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November 6, 2018

VIA ELECTRONIC MAIL AND U.S. MAIL

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

Re: Petition 1347 - GRE GACRUX LLC Petition for a Declaratory Ruling, Pursuant to Connecticut General Statutes §4-176 and §16-50k, for the Proposed Construction, Maintenance and Operation of a 16.78 MW AC Ground-mounted Solar Photovoltaic Electric Generating Facility Located on Oil Mill Road in Waterford, Connecticut

Dear Ms. Bachman:

I am enclosing an original and sixteen copies of the Petition for Reconsideration being filed by GRE GACRUX, LLC in the above-referenced Petition. Please return one copy of this submittal, date-stamped, to me in the enclosed envelope.

If you have any questions concerning this submittal, please contact the undersigned at your convenience. I certify that copies of this submittal have been submitted to the Town of Waterford and to counsel for Save the River-Save the Hills.

Sincerely,

Lee D. Hoffman

Lee D. Hoffman

Enclosures

STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL

Petition of GRE GACRUX LLC for a Declaratory Ruling pursuant to C.G.S. §4-176 and § 16-50k, for the proposed construction, maintenance and operation of a 16.78 MW AC ground-mounted solar photovoltaic electric generating facility located on Oil Mill Road in Watertown, Connecticut

Petition No. 1347

November 6, 2018

GRE GACRUX LLC'S PETITION FOR RECONSIDERATION

Pursuant to Conn. Gen. Stat. §4-181a ,[1] the Petitioner, GRE GACRUX LLC ("GRE" or "the Petitioner") respectfully moves the Connecticut Siting Council ("Council") for reconsideration of its October 25, 2018 denial without prejudice of GRE's Petition for Declaratory Ruling for the above-referenced proposed solar photovoltaic electric generating facility ("Decision"). Based on the Council's prior articulation of its authority under Conn. Gen. Stat. §16-50k, GRE respectfully requests that the Council reconsider its Decision and approve GRE's Petition for the facility, subject not only to the conditions articulated in the Council's staff report, but also subject to additional conditions as outlined below.

[1] Sec. 4-181a. Contested cases. Reconsideration. Modification. (a)(1) Unless otherwise provided by law, a party in a contested case may, within fifteen days after the personal delivery or 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 twenty-five days of the filing of the petition, the agency shall decide whether to reconsider the final decision. The failure of the agency to make that determination within twenty-five days of such filing shall constitute a denial of the petition.

Background

At its scheduled meeting on October 25, 2018, the Council discussed several petitions, including the instant Petition (Petition 1347) and another petition involving a similar solar photovoltaic facility to be located in North Stonington (Petition 1345). During the discussion of Petition 1345, one of the members of the Council read a prepared statement into the record in which he stated that he had unanswered questions concerning both petitions. The Council member went on to state that he regretted that the Council did not hold an evidentiary hearing on either petition, and that as a result of the lack of an evidentiary hearing, the Council member could not have all of his questions answered.

It appears, however, that Petition 1345 and Petition 1347 were treated differently by the Council, despite the fact that neither petition had an evidentiary hearing. First, the petitioner in Petition 1345 was notified of various concerns by the Council, and was given time to provide additional information to the Council to address some, if not all of those concerns through the use of three sets of interrogatories submitted by the Council. Second, Petition 1345 appears to have similar Natural Diversity Database ("NDDB") issues in common with Petition 1347, but the two petitions were treated differently. Petition 1345 was approved by the Council, however, Petition 1347 was, pursuant to the Council's October 26, 2018 letter to the Petitioner "denied without prejudice . . . based on concerns from the Connecticut Department of Energy and Environmental Protection regarding a recommended wildlife survey in correspondence submitted to the Council on August 24, 2018." No other reason was provided for the denial of the Petition. GRE has brought this motion because it respectfully suggests that the two petitions, which share similar issues, should share similar outcomes.

Discussion

As is set forth in greater detail below, the Council should reconsider its decision in the instant Petition on the following grounds:

- The Council exceeded its statutory authority under Conn. Gen. Stat. §16-50k;
- The Council overlooked the environmental benefits noted by DEEP of the generation of early successional habitat that the project would provide, and also considered a recommendation by the DEEP to be a mandate;
- The Council allowed another petition with similar NDDB issues to go forward while denying the instant Petition; and
- Given the timing for when such a wildlife study could be completed, the Petitioner believes that such a study would be appropriate for inclusion in a D&M Plan. The Petitioner would also be willing to submit additional geotechnical information[2] for the project as part of its D&M Plan, and both the wildlife study and geotechnical information would be subject to Council review and approval before the project would commence construction.

The Council Exceeded Its Statutory Authority Under Conn. Gen. Stat. §16-50k

In crafting section 16-50k, the Legislature was quite clear in providing the Council with guidelines as to when a petition is to be approved. Section 16-50k provides, in pertinent part:

> The council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling . . .or of any customer-side distributed resources project or facility or grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection.

With its use of the word "shall" rather than "may," in the beginning of this portion of section 16-50k, the Legislature made it clear that the Council did not have discretion to

[2] GRE noted in its responses to Interrogatories 15, 22 and 23 that it anticipated that it would be performing additional geotechnical analysis to assist it with project design, particularly as it relates to stormwater basin design. It is this information that would be appropriate, GRE believes, to be included in its D&M Plan.

disapprove projects for a variety of factors, only air and water quality standards were to be considered. Projects must therefore be approved if they meet the air and water quality standards of the Department of Energy and Environmental Protection ("DEEP"). The Council's October 26, 2018 letter to GRE clearly states that the only reason the instant Petition was denied was due to the fact that GRE did not complete a "wildlife survey" that was recommended (not mandated) by the DEEP. No mention was made by the Siting Council of the adverse impacts to water or air that the proposed project would cause. As such, the Petition should be granted.

This analysis is borne out by the Council's own legal analysis on the matter. In the Siting Council's Supreme Court Brief in the matter of *FairwindCT, Inc. v. State of Connecticut Siting Council*, (S.C. 19090 and S.C. 19091) at page 30, the Council analyzed this situation as follows:

> In *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 836 A.2d 414 (2003), this Court held that an agency that did not have jurisdiction over noise pollution had no obligation to consider it even though CEPA intervenors had raised noise issues. *Id.*, 267 Conn. at 131. In the instant cases, it is uncontested that Conn. Gen. Stat. § 16-50k grants jurisdiction to the CSC only over air and water quality issues. The fact that the CSC considered the full range of §16-50p issues does not expand the CSC's, or the court's jurisdiction in the two Colebrook petitions. The CSC cannot expand its own jurisdiction by considering more than its mandate. "An administrative agency, as a tribunal of limited jurisdiction, must act strictly within its statutory authority." *State v. State Employees' Review Board*, 231 Conn. 391, 406, 650 A.2d 158 (1994).

That analysis was correct when the Council argued it five years ago, and that analysis applies to Petition 1347. The Council was also correct later on page 30 of its Brief when it stated that the jurisdiction of a state agency cannot be expanded to environmental issues over which it does not already have jurisdiction, citing *Nizzardo v. State Traffic Commission*, 259 Conn. 131, 148-152, 788 A.2d 1158 (2002). The Council concluded in the Colebrook matter, as it should for the instant Petition, "Although in other proceedings, the CSC has jurisdiction over noise, these petition proceedings were, as earlier noted, limited to air and water quality."

Like the Colebrook petitions, the instant Petition limited the Council's jurisdiction to air and water quality standards. The Council rejected GRE's Petition due to GRE not providing a wildlife survey to the Council that was recommended for preparation by DEEP. Such a wildlife survey does not relate to the air or water quality standards of the state, and as such, should not form the basis of a denial for a petition.

The Council overlooked the environmental benefits noted by DEEP of the generation of early successional habitat that the project would provide, and also considered a recommendation by the DEEP to be a mandate

In reaching its decision, the Council appears to place great weight on the fact that in the "Wildlife" section of the DEEP's comments, DEEP recommended that a wildlife survey be conducted at the site. It would appear that the Council focused on one sentence in that section, which stated, "given the lack of available information, it is recommended that a comprehensive wildlife survey be conducted at the site," rather than on DEEP's comments as a whole.

First, it should be noted that DEEP itself acknowledged that "this site does not fall in an existing Natural Diversity Database area," because, according to DEEP, it was "likely" that the location had not been surveyed, although DEEP could not be certain of this, hence its use of the word "likely." DEEP did not mandate that such a wildlife survey be done; it only recommended such a survey be completed. Moreover, DEEP did not point out that such a survey would be required for stormwater permitting, nor did DEEP provide any detail as to what such a survey would entail, other than providing some cursory guidance that such a survey should include state listed plants, "bats or other animals," state listed insects and birds. This was "recommended" rather than required because DEEP knew that such a study would not be required under its own regulations, such as for stormwater permitting, otherwise DEEP would have pointed that out to the Council.

What DEEP did note for the Council's benefit, however, was that a biological assessment related to the Eastern ribbon snake was nevertheless prepared and furnished to DEEP. Moreover, on the last page of its comments, DEEP stated that the timber harvest that "was being conducted by the landowner" would provide the area with valuable habitat. "A harvested area creates valuable habitat and does not diminish the value of the greater core forest. By creating such early succession habitat, many species of Greatest Conservation Need will benefit for more than fifteen years." Thus, DEEP knew that the project, as proposed, would provide sustained environmental benefits for area wildlife. That is why it did not couch a wildlife survey as a requirement to be done by a certain time; it couched the wildlife survey as a recommendation.

DEEP also knew, as should the Council, that such a wildlife survey, if it was to involve plants, insects, and breeding birds, could not have been undertaken in August when the DEEP provided its comments. Such surveys can only occur in the spring and early summer months. If DEEP's recommendations are now to be taken as requirements by the Council on a going-forward basis, that means that petitioners will have to wait to gain approval for their sites until after: 1) filing a petition; 2) then receiving DEEP comments; 3) then waiting for the appropriate part of the year to conduct wildlife surveys; and then 4) re-submitting petitions again to bring themselves in line with DEEP's comments. The Legislature did not intend for such a result, which is why petitions are to be judged on air and water quality issues only. Indeed, DEEP itself didn't intend for such a result, which is why DEEP couched its comment as a recommendation, not a requirement. DEEP knew the difference between recommendations and requirements, as it showed in its comments in Petition 1345.

The Council allowed another petition with similar NDDB issues to go forward

The differences in the outcomes between Petition 1345 and Petition 1347 are quite striking, particularly given the similarities in the scopes of the two projects. Petition 1345, which was approved by the Council on the same day that Petition 1347 was denied, had far more serious wildlife concerns that were flagged by DEEP for the Council's consideration. Petition 1345 involved a known species of concern, the Eastern spadefoot toad, whereas Petition 1347 had no such species of concern known to be on the site. Moreover, the petitioner in 1345 had failed to keep NDDB personnel informed of its progress with respect to its project, and had allowed it preliminary NDDB determination to expire. None of those facts was present in Petition 1347. Indeed, a side-by-side comparison of the DEEP comments for each project is illuminating.

Pages three and four of the DEEP's June 6, 2018 comments on Petition 1345 show DEEP's identification of several issues associated with NDDB matters at that site:

> Natural Diversity Data Base
>
> The Pawcatuck Solar Petition does not contain any correspondence with the DEEP Natural Diversity Data Base (NDDB) program. A preliminary assessment was issued for this project in April 2017 identifying the four listed species referenced on page 23 of the Petition. The preliminary assessment letter is valid for a period of one year. The preliminary assessment letter requested site surveys for the listed species and protection strategies for the species identified as present or potentially present.
>
> Since the preliminary assessment letter was issued in April 2017, there has been no contact of any kind from representatives of the Pawcatuck Solar Center with the NDDB program. The Petition presents evidence that, for the eastern spadefoot toad in particular,

> protection and habitat enhancement strategies have been formulated. However, the applicant needs to contact the NDDB program to provide the results of its survey work and its protection strategies and to request an update of the now-expired preliminary assessment. Of special relevance to the applicant is the fact that no Stormwater General Permit can be issued until the NDDB sign-off is obtained. Dawn McKay of the DEEP NDDB program should be contacted at (860)424-3592 or at Dawn.McKay@ct.gov in this regard. Please also note that a response to the Connecticut Siting Council with the survey and protection information does not constitute a reply to the NDDB program which specifically requested the information.

These comments are in stark contrast to the DEEP's comments in Petition 1347:

> **Wildlife**
>
> This site does not fall in an existing Natural Diversity Database area, but it is likely this location has never been surveyed. The location of the special concern species, the Eastern ribbon snake, and the biological assessment have been furnished to DEEP's Wildlife Division. The wildlife assessment was generally based on habitat with a focus on vernal pools and not on detailed surveys which may have identified state listed plants, presence/absence of bats or other animals, and state listed insects in the area. Breeding bird surveys were not conducted, though avian species were observed when the biologists were at the site. Given the lack of available information, it is recommended that a comprehensive wildlife survey be conducted at the site.

In Petition 1345, known species of concern were involved, the preliminary assessment done by the petitioner was "now-expired," which would necessitate updating, and there had been no contact between the petitioner and NDDB staff for over a year. Moreover, as DEEP noted in its comments to Petition 1345, "no Stormwater General Permit can be issued until the NDDB signoff is obtained" and that the petitioner should be contacting NDDB staff. Thus, DEEP explicitly noted a *requirement* for NDDB participation in Petition 1345, but made only *recommendations* in Petition 1347, where there were no known species of concern and where the petitioner had been in contact with NDDB staff. If one project was going to be denied based on wildlife concerns[3] and the other was to be permitted, it would seem that Petition 1345 would be the one to be denied, not Petition 1347.

The situation is particularly vexing since GRE responded to over 120 interrogatories and its responses totaled approximately 200 pages. Despite the heavy volume of questioning GRE received (and responded to), the recommended wildlife study was never requested by the Council. Indeed, the first mention that the Council desired the recommended wildlife study was made at the October 25, 2018 Council meeting. Had such a request been made, GRE would have informed the Council that providing such a wildlife study is not a requirement for approval of a petition, as GRE sees it, but GRE would be willing to provide the Council with such a study as part of its D&M Plan, and before GRE is permitted to begin construction at the site.

GRE understands that certain members of the Council regret that a public hearing was not held for this project, and that regret is understandable. Had a public hearing been held, these questions could have been asked, and GRE could have provided its responses. Under the

[3] The only basis for the denial in Petition 1347 was "concerns" from DEEP "regarding a recommended wildlife survey."

Uniform Administrative Procedures Act, Conn. Gen. Stat. §4-166 *et seq.* and the Council's implementing regulations, the Council has the ability, but not the duty, to provide for a public hearing for a petition. *See* RCSA §16-50j-40. The Council chose not to do so in this Petition. However, even in the absence of a hearing, if the Council had included requests for additional information related to wildlife studies, GRE could have provided a meaningful response. Again, the Council chose not do so.

Members of the Council may regret the process and procedure that was used in Petition 1347, and members of the Council may wish that certain studies were provided before the Petition was filed, however, such studies are not required under section 16-50k, which limits the analysis to air and water quality standards, nor are such studies required by the Council's own filing guidelines. According to page 3 of the Council's August 2016 filing guidelines entitled "Petition for a Declaratory Ruling for a Renewable Energy Facility," petitioners are to provide "DEEP Natural Diversity Database (NDDB) consultation correspondence and analysis of federally-listed species (ex. Northern Long-Eared Bat)" as part of their petitions. GRE did precisely that in this Petition. The Siting Council may have wanted more information, but it never asked for such information anywhere within the proceeding, waiting until it was far too late to alert GRE to its concerns.

Conclusion

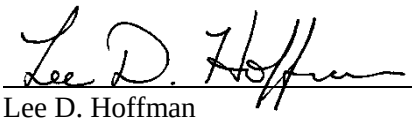
Fortunately, the D&M Plan process provides a method whereby this issue can be addressed, hopefully to all parties' satisfaction. Although, for the reasons set forth above, GRE does not believe that it is legally required to provide this information to the Council as part of a petition (as opposed to an application for a certificate, where GRE would agree that the Council

has the jurisdiction to require applicants to provide such information to the Council), GRE is willing to undertake this wildlife study and submit it to the Council as part of GRE's D&M Plan. GRE would therefore respectfully request that the Council reconsider its October 25, 2018 decision denying the Petition, and instead grant the Petition as articulated in the Staff Report that accompanied the Council's October 26, 2018 letter, with a few modifications.

These modifications would be in the form of providing the Council with the additional information it is seeking. Thus, GRE would expect that the Council would expand what would be included in its D&M Plan to include both the wildlife study recommended by DEEP as well as the geotechnical information that was mentioned by other members of the Council during the October 25, 2018 meeting and referenced in GRE's responses to Interrogatories 15, 22, and 23. While GRE does not believe that either document is legally required to be produced to the Council as part of a D&M Plan, GRE wishes to be open with the Council and provide it with the requested information. In addition, GRE would expect that the Council, in accordance with its regulations and applicable law, would not permit GRE to begin the construction of its project until the Council had approved such a D&M Plan.

Wherefore, GRE respectfully requests that the Council reconsiders its October 25, 2018 decision and approves this Petition with the modifications suggested.

Respectfully Submitted,
GRE GACRUX LLC

By: 

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