PULLMAN &COMLEY LLC
ATTORNEYS

Lee D. Hoffman
90 State House Square
Hartford, CT 06103-3702
p 860 424 4315
f 860 424 4370
lhoffman@pullcom.com
www.pullcom.com

September 14, 2017

VIA U.S. MAIL AND ELECTRONIC MAIL
Melanie Bachman
Acting Executive Director
Connecticut Siting Council
10 Franklin Square
New Britain, CT 06051

Re: Petition 1313 – Petition of DWW Solar II, LLC for a Declaratory Ruling that no Certificate of Environmental Compatibility and Public Need is Required for a 26.4 Megawatt AC Solar Photovoltaic Electric Generating Facility in Simsbury, Connecticut

Dear Ms. Bachman:

I am writing on behalf of my client, DWW Solar II, LLC, ("DWW") in connection with the above-referenced Petition. Enclosed is an original and fifteen (15) copies of DWW Solar II, LLC's Objection to the Department of Agriculture's August 23, 2017 Motion to Deny Declaratory Ruling. I have also enclosed one extra copy to be date stamped and returned to me.

If you have any questions concerning this submittal, please contact me at your convenience. I certify that copies of this submittal have been provided to all parties on the Petition's service list.

Sincerely,

Lee D. Hoffman

Enclosures

cc: Service List for Petition 1313

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

DWW SOLAR, II, LLC PETITION FOR DECLARATORY RULING THAT NO CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED IS REQUIRED FOR A 26.4 MEGAWATT AC SOLAR PHOTOVOLTAIC ELECTRIC GENERATING FACILITY IN SIMSBURY CONNECTICUT	)	PETITION NO. 1313
	)	SEPTEMBER 14, 2017

DWW SOLAR II, LLC'S OBJECTION TO MOTION TO DENY DECLARATORY RULING

The petitioner, DWW Solar II, LLC ("DWW"), respectfully submits this Objection to the Motion to Deny Declaratory Ruling ("Motion") filed by the State of Connecticut Department of Agriculture ("DOA") on August 23, 2017.[1] In support of its objection, DWW states as follows:

1. DWW filed the instant Petition with the Siting Council on June 29, 2017 (the "Petition"). In accordance with the provisions of Conn. Gen. Stat. § 16-50k(a) and Conn. Gen. Stat. § 4-176(a), the Petition seeks a declaratory ruling from the Siting Council as articulated by the statute.

[1] DWW notes that other parties in this proceeding, including the abutter parties and the Town of Simsbury, have filed motions that also seek to Deny DWW's Petition. These motions cite the DOA's Motion with approval, and do not advance legal theories or facts beyond those that were articulated by DOA. Accordingly, DWW notes that it objects to all motions that seek to deny its Petition for the reasons set forth in this Objection and accompanying Memorandum of Law. However, for the sake of convenience, it will only file one Objection, which should be viewed as objecting to all such motions.

2. The Petition presents evidence to demonstrate that the construction, operation and maintenance of the proposed Project satisfies the criteria of Conn. Gen. Stat. § 16-50k(a) and will not have a substantial adverse environmental effect.

3. Public Act 17-218 ("PA 17-218") was enacted by the Connecticut Legislature in the 2017 Connecticut legislative session. It contains provisions which modify Conn. Gen. Stat. § 16-50k(a), however, the language implementing PA 17-218 specifically states that its provisions are effective on July 1, 2017.

4. PA 17-218 therefore does not apply to the Petition because the Petition was filed on June 29, 2017, before PA 17-218 was effective.

5. DOA's Motion states that the provisions of PA 17-218 which modify Conn. Gen. Stat. § 16-50k(a) must be utilized by the Siting Council in this matter regardless of the fact that DWW filed its Petition prior to the effective date of the Public Act. DOA makes two points in supports of this position:

a) That the statute operates prospectively on decisions made by the Siting Council and thus the amended provisions must be utilized; and

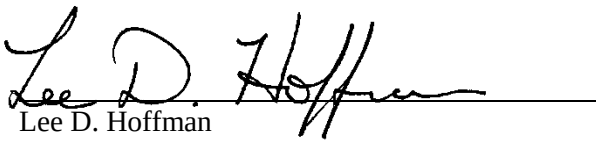
b) That the retroactive application of the amended statute is appropriate because the statute is procedural in nature.

6. As is set forth in greater detail in the accompanying Memorandum of Law, PA 17-218 should not be applied to DWW's Petition, given the well-established law that applications similar to DWW's Petition are decided based on the requirements in place at the time of filing of a petition, not at the time of decision.

7. Moreover, PA 17-218 requires that the Siting Council consider entirely new areas of inquiry when making its decisions. The law is therefore substantive, not procedural, and should therefore not be applied to DWW's Petition.

WHEREFORE, for the foregoing reasons, and as articulated more fully in the accompanying Memorandum of Law, DWW objects to the DOA's Motion to Deny Declaratory Ruling and respectfully requests that the Siting Council deny DOA's Motion.

Respectfully Submitted,
DWW Solar II, LLC

By: 

Lee D. Hoffman
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702
Juris No. 409177
860-424-4300 (p)
860-424-4370 (f)
lhoffman@pullcom.com
Its Attorney

CERTIFICATION

I hereby certify that on September 14, 2017, the foregoing was delivered by electronic mail and regular mail, postage prepaid, in accordance with § 16-50j-12 of the Regulations of Connecticut State Agencies, to all parties and intervenors of record, as follows:

Jesse A. Langer
Robert M. DeCrescenzo
Updike, Kelly & Spellacy, P.C.
One Century Tower
265 Church Street
New Haven, CT 06510
Counsel for the Town of Simsbury

Kirsten S.P. Rigney
CT Dept. of Energy and Environmental Protection
Bureau of Energy and Technology Policy
10 Franklin Square
New Britain, CT 06051
Counsel for the CT DEEP

Krista Trousdale
Connecticut Office of the Attorney General
PO Box 120
Hartford, CT 06141-0120
Counsel for the CT Dept. of Agriculture

Jason Bowsza
Connecticut Department of Agriculture
450 Columbus Blvd.
Hartford, CT 06103

Alan M. Kosloff
Alter & Pearson, LLC
701 Hebron Avenue
P.O. Box 1530
Glastonbury, CT 06033

Lee D. Hoffman
Commissioner of the Superior Court

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

DWW SOLAR, II, LLC PETITION FOR DECLARATORY RULING THAT NO CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED IS REQUIRED FOR A 26.4 MEGAWATT AC SOLAR PHOTOVOLTAIC ELECTRIC GENERATING FACILITY IN SIMSBURY CONNECTICUT	)	PETITION NO. 1313
	)	SEPTEMBER 14, 2017

DWW SOLAR II, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS OBJECTION TO MOTION TO DENY DECLARATORY RULING

Introduction

In its Motion to Deny Declaratory Ruling, the Department of Agriculture ("DOA") has provided virtually no legal authority for the proposition that Public Act 17-218 should be applied retroactively to DWW Solar II, LLC's ("DWW") Petition. On page 4 of its Memorandum, DOA baldly states that "the law that applies to this project is the law in effect at the time of the decision – rather than the law in effect at the time of the filing of the petition" based on "the case law and statues that govern what law applies to municipal zoning and wetlands applications," but cites no case law or statute to support this proposition. Moreover, the relevant legal precedent that the DOA does cite stands for the proposition, as the DOA correctly notes, that "the current rule is that a zoning application or a wetlands application is governed by the zoning or wetlands regulations *in effect on the date of the application." Id.*, emphasis added. To the extent that the DOA cites any relevant law on this issue, such law goes against the very argument that the DOA is trying to propose.

The DOA's other main argument in support of its Motion is that the changes in PA 17-218 are procedural in nature rather than substantive, therefore, the provisions of PA 17-218 should apply retroactively to the current Petition. It is admittedly difficult to follow the tortured logic of the DOA with respect to this argument, since the DOA's Motion appears to argue that DOA's involvement in this proceeding will not be substantive. DOA cannot have it both ways. If its involvement in a proceeding is to be substantive and have meaning, retroactive application of PA 17-218 is not permissible. If DOA's involvement is merely procedural, then it has no reason to file testimony in this Petition or any other matter before the Siting Council.

The clear choice between these two alternatives is that DOA's involvement is substantive, as are the new requirements now imposed on project developers by PA 17-218. PA 17-218 provides the DOA with the unilateral right to preclude certain projects from filing a petition for declaratory ruling with the Siting Council, which is, in and of itself, a substantive right. Moreover, for projects that are denied the petition for declaratory ruling path for approval, Pa 17-218 requires not only completing a full certificate proceeding (which requires the Council to consider several additional factors not found in petition proceedings), PA 17-218 *specifically mandates* a new requirement to be considered during certificate proceedings – the impact and effects of a project on agriculture.

The need to obtain approval of the DOA prior to filing certain petitions, and the review of agricultural impacts during certificate proceedings is the very essence of the imposition of new obligations on a petitioner. However, the retroactive imposition of "any new obligations" on any entity as a result of a change in law is specifically prohibited by Conn. Gen. Stat. § 55-3. Thus, PA 17-218 does provide for new and substantive rights for DOA and impacts on parties before the Siting Council. However, given the date of DWW's filing of its Petition and the date by

which PA 17-218 was to take effect, those requirements of PA 17-218 do not apply to this Petition.

DOA's Motion ignores this statutory requirement and provides an artificial construction that circumvents established law regarding the prospective application of legislation. It is a well-established general principle in Connecticut that statutes are prospective unless the plain language of the statute holds otherwise. This principal is codified in Conn. Gen. Stat. § 55-3 which provides that "No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

While the language of the statute is sufficiently clear, the Connecticut courts have consistently held that the presumption should be to give legislation prospective, rather than retroactive effect. For example, in *Flanagan v. Blumenthal*, 100 Conn. App. 255, 259-60, 917 A. 2d 1047, 1050 (2007), the court utilized "well established rules of statutory construction" that no statute that imposes "any new obligation on any person or corporation shall be construed to have retrospective effect." Moreover, the *Flanagan* court noted that "a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application. *Id. See also, A. Gallo and Co. v. McCarthy*, 51 Conn. Supp. 425, 2 A.3d 56, *rev'd* 309 Conn. 810, 73 A.3d 693 (2010) (presumption that statues apply prospectively is only rebutted when legislature clearly and unequivocally expresses its intent that the legislation shall apply retrospectively) and *Anderson v. Schieffer*, 35 Conn. App. 31, 645 A.2d 549 (1994) (section 55-3 is a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only).

Taking this analysis to the issue before us, if DOA's Motion were to be granted, the result would be that DWW would have to meet new obligations, that it did not have at the time it filed its petition. These obligations include obtaining a letter from DOA approving the project in advance, or being forced to file a full certificate proceeding. These are new obligations, imposed after filing, and such changes are expressly prohibited by the plain reading of section 55-3 and the relevant case law. It may be that the Siting Council needs to go no further in its analysis than the clear language of section 55-3. The requirements of PA 17-218 are explicitly effective July 1, 2017, and there is no language in PA 17-218 which even remotely suggest it should be given retroactive effect. As such, DOA's Motion should be denied based on the plain language of PA 17-218 itself, particularly in light of the requirements of section 55-3 and relevant case law.

That analysis should end the issue, however, DOA has sought to cloud the issue by bringing up two arguments, neither of which are availing. The first argument relates to the application of zoning law to the current situation. The second argument alleges that the provisions of PA 17-218 are procedural; therefore, those provisions may be given retroactive effect. As is discussed in greater detail below, neither of these arguments possesses merit, and DOA's Motion should therefore be denied.

DOA's Motion Misapplies the Standards for Zoning Applications

DOA's conclusions regarding the application of zoning law to the issue currently before the Siting Council is incorrect, however, a review of these provisions may nonetheless prove illuminating, given the similarities to the functions performed by the Siting Council and local zoning boards. As DOA itself notes "The current rule is that a zoning application or a wetlands application is governed by the zoning or wetlands regulation in effect on the date of the

application." Motion, p. 4. DWW agrees with DOA that the provisions of Conn. Gen. Stat. § 8-2h (zoning) and Conn. Gen. Stat. § 22a-42e (wetlands) codify this rule.

The Siting Council has exclusive jurisdiction, by statute, over the siting of electrical generating facilities such as the ones that are the subject of the Petition. This jurisdiction is, in effect, the same as that traditionally held by municipal zoning and wetlands agencies. It is therefore appropriate that the Siting Council adhere to the provisions of sections 8-2h and 22a-42e and use requirements that are in effect on the date that the Petition was filed, rather than the requirements that went into effect after the Petition's filing.

This position is further mandated by close examination of Conn. Gen. Stat. § 8-2h which states in relevant part:

> "(a) An application filed with a zoning commission, planning and zoning commission, zoning board of appeals or agency exercising zoning authority of a town, city or borough which is in conformance with the applicable zoning regulations as of the time of filing shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change in the zoning regulations or the boundaries of zoning districts of such town, city or borough taking effect after the filing of such application." (emphasis added)

Conn. Gen. Stat. § 16-50x provides the Siting Council with "exclusive jurisdiction over the location and type of facilities" such as are the subject of the Petition. The Siting Council thus is the agency, by statute, which exercises zoning authority of a town, city or borough. The provisions of Conn. Gen. Stat. § 8-2h thus should be followed, and the provisions of PA 17-218 should not be given effect, except for filings made after July 1, 2017. The requirements that were in effect as of the filing of the Petition are what controls for this Petition. PA 17-218 does not apply to DWW's Petition.

The Requirements of PA 17-218 Are Substantive in Nature, Therefore, Retroactive Application of the Statute is Unwarranted

DOA's second argument regarding the procedural vs. substantive nature of PA 17-218 stands Connecticut jurisprudence on its ear. It is black-letter law that a statute is not to be applied retroactively, unless the statute specifically calls for such retroactive application. This standard is further codified by the strictures of Conn. Gen. Stat. § 55-3 cited above. DOA's argument that the provisions of PA 17-218 are procedural and not substantive in nature is not supported by application of the facts to the body of case law which considers the question of substance vs. procedure.

While Conn. Gen. Stat. § 55-3 bars retroactive application of new statutes which impose new obligations or affect substantive rights, it does not bar those which are clearly procedural only. There is a presumption against statutory retroactive application that must be overcome in order to circumvent Conn. Gen. Stat. § 55-3, however. The Connecticut Supreme Court has held that Conn. Gen. Stat. § 55–3 is "a rule of presumed legislative intent that statutes affecting substantive rights shall apply prospectively only.... The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation." (Internal quotation marks omitted.) *Investment Associates v. Summit Associates, Inc.*, 309 Conn. 840, 867–68, 74 A.3d 1192 (2013).

The Court further articulated and fleshed out this principle in *Shannon v. Comm'r of Hous*., 322 Conn. 191, (2016):

> "[t]he presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id*.; accord *D'Eramo v. Smith, supra*, 273 Conn. at 620 n. 8, 872 A.2d 408 ("the presumption against retroactivity is rooted in common-law notions of fairness that

> have general application," including that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly" and that "settled expectations should not be lightly disrupted" [internal quotation marks omitted]); *Miano v. Thorne*, 218 Conn. 170, 176, 588 A.2d 189 (1991) ("[t]he rule is one of obvious justice and prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed" [internal quotation marks omitted]). The court observed that "[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Landgraf v. USI Film Products, supra*, 511 U.S. at 271, 114 S.Ct. 1483. Put differently, under *Landgraf*, a law has retroactive effect when it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id., at 280, 114 S.Ct. 1483; accord *Rudewicz v. Gagne*, 22 Conn. App. 285, 290–91, 582 A.2d 463 (1990) (applying § 55–3 and concluding that "[w]e cannot now declare that the defendants' property rights were invalidated by a statute [governing discontinuance of public highways, which] was passed nearly fifty years after those rights had vested"). Finally, the "*Landgraf* analysis applies equally to administrative rules." *Durable Mfg. Co. v. United States Dept. of Labor, supra*, 578 F.3d at 503 n. 9; see also *Bruh v. Bessemer Venture Partners III L.P.*, 464 F.3d 202, 213 (2d Cir.2006), *cert. denied*, 549 U.S. 1209, 127 S.Ct. 1334, 167 L.Ed.2d 81 (2007).

Shannon v. Comm'r of Hous., 322 Conn. 191, 205–06 (2016)

The determination of substantive versus procedural effects of new legislation is fact-driven and based on certain guiding principles. *Investment Associates v. Summit Associates, Inc*. 309 Conn. 840, 868 (2013) provides a good summary of the general standards to be utilized when undertaking this analysis:

> "While there is no precise definition of either [substantive or procedural law], it is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." (Citations omitted; footnote omitted; internal quotation marks omitted.) *D'Eramo v. Smith, supra*, at 620–21, 872 A.2d 408. "Procedural statutes ... therefore leave the preexisting scheme intact." (Internal quotation marks omitted.) *Id*., at 621, 872 A.2d 408. "[A]lthough we have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary ... a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application." (Internal quotation marks omitted.) Id.

For purposes of this analysis, we must consider the changes being wrought by the passage of PA 17-218 which impacts, among other provisions, the declaratory ruling process for the Siting Council articulated in Conn. Gen. Stat. § 16-50k. Prior to the passage of PA17-218, approval for certain projects through a declaratory ruling process was permissible under Conn. Gen. Stat. § 16-50k "as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection." For months, DWW worked on its Petition and developed a substantial document, based on meeting these requirements.

PA 17-218 raised the bar by mandating the following additional prerequisites that projects must satisfy to utilize the declaratory ruling process under section 16-50k. projects were now to be approved 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, and (iii) for a solar photovoltaic facility with a capacity of two or more megawatts, to be located on prime farmland or forestland, excluding any such facility that was selected by the Department of Energy and Environmental Protection in any solicitation issued prior to July 1, 2017, pursuant to section 16a-3f, 16a-3g or 16a-3j, the Department of Agriculture represents, in writing, to the council that such project will not materially affect the status of such land as prime farmland or the Department of Energy and Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest.

Conn. Gen. Stat. § 16-50k(a), as amended by Public Act 17-218 effective July 1, 2017

This is, on its face, not a procedural change or clarification but rather is a detailed and substantive change. There was no suggestion or consideration of these additional standards previously under the statute. The approval of a declaratory ruling is now subject to three potential bars for petitioners whereas it was previously subject to one. It is the obligation of any petitioner, after July 1, 2017, to satisfy these additional standards when filing a petition.

With PA 17-218, the Siting Council is given wholly new factors to evaluate before issuing a required declaratory ruling. Applicants who historically satisfied the existing requirement of meeting the air and water quality standards were entitled to a declaratory ruling under the statute. Under PA 17-218, if applied retroactively, the very same applicants now must also satisfy the requirement of no "substantial adverse environmental effect" and, for some projects, satisfy yet another requirement regarding "prime farmland" or "core forest."

The DOA may attempt to argue that prospective projects that cannot meet the above criteria for petitions may still utilize a certificate proceeding to achieve approval. While this is true, the certificate proceeding involves preparation and consideration of additional information not previously required under the former version of section 16-50k. Moreover, PA 17-218 amended what the Siting Council will consider when approving certificates by adding that the Siting Council must consider the agricultural effects of a project. These requirements have a material substantive effect on the rights of DWW and other petitioners. As such, they are anything but procedural in nature and must therefore not be given retroactive application.

The Connecticut Supreme Court analysis in *D'Eramo v. Smith*, 273 Conn. 610 (2005), that a similar legislative change was substantive and thus was not subject to retroactive application, may be instructive. The court in *D'Eramo* analyzed a change to Conn. Gen. Stat. § 4-160(b), where a change to the statute made it easier for individuals to sue the state for medical malpractice claims. The Court held that "Where a statute creates a right to bring an action against the state that did not exist at common law, and places limitations on the right, any such limitations are substantive and not merely remedial or procedural." *D'Eramo v. Smith,* 273 Conn. 610, 623 (2005). "It follows, therefore, that the amendment of a statutory limitation on a right to sue the state constitutes a substantive change to the statute." *Id.* The *D'Eramo* Court

went on to state that absent legislative history to the contrary, such changes in law would be "presumptively prospective." *Id.*

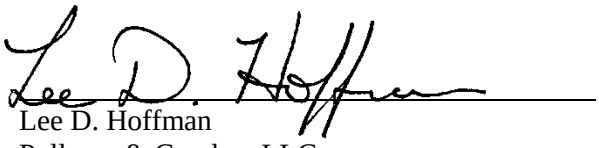
In this Petition, DWW admittedly does not have a right to bring an action against the state, but it did, until July 1, 2017, have the right to bring a petition for a declaratory ruling under the prior provisions of section 16-50k. Using the logic of the holding in *D'Eramo*, it would therefore follow that any amendment to DWW's statutory rights to bring a petition would constitute a substantive change to the statute. Such a change would be presumptively prospective under Connecticut law, and PA 17-218 would therefore not apply to DWW's Petition.

Conclusion

DOA's Motion fails on two independent grounds. First, DOA has failed to consider the fact that the requirements for zoning and siting applications are those that are in effect as of the date of filing, not the date of decision. Even if the Siting Council were to find that it is not a body that decides such zoning matters, PA 17-218 cannot be granted the retroactive application DOA desires since it substantively impacts DWW's rights and establishes significant new requirements both for petition and certificate proceedings. Since PA 17-218 contains no language indicating a retroactive intent, Connecticut law holds it to be presumptively prospective in nature and DWW's Petition should proceed using the requirements that were in effect at the

time it filed its Petition. For these reasons, DWW respectfully submits that the retroactive application of PA 17-128 in the instant matter is improper and DOA's Motion should be denied.

Respectfully Submitted,
DWW Solar II, LLC

By: 

Lee D. Hoffman
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103-3702
Juris No. 409177
860-424-4300 (p)
860-424-4370 (f)
lhoffman@pullcom.com
Its Attorney

CERTIFICATION

I hereby certify that on September 14, 2017, the foregoing was delivered by electronic mail and regular mail, postage prepaid, in accordance with § 16-50j-12 of the Regulations of Connecticut State Agencies, to all parties and intervenors of record, as follows:

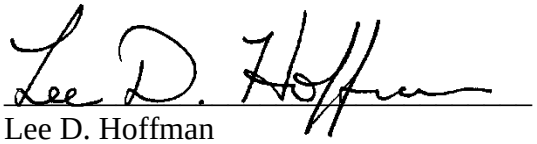
Jesse A. Langer
Robert M. DeCrescenzo
Updike, Kelly & Spellacy, P.C.
One Century Tower
265 Church Street
New Haven, CT 06510
Counsel for the Town of Simsbury

Kirsten S.P. Rigney
CT Dept. of Energy and Environmental Protection
Bureau of Energy and Technology Policy
10 Franklin Square
New Britain, CT 06051
Counsel for the CT DEEP

Krista Trousdale
Connecticut Office of the Attorney General
PO Box 120
Hartford, CT 06141-0120
Counsel for the CT Dept. of Agriculture

Jason Bowsza
Connecticut Department of Agriculture
450 Columbus Blvd.
Hartford, CT 06103

Alan M. Kosloff
Alter & Pearson, LLC
701 Hebron Avenue
P.O. Box 1530
Glastonbury, CT 06033



Lee D. Hoffman
Commissioner of the Superior Court