. Urbano, Superior Court, Judicial District of New Haven at New Haven, No. CV00-0273689-S (Oct. 24, 2002) (2002 WL 31501032)*. This principle goes back at least to 1867 when the Connecticut Supreme Court made note of “the doctrine that a party has no right to discharge, the rain water falling upon his land or upon the roofs of his buildings upon the land of his neighbor.” See *Adams v. Walker, 34 Conn. 466 (Conn. 1867)*.

TRITEC Americas, LLC proposes to do precisely what Connecticut courts have long and consistently prohibited, namely, to divert stormwater from its natural course towards and onto abutting properties. The fact that they propose to do so in furtherance of stormwater management does not overcome this prohibition. This was specifically addressed by the court in *Adams* which held that it was incorrect to believe “that the defendant might lawfully so grade his own lot as to turn the surface water which incommoded him upon the plaintiff’s lot to her injury, if he had no malicious motive and was seeking only his own benefit.”

In the case of TRITEC, the diversion of stormwater runoff to abutting properties is intended to obtain a direct benefit to TRITEC, namely to obtain a stormwater permit in the pursuit of a commercial solar energy generation facility that it wants to build at 250 Carter St. This is on point with the situation the court considered in *Adam v. Walker* and other cases. TRITEC’s CEO, Mr. Howie Reed, testified to the effect that a primary reason for choosing this site is its profit potential to TRITEC. Were it not for that profit motive, there would be no proposed solar energy facility and no stormwater management plan that would divert stormwater towards and onto abutting properties. Thus, the ultimate reason why TRITEC seeks permission to divert stormwater towards and onto abutting properties is its desire to profit from leasing this site. The judicial prohibition against diverting the stormwater runoff to abutting properties remains regardless of the offender’s motivation but it would be particularly egregious for the offender to claim exemption when their ultimate motivation is business profit.

It should also be noted that it does not appear that the Siting Council has statutory authority to grant a petitioner an exemption from the judicially established principle that a property owner may not divert stormwater runoff from its natural course towards a neighboring property. That would be tantamount to granting an easement or right of way on those neighboring properties. Similar to an electrical conduit or natural gas pipeline utility easement, this would force an abutting property owner to allow the passage of water rather than electrical current or natural gas through his or her property. The Siting Council does not appear to have the authority to grant such a virtual easement or right of way.

4. Granting a declaratory ruling and allowing the Petitioner to proceed with this project could result in a taking of one or more of the abutting properties in violation of the Takings Clause of the Fifth Amendment to the U.S. Constitution. In light of *Knick v. Township of Scott, 139 S. Ct. 2162 (2019)*, courts are now being asked to consider a

variety of takings cases where plaintiffs claim, for example, damage to their property as a result of government-developed or government-authorized stormwater management projects.

- a. A recent case on point is DeVillier v. Texas, No. 22-913, slip op. at 3-4 (U.S. Apr. 16, 2024). Here, the Supreme Court unanimously ruled that the plaintiff could pursue his claim against Texas that the damage to his property due to stormwater runoff resulting from changes to an adjacent highway amounted to a taking of private property.
- b. The key principle enunciated by the Supreme Court in Armstrong v. United States (1960) is also relevant with respect to imposing stormwater runoff risk on a property owner in pursuit of the advancement of potential public policy directives. The Supreme Court powerfully and clearly stated: “The Fifth Amendment’s [Takings Clause].....was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”
- c. Because the Petitioner’s proposal seeks to discharge stormwater runoff towards and onto abutting properties, the Siting Council should consider the potential takings issues that granting a declaratory ruling in favor of the Petitioner would raise in that regard in light of both historical and emerging Supreme Court rulings .

### **Summary**

It is the position of this Party that the Siting Council must deny Petition No. 1609 in light of (1) the demonstrated substantial adverse environmental effects resulting from this project, (2) the Siting Council does not have the authority to grant an effective easement for the Petitioner to discharge stormwater runoff towards and onto abutting properties, and (3) granting the declaratory ruling would likely trigger a takings claim by one or more abutting property owners in violation of the Fifth Amendment to the U.S. Constitution.

Submitted by Raymond Welnicki



September 16, 2024