

DATE: April 16, 2021

TO: Council Members

FROM: Melanie A. Bachman, Executive Director/Staff Attorney

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. **DRAFT STAFF REPORT - Windham Solar LLC Motion to Vacate, or in the Alternative, to Reconsider the March 12, 2021 Final Decision.**

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On March 26, 2021, pursuant to the provisions of Connecticut General Statutes (CGS) §4-181a(a), Windham Solar, LLC (WS) filed a Motion to Vacate, or in the Alternative, Petition for Reconsideration (Petition) of the Connecticut Siting Council's (Council) March 12, 2021 final decision (Final Decision) to deny with prejudice a declaratory ruling to WS for the above-referenced proposed solar photovoltaic electric generating facilities in the City of Ansonia (Project). In its Petition, WS requests that the Council vacate, or in the alternative, reconsider, its Final Decision based on the following:

- A. There is no authority to deny a petition with prejudice;
- B. WS' due process and equal protection rights were violated; and
- C. It is clearly erroneous, arbitrary and capricious, and not based upon substantial evidence.

Under CGS §4-181a(a), a party in a contested case may, within 15 days after mailing of the final decision, file with the agency a petition for reconsideration of the decision on the ground that: (A) an error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown. Within 25 days of the filing of the petition for reconsideration, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within 25 days of such filing shall constitute a denial of the petition for reconsideration. If the agency decides to reconsider the final decision, the agency shall conduct additional proceedings as may be necessary to render a decision to modify, affirm or reverse the final decision not later than 90 days following the date on which the agency decides to reconsider the final decision.

On March 26, 2021, the Council requested the Petition 1395A service list to submit written comments with respect to whether the Petition should be granted or denied by April 9, 2021. On April 9, 2021, the City of Ansonia (City), a party to Petition 1395A, objected to the Petition stating the Council is barred from reconsidering the decision based on principles of res judicata, which preclude a matter that has been adjudicated from being reconsidered. In this case, res judicata principles do not apply.<sup>1</sup> Res judicata

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<sup>1</sup> *New England Rehabilitation Hosp., Inc. v. Commission on Hosps. & Health Care*, 226 Conn. 105, 128-131 (1993).

principles in administrative decisions yield to applicable statutes. In this case, the applicable statute is the Uniform Administrative Procedure Act (UAPA).

## I. JURISDICTION AND STATUTORY AUTHORITY

Council proceedings are governed by the UAPA. A central purpose of the UAPA is to prevent piecemeal appeals.<sup>2</sup> Under the UAPA, the Council is an “agency” that is authorized by law to make regulations and to determine contested cases.<sup>3</sup> “Contested cases” are proceedings in which the rights of a party are required by statute to be determined by an agency after a hearing is held, but ***does not include proceedings on a petition for a declaratory ruling under CGS §4-176.***<sup>4</sup> (Emphasis added). If a hearing is held on a petition for a declaratory ruling, contested case provisions apply.<sup>5</sup> In any proceeding, a “final decision” is: (A) an agency determination in a contested case; (B) a declaratory ruling issued by an agency; or (C) an agency decision made after reconsideration.<sup>6</sup>

Council proceedings are also governed by the Public Utility Environmental Standards Act (PUESA). A central purpose of PUESA is to balance competing interests among energy production and environmental protection. Under PUESA, the Council’s purpose is to reduce the time and cost involved in meeting the reasonable power needs of Connecticut citizens without jeopardizing the environment.<sup>7</sup> The Council balances the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state.<sup>8</sup> It has exclusive jurisdiction over facilities that include, but are not limited to, any electric generating facility using any fuel.<sup>9</sup>

Public Act (PA) 05-1, An Act Concerning Energy Independence (codified at CGS §16-50k of PUESA), states, “[T]he Council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... any grid-side distributed resources project or facility with a capacity of not more than 65 megawatts, as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection [DEEP] and the Council does not find a substantial adverse environmental effect.” (Emphasis added.) The purpose was to incent distributed resource projects and reduce peak electric demand consistent with the policy of the state to diversify the energy supply mix and develop renewable energy sources, such as solar and wind energy, to the maximum practicable extent.<sup>10</sup> It established a rebuttable presumption that there is a public benefit for a grid-side distributed resources facility with a capacity of 65 MW or less that is selected in a Request for Proposals (RFP).<sup>11</sup>

## II. WS’ PETITION

In its Petition, WS requests the Council to vacate, or in the alternative, reconsider, the Final Decision on the ground that an error of fact or law should be corrected. A petition for reconsideration submitted under CGS §4-181a(a) applies to contested cases. Petition 1395A was not a contested case. A hearing was not

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<sup>2</sup> *Town of Killingly v. Conn. Siting Council*, 220 Conn. 516, 523 (1991).

<sup>3</sup> CGS §4-166(1)(2021).

<sup>4</sup> CGS §4-166(2)(2021).

<sup>5</sup> CGS §4-176 (2021) (If a hearing is held, contested case provisions of the UAPA apply to the proceedings.)

<sup>6</sup> CGS §4-166(5)(2021).

<sup>7</sup> *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 703-704 (2014); 1973 Conn. Public Acts 458.

<sup>8</sup> CGS §16-50g, *et seq.* (2021).

<sup>9</sup> CGS §16-50x (2021) (“Notwithstanding any other provision of the general statutes,... the council shall have exclusive jurisdiction over facilities...”); CGS §16-50i(a)(3) (2021).

<sup>10</sup> 2005 Conn. Special Acts 1; CGS §16a-35k (2021); Governor Lamont, Executive Order No. 3, September 2019.

<sup>11</sup> 2005 Conn. Spec. Acts 1; CGS §16-50p(c)(2021) (a public benefit exists if a proposed electric generating facility is necessary for the reliability of the electric supply of the state or for the development of a competitive market for electricity); *Citizens for Defense of Oxford v. Conn. Siting Council*, 2000 Conn. Super. LEXIS 2994 (2000).

required to be held by statute and the Council did not order a hearing be held under CGS §4-176.<sup>12</sup> Notwithstanding, under the UAPA, declaratory rulings are final decisions and final decisions can be reopened.<sup>13</sup>

**A. Denial of a petition with prejudice does not preclude applicability of UAPA provisions.**

Deeply rooted in the UAPA are the related doctrines of exhaustion of administrative remedies and finality of administrative action.<sup>14</sup> These doctrines are designed to prevent piecemeal appeals. A person who has exhausted all administrative remedies available within an agency, such as WS' submission of a petition for a declaratory ruling under CGS §4-176 and WS' submission of a petition for reconsideration under CGS §4-181a(a), and who is aggrieved by a final decision, such as a declaratory ruling issued by an agency or an agency decision made after reconsideration, may appeal to the Superior Court.<sup>15</sup>

WS is correct that there is nothing in the Council's statutes or regulations to deny a petition with or without prejudice. Attachment of "without prejudice" to final decisions is based on court precedent holding that denial of a permit "without prejudice" should not be made except in situations where there is a reasonable ground for a conclusion that the issues should not be finally decided on the existing situation.<sup>16</sup> For example, in *City of Norwalk v. Connecticut Siting Council*, the court upheld the Council's denial of an application without prejudice and motion to reconsider based on expiration of the statutory final decision deadline.<sup>17</sup> An alternative configuration for the electric transmission line facility was proposed after the evidentiary record had closed. This constituted a reasonable ground for a conclusion that the issues should not be finally decided on the application.

Attachment of "with prejudice" to final decisions is based on Council precedent finding that a site is not suitable for the proposed development. In its final decision to deny an application "with prejudice" for a proposed 500 MW natural gas-fired electric generating facility in New Milford, the Council stated: "We find development of the proposed facility to be incompatible with the site."<sup>18</sup> In its final decision to deny a declaratory ruling "with prejudice" for a proposed 1.98 MW solar electric generating facility in Killingworth, the Council stated: "Of substantial concern to the Council are the minimal buffer zones afforded to on-site wetlands as a result of the site development."<sup>19</sup> Neither project developer moved for reconsideration nor reopening of these final decisions, but under the UAPA, they could have.<sup>20</sup>

Regardless of whether a declaratory ruling is denied, denied with prejudice or denied without prejudice, under CGS §4-181a(b) **any person, at any time**, on a showing of changed conditions, may request an agency to reverse or modify a final decision. Denial of a petition "with prejudice" does not preclude applicability of UAPA provisions.

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<sup>12</sup> *Intercon Gas v. Conn. Siting Council*, 1992 Conn. Super. LEXIS 732 (Conn. Super. 1992) (Council decision to deny an **application** from a gas company without prejudice as "premature and not ripe for consideration" without holding a public hearing violated CGS §16-50m and caused prejudice of gas company's rights.)(Emphasis added).

<sup>13</sup> CGS §4-181a(b) (2021) (**Any person** may request an agency to modify or reverse a final decision).

<sup>14</sup> *Office of Consumer Counsel v. Department of Public Utility Control*, 2003 Conn. Super. LEXIS 1161 at \*4-5.

<sup>15</sup> CGS §4-183 (2021) (An appeal may be filed within 45 days after mailing of the final decision or within 45 days after the agency denies a petition for reconsideration of the final decision.)

<sup>16</sup> *Bright v. Zoning Board of Appeals*, 149 Conn. 698 (1962).

<sup>17</sup> *City of Norwalk v. Conn. Siting Council*, 2004 Conn. Super. LEXIS 2770 (Conn. Super. 2004).

<sup>18</sup> Docket 193, available at [https://portal.ct.gov/CSC/1\\_Applications-and-Other-Pending-Matters/Applications/Decisions/Opinion-for-Docket-No-193](https://portal.ct.gov/CSC/1_Applications-and-Other-Pending-Matters/Applications/Decisions/Opinion-for-Docket-No-193)

<sup>19</sup> Petition 1354, available at [https://portal.ct.gov/lib/csc/pending\\_petitions/3\\_petition\\_1301through1400/pe1354/finaldecisiondocs/pe1354\\_opn\\_final.pdf](https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1354/finaldecisiondocs/pe1354_opn_final.pdf)

<sup>20</sup> CGS §4-181a (2021).

## **B. WS was afforded due process and equal protection under the UAPA and PUESA.**

In its Petition, WS claims it was denied due process and it was discriminated against as compared to other developers of solar projects before the Council. These claims are based on the applicability of CGS §4-179 and a comparison among dissimilarly situated sites. CGS §4-179 does not apply to Petition 1395A. Petition 1395A was not treated any differently than similarly situated sites.

### **1. The Final Decision complies with due process requirements under CGS §4-176.**

Due process requires notice and an opportunity to be heard. Due process is flexible and calls for procedural protections as particular situations demand.<sup>21</sup> It does not guarantee any particular form of state procedure.<sup>22</sup> The degree of procedural formality to adjudicate claims is left to an agency's discretion.<sup>23</sup> WS claims its rights under CGS §4-179 were violated. CGS §4-179 requires an agency to issue a proposed final decision if a majority of the members "have not heard the matter or read the record." CGS §4-179 applies to contested cases.<sup>24</sup> Petition 1395A was not a contested case.<sup>25</sup> The proceedings were held under CGS §4-176. If the agency conducts a hearing in a proceeding for a declaratory ruling under CGS §4-176, the provisions of §4-177c, §4-178 and ~~§4-179~~ shall apply to the hearing. A hearing was not held on Petition 1395A. Therefore, the provisions of CGS §4-179 do not apply.

The Council is an agency with limited jurisdiction.<sup>26</sup> It must obey the statutory commands of the UAPA.<sup>27</sup>

Under **CGS §4-176(a)**, any person may petition an agency for a declaratory ruling as to the applicability to specified circumstances of a provision of the statutes, a regulation or a final decision on a matter within the jurisdiction of an agency.

In compliance with regulations adopted under **CGS §4-176(b)**, on June 23, 2020, pursuant to CGS §4-176 and CGS §16-50k, WS submitted a petition for a declaratory ruling to the Council for the construction, maintenance and operation of a 1.99 MW solar photovoltaic electric generating facility located at 31 Benz Street, Ansonia, Connecticut.<sup>28</sup>

In accordance with **CGS §4-176(c)**, within 30 days after receipt of WS' petition for a declaratory ruling, the Council gave notice to all persons to whom notice is required by law, including, but not limited to, the City and state agencies.<sup>29</sup> The Council also posted the petition on its website and issued a proceeding schedule identifying the 30-day comment deadline (7/23/20), 60-day agency action deadline (11/21/20), and 180-day final decision deadline (3/20/21), as extended by state emergency orders.<sup>30</sup>

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<sup>21</sup> *Concerned Citizens of Sterling v. Conn. Siting Council*, 215 Conn. 474, 484 (1990).

<sup>22</sup> *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669 (2014); *Katz v. Brandon*, 156 Conn. 521, 537-38 (1968).

<sup>23</sup> *Summit Hydropower Partnership v. Commissioner of Environmental Protection*, 226 Conn. 792 (1993).

<sup>24</sup> *Pet v. Department of Public Health Services*, 228 Conn. 651 (1994) (appeal of contested case proceeding).

<sup>25</sup> WS acknowledges it is not a contested case in its Opposition to the City's Intervention at page 5.

<sup>26</sup> *Tilcon Conn., Inc. v. Commissioner of Environmental Protection*, 317 Conn. 628 (2015) (Agency exceeded its authority in attempting to regulate excavation activities not subject to permit applications and delaying issuance of unrelated permit.); *Kleen Energy Sys., LLC v. Commissioner of Environmental Protection*, 319 Conn. 367 (2015); *Wheelabrator Lisbon, Inc. v. Department of Public Utility Control*, 283 Conn. 672 (2007).

<sup>27</sup> *Salmon Brook Convalescent Home, Inc. v. Commission on Hospitals and Healthcare*, 177 Conn. 356 (1979).

<sup>28</sup> CGS §4-176(b)(2021) (Each agency shall adopt regulations for petitions that provide for the form and content, the filing procedure and the procedural rights of persons.); RCSA §16-50j-39, *et seq.* (2021).

<sup>29</sup> CGS §4-176(c)(2021) (correspondence to City and State Agency Comment Request Memo on June 26, 2020.)

<sup>30</sup> Governor Lamont, Executive Order No. 7, March 10, 2020; Petition 1395A, Schedule, *available at* [https://portal.ct.gov/-/media/CSC/PE\\_1395A-SCHEDULE\\_exeorder7M\\_with-request-for-Info.pdf](https://portal.ct.gov/-/media/CSC/PE_1395A-SCHEDULE_exeorder7M_with-request-for-Info.pdf)

In accordance with **CGS §4-176(d)**, during a meeting held on November 19, 2020, the Council granted the City's November 6, 2020 request for party status. On August 10, 2020 and November 30, 2020, the Council issued interrogatories to WS, one of which requested photographic documentation of site specific features intended to serve as a virtual field review of the site. WS responded to the Council's interrogatories on September 30, 2020 and December 30, 2020. The City issued interrogatories to WS on February 22, 2021. WS responded to the City's interrogatories on February 26, 2021.

In accordance with **CGS §4-176(e) and CGS §4-176(f)**, during a meeting held on November 19, 2020, within 60 days of receipt of WS' petition for a declaratory ruling, the Council, in writing, set the date by which to render a final decision as March 20, 2021, the statutorily-mandated 180-day final decision deadline.<sup>31</sup> In its discretion, under CGS §4-176(e), within 60 days of receipt of WS' petition for a declaratory ruling, the Council could have ordered a public hearing in accordance with **CGS §4-176(g)** as the degree of procedural formality to adjudicate claims is left to an agency's discretion.<sup>32</sup> No timely requests for a public hearing were made by WS, any party, interested person or the Council.

In compliance with **CGS §4-176(h) and CGS §4-176(i)**, on March 12, 2021, the Council mailed its Final Decision to WS and the service list for Petition 1395A.<sup>33</sup> In accordance with **CGS §4-176(j)**, the Council kept a record of the Petition 1395A proceeding.<sup>34</sup>

The Final Decision complies with the due process requirements of the UAPA.

## **2. WS has not been discriminated against as compared to other developers of solar projects before the Council.**

Equal protection requires similarly situated projects to be evaluated similarly. Equal protection of the law prevents arbitrary discrimination. A violation of equal protection arises if: 1) the person, compared with others similarly situated, was selectively treated; and 2) such selective treatment was based on impermissible considerations, such as intent to inhibit rights or bad faith intent to injure a person.<sup>35</sup> The claimant has the burden of proof to identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently.<sup>36</sup> WS claims it has been discriminated against as compared to other developers of solar projects before the Council.

Under PUESA, a proposed electric generating facility of any capacity using any fuel is subject to the same balance of public benefit and substantial adverse environmental effect. Like other similarly situated solar projects, WS' project was selected in a RFP.<sup>37</sup> Its public benefit is therefore presumed.

The factors for the Council's evaluation of "substantial adverse environmental effect" are as follows:

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<sup>31</sup> CGS §4-176(e)(2021)(Within 60 days after receipt of a petition for a declaratory ruling, an agency, in writing, shall: (1) Issue a declaratory ruling, (2) order the matter for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) initiate regulation-making proceedings, or (5) decide not to issue a declaratory ruling.)

<sup>32</sup> *Summit Hydropower Partnership v. Commissioner of Environmental Protection*, 226 Conn. 792 (1993).

<sup>33</sup> CGS §4-176(h)(2021) (A declaratory ruling shall be effective when mailed and shall be a final decision for purposes of appeal.); CGS §4-176(i)(2021) (If an agency does not issue a declaratory ruling within 180 days after the filing of a petition, the agency shall be deemed to have decided not to issue such ruling.)

<sup>34</sup> CGS §4-176(j)(2021) (The agency shall keep a record of the proceeding.); Petition 1395A, Record, *available at* [https://portal.ct.gov/CSC/3\\_Petitions/Petition-Nos-1391-1400/Petition-No-1395A-Windham-Solar\\_Ansonia](https://portal.ct.gov/CSC/3_Petitions/Petition-Nos-1391-1400/Petition-No-1395A-Windham-Solar_Ansonia)

<sup>35</sup> *Cadlerock Properties, LP v. Commissioner of Environmental Protection*, 253 Conn. 661, 671 (2000).

<sup>36</sup> *Id.* at 672.

<sup>37</sup> CGS §16-244r (2021). (WS was awarded two 15-year contracts with The United Illuminating Company under the Low-emission Renewable Energy Credit/Zero-emission Renewable Energy Credit Program.)

The nature of the probable environmental impact of the facility, including, but not limited to, effects, impact on, and conflict with the policies of the state concerning: (i) natural environment, (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture, (vi) forests and parks, (vii) air and water purity and (viii) fish, aquaculture and wildlife.<sup>38</sup>

Under CGS §16-50k, the Council shall approve by declaratory ruling the construction of any distributed resources facility with a capacity of not more than 65 MW as long as the facility meets air and water quality standards of DEEP and the Council does not find a substantial adverse environmental effect. To assist developers of facilities subject to the provisions of CGS §16-50k, the Council maintains a Filing Guide for a Petition for a Declaratory Ruling for a Renewable Energy Facility.<sup>39</sup> Consistent with the UAPA and Council regulations, it describes the process, form and content of a petition for a declaratory ruling and applies to all proposed facilities that qualify to be submitted under CGS §16-50k, including, but not limited to, solar facilities.

To further assist developers of facilities subject to the provisions of CGS §16-50k, the Council also maintains a standard set of interrogatories that is supplemented with site-specific interrogatories. WS consistently submits its petitions for declaratory rulings with a section entitled, “Additional Information,” that responds to Council interrogatories issued on other WS projects.<sup>40</sup> In its Petition, WS notes the Council issued 65 interrogatories on Petition 1395A, which was 17 more interrogatories than the Council issued on Docket 470B.<sup>41</sup> Certainly, for an equal protection claim, WS’ 1.99 MW solar facility should not be compared to NTE’s 650 MW natural gas facility as the two facilities are not similarly situated in permitting process, generating capacity or fuel type.

In support of its equal protection claim, WS references the Council’s approvals of Petitions 1159 and 1181. For Petition 1159, relating to a 2 MW solar facility located at Sullivan Farm in Suffield that was approved by the Council on September 3, 2015,<sup>42</sup> WS indicates the lack of wetland buffers composed of undisturbed vegetation and widening of a wetland crossing to accommodate an access road. The record of Petition 1159 demonstrates that the on-site wetlands were determined to be of low function and value as they were influenced by previous agricultural use and gravel extraction on the property, and the existing wetland crossing was widened to minimize more substantial adverse environmental effects associated with crossing the wetland corridor for a new access road. Additionally, to minimize some of the negative

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<sup>38</sup> CGS §16-50p(a)(3)(B)(2021).

<sup>39</sup> Council’s Guide to a Petition for a Declaratory Ruling for a Renewable Energy Facility, [https://portal.ct.gov/-/media/CSC/Guides/2019\\_guides/RenewableEnergyFacilityPetitionGuide082619pdf.pdf](https://portal.ct.gov/-/media/CSC/Guides/2019_guides/RenewableEnergyFacilityPetitionGuide082619pdf.pdf)

<sup>40</sup> Petition 1137, [https://portal.ct.gov/lib/csc/pending\\_petitions/petition\\_1137/pe1137\\_filingwithexhibits.pdf](https://portal.ct.gov/lib/csc/pending_petitions/petition_1137/pe1137_filingwithexhibits.pdf); Petition 1220, [https://portal.ct.gov/lib/csc/pending\\_petitions/2\\_petitions\\_1201through1300/pe1220\\_filing.pdf](https://portal.ct.gov/lib/csc/pending_petitions/2_petitions_1201through1300/pe1220_filing.pdf); Petition 1221, [https://portal.ct.gov/lib/csc/pending\\_petitions/2\\_petitions\\_1201through1300/pe1221\\_filing.pdf](https://portal.ct.gov/lib/csc/pending_petitions/2_petitions_1201through1300/pe1221_filing.pdf); Petition 1222, [https://portal.ct.gov/lib/csc/pending\\_petitions/2\\_petitions\\_1201through1300/pe1222\\_filing\\_hampton.pdf](https://portal.ct.gov/lib/csc/pending_petitions/2_petitions_1201through1300/pe1222_filing_hampton.pdf); Petition 1323, [https://portal.ct.gov/lib/csc/pending\\_petitions/3\\_petition\\_1301through1400/pe1323-biltonsolar\\_somers\(with\\_exhibits\)08.24.17.pdf](https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1323-biltonsolar_somers(with_exhibits)08.24.17.pdf); Petition 1328, [https://portal.ct.gov/lib/csc/pending\\_petitions/3\\_petition\\_1301through1400/pe1328\\_filing\\_windhamsolar-pomfret.pdf](https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1328_filing_windhamsolar-pomfret.pdf)

Petition 1395A, [https://portal.ct.gov/-/media/CSC/3\\_Petitions-medialibrary/Petitions\\_MediaLibrary/MediaPetitionNos1301-1400/PE1395A/PetitionerSubmissions/Benz-Solar---Petition-for-Declaratory-Ruling-6-09-2020Narrative.pdf](https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1395A/PetitionerSubmissions/Benz-Solar---Petition-for-Declaratory-Ruling-6-09-2020Narrative.pdf)

<sup>41</sup> Petition 1395A, Motion to Vacate, or in the Alternative, to Reconsider, at p. 8, 12, available at [https://portal.ct.gov/-/media/CSC/3\\_Petitions-medialibrary/Petitions\\_MediaLibrary/MediaPetitionNos1301-1400/PE1395A/PetitionerSubmissions/PE1395A-20210326-Windham-Solar-Motion-to-Vacate-and-reconsider-1395A.pdf](https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1395A/PetitionerSubmissions/PE1395A-20210326-Windham-Solar-Motion-to-Vacate-and-reconsider-1395A.pdf); Docket 470B related to a motion to reopen Docket 470. The Council issued 139 interrogatories total.

<sup>42</sup> Petition 1159, [https://portal.ct.gov/CSC/3\\_Petitions/Petition-Nos-0001-1219/Petition-No-1159--LodestarSuffield](https://portal.ct.gov/CSC/3_Petitions/Petition-Nos-0001-1219/Petition-No-1159--LodestarSuffield)



wetland effects of past agricultural use on the property, the developer restored a portion of the previously disturbed on-site wetlands.

For Petition 1181, relating to a 4.93 MW solar facility located at the former Mountain Ash Dairy Farm in Norwich that was approved by the Council on November 12, 2015,<sup>43</sup> WS indicates that 415 square feet of wetland within the solar facility footprint would be filled. The record of Petition 1181 demonstrates that the on-site wetland was determined to be of low function and value as it was an isolated, depressional-pocket created by an excavation pit associated with the farm. Notification of the filling of this wetland was made to the U.S. Army Corps of Engineers.

The record of Petition 1395A demonstrates that the on-site wetland is a seasonally flooded, forested wetland.<sup>44</sup> Undisturbed seasonally flooded, forested wetlands typically have high function and value.

Petitions for solar facilities similarly situated to Petition 1395A in facility size and final decision are identified in the chart below. Council decisions on motions to reopen any final decisions of similarly situated sites are also noted.

Petition	Facility Size (MW AC)	Final Decision on Petition	Final Decision Date	Motion to Reopen Decision
1221	2.5 MW	<b>Denied</b> on basis petition remains incomplete and project appears to have a substantial adverse effect on water quality, including, but not limited to, the following: <ul style="list-style-type: none"> <li>• Direct wetland impacts</li> <li>• Access to solar array may require brook crossing</li> </ul>	7/25/2016	12/8/2017 Denied*
1354**	1.98 MW	<b>Denied with prejudice</b> on basis project would have a substantial adverse effect on water quality, including, but not limited to, the following: <ul style="list-style-type: none"> <li>• Inadequate buffer areas to wetlands</li> <li>• Steep slopes with erodible soils could cause sedimentation and alter wetland ecology</li> </ul>	5/9/2019	N/A
1395A	1.99 MW	<b>Denied with prejudice</b> on basis project would have a substantial adverse effect on water quality, including, but not limited to, the following: <ul style="list-style-type: none"> <li>• Proposed construction does not follow guidance in the <i>2004 Connecticut Stormwater Quality Manual</i> to maintain an undisturbed vegetative buffer to a wetland</li> <li>• Insufficient information pertaining to hydrological effects of removal and processing of on-site ledge for use as fill material</li> </ul>	3/12/2021	3/26/2021 Pending

<sup>43</sup> Petition 1181,  
[https://portal.ct.gov/lib/csc/pending\\_petitions/1\\_petitions\\_1144through1200/pe1181\\_file\\_completefile.pdf](https://portal.ct.gov/lib/csc/pending_petitions/1_petitions_1144through1200/pe1181_file_completefile.pdf)

<sup>44</sup> Petition 1395A, Exhibit F, Wetlands Report.

<b>1398</b>	1.99 MW	<b>Denied without prejudice</b> on basis petition remains incomplete and project appears to have a substantial adverse effect on water quality including, but not limited to, the following: <ul style="list-style-type: none"> <li>Proposed construction does not follow guidance in <i>the 2004 Connecticut Stormwater Quality Manual</i> to maintain an undisturbed vegetative buffer to a wetland</li> <li>Insufficient information pertaining to hydrological effects on wetlands from diversion of overland stormwater flows</li> </ul>	9/28/2020	2/17/2021 Reopened
<b>1425**</b>	1.9 MW	<b>Denied</b> on basis project would have a substantial adverse effect on water quality, including, but not limited to: <ul style="list-style-type: none"> <li>Inadequate buffer areas to wetlands</li> <li>Steep slopes with erodible soils could cause sedimentation and alter wetland ecology</li> </ul>	3/29/2021	N/A

\*Petition 1324 was submitted on August 31, 2017 for the construction, maintenance and operation of a 3 MW solar facility at the Petition 1221 site. It was rendered improperly filed with a recommendation to submit a motion to reopen under CGS §4-181a(b). Petition 1324 was withdrawn on October 4, 2017. A motion to reopen Petition 1221 was submitted on October 31, 2017. The Council denied the motion to reopen Petition 1221 on December 8, 2017.

\*\* Under CGS §4-176, the Council exercised its discretion to hold a public hearing.

Common factors among the similarly situated sites identified as substantial adverse effects on water quality are inadequate buffers to wetlands, steep slopes with erodible soils and hydrological effects from construction activities. These factors directly relate to the soils. Hydrologic soil groups and ratings specific to the similarly situated sites are listed in the chart below.<sup>45</sup>

	<b>Hydrologic Soil Group</b>	<b>Rating</b>
<b>Petition 1221</b>	38C Hinckley loamy sand, 3-15% slopes 61B Canton and Charlton soils, 3-8% slopes, very stony <a href="https://portal.ct.gov/lib/csc/pending_petitions/2_petitions_1201through1300/pe1221_filing.pdf">https://portal.ct.gov/lib/csc/pending_petitions/2_petitions_1201through1300/pe1221_filing.pdf</a>	A B
<b>Petition 1354</b>	47C Woodbridge fine sandy loam, 3-15% slopes, extremely stony 85C Paxton and Montauk fine sandy loams, 8-15% slopes, very stony <a href="https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1354/pe1354_filing_killingworth-1.pdf">https://portal.ct.gov/lib/csc/pending_petitions/3_petition_1301through1400/pe1354/pe1354_filing_killingworth-1.pdf</a>	C C
<b>Petition 1395A</b>	73C Charlton-Chatfield complex, 0-15% slopes, very rocky 73E Charlton-Chatfield complex, 15-45% slopes, very rocky <a href="https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1395/PE1395-Petition.pdf">https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1395/PE1395-Petition.pdf</a>	B B
<b>Petition 1398</b>	86C Paxton and Montauk fine sandy loams, 3-15% slopes, extremely stony 62C Canton and Charlton fine sandy loams, 3-15% slopes, extremely stony <a href="https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1398/filing/Exhibit9_stormwater-and-supporting-documentation.pdf">https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1301-1400/PE1398/filing/Exhibit9_stormwater-and-supporting-documentation.pdf</a>	C C

<sup>45</sup> USDA, NRCS Soil Surveys: <https://www.nrcs.usda.gov/wps/portal/nrcs/surveylist/soils/survey/state/?stateId=CT>; Soil surveys determine the potentials and limitations of soils. Based on estimates of runoff potential, soils are classified into “hydrologic soil groups” according to the rate of water infiltration when the soils are not protected by vegetation, are thoroughly wet, and receive precipitation from long-duration storms.



<b>Petition 1425</b>	78E Holyoke-Rock outcrop complex, 15-45% slopes	D
	78C Holyoke-Rock outcrop complex, 3-15% slopes <a href="https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1421-1430/PE1425/PetitionerSubmissions/Petitionfiling/Exhibit-H---CT619100_Hamden_Drainage-Report_Rev0.pdf">https://portal.ct.gov/-/media/CSC/3_Petitions-medialibrary/Petitions_MediaLibrary/MediaPetitionNos1421-1430/PE1425/PetitionerSubmissions/Petitionfiling/Exhibit-H---CT619100_Hamden_Drainage-Report_Rev0.pdf</a>	D

The Hydrological Soil Group Ratings are classified as follows:

Group A. Soils having a high infiltration rate (low runoff potential) when thoroughly wet. These consist mainly of deep, well drained to excessively drained sands or gravelly sands. These soils have a high rate of water transmission.

Group B. Soils having a moderate infiltration rate when thoroughly wet. These consist chiefly of moderately deep or deep, moderately well drained or well drained soils that have moderately fine texture to moderately coarse texture. These soils have a moderate rate of water transmission.

Group C. Soils having a slow infiltration rate when thoroughly wet. These consist chiefly of soils having a layer that impedes the downward movement of water or soils of moderately fine texture or fine texture. These soils have a slow rate of water transmission.

Group D. Soils having a very slow infiltration rate (high runoff potential) when thoroughly wet. These consist chiefly of clays that have a high shrink-swell potential, soils that have a high water table, soils that have a claypan or clay layer at or near the surface, and soils that are shallow over nearly impervious material. These soils have a very slow rate of water transmission.

Irrespective of denial “with prejudice” or “without prejudice” or just “denied,” the Council’s final decisions on similarly situated solar projects to Petition 1395A are all based on substantial adverse effects on water quality. Petition 1395A was denied based on substantial adverse effects on water quality. WS has not been discriminated against as compared to other developers of solar projects before the Council.

**C. The Final Decision was not clearly erroneous, arbitrary or capricious, and it was based on substantial evidence.**

In its Petition, WS claims the Final Decision is clearly erroneous, arbitrary and capricious, and not based on substantial evidence because the Council did not raise an objection based on water quality or lack of information. It claims the Final Decision not to issue a declaratory ruling does not contain the particular facts on which it is based and the reasons for its conclusion as required by Regulations of Connecticut State Agencies §16-50j-40(d).

The particular facts on which the Council’s Final Decision was based include, but are not limited to, the following:

- ***Given the rocky nature of the site, material may need to be crushed and processed on site.*** The Petitioner will explore these field decisions with their earthwork contractor at the time of site grading once the quality of subsurface material is understood.<sup>46</sup> ***Amendments to plans and the Stormwater Pollution Control Plan may be necessary*** to ensure appropriate measures are taken for this earthwork balance.

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<sup>46</sup> Petition 1395A, WS Response to Council Interrogatory No. 30.

- **10.68 acres of tree clearing** is necessary for the footprint represented in the submission.<sup>47</sup>
- The facility is designed per the requirements outlined by the *2002 Connecticut Guidelines for Soil Erosion and Sedimentation Control*, the **2004 Connecticut Stormwater Quality Manual** and the hydraulic modeling requirements outlined in the draft Appendix I, Stormwater Management at Solar Array Construction Projects in accordance with DEEP's proposed revisions.<sup>48</sup>
- Petitioner has **not had any meetings** with the DEEP Stormwater Division.<sup>49</sup>
- Petitioner submitted an application for a DEEP General Permit on **December 30, 2020**.<sup>50</sup>
- The developed portion of the Vernal Pool Critical Terrestrial Habitat would **increase by 18%**.<sup>51</sup>
- Grading for the stormwater basin will occur **within the 100-foot regulated area**.<sup>52</sup>
- The maximum slope in the solar envelope will be **approximately 12%**.<sup>53</sup>
- Site clearing would occur **23.4 feet from the on-site wetland**.
- Stormwater Basin 1 would be **installed within 100 feet of the wetland**.<sup>54</sup>

The reasons for the Council's conclusion that the proposed project would have substantial adverse environmental effects with regard to water quality are listed in the Final Decision as follows:

1. Insufficient wetland buffers composed of undisturbed vegetation to maintain water quality of onsite 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.

WS claims the Council's conclusion is based on the absence of evidence and is not supported by substantial evidence. It notes the hydraulic monitoring and further information provided in response to Council Interrogatory No. 57 was sufficient to represent the proposed conditions include the removal and processing of on-site ledge. The Updated Grading and Erosion Control Plan, Sheet 4 depicts field verified data from 8 test holes dug throughout the site ensures constructability of the stormwater basins. Further, the response to Council Interrogatory No. 30 indicates the on-site crushing and processing of rock would be determined by the earthwork contractor in the field at the time of site grading and any fill material would be installed to maintain existing drainage characteristics.

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.<sup>55</sup> WS' response to Council Interrogatory No. 57 indicates soil results for every test hole (TH) dug throughout the site except TH-5 are characterized as "with boulders."<sup>56</sup> The soil survey indicates dominant soil types at the site are characterized as very rocky with 0-45% slopes. WS' response to Council Interrogatory No. 30 indicates the on-site crushing and processing of rock would be determined by the earthwork contractor "in the field at the time of site grading and amendments to plans may be necessary to ensure appropriate measures are taken for this

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<sup>47</sup> Petition 1395A, WS Response to Council Interrogatory No. 39.

<sup>48</sup> Petition 1395A, WS Response to Council Interrogatory No. 47.

<sup>49</sup> Petition 1395A, WS Response to Council Interrogatory No. 54, (Set 2).

<sup>50</sup> Petition 1395A, WS Response to Council Interrogatory No. 54; DEEP General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities, **December 31, 2020**, available at [https://portal.ct.gov/-/media/DEEP/Permits\\_and\\_Licenses/Water\\_Discharge\\_General\\_Permits/stormconstgpl.pdf](https://portal.ct.gov/-/media/DEEP/Permits_and_Licenses/Water_Discharge_General_Permits/stormconstgpl.pdf)

<sup>51</sup> Petition 1395A, WS Response to Council Interrogatory No. 42.

<sup>52</sup> Petition 1395A, WS Response to Council Interrogatory No. 49.

<sup>53</sup> Petition 1395A, WS Response to Council Interrogatory No. 56, (Set 2).

<sup>54</sup> Petition 1395A, WS Response to Council Interrogatory No. 49, Grading Plan: Basin #1, Sheet No. 5.

<sup>55</sup> *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 689 (2014).

<sup>56</sup> Petition 1395A, WS Response to Council Interrogatory No. 57, (Set 2). TH-5 was dug within the wetland.

earthwork balance.”<sup>57</sup> In the evaluation of any proposed facility, the Council exercises its discretion as to which conclusions are drawn from facts in the record.<sup>58</sup> ***No other solar facility site reviewed by the Council proposed on-site rock processing.***

WS also claims the evidence does not support the Council’s conclusion of substantial adverse environmental effect. The Petition 1395A Staff Report addresses each factor for the Council’s consideration in evaluating “substantial adverse environmental effect” under CGS §16-50p and the Decision concludes “the proposed project would have substantial adverse environmental effects, particularly with regard to water quality.” WS notes the *2004 Connecticut Stormwater Quality Manual* is a guidance document. The *2015 US Army Corps of Engineers Best Management Practices for Vernal Pools* is also a guidance document. The Petition 1395A Environmental Site Assessment indicates “groundwater can be considered an environmentally sensitive area and a potential receptor. The groundwater at the site is classified GA. The state’s goal is to maintain the drinking water quality of class GA.”<sup>59</sup> In the evaluation of any proposed facility, the Council exercises its discretion in making site-specific determinations as to the applicability of any guidelines. Wetlands of high function and value are hydrologically vulnerable to changes in water supply.

### III. CONCLUSION

Petition 1395A was submitted to the Council on June 23, 2020. The City attained party status in the proceeding on November 20, 2020. Pursuant to CGS §4-176, neither WS nor the City nor the Council requested a public hearing be held on Petition 1395A within the statutory 60-day agency action deadline, as extended by state emergency orders. The Council issued two sets of interrogatories to WS and the City issued one set of interrogatories to WS. WS timely responded to all of the interrogatories. WS’ Petition mentions that if the Council had additional questions, it should have asked. If the Petition is granted, the Council and the City may ask additional questions in accordance with a schedule developed by the Council that is consistent with the provisions of CGS §4-181a(a).

Therefore, staff recommends WS’ Petition be granted to conduct additional proceedings, ***specifically limited to maintenance of on-site water quality as it relates to implementation of wetland buffers and on-site processing of fill material***, and a decision to modify, affirm or reverse the Final Decision be rendered ***within 90 days***, consistent with the provisions of CGS §4-181a(a).

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<sup>57</sup> Petition 1395A, WS Response to Council Interrogatory No. 30.

<sup>58</sup> *Concerned Citizens of Sterling v. Conn. Siting Council*, 215 Conn. 474 (1990); *Connecticut Natural Gas Corp. v. Public Utilities Control Authority*, 183 Conn. 128 (1981).

<sup>59</sup> Petition 1395A, Exhibit E, Phase I and II Environmental Site Assessment, page 24.