



STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

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DATE: November 23, 2018

TO: Council Members

FROM: Melanie A. Bachman, Executive Director *MAB*

RE: **PETITION NO. 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-megawatt AC solar photovoltaic electric generating facility located at 117 Oil Mill Road and associated electrical interconnection to Eversource Energy's existing substation at 325 Waterford Parkway North in Waterford, Connecticut. **DRAFT Conclusions of Law – GRE GACRUX LLC Petition for Reconsideration.**

On November 7, 2018, pursuant to the provisions of Connecticut General Statutes (CGS) §4-181a(a), GRE GACRUX LLC (GRE) filed a Petition for Reconsideration (Petition) of the Connecticut Siting Council's (Council) October 26, 2018 final decision to deny without prejudice a declaratory ruling to GRE for the above-referenced proposed solar photovoltaic electric generating facility in the Town of Waterford (Proposed Project). In its Petition, GRE contends that the Council's final decision should be reconsidered and Petition 1347 should be approved based on the following:

1. The Council exceeded its statutory authority under CGS §16-50k;
2. The Council considered a recommendation by DEEP to be a mandate;¹
3. The Council allowed another petition with similar Natural Diversity Database (NDDB) issues to go forward while denying Petition 1347;² and
4. Given the timing for when a wildlife survey could be conducted, GRE believes that such a survey, as well as the results of the additional geotechnical study, would be appropriate for inclusion in a Development and Management Plan (D&M Plan).³

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

¹ Petition 1347, August 20, 2018 DEEP comment letter, *available at* https://www.ct.gov/csc/lib/csc/pending_petitions/3_petition_1301through1400/pe1347/pe1347-sacrcdpi-deep.pdf

² Petition 1345, Record, *available at* <https://www.ct.gov/csc/cwp/view.asp?a=2397&q=602894>

³ In its Petition, GRE refers to its responses to Council Interrogatory Nos. 15, 22 and 23 regarding its intent to conduct additional geotechnical studies and submit the results in a D&M Plan, **if the project is approved.** (Emphasis added); See also GRE's responses to Council Interrogatory Nos. 28, 38, 59, 70 and 83, *available at* https://www.ct.gov/csc/lib/csc/pending_petitions/3_petition_1301through1400/pe1347/pe1347-gre_responses_interrogatories-set-one-20180907.pdf.



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On November 7, 2018, the Council requested parties and intervenors to submit written comments with respect to whether the Petition should be granted or denied by November 21, 2018. On November 21, 2018, Save the River-Save the Hills (STRSTH) submitted comments in opposition to GRE's Petition.

GRE requests that the Council grant the Petition for Reconsideration of its October 26, 2018 final decision and approve Petition 1347 subject to the conditions articulated in the Council's October 25, 2018 Staff Report and subject to the additional conditions that GRE conduct the wildlife survey and geotechnical study recommended by DEEP in its August 20, 2018 comments and submit the results in a D&M Plan.

I. The Council's statutory authority.

The Council is an "agency" under the Uniform Administrative Procedure Act (UAPA). It is a state commission authorized by law to make regulations or to determine contested cases.⁴ It issues certificates and declaratory rulings for jurisdictional facilities that constitute final decisions under the UAPA. A "final decision" is (A) an agency determination in a contested case, (B) a declaratory ruling issued by an agency, or (C) an agency decision made after reconsideration.⁵ A person who has exhausted all administrative remedies available within an agency, such as GRE's submission of a petition for a declaratory ruling under CGS §4-176 and GRE's submission of a petition for reconsideration under CGS §4-181a(a), and who is aggrieved by a final decision, such as a declaratory ruling issued by an agency or an agency decision made after reconsideration, may appeal to the Superior Court within 45 days after mailing of the final decision or within 45 days after the agency denies a petition for reconsideration of the final decision.⁶

Proceedings held by the Council on applications for certificates and petitions for declaratory rulings are governed by the UAPA and the Public Utility Environmental Standards Act (PUESA). The PUESA is the Act passed by the legislature that created the Council and specifies its statutory jurisdiction and authority. The Council was established for the purpose of one-stop permitting to help reduce the time and cost involved in meeting the reasonable power needs of Connecticut citizens without jeopardizing the environment.⁷ Under the PUESA, the Council's charge is to provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state.⁸ It has exclusive jurisdiction over facilities defined under PUESA that include, but are not limited to, electric generating facilities.⁹ GRE's Proposed Project is an electric generating facility. It is subject to the Council's exclusive jurisdiction.

Pursuant to Public Act (PA) 05-1, An Act Concerning Energy Independence (codified at CGS §16-50k of the PUESA), "[T]he Council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... any grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as such project meets air and water quality standards of the Department of Environmental Protection." (Emphasis added.) The legislative purpose of PA 05-1 was to incent distributed resource projects and reduce peak electric demand, which is consistent with the energy policy of the state under CGS §16a-35k to diversify the state's energy supply mix and to develop and utilize

⁴ Conn. Gen. Stat. §4-166(1)(2017).

⁵ Conn. Gen. Stat. §4-166(5)(2017).

⁶ Conn. Gen. Stat. §4-183 (2017).

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

⁸ Conn. Gen. Stat. §16-50g (2017).

⁹ Conn. Gen. Stat. §16-50x (2017) ("Notwithstanding any other provision of the general statutes... the council shall have exclusive jurisdiction over facilities... In ruling on applications for certificates or petitions for declaratory rulings for facilities... the council shall give such consideration to other state laws and municipal regulations as it shall deem appropriate. Whenever the council certifies a facility, such certification shall satisfy and be in lieu of all certifications, approvals and other requirements of state and municipal agencies..."); Conn. Gen. Stat. §16-50i(a)(3)(2017).

renewable energy sources, such as solar and wind energy, to the maximum practicable extent.¹⁰ The Act established a rebuttable presumption that there is a public benefit for a grid-side distributed resource facility with a capacity of 65 megawatts (MW) or less that is selected in a Request for Proposals (RFP).¹¹ GRE's Proposed Project is a grid-side distributed resources facility with a capacity of 16.78 MW that was selected in the DEEP Small Scale RFP.¹² It has a presumed public benefit.

A. Section 4-176 of the UAPA

The Council is an agency with limited authority.¹³ It must obey the statutory commands of the UAPA.¹⁴

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

In compliance with regulations adopted under **CGS §4-176(b)**, on June 20, 2018, pursuant to CGS §4-176 of the UAPA and CGS §16-50k of the PUESA, GRE submitted to the Council a petition for a declaratory ruling for the construction, maintenance and operation of a 16.78 MW solar photovoltaic electric generating facility located at 117 Oil Mill Road in Waterford, Connecticut.¹⁵

In accordance with **CGS §4-176(c)**, within 30 days after receipt of GRE's petition for a declaratory ruling, the Council gave notice to all persons to whom notice is required by law, including, but not limited to, the Town of Waterford (Town) and DEEP.¹⁶ The Council also posted the Proposed Project on its website and issued a schedule identifying the 30-day comment deadline (7/20/18), 60-day agency action deadline (8/19/18), and 180-day final decision deadline (12/17/18). On July 16, 2018, DEEP requested an extension of the 30-day comment deadline and the Council granted an extension of time for all interested persons until August 20, 2018.

In accordance with **CGS §4-176(d)**, during a meeting held on July 20, 2018, the Council granted the Town's July 18, 2018 request for party status.¹⁷ On July 25, 2018, a public field review of the proposed site was held and attended by Council members, staff, GRE representatives, Town representatives and DEEP representatives. On August 2, 2018, the Council issued 87 interrogatories to GRE. Subject to objections, GRE responded to the Council's interrogatories on September 7, 2018.

In accordance with **CGS §4-176(e) and CGS §4-176(f)**, during a meeting held on August 2, 2018, within 60 days of receipt of GRE's petition for a declaratory ruling, the Council, in writing, set the date by which

¹⁰ 2005 Conn. Special Acts 1; Conn. Gen. Stat. §16a-35k (2017).

¹¹ 2005 Conn. Spec. Acts 1; Conn. Gen. Stat. §16-50p(c)(2017) (a public benefit exists if a proposed electric generating facility is necessary for the reliability of the electric supply of the state or for the development of a competitive market for electricity); *Citizens for Defense of Oxford v. Connecticut Siting Council*, 2000 Conn. Super. LEXIS 2994 (2000).

¹² GRE was selected in the DEEP Small Scale RFP on June 27, 2017 and entered into a Power Purchase Agreement with Eversource Energy (80%) and the United Illuminating Company (20%) that was approved by the Public Utilities Regulatory Authority (PURA) on September 7, 2017 under PURA Docket No. 17-01-11.

¹³ *Ticon, Inc. v. Comm'r of Envtl. Protection*, 317 Conn. 628 (2015) (Agency exceeded authority in attempt to regulate activities not subject to permit applications and to delay issuance of unrelated permit.); *Kleen Energy Sys., LLC v. Comm'r of Envtl. Protection*, 319 Conn. 367 (2015); *Wheelabrator Lisbon, Inc. v. Dept of Public Utility Control*, 283 Conn. 672 (2007).

¹⁴ *Salmon Brook Convalescent Home, Inc. v. Commission on Hospitals and Healthcare*, 177 Conn. 356 (1979).

¹⁵ Conn. Gen. Stat. §4-176(b)(2017) (Each agency shall adopt regulations for petitions that provide for the form and content, the filing procedure and the procedural rights of persons.); R.C.S.A. §16-50j-39, *et seq.* (2018).

¹⁶ Conn. Gen. Stat. §4-176(c)(2017); On June 22, 2018, the Council sent correspondence to the Town and a Request for State Agency Comment Memo to DEEP, among other state agencies.

¹⁷ Conn. Gen. Stat. §1-176(d)(2017) (If an agency finds that a timely petition to become a party or intervenor has been filed according to the regulations, the agency may grant a person party or intervenor status.)

to render a final decision as December 17, 2018, the statutorily-mandated 180-day final decision deadline.¹⁸ In its discretion, under CGS §4-176(e), within 60 days of receipt of GRE's petition for a declaratory ruling, the Council could have ordered a public hearing in accordance with **CGS §4-176(g)** as the degree of procedural formality to adjudicate claims is left to an agency's discretion.¹⁹ No timely requests for a public hearing were made by any party, intervenor, interested person or the Council.²⁰

On August 20, 2018, after the Council voted to set the date by which to render a final decision pursuant to the UAPA 60-day agency action deadline, DEEP submitted comments and STRSTH requested intervenor status and a public hearing. During a meeting held on August 29, 2018, the Council granted STRSTH intervenor status. As for the request for a public hearing, in the case of *A. Gallo & Co. v. McCarthy*, drink distributors subject to the provisions of the bottle bill challenged the validity of DEEP regulations that allowed for the tolling of the UAPA 60-day agency action deadline to be applied within the discretion of the agency.²¹ The court invalidated the regulations on the basis that there is no provision of the UAPA that provides for the extension of the time period within which an agency must act on a petition for a declaratory ruling.²² In accordance with the court's holding in *A. Gallo & Co.*, STRSTH's request for a public hearing was rendered moot by the passage of the UAPA 60-day agency action deadline.

On August 31, 2018, the Council issued a revised schedule for the exchange of further interrogatories for all participants designating an issuance deadline of September 14, 2018 and a response deadline of October 5, 2018. Upon request from STRSTH, the issuance deadline was extended to September 21, 2018 and the response deadline was extended to October 12, 2018. Within this time period, GRE and STRSTH issued interrogatories. The Town and the Council did not issue any further interrogatories.²³

In compliance with **CGS §4-176(h)** and **CGS §4-176(i)**, on October 26, 2018, 128 days after receipt of GRE's Proposed Project, the Council mailed its final decision to deny the petition for a declaratory ruling without prejudice to GRE and the service list.²⁴ In accordance with **CGS §4-176(j)**, the Council kept a record of the proceeding.²⁵ It is not unconstitutional for the Council to balance its statutory time constraints against parties' desires for more time to present their objections to a proposal.²⁶

The Council obeyed the statutory commands of the UAPA.

¹⁸ Conn. Gen. Stat. §4-176(e)(2017) (Within 60 days after receipt of a petition for a declaratory ruling, an agency, in writing, shall: (1) Issue a declaratory ruling, (2) order the matter for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) initiate regulation-making proceedings, or (5) decide not to issue a declaratory ruling.); Conn. Gen. Stat. §4-176(f) (2017) (A copy of all rulings issued and any actions taken shall be promptly delivered to the petitioner and other parties by mail.)

¹⁹ *Summit Hydropower Partnership v. Comm'r of Env'tl. Protection*, 226 Conn. 792 (1993); Conn. Gen. Stat. §4-176(g)(2017) (If the agency conducts a hearing for a declaratory ruling, the UAPA contested case provisions shall apply to the hearing.)

²⁰ The Council member that made the statement during the October 25, 2018 meeting regarding "regrets that a public hearing was not held" seconded the motion to "set the date by which to render a decision" on Petition 1347. (August 2, 2018 Council Meeting Minutes); The Council member also made the motion to "set the date by which to render a decision" on Petition 1345 (June 21, 2018 Council Meeting Minutes).

²¹ *A. Gallo & Co. v. McCarthy*, 2010 Conn. Super. LEXIS 1788 (Conn. Super. 2010).

²² *Id.*; The court also concluded that engrafting a tolling provision onto the statute to be applied within the sole discretion of the agency undermines the streamlined procedure contemplated by the statutory scheme.

²³ The Council member that made the statement during the October 25, 2018 meeting regarding "unanswered questions" did not suggest any further interrogatories after GRE responded to the Council's 87 interrogatories on September 7, 2018.

²⁴ Conn. Gen. Stat. §4-176(h)(2017) (A declaratory ruling shall be effective when mailed and shall be a final decision for purposes of appeal.); Conn. Gen. Stat. §4-176(i)(2017) (If an agency does not issue a declaratory ruling within 180 days after the filing of a petition, the agency shall be deemed to have decided not to issue such ruling.)

²⁵ Conn. Gen. Stat. §4-176(j)(2017) (The agency shall keep a record of the proceeding.)

²⁶ *FairwindCT, Inc.*, *supra* note 7 at 734; *Concerned Citizens of Sterling v. Connecticut Siting Council*, 215 Conn. 474, 485 (1990).

B. Section 16-50k of the PUESA.

Effective July 1, 2017, CGS §16-50k was amended by PA 17-218 as follows, with new language in italics:

The council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling... any grid-side distributed resources project or facility with a capacity of not more than sixty-five megawatts, as long as: (i) Such project meets air and water quality standards of the [DEEP], (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 DEEP in any solicitation issued prior to July 1, 2017,...*²⁷

PA 17-218 designated the existing requirement that a grid-side distributed resources facility with a generating capacity of not more than 65 MW shall be approved by declaratory ruling as long as “such project meets air and water quality standards of the DEEP” as clause (i). It also added two new requirements. Clause (ii) requires “the Council does not find a substantial adverse environmental effect.” Clause (iii) requires “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 DEEP in any solicitation issued prior to July 1, 2017...” (Emphasis added). GRE’s Proposed Project was selected by DEEP in a solicitation issued prior to July 1, 2017. Clause (iii) does not apply. Clause (ii) does apply.

In its November 7, 2018 Petition, GRE references the Council’s legal analysis in the 2014 case of *Fairwind v. Connecticut Siting Council* arguing that CGS §16-50k grants jurisdiction to the Council over air and water quality issues only and the fact that the Council considered the “full range of 16-50p issues” does not expand the Council’s jurisdiction.²⁸ The “full range of 16-50p issues” constitute the factors for the Council’s evaluation of “substantial adverse environmental effect” under the PUESA and are as follows:

The nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, (i) electromagnetic fields that, whether alone or cumulatively with other effects, impact on, and conflict with the policies of the state concerning the natural environment, (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture, (vi) forests and parks, (vii) air and **water purity** and (viii) fish, aquaculture and **wildlife**.²⁹ (Emphasis added).

Referring to the provisions of CGS §16-50x, the Connecticut Supreme Court concluded that the legislature intended to authorize the Council to approve petitions for declaratory rulings for proposed projects even if they do not comply with state laws outside of PUESA and determined that although the Council was only required to determine compliance with DEEP’s air and water quality standards, the Council has discretion to consider additional standards “as it shall deem appropriate.”³⁰ Among the “16-50p issues” are water purity and wildlife. Under the holding in *Fairwind* on the question of the Council’s jurisdiction, and clause (ii) of CGS §16-50k, as amended by PA 17-218, effective July 1, 2017, without any exclusions, the Council’s consideration of DEEP’s recommendations for a wildlife survey and a geotechnical study did not exceed its statutory authority under Section §16-50k of the PUESA.

The Council did not exceed its statutory authority under CGS §16-50k.

²⁷ Conn. Gen. Stat. §16-50k(a) (Supp. 2018).

²⁸ GRE Petition, p. 4 citing *FairwindCT, Inc.*, *supra* note 7.

²⁹ Conn. Gen. Stat. §16-50p(a)(3)(B)(Supp. 2018).

³⁰ *FairwindCT, Inc.*, *supra* note 7 at 697-704; Conn. Gen. Stat. §16-50x (2017).

II. The DEEP comments.

On August 20, 2018, DEEP submitted comments on GRE's Proposed Project. Under the heading, "Stormwater Discharge and Infiltration," DEEP states, "A detailed geotechnical study of the site should be completed to verify constructability and size of the drainage basins and level spreaders indicated on the site plans." Under the heading, "Wildlife," DEEP states, "**This site does not fall in an existing NDDB area**, but it is likely this location has never been surveyed. 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. Given the lack of available information, it is **recommended** that a comprehensive wildlife survey be conducted at the site." (Emphasis added). It is upon this statement in the DEEP comments that the Council based its October 26, 2018 final decision to deny GRE's Proposed Project without prejudice. It should be noted, however, under the heading, "Core Forest," DEEP also states, "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."

Reliance on recommendations in a DEEP comment letter as the basis for denying a petition for a declaratory ruling submitted pursuant to CGS §4-176 of the UAPA and CGS §16-50k of the PUESA is inconsistent with the holding in *Fairwind* on the question of due process. There, the plaintiffs alleged the Council deprived them of due process because the Council denied their request to cross-examine the analyst who authored the DEEP comments on the proposed wind projects and the Council relied on those comments to support several of its findings of fact.³¹ Specifically, the Council relied on the DEEP comments to support findings that several species of bats could occur at the site, the project could have some impact on those species and post-construction monitoring of the situation was **recommended**. (Emphasis added).³² The Connecticut Supreme Court concluded that the use the Council decides to make of the DEEP comments is a matter of discretion and although the Council relied on the DEEP comments to support certain findings of fact, those findings were **peripheral to the Council's rulings**. (Emphasis added).³³

It is well established that nothing in the statute requires the Council to abide by comments of other state agencies.³⁴ Just as the DEEP comments related to a recommendation for bat monitoring were considered peripheral in *Fairwind*, the DEEP comments related to recommendations for a wildlife survey and a geotechnical study in Petition 1347 would also be considered peripheral. It should be noted, however, that in its Decision and Order in approving Petition 983, the subject of the *Fairwind* case, the Council issued the following condition: "The Petitioner shall submit ongoing bird and bat studies and perform post-construction monitoring of birds and bats to document any mortality from project operations. The extent of the monitoring shall be coordinated with the DEEP Wildlife Division."

III. Council precedent.

The Council's Filing Guide for a Petition for a Declaratory Ruling for a Renewable Energy Facility requires formal DEEP NDDDB consultation correspondence. However, if the site boundaries of a proposed facility are located more than ¼ mile from a shaded area of the most recent NDDDB map, formal consultation is not required.³⁵ GRE's petition for a declaratory ruling and the DEEP comments acknowledge that this site does not fall in an existing NDDDB area. GRE's petition for a declaratory ruling and the DEEP comments also acknowledge that a state-listed special concern species, the Eastern ribbon snake, was observed on the site

³¹ *Id.* at 714.

³² *Id.*

³³ *Id.*

³⁴ *Id.*; *Corcoran v. Connecticut Siting Council*, 284 Conn. 455 (2007).

³⁵ Council Memorandum, available at https://www.ct.gov/csc/lib/csc/guides/2018_guides/20180328-nddbmemo.pdf

during GRE's Wetland and Biological Assessment. GRE's September 7, 2018 response to Council Interrogatory No. 47 indicates GRE would comply with any DEEP-recommended seasonal construction restrictions due to the presence of any protected species on the site.

Reliance on recommendations in a DEEP comment letter as the basis for denying a petition for a declaratory ruling submitted pursuant to CGS §4-176 of the UAPA and CGS §16-50k of the PUESA is inconsistent with Council precedent. Council records demonstrate that recommendations in DEEP comment letters are typically addressed as D&M Plan conditions:

Petition	D&M Plan Condition
1195	c) Submission of a report regarding NDDDB plants in the vicinity of the project and plans to protect such species in the vicinity of the project, as applicable; d) Submission of plans to protect the bald eagle and other breeding birds including plans to relocate osprey nesting platforms in consultation with DEEP.
1234	e) Final determination from DEEP and compliance with any recommended mitigation measures.
1312 (Hearing)	m) Final wildlife protection measures and/or seasonal restriction timelines for all DEEP-identified NDDDB species except for the golden-winged warbler.
1313 (Hearing)	h) Final plant and wildlife protection measures and/or seasonal restriction timelines for all DEEP-identified NDDDB species, as recommended by DEEP. i) Preventative measures for breeding birds and forest roosting bats, including clearing restrictions or field surveys with subsequent avoidance measures.
1323	f) Final protection measures and/or seasonal restriction timelines for all DEEP-identified NDDDB species, as recommended by DEEP.
1339	d) Plans to comply with DEEP NDDDB comments dated March 9, 2018 including, but not limited to, final turtle protection plan, final bat protection plan and plans for additional NDDDB invertebrate surveys or relocation of solar panels outside of sand barren habitat.
1342	b) Final wildlife survey results and a conservation/protection plan in accordance with DEEP NDDDB comments dated March 22, 2018.
1345	f) Details of any post-construction environmental mitigation measures.

Council records also demonstrate that two petitions for declaratory rulings were denied based on adverse effects on water quality: Petition 1221 and Petition 1310.³⁶ Among the deficiencies and adverse effects on water quality considered and identified by the Council in the final decisions were the following:

Petition	Adverse effect on water quality
1221	1. Wetlands comprise approximately 25% of the subject site and there would be 4,660 square feet of direct wetland impacts that would require a Category 1 or Category 2 permit from the U.S. Army Corps of Engineers. 2. No access to the "Future Project" has been determined or developed and may require a brook crossing and associated impacts.
1310	1. Without sufficiently detailed information regarding grading, erosion and stormwater control, the Council is concerned about stormwater management, sedimentation impacts to wetlands and watercourses that are in close proximity to the limits of disturbance and the resulting detrimental effect on water quality. 2. Although QS concedes that development of the proposed project would impact the envelopes around the vernal pools on the site and concedes that there is no substitution for site-specific surveys, the failure to adequately respond to DEEP's October 7, 2016 request for site-specific surveys or protection measures makes it unacceptable to issue a declaratory ruling.

³⁶ Petition 1221, Final Decision, available at <https://www.ct.gov/csc/cwp/view.asp?a=2397&q=578336>; Petition 1310, Final Decision, available at <https://www.ct.gov/csc/cwp/view.asp?a=2397&q=594016&PM=1>

Petition 1347 is distinguishable from Petitions 1221 and 1310 in that it was denied based on concerns from DEEP regarding a recommended wildlife survey rather than adverse effects on water quality. With respect to wildlife, in Petition 1310, the DEEP comments specifically **requested** the petitioner to conduct site-specific field surveys for state-listed species that could occur on the project site or forego the surveys, assume the listed species occur at the project site and prepare protection strategies for each species.³⁷ The Council denied the petition partially because the petitioner did neither. In Petition 1345, the DEEP comments specifically **requested** the petitioner to provide the results of its protection strategies.³⁸ The Council approved the petition subject to the condition the petitioner submit the details of any environmental mitigation measures as part of its D&M Plan. In Petition 1347, the DEEP comments **recommended** a wildlife survey and a geotechnical study. The Council denied the petition without prejudice. This is inconsistent with Council precedent.

IV. CONCLUSION

GRE's September 7, 2018 responses to Council Interrogatory Nos. 28, 38, 59, 70, and 83 indicate that GRE has performed a geotechnical investigation, a copy of which was attached to the interrogatory responses as Exhibit Q; additional geotechnical work will be pursued if the Proposed Project is approved; and GRE could include the additional geotechnical information as part of the D&M Plan.³⁹ In its November 7, 2018 Petition, GRE reiterates that it would provide the additional geotechnical information as part of a D&M Plan.

GRE's September 7, 2018 response to Council Interrogatory No. 47 indicates GRE would comply with any DEEP-recommended seasonal construction restrictions due to the presence of any protected species on the site. In its November 7, 2018 Petition, GRE indicates it is willing to undertake the wildlife survey and submit it to the Council as part of a D&M Plan.

Based on the Council's statutory authority under the UAPA and PUESA, the DEEP comments and Council precedent, GRE's Petition should be granted and there is substantial evidence in the record of Petition 1347 to support issuance of a declaratory with additional conditions as the Council, within its discretion, deems appropriate.

Therefore, staff recommends GRE's November 7, 2018 Petition for Reconsideration be granted and Petition 1347 be approved with the conditions noted in the October 25, 2018 Staff Report and the following additional conditions:

- g) Consultation with the DEEP Wildlife Division regarding the parameters of the DEEP-recommended comprehensive wildlife survey and submission of the completed wildlife survey and any associated DEEP-recommended construction mitigation measures to the Council; and
- h) Submission of the results of any additional geotechnical investigation conducted at the project site.

³⁷ Petition 1310, September 14, 2017 DEEP comment letter, *available at* https://www.ct.gov/csc/lib/csc/pending_petitions/3_petition_1301through1400/pe1310_quinebaug_solar/state_town_officialcomments/pe1310-sacrcdpi-deep.pdf

³⁸ Petition 1345, June 6, 2018 DEEP comment letter, *available at* <https://www.ct.gov/csc/cwp/view.asp?a=2397&q=602894>

³⁹ GRE's responses to Council Interrogatory No. 28, 38, 59, 70 and 83, *supra* note 3.