

**STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL**

DWW SOLAR II, LLC PETITION FOR)	PETITION NO. 1313
DECLARATORY RULING THAT NO)	
CERTIFICATE OF ENVIRONMENTAL)	
COMPATIBILITY AND PUBLIC NEED)	
IS REQUIRED FOR A 26.4 MEGAWATT)	
AC SOLAR PHOTOVOLTAIC ELECTRIC)	November 1, 2017
GENERATING FACILITY IN SIMSBURY)	
CONNECTICUT)	

TOWN OF SIMSBURY'S PROPOSED FINDINGS OF FACT

In accordance with § 16-50j-31 of the Regulations of Connecticut State Agencies, the Town of Simsbury ("Town") respectfully submits the following proposed Findings of Fact in connection with the above captioned proceeding.

THE PROJECT

1. On June 29, 2017, the Connecticut Siting Council ("Council") received from DWW Solar II, LLC ("DWW") a 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"). (*II.B.1.*)¹

2. The Petition seeks the approval of a 26.4 megawatt ("MW") AC electric generating facility in the Town ("Facility"). (*Id.*, pp. 8-9)

3. The Facility is proposed on five separate parcels of land totaling approximately 289 acres off of Hopmeadow Street, Hoskins Road and County Road in the Town ("Project Site"). The Project Site consists of agricultural fields, woodland and wetland areas. (*Id.*, p. 8.)

4. The Project Site is a classic New England rural landscape, with scattered residential development; intermixed with historic homesteads, woods and agricultural lands and narrow roads. The area has largely retained its rural agricultural feel from 1934. Since 1934, some of the farmland has been converted from pasture, cultivated soils and/or wood lands to residential uses, along with a few municipal functions (i.e., school, athletic fields, playgrounds and firehouse) as the community developed in the years following World War II. (*IV.B.5, A4-1; II.B.1, p. 8.*)

5. The various parcels are well suited for agriculture and are still cleared agricultural fields with a history of use for tobacco cultivation. (*II.B.1, Ex. N, p. 14.*)

¹ All Exhibit references are based on the November 2, 2017 Hearing Program.

6. The Project Site, particularly Parcel 5, which is located south of Hoskins Road, was used historically for tobacco cultivation and other various crops, including rye, corn, potatoes and orchard fruit. (*Id.*, pp. 19-20, 22-23.)

7. Approximately 213 acres of the 289 acre Project Site constitute prime or important farmland soils. (*II.B.1, Ex. H; III.B.3, A12-14, 22-31; III.B.4, Nos. 15, 19; Tr., p. 543.*)

8. Approximately thirty-seven to forty-three acres of prime and important farmland soils would be directly disturbed by the proposed Facility. (*III.B.4, No. 19.*)

9. The Project Site is owned by a developer who is a passive participant in the agricultural use of the parcels making up the Project Site by leasing the land to others. (*Tr., p. 573.*)

10. The groundwater located beneath a majority of the Project Site is classified as GA. A GA classification means existing or potential public or private supply of water which is suitable for drinking without treatment. (*II.B.1, Ex. O, p. 5; Tr., p. 631.*)

11. The precipitation at the Project Site is expected to infiltrate permeable ground surfaces or run off to nearby streams and ponds. (*II.B.1, Ex. O, p. 13; Tr., p. 631.*)

12. The potable water wells associated with residential properties located down gradient from the Project Site were tested in the past and found to contain the pesticides Vorlex and/or ethylene dibromide (“EDB”). Vorlex and EDB were used for tobacco cultivation in Connecticut and specifically at the parcels making up the Project Site. (*IV.B.7.*)

13. A nearby property to the north of the Project Site, along both Hoskins and County Roads, commonly referred to as Meadowood, was also used by a prior owner of the Project Site for tobacco cultivation. Past environmental testing revealed the presence of several chemicals, including cyanide, and the presence of EDB in the groundwater on site, which had contaminated several residential potable water wells nearby the Meadowood property. (*III.B.2, Ex. C, Attach. B; III.B.7.*)

14. Public Act 17-208 amended General Statutes § 16-50k(a) so that a petitioner seeking the approval of a solar photovoltaic facility with a capacity of two or more megawatts “to be located on prime farmland . . .” must do the following in addition to demonstrating that the proposed facility meets DEEP’s air and water quality standards and obtaining a finding from the Council that the facility does not have a substantial adverse environmental effect: obtain a written representation from the Department of Agriculture (“DOA”) that the proposed facility “will not materially affect the status of such land as prime farmland . . .” The effective date of Public Act 17-208, pertaining to the amendment to § 16-50k(a), was July 1, 2017. (*Public Act 17-218, § 3.*)

15. The DOA has not issued a written representation that the proposed Facility will not materially affect prime farmland due to the DOA’s opinion that there will be a material impact on the prime farmland subject to the Petition. (*III.B.2.*)

16. The proposed Facility would require the excavation of at least 10,000 holes between twelve and fourteen feet deep for the piles or piers necessary to support the solar panels for the Facility. (*II.B.11, No. 3; Tr., pp. 659-60.*)

17. The DOA determined that 10,000 holes is too conservative based on the configuration (array per foot) provided to the DOA by DWW. (*III.B.3, No. 35; Tr., p. 441.*)

18. The proposed Facility would require the disturbance of approximately 58,700 cubic yards ("CY") of soil, with a net of 37,200 CY to be removed from the Project Site. (*II.B.2, No. 56; Tr., p. 661.*)

19. The excavation and grading contemplated by DWW constitutes a significant soil disturbance. (*Tr., p. 661.*)

20. The Facility would be the largest development in the history of Simsbury. (*Tr., p. 536.*)

21. DWW has committed to testing the potable water wells of all residential properties abutting the Project Site. (*Tr., p. 730.*)

LOCAL REGULATION OF PROJECT SITE AREA

22. The five parcels are designated as either I-1 (industrial use) or R-40 (residential use) Zones under the Simsbury Zoning Regulations ("Regulations"). Simsbury Zoning Regs., Art. 2 §§ A and B; Simsbury Zoning Map. (*IV.B.3.*)

23. The portion of the Project Site south of Hoskins Road is zoned for residential use. A portion of approximately seventy acres north of Hoskins Road is zoned for industrial use, such as light industrial and commercial office space. The northern portion of the Project Site is zoned for residential use. (*IV.B.3; II.B.1, p. 8; Tr., pp. 527-28.*)

24. There is no specific zoning classification for agriculture in the Regulations; rather, the Regulations allow for agricultural land use in zones such as residential and industrial zones. (*Tr., p. 543.*)

25. The Facility is not permitted "as of right" under the Regulations. Simsbury Zoning Regs., Art. 7 §§ B and I. As a general matter, the Facility is not permitted by Special Exception in either an I-1 or R-40 Zone. Simsbury Zoning Regs., Art. 7 §§ C and I. (*IV.B.3.*)

26. DWW could seek an amendment to the Regulations under Article 13 to allow solar facilities, most likely by Special Exception. (*Id.*)

27. Article 7, Section A of the Regulations provides in relevant part: "The following uses are declared to possess such special characteristics that each must be considered as an individual case. They may be permitted as a special exception in any zone after a public hearing, subject to conditions and modifications as determined by the Commission. In evaluating the uses, the Commission shall apply the standards set forth in Section C of this article. The Commission shall require the approval of a Site Plan prepared in accordance with Article Five, Section J. . . . 3.

Public Utility installations needed for the public convenience and necessity.” Simsbury Zoning Regs., Art. 7 § A(3).

28. The Regulations do not define “Public Utility.” (*Id.*)

29. The Special Exception standards include: (a) The need for the proposed use in the proposed location; (b) The existing and future character of the neighborhood in which the use is to be located; (c) The location of main and accessory buildings in relation to one another; (d) The height and bulk of buildings in relation to other structures in the vicinity; (e) Traffic circulation within the site, amount, location, and access to parking, traffic load or possible circulation problems on existing streets; (f) Availability of water to the site and adequate disposal of sewage and storm water; (g) Location and type of display signs and lighting, loading toner and landscaping; (h) Safeguards to protect adjacent property and the neighborhood its general from detriment. Simsbury Zoning Regs., Art. 7, § C, ¶ 10. (*Id.*)

30. The Town developed the Design Review Guidelines referenced in the Regulations and incorporated them into the Town’s regulatory process. The Town’s Design Review Board (“DRB”) was created in 1988 at the request of the Zoning and Planning Commissions. In 2011, the Town began to develop design guidelines for the Community, which culminated in the “Guidelines for Community Design” October 15, 2012 - Design Review Board - Town of Simsbury. This document is specifically referenced in the Regulations. The DRB reviews all applications associated with non-residential development and multi-family development before the Town’s Zoning Commission. (*IV.B.5, Nos. A5-1 and A5-2.*)

31. The Regulations and Subdivision Regulations, along with the Guidelines, make specific references to minimizing visual impact. The Town’s land use regulations specify techniques to minimize visual impact. Article 10 of the Regulations requires screening measures in the form of landscaping in I-1 Zones abutting residential zones. The Regulations also discuss a development’s context and character and whether a project has been designed with the appropriate context and character. Page 10 of the Guidelines recommends that projects separate incompatible uses with large open space or natural buffers. Under site and landscape standards (page 12), the Guidelines recommend that parking be screened from street view (i.e. landscaping, berms, fencing, etc.). The Landscaping and Street Tree Plan (pages 16-17) Section under General Standards develops recommendations for varying landscape material with projects scale (height and distances). (*Simsbury Zoning Regs., Art.10; IV.B.5, No. A5-2; Tr., p. 559.*)

32. Subdivision Regulations also allow the Town’s Planning Commission to require the developer to set aside up to 20 percent for open space. (*Tr., p. 530.*)

33. The Town’s 2007 Plan of Conservation and Development (“2007 POCD”) highlights the Town’s cultural and historical heritage. The various tobacco fields and barns on Hoskins Road are listed under Character Places —Simsbury Treasures Aesthetic Places #30 on page 46 the 47 of the 2007 POCD, on the map titled “Character Places Simsbury’s Treasures.” (*II.A.1; IV.B.5, No. A5-2.*)

34. The Town’s 2017 Plan of Conservation and Development, effective November 1, 2017, continues the Town’s commitment to preserving and enhancing the Town’s cultural and historical heritage. (*II.A.2.*)

35. The Town has development standards associated with all types of development along all of its roads that attempt to achieve a balance between growth and legacy. These standards are informed by the 2007 POCD, including page 86, entitled "How We Want To Grow - Special Areas," which emphasizes the importance of the historic development patterns in the Hoskins Road area, and refers to existing residential uses and zoning along Hoskins Road. As an example, the construction of Iron Horse Boulevard in the center of the Town, which is located along the easterly edge of the Town's downtown, was designed and constructed in a manner to preserve the nature/aesthetics of the community's downtown and/or the surrounding Simsbury Meadows' property that was purchased by the Town between downtown and the Farmington River. (*IV.B.5, No. A7.*)

36. The Town passed the ordinance establishing the Town's Historic District Commission in December 1987, and that Commission's rules and procedures were adopted by the Town in July 1988. (*IV.B.9, No. 37.*)

37. Approximately 35 percent of land in the Town is not taxable because it is designated open space. *Tr., p. 548.*)

DWW'S ENVIRONMENTAL ASSESSMENT OF THE PROJECT SITE

Environmental Assessment

38. GZA GeoEnvironmental, Inc. ("GZA") was retained to perform a Phase I Environmental Site Assessment ("Phase I") of the Project Site, dated March 29, 2016. (*II.B.1, Ex. O.*)

39. GZA performed the Phase I under the American Society for Testing and Materials Standard Practice E1527-13 ("ASTM E1527-13"). (*II.B.1, Ex. O; Tr., p. 641.*)

40. GZA rendered an opinion as to whether surficial or historical evidence indicates the presence of recognized environmental conditions ("RECs"), which could result in the presence of hazardous material in the environment. (*II.B.1, Ex. O; IV.B.2, Ex. C, Attach. B; Tr., p. 641.*)

41. It is the industry standard in Connecticut for a Licensed Environmental Professional ("LEP") to perform a Phase I under the Department of Energy and Environmental Protection's ("DEEP") Site Characterization Guidance Document ("SCGD"). The SCGD requires the LEP to identify Areas of Concern ("AOC"), which include "[l]ocations or areas at a site where hazardous waste and/or hazardous substances (including petroleum products) have been or may have been used, stored, treated, handled, disposed, spilled, and/or released to the environment." (*IV.B.2, Ex. C, Attach. B.*)

42. An AOC is distinctly different from a REC, as an AOC includes the potential of a release of hazardous materials, not just evidence of an actual release or material threat of a release. (*IV.B.2, Ex. C, Attach. B.*)

The Phase I Revealed Significant Data Gaps and Incomplete Data

43. The Phase I acknowledged that the property owner of the parcels making up the Project Site provided little to no information concerning the historical and current operations of the Project Site for tobacco cultivation or otherwise. (*II.B.1, Ex. O, p. 14; Tr., pp. 490, 503.*)

44. The Phase I acknowledged that the hazardous waste manifests related to the Project Site for 2009-11 were not made available for review. (*II.B.1, Ex. O, p. 24; Tr., p. 649.*)

45. The Phase I identified a fifty-five gallon metal drum in the eastern portion of Parcel 3 of the Property Site with unknown contents. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 631-32.*)

46. The contents of that fifty-five gallon metal drum, whether those contents were released and whether those contents were in the ground would be pertinent to an LEP performing a Phase I. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 631-35.*)

47. The Phase I identified discarded empty drums on Parcels 1 and 3 of the Project Site. (*II.B.1, Ex. O, pp. 20, 24; Tr., pp. 635-37.*)

48. The contents of those discarded drums and whether those contents were released into the ground would be pertinent to determine whether the proposed Facility would meet DEEP's water quality standards. (*Tr., pp. 635-37.*)

49. The Phase I identified eight monitoring wells on Parcel 5 of the Project Site, which suggested previous environmental investigation was conducted on Parcel 5. (*II.B.1, Ex. O, pp. 12, 21; Tr., p. 638.*)

50. No information was provided to GZA concerning the environmental investigation concerning the eight monitoring wells on Parcel 5 of the Project Site. (*II.B.1, Ex. O, pp. 12, 21; Tr., p. 639.*)

51. The information concerning the (or any) previous environmental investigation would be pertinent to whether the proposed Facility would meet DEEP's water quality standards. (*Tr., pp. 639, 669.*)

52. The Phase I identified the following as RECs on the Project Site: (1) the portions of the Project Site used historically for tobacco cultivation such that pesticide and/or herbicide residuals may be present in soil and/or groundwater, as demonstrated by the monitoring wells on Parcel 5; (2) the 55 gallon metal drum on Parcel 3; and (3) the discarded metal drums on Parcels 1 and 3. (*II.B.1, Ex. O, p. 23.*)

The Failure to Perform Follow Up Research on Either the Project Site or Adjoining Properties

53. The Phase I environmental database search identified two sites, "Culbro" and "Culbro tobacco farm," commonly referred to as "orphan sites" in the LEP vernacular, which are sites or adjoining sites identified in standard environmental record sources in the environmental

database that are potentially relevant to a Phase I, but unsupported by sufficient information. (*II.B.1, Ex. O, App. D, p. 10; IV.B.7; Tr., pp. 641-42.*)

54. STM E1527-13 requires the environmental professional to perform follow up review of the site or adjoining site identified in one or more environmental record sources. (*Tr., p. 643.*)

55. GZA did not perform any follow up review on the two “orphan sites” as required by § 8.2.2.1 of ASTM E1527-13. (*Tr., p. 643.*)

56. GZA did not perform any review of the records located at the Connecticut State Library or any of the documents found by Zuvic · Carr and Associates, Inc. (“Zuvic Carr”) at DEEP’s file room and produced by the Town. These documents relate to the two “orphan sites” that were found to be the Project Site and an adjoining site (Hall Farm). (*IV.B.4, Nos. 27-28; IV.B.7; Tr., pp. 639-40, 44-45.*)

57. The two “orphan sites” are referenced on a list of contaminated or potentially contaminated sites maintained by DEEP on its website, but were not mentioned in the Phase I. This list is readily available on DEEP’s website to the public. (*Tr., pp. 645-46.*)

58. ASTM E1527-13 defines “practically reviewable” as follows: “information that is practically reviewable means that the information is provided by the source in a manner and in a form that, upon examination, yields information relevant to the property without the need for extraordinary analysis of irrelevant data. The form of the information shall be such that the user can review the records for a limited geographic area. Records that cannot be feasibly retrieved by reference to the location of the property or a geographic area in which the property is located are not generally practically reviewable. Most databases of public records are practically reviewable if they can be obtained from the source agency by the county, city, zip code, or other geographic area of the facilities listed in the record system. Records that are sorted, filed, organized, or maintained by the source agency only chronologically are not generally practically reviewable. Listings in publicly available records which do not have adequate address information to be located geographically are not generally considered practically reviewable. For large databases with numerous records (such as RCRA hazardous waste generators and registered underground storage tanks), the records are not practically reviewable unless they can be obtained from the source agency in the smaller geographic area of zip codes. Even when information is provided by zip code for some large databases, it is common for an unmanageable number of sites to be identified within a given zip code. In these cases, it is not necessary to review the impact of all of the sites that are likely to be listed in any given zip code because that information would not be practically reviewable. In other words, when so much data is generated that it cannot be feasibly reviewed for its impact on the property, it is not practically reviewable.” (*ASTM E1527-13, § 3.2.69.*)

59. ASTM E1527-13 defines reasonably ascertainable to mean “information that is (1) publicly available, (2) obtainable from its source within reasonable time and cost constraints, and (3) practically reviewable.” (*ASTM E1527-13, § 3.2.77.*)

60. The documents produced by the Town are reasonably ascertainable and practically reviewable under ASTM E1527-13. (*ASTM E1527-13*, §§ 3.2.69 and 3.2.77; *IV.B.4, Nos. 27-28; IV.B.7; Tr., pp. 639-40, 44-45.*)

GZA October 3, 2017 Report

61. On October 3, 2017, GZA prepared a report for DWW concerning the potential impact of the use of the Project Site for tobacco cultivation on the nearby aquifer or residential potable water wells (“GZA Report”). The GZA Report concluded that there was no need to perform any testing of the Project Site or any surrounding wells because any “pesticide residues” on the Project Site “would have long since leached to groundwater and potentially migrated to receptors, if present.” (*II.B.8, Ex. D; Tr., p. 656.*)

62. The GZA Report referred to “pesticide residues” on the Project Site as an indication that GZA believed there were only small amounts of pesticides, if any at all. (*Tr., p. 651.*)

63. In preparing the GZA Report, GZA did not (and does not) have any sense of the concentrations of “pesticide residues” on or in the Project Site, nor did GZA quantify those amounts. (*Id. pp. 651-52.*)

64. In preparing the GZA Report, GZA had no idea of the subsurface environmental conditions of the Project Site. (*II.B.8, Ex. D; Tr., p. 652.*)

65. The GZA Report stated that “[t]his letter is subject to the attached Limitations and the Terms & Conditions of our contract.” The limitations state expressly that “GZA has not performed a site visit as part of the preparation of this report.” (*II.B.8, Ex. D.*)

66. Although contrary to the express terms of the GZA Report, Adam T. Henry, an LEP at GZA, indicated that he performed a visual inspection of the Project Site in preparing the GZA Report, although he could not recall the date. (*Tr., p. 653.*)

67. In preparing the GZA Report, GZA did not (and does not) know if there are any contaminants in the soil of the Project Site. (*Id., p. 652.*)

68. In preparing the GZA Report, GZA did not review any of the documents referenced in the Zuvic Carr report dated, October 5, 2017 (“Zuvic Carr Report”). (*IV.B.7; Tr., pp. 655-56.*)

69. In preparing the GZA Report, GZA did not (and does not) know if any contaminants existing at the Project Site exceed DEEP’s water quality standards. (*Tr., p. 657.*)

70. Neither GZA nor anyone else on behalf of DWW has performed any soil or water testing of the Project Site or any adjacent areas and DWW “does not have any current plans to do so.” (*II.B.8, Ex. D; II.B.9, No. 10; II.B.11, No. 12; Tr., p. 656.*)

71. The only way to know whether there are any contaminants at the Project Site and whether those contaminants exceed DEEP’s water quality standards is to perform soil and water testing as required in a Phase II Environmental Assessment. (*Id., pp. 657-58.*)

72. The GZA Report did not address potential buried pesticides or other materials at the Project Site. (*Id.*, p. 658.)

73. The GZA Report did not address the drums found at the Project Site as identified in the Phase I. (*Id.*)

74. The GZA Report did not address the presence of potential pesticide storage and handling areas incident to tobacco cultivation. (*Id.*, pp. 658-59.)

The November 2, 2017 Disclosure by DWW

75. On November 2, 2017, DWW filed a revision to No. 84 of its response to the Council's Second Set of Interrogatories ("November Disclosure"). The revision included approximately 240 pages of documents gathered from the DEEP's file room on October 31 and November 1, 2017 by GZA. (*II.B.12.*)

76. Some of the documents included in the November Disclosure were documents produced by the Town in October. (*IV.B.4, Nos. 27-28; IV.B.7.*)

77. The Phase I and the November Disclosure do not establish that the Project Site was not used for the storage, handling or disposal of pesticides. (*II.B.1, Ex. O, II.B.12.*)

78. The Phase I and the November Disclosure do not demonstrate that the Project Site, was investigated, sampled or remediated. This would include a likely disposal area mapped on Parcel 1. Only a small, off-site area was actually remediated as referenced in the Zuvic Carr Report. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7.*)

79. The Phase I and the November Disclosure do not provide any information concerning any environmental studies related to the monitoring wells located on Parcel 5 of the Project Site. (*Id.*)

The Phase I Does Not Meet ASTM E1527-13

80. ASTM E1527-13 requires the environmental professional to include sufficient information concerning RECs on the subject site or adjoining properties. ASTM 8.2.2.1 provides: "If the property or any of the adjoining properties is identified on one or more of the standard environmental record sources in 8.2.1, pertinent regulatory files and/or records associated with the listing should be reviewed in accordance with 8.1.1 through 8.1.8. The purpose of the regulatory file review is to obtain sufficient information to assist the environmental professional in determining if a recognized environmental condition, historical recognized environmental condition, controlled recognized environmental condition, or a de minimis condition exists at the property in connection with the listing. If, in the environmental professional's opinion, such a review is not warranted, the environmental professional must explain within the report the justification for not conducting the regulatory file review."

81. The material submitted by DWW does not satisfy ASTM E1527-13. (*Tr.*, pp. 583, 660-661.)

The Unknown Subsurface Environmental Conditions

82. DEEP has voiced concerns over the historical operations of the Project Site for tobacco cultivation and the releases that occurred in relation thereto. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7; Tr., pp. 583-84.*)

83. Pesticides were used in substantial quantity on the Project Site. (*II.B.1, Ex. O, II.B.12; IV.B.4, Nos. 27-28; IV.B.7; Tr., p. 584.*)

84. The proposed Facility constitutes a significant construction project, which could disturb unknown sources of contamination based on prior known usage of the Project Site. (*IV.B.7; Tr. p. 585.*)

85. One cannot know whether the subsurface environmental conditions of the Project Site would yield pesticide residues or significant pockets of contaminants without conducting a proper Phase I or soil and water testing. (*IV.B.7; Tr. p. 608.*)

86. One cannot prepare a soil management plan without knowing the subsurface environmental conditions of the Project Site. One cannot propose a significant construction project responsibly by going “blind.” (*IV.B.7; Tr. pp.603-04, 610.*)

87. The construction work contemplated for the proposed Facility is very different from and far greater than the tilling practices used for past farming operations. Tilling would require the displacement of approximately nine to twelve inches of soil, while the proposed Facility would require the disturbance of approximately 58,700 CY of soil and the excavation of at least 10,000 holes, each approximately twelve to fourteen feet below the surface. (*Tr., pp. 612, 734.*)

88. A significant issue concerning the auger or pile driving of posts for the proposed Facility is the creation of preferential pathways for potentially existing pockets of contaminants. Another significant issue concerning the auger or pile driving of posts is the potential release of contaminants typically found in buried “farm dumps” associated with past tobacco cultivation such as what likely was shown on Parcel 1 of the Project Site. Disturbance of a “farm dump” or other areas of buried pesticides via pile driving, augering or extensive earth movement would create a significant release to the environment. (*IV.B.2, Ex. C, Attach. B; IV.B.4, Nos. 27-28; IV.B.7; Tr., p. 609.*)

89. ASTM E1903-11 is the ASTM standard for conducting Phase II environmental site assessments. ASTM E1903-11 sets forth several objectives including: “Objective 1 –Assess whether there has been a release of hazardous substances . . . Objective 4 - “Provide information relevant to identifying, defining and evaluation property conditions associated with target analytes [(contaminants)] that may pose risk to human health or the environment, or risk of bodily injury to persons on the property and thereby give rise to potential liability in tort.” (ASTM E1903-11.)

THE HISTORICAL AND CULTURAL IMPORT OF THE PROJECT SITE

90. The southern portion of Project Site (Parcel 5) is connected to historical agricultural use. (*II.B.1, Ex. M, Phase IA, p. 2; II.B.5, No. 34, pp. 20, 22; Tr., pp. 566-67.*)

91. The five tobacco barns located on the Project Site are structures eligible for the National Register of Historic Places ("Register"). (*IV.B.2, Ex. B, Attach. B; II.B.1, Ex. M, Phase IA, p. 2; II.B.5, No. 34, p. 22; Tr., pp. 570-71.*)

92. The crucial issue is not whether a particular structure is already listed on the Register, but whether it is eligible for listing on the Register. (*Tr., pp. 569, 612-13.*)

93. Often, structures are not listed on the Register until threatened. (*Tr. p., 571.*)

94. Historic preservation requires resources and cooperation from the property owner. (*Tr., p. 571.*)

95. DWW's consultant, Heritage Consultants, LLC ("Heritage") recommended the preservation of the five tobacco barns located on the Project Site. (*II.B.1, Ex. M, Phase IA, pp. 30-31.*)

96. The Connecticut State Historic Preservation Office ("SHPO") recommended the preservation of the five tobacco barns located on the Project Site. (*II.B.1, Ex. M; IV.B.8.*)

97. The Project Site, specifically Parcel 5, and including the barns, is also historically significant in that Doctor Martin Luther King, Jr.'s time in the Town as a college student had a significant impact on his calling as a civil rights activist, as well as a larger historical trend of southern minority workers to travel to New England for work. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10; II.B.1, Ex. M, Phase IA, p. 21; II.B.5, No. 34, p. 22; Tr., pp. 570-71.*)

98. Because of the important link between portions of the Project Site and Dr. Martin Luther King, Jr., SHPO has submitted an application with the African American Civil Rights Grant Program administered by the National Park Service, United States Department of the Interior. The application is pending. (*IV.B.8; Tr., p. 576.*)

99. Over the past twenty years, the Town has realized the historical significance of the southern portion of the Project Site, including the five tobacco barns located throughout the Project Site. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10.*)

100. Prior to DWW's proposal, the Town initiated an historic resources inventory in 2013, which include a recommendation for a thematic nomination for agricultural buildings in the Town. (*IV.B.2, Ex. B, Attach. B; IV.B.4, No. 10; Tr., pp. 570-71.*)

101. The Town would like to preserve the five tobacco barns because of their historical significance. (*IV.B.2; Tr., p. 579.*)

102. DWW could preserve all five tobacco barns. (*Tr., pp. 565-66.*)

103. Additional study is needed to confirm how much of a buffer from the proposed Facility's infrastructure is necessary to preserve the tobacco barn's historical character adequately. (*Tr., p. 581.*)

104. Two residential structures, 85 and 100 Hoskins Road, which were deemed historically significant by Heritage, would be visually impacted by the proposed Facility. (*II.B.1, Ex. M, Phase IA, pp. 2-3; II.B.5, No. 34, p. 20; IV.B.5, No. 9.*)

105. Heritage recommended vegetative screening to buffer the historic residences from the proposed Facility's infrastructure to preserve their historic context. (*II.B.1, Ex. M, Phase IA, pp. 2-3, 32-33.*)

SCREENING

106. The residential areas adjacent to the Project Site which would have an inadequate buffer from the proposed Project include:

Area 1: Hoskins Road and easterly portions of County Road looking north into the proposed development.

Area 2: Hoskins Road looking south into the proposed development, which includes impact to properties on the north side of Hoskins across from the proposed project (i.e. 100 Hoskins Road)

Area 3: 85 Hoskins Road

Area 4: The homes immediately north of the intersection with County Road and Hoskins Road County Road just west of the proposed project. The homes on the right of Saxton Brook Drive immediately abutting the proposed project.

Area 5: The homes on the west side of Howard Street.

Area 6: The homes on the corner of Centerwood and Gorden Street.

Area 7: The homes on the west side of Knollwood Circle.

Area 8: Litchfield Road (during construction).

Some residences along Berkshire Way may also have views of the Facility.

(*IV.B.5, No. 6f-2; IV.B6.*)

107. The southern portion of the Project Site (Parcel 5), consisting of an important cultural and historical component of the Town, would be visually impacted significantly by the proposed Facility. (*II.B.1, Ex. G; IV.B.2, Ex. D; IV.B.5, Nos. 4, 10.*)

108. DWW has committed to providing sufficient vegetative screening for the historic residences at 85 and 100 Hoskins Road from the proposed Facility. (*Tr., p. 690.*)

109. DWW has committed to providing sufficient vegetative screening for each and every residential property abutting the Project Site with views of the proposed Facility during leaf on or leaf off conditions. (*Tr., pp. 674-75.*)

110. DWW will confirm views from the residential properties abutting the Project Site during leaf off conditions. (*Tr., p. 674.*)

111. The Project Site has experienced leaf off conditions since DWW initiated development of the proposed Project in 2015. (*Tr., pp. 678-79.*)

112. DWW did not include a leaf off assessment of the visual impact of the proposed Facility on abutting residential properties because the photosimulations would have been less visually appealing. (*Tr.*, p. 677.)

113. Leaf off conditions would persist throughout the Project Site over approximately six months of the year. (*Tr.*, p. 678.)

114. DWW proposed a ten foot vinyl fence along Hoskins Road, which consists of historically and culturally significant resources, which contradicted Heritage's recommendations contained in the Phase IA as well as the 2007 POCD and the Town's Guidelines. (*II.B.1, Ex. G; IV.B.2, Ex. D; IV.B.5, Nos. 4, 10.*)

115. DWW's rationale for the ten foot vinyl fence was that "DWW is hard-pressed to ascertain what the 'historical character' of the neighborhood and/or immediate area is." (*II.B.5, No. 6.*)

116. The Town's proposed alternative screening for Parcel 5 included undulating berms and vegetation. Along the northern side of Hoskins Road, there would be a short shoulder to the road, with street trees beyond the shoulder, followed by a split rail fence (open and see through), followed by an undulating vegetative berm with elevations between eight and twelve feet. (*IV.B.2, Ex. D; Tr.*, p. 369.)

117. The existing topography along the north side of Hoskins Road would aid in achieving the necessary height of the undulating berms and the two existing tobacco barns would also assist with screening the proposed Project and enhancing the viewshed. (*IV.B.2, Ex. D, Tr.*, p. 369.)

118. The earthen berms on the north side of Hoskins Road would not block the existing tobacco barns; rather, the berms would lie between almost connecting the two tobacco barns, with the split rail fence tying in to the two tobacco barns. (*Tr.*, pp. 369-70.)

119. The south side of Hoskins Road would be similar to the north side; however, the existing topography drops down in elevation and there are no existing barns to obscure the proposed Facility. Additional evergreen trees interspersed sporadically with a split rail fence would achieve sufficient screening. (*Tr.*, p. 370.)

120. The undulating earthen berms would take up approximately fifty feet of the 100 foot buffer articulated by DWW, and was measured from approximately where DWW intended to locate its security fence. (*Tr.*, pp. 371-72.)

121. The Town's alternative screening proposal would still be necessary south of 85 Hoskins Road even if DWW shifts some of the proposed infrastructure north of Hoskins Road as the Town's alternative is aimed at maintaining the agricultural view and aesthetic, i.e. to look like grassland. This aim is not achieved by the installation of a ten foot vinyl fence in that area. (*Tr.*, pp. 373-75.)

122. The Town's alternative screening proposal would not be maintained like a lawn. The alternative screening proposal would likely require sporadic mowing, perhaps annually or biannually, to keep invasive plant species from colonizing on the berm. (*Tr.*, p. 375.)

123. Earthen berms have been used successfully within the Town to screen tall buildings and large parking areas. (*IV.B.5, No. 6; Tr.*, pp. 376, 378.)

124. The undulating earthen berms could be smaller on the north side of Hoskins Road because of the existing topography. The berms would have to be somewhat higher on the south side of Hoskins Road because of the downward sloping topography. (*Tr.*, p. 377.)

125. The Town's alternative screening proposal would consist of native vegetation species. (*Tr.*, p. 381.)

126. The cost for the Town's alternative screening proposal would be minor when compared to the cost per linear foot for the ten foot vinyl fence proposed by DWW, particularly if soil excavated in the construction of the Project is used for berms (assuming regulatory approvals). DWW has already accounted for grassland plantings. The street trees are also minor costs when measured against the scope of the proposed project. (*IV.B.2, Ex. D; Tr.*, pp. 378-79, 383, 407.)

127. The undulating earthen berms could be engineered to address stormwater runoff appropriately. (*Tr.*, p. 401.)

128. The undulating earthen berms can be smaller than as proposed in the Town's alternative screening proposal and still be effective. The Town would likely find an undulating earthen berm from four feet to eight feet acceptable. (*Tr.*, pp. 554-55.)

129. There is sufficient area for the undulating earthen berms, particularly over areas not historically used for agriculture. (*Tr.*, p. 557.)

130. Dense vegetative screening would be a viable option to the earthen berms if installed in accordance with the Guidelines and Regulations. (*Tr.*, p. 561.)

VEGETATIVE COVER AND OPERATIONS AND MAINTENANCE

131. The Town would want pollinator habitats to be utilized throughout the proposed Project Site, which is a feasible land cover. (*IV.B.2; IV.B.5, No. 4.*)

132. Heritage initially determined that certain portions of the Project Site were potentially sensitive archaeological areas. Heritage conducted a Phase IB cultural resources reconnaissance survey of moderate and high archaeologically sensitive areas, including shovel tests, and determined that none of the previously designated sites were sensitive archaeologically. (*II.B.5, No. 34, pp. 31-36; Tr.*, p. 692.)

133. There is no reason DWW could not grub the areas previously designated as potentially sensitive archaeologically based on the Phase IB results. (*Tr.*, p. 692.)

134. DWW has not confirmed that SHPO has no issues with grubbing the areas previously determined to be potentially sensitive archeologically. (*Tr.*, p. 693.)

135. DWW has not offered any documentary evidence that it is industry standard to mow once annually or otherwise conduct vegetative maintenance on an annual basis. (*IV.B.5, Nos. 68, 72.*)

DECOMMISSIONING

136. DWW's decommissioning plan would fund a financial assurance for decommissioning costs in equal installments over first ten years. (*II.B.1, Ex. S.*)

137. The financial assurance for decommissioning costs may be in form of performance bond, surety bond, letter of credit, parental guaranty or other form. (*Id.*)

138. The financial assurance for decommissioning costs is based on salvage value, although this value is uncertain because of expected technology innovation. (*II.B.1, Ex. S; II.B.5, No. 78.*)

139. DWW states that the financial assurance would be funded by the revenue stream flowing from four Power Purchase Agreements executed by and between DWW and several Massachusetts utilities ("DWW PPAs"). (*II.B.5, No. 79; Tr.*, p. 694.)

140. There is no evidence that the revenues from the DWW PPAs will provide sufficient financial assurance for decommissioning costs before the tenth year.

141. There is no evidence of how much of the payments from the DWW PPAs will go to DWW as opposed to lenders or project costs.

142. There is no evidence of environmental monitoring or of a more robust decommissioning package to ensure future agricultural use of the Project Site. (*III.B.3, Nos. 45-48; Tr.*, p. 502.)

143. There are discussions concerning the preservation of the Project Site for agricultural uses after the expiration or termination of the DWW PPAs. The Town is interested in such discussions and would prefer that the Project Site be transferred to the Town so the Town and its citizens could determine the appropriate use of the Project Site. (*Tr.*, pp. 523-24, 547-50.)

INFRASTRUCTURE

144. The DWW PPAs are based on the same template offered to all bidders who participated in the New England Clean Energy Request for Proposals ("Template PPA"). The only difference between the Template PPA and the DWW PPAs is that the latter articulates details specific to the Facility and the Project Site. (*Tr.*, p. 694.)

145. The DWW PPAs have provisions concerning a "capacity deficiency." (*Tr.*, pp. 696-697.)

146. Section 3.3(b) of the Template PPA provides: “To the extent that Seller has constructed the Facility in accordance with Good Utility Practice, and met all other requirements for the Commercial Operation Date under Section 3.4(b) of this Agreement, but a Capacity Deficiency exists on the Commercial Operation Date as permitted by Section 3.4(b), then on the Commercial Operation Date, the Contract Maximum Amount shall be automatically and permanently reduced commensurate with the Capacity Deficiency, which reduced Contract Maximum Amount shall be stated in a notice from Buyer to Seller, which notice shall be binding absent manifest error.” (*New England Clean Energy Request for Proposal, Template PPA § 3.3(b); Tr., pp. 697-98.*)

147. Section 3.4(b) of the Template PPA provides in relevant part: “The Commercial Operation Date shall occur on the date on which the Facility as described in Exhibit A is completed (subject, if applicable, to a Capacity Deficiency so long as the Actual Facility Size on the Commercial Operation Date is (1) at least ninety percent (90%) of the proposed nameplate capacity of the Facility as set forth in Exhibit A, and (2) not more than ten (10) MW less than the proposed nameplate capacity of the Facility set forth in Exhibit A) and capable of regular commercial operation in accordance with Good Utility Practice, the manufacturer’s guidelines for all material components of the Facility, all requirements of the ISO-NE Rules and ISO-NE Practices for the delivery of the Products to the Buyer have been satisfied, and all performance testing for the Facility has been successfully completed, provided Seller has also satisfied the following conditions precedent as of such date” (*New England Clean Energy Request for Proposal, Template PPA § 3.4(b); Tr., pp. 699.*)

148. The nameplate capacity of the Facility is 26.4 MW AC. Ten percent of the nameplate capacity is 2.64 MW AC. (*II.B.1, p.1; Tr., p. 700.*)

149. Parcel 5 of the Project Site (south of Hoskins Road) would host approximately 2.4 MW AC of the Facility, which is less than 10 percent of the Project’s nameplate capacity. (*II.B.8, No. 66; Tr., pp. 701-02.*)

150. If the output associated with Parcel 5 is removed from the proposed Facility, DWW would not be in violation of the DWW PPAs. (*Tr., pp. 702-03.*)

151. There is no evidence that a 10 percent reduction in the nameplate capacity would render the Facility financially unfeasible. (*Tr., p. 705.*)

152. DWW has proposed relocated approximately 40 percent of the Facility infrastructure to be located on Parcel 5 to other portions of the Project Site (points north of Hoskins Road). (*II.B.8, Nos. 66-67; Tr., pp. 706-07.*)

153. If Parcel 5 of the Project Site (south of Hoskins Road) is removed from the Facility, and DWW relocates approximately 40 percent of the Facility infrastructure to be located on Parcel 5 to other portions of the Project Site, then the Facility would produce approximately 96 percent of the Facility’s nameplate capacity. (*II.B.8, Nos. 66-67; Tr., pp. 707-08.*)

154. There is no evidence that an approximate 4 percent reduction in the Facility's nameplate capacity would render the Facility financially unfeasible. (*Tr.*, pp. 708-09.)

155. Some solar panels are more efficient than others. (*Tr.*, p. 710.)

156. Less efficient solar panels generally require more space than efficient solar panels to reach the same nameplate capacity. (*Tr.*, pp. 710-11.)

157. DWW has not yet selected the solar panels to be used for the Facility. (*II.B.5, No. 88; Tr.*, p. 710.)

158. DWW has committed to investigating alternatives that might result in a reduction of the Facility's footprint. (*Tr.*, p. 772.)

Respectfully submitted by,

THE TOWN OF SIMSBURY

By: _____


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CERTIFICATION

I hereby certify that on this day that 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:

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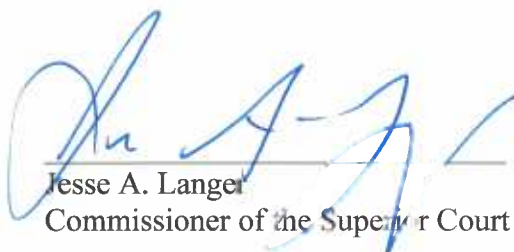
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