STATE OF CONNECTICUT
CONNECTICUT SITING COUNCIL
Ten Franklin Square, New Britain, CT 06051
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www.ct.gov/csc

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 26, 2019

Daniel E. Casagrande, Esq.
New Milford Town Attorney
Cramer & Anderson LLP
30 Main Street, Suite 204
Danbury, CT 06810

RE: **PETITION NO. 1362** - Town of New Milford petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176, for a determination that the January 28, 2019 Development and Management Plan submitted by Candlewood Solar, LLC in Petition No. 1312 conflicts and/or is inconsistent with the Connecticut Siting Council's December 21, 2017 final decision on Petition No. 1312.

Dear Attorney Casagrande:

At a public meeting held on April 25, 2019, the Connecticut Siting Council (Council) considered and denied the above-referenced petition for a declaratory ruling on the bases that Candlewood Solar, LLC's (CS) January 28, 2019 Development and Management Plan (D&M Plan) is consistent with the Council's December 21, 2017 final decision in Petition 1312, the Department of Energy and Environmental Protection retains final jurisdiction over stormwater management and pursuant to Regulations of Connecticut State Agencies §16-50j-61 to 16-50j-62, D&M Plans can be modified by the Council.

As a result of the Council's denial of the above-referenced petition for a declaratory ruling, the requests for Connecticut Environmental Protection Act Intervenor Status and to schedule a public hearing on the petition and/or conduct further proceedings are rendered moot.

Furthermore, the request to extend the time for review of the D&M Plan is moot as on March 13, 2019, CS granted the Council an extension of time for review of the D&M Plan to May 10, 2019.

Enclosed for your information is a copy of the staff report on this petition for a declaratory ruling.

Sincerely,

Melanie Bachman
Executive Director

MAB/MP/lf

Enclosure: Staff Report dated April 25, 2019

c: Parties and Intervenors

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DATE: April 25, 2019

TO: Council Members

FROM: Melanie A. Bachman
Executive Director/Staff Attorney

RE: **PETITION NO. 1362** – Town of New Milford petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176, for a determination that the January 28, 2019 Development and Management Plan submitted by Candlewood Solar, LLC in Petition No. 1312 conflicts and/or is inconsistent with the Connecticut Siting Council's December 21, 2017 final decision on Petition No. 1312. **Staff Report.**

Pursuant to Condition 1 of the Connecticut Siting Council's (Council) December 21, 2017 Decision and Order (D&O) on Petition 1312 approving a 20 megawatt solar photovoltaic electric generating facility in New Milford, Connecticut, Candlewood Solar, LLC (CS) submitted a Development and Management Plan (D&M Plan) for Council review on January 28, 2019. Approval of this D&M Plan is necessary to ensure the site plans are consistent with the orders and conditions set forth by the Council in its December 21, 2017 final decision on Petition 1312 and is a prerequisite for commencement of construction.

On February 28, 2019, in lieu of submitting comments on the D&M Plan pursuant to Condition 1 of the Council's D&O in Petition 1312, the Town of New Milford (Town), a party to Petition 1312, submitted a Petition for a Declaratory Ruling (Petition) to the Council contending that CS's January 28, 2019 D&M Plan conflicts and/or is inconsistent with the Council's December 21, 2017 final decision to approve the facility.

The Town separates its Petition into two parts and requests:

1. A declaratory ruling that the D&M Plan:
    a. fails to comply with the erosion and sedimentation (E&S) control and stormwater pollution control standards set forth in the Department of Energy and Environmental Protection's (DEEP) regulations and guidelines;
    b. fails to address or comply with accepted best engineering practices for controlling sedimentation, erosion and runoff; and
    c. is in material conflict with other portions of the Council's final decision related to the tree clearing schedule and decommissioning plan; and

2. Intervenor status under the Connecticut Environmental Protection Act (CEPA) pursuant to Connecticut General Statutes (CGS) §22a-19.

Also in its Petition, the Town requests the Council to deny the D&M Plan, or in the alternative, the Town makes the following additional requests of the Council:

1. Extend the time for review of the D&M Plan beyond the 60-day deadline set forth in Regulations of Connecticut State Agencies (RCSA) §16-50j-60(d); and

2. Schedule a hearing on the Petition and/or conduct further proceedings.

On March 1, 2019, the Council provided notice of the Town's Petition. No comments were received. On March 7, 2019, CS requested party status, which was granted by the Council on March 28, 2019.

I. The Petition 1312 proceedings.

On June 28, 2017, CS submitted Petition 1312 to the Council. On July 19, 2017, the Town submitted a request for party status, pursuant to CGS §§4-177 and 16-50n, and a request for a public hearing. The Town did not request CEPA intervenor status under CGS §22a-19. During a regular meeting held on July 20, 2017, the Council granted the Town party status and voted to hold a public hearing. On September 6, 2017, Rescue Candlewood Mountain (RCM) submitted a request for party status, pursuant to CGS §§4-177 and 16-50n, and a request for CEPA intervenor status under CGS §22a-19. During a regular meeting held on September 14, 2017, the Council granted RCM party and CEPA intervenor status. The first public hearing on Petition 1312 was held on September 26, 2017 in New Milford. Two additional public hearings were held on October 31, 2017 and November 14, 2017 in New Britain.

During the course of the proceedings, CS submitted pre-filed testimony and exhibits, including, but not limited to, a Stormwater Management Plan (SMP) and an E&S Control Plan for the original proposed project, responded to interrogatories from the Council and the other parties, was subject to cross examination by the Council and the other parties, cross examined the other parties and submitted a post hearing brief. On October 24, 2017, CS submitted revised project plans reducing the footprint to avoid slimy salamander habitat and increasing the buffer around vernal pools and an area of archaeological sensitivity.[1] The Council's final decision in Petition 1312 approved the revised project plans and the record is clear the revised project plans necessitate a modified stormwater design.[2]

The Town was a party to Petition 1312 and had a full and complete opportunity to present its case.[3] During the course of the proceedings, the Town submitted pre-filed testimony and exhibits, requested administrative notice of the "Low Impact Development Appendix to the Connecticut Stormwater Quality Manual" and the "Low Impact Development Appendix to the Connecticut Guidelines for Soil E&S Control Manual," submitted interrogatories to CS and DEEP, cross examined CS and the other parties, was subject to cross examination by CS, the Council and other parties, and submitted proposed findings of fact and a post-hearing brief. On December 21, 2017, the Council rendered its final decision on Petition 1312 to approve the facility.

On February 1, 2018, RCM filed a timely appeal of the Council's December 21, 2017 final decision on Petition 1312. A copy of the Council's brief in response to the RCM appeal is attached as Exhibit A and is incorporated by reference. Although the Town notes in its Petition that it shares RCM's concerns, the Town did not file its own timely appeal of the Council's final decision nor did the Town join in RCM's timely appeal of the Council's final decision. The RCM appeal is pending in New Britain Superior Court.

II. The Town of New Milford's Petition for a Declaratory Ruling

Under CGS §4-176, any person may petition an agency for a declaratory ruling as to the applicability of specified circumstances of a final decision on a matter within the jurisdiction of the agency. Condition 1 of the Council's D&O, in Petition 1312, attached as Exhibit B, requires, "CS prepare a D&M Plan in compliance with Sections 16-50j-60 through 16-50j-62 of the RCSA and serve the D&M Plan on the Towns of New Milford, Brookfield and Fairfield (Towns) for comment, and all parties and intervenors on the service list, and submit it to the Council for approval prior to the commencement of facility construction" (Condition 1). It is undisputed that CS submitted its D&M Plan

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[1] Petition 1312, Finding of Fact ¶114; Opinion at pages 2, 5-7.

[2] Petition 1312, Finding of Fact ¶196; Opinion at page 9.

[3] *Town of Westport v. Connecticut Siting Council*, 260 Conn. 266 (2002); *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474 (1990) (The Council made voluminous detailed findings about the facility's likely effects on water and air. In light of the lengthy record, **the town had a full and complete opportunity to present its case**.)(Emphasis added).

to the Towns, all parties and intervenors on the service list and the Council on January 28, 2019 in compliance with Condition 1. On February 28, 2019, the Town filed its Petition contending that CS's D&M Plan conflicts and/or is inconsistent with the Council's December 21, 2017 final decision to approve the facility.

In support of its Petition, the Town cites to *Town of Middlebury v. Connecticut Siting Council.* In that case, the Town of Middlebury submitted a petition for a declaratory ruling to the Council that the D&M Plan submitted for an approved electric generating facility was inconsistent with the Council's D&O in that matter.[4] Although the Town of Middlebury was a party to the Council's proceedings held on the proposed electric generating facility, the Town of Middlebury did not file a timely appeal of the Council's final decision to approve the facility. The Council denied the petition for a declaratory ruling that the D&M Plan was inconsistent with the Council's D&O and approved the D&M Plan. The Town of Middlebury filed an appeal. In its decision, the court dismissed the appeal and held that "the D&M Plan functions to "fill up the details" in the Council's final decision and ***the D&M Plan cannot provide a substitute for matters not addressed during the application process.***"(Emphasis added).[5]

Pursuant to CGS §4-176 and the court's holding in *Town of Middlebury*,[6] the Council should deny the Town's Petition that CS's D&M Plan in Petition 1312 conflicts and/or is inconsistent with the Council's December 21, 2017 final decision for the following reasons:

A. CS's D&M Plan is consistent with the Council's final decision in Petition 1312.

A D&M Plan is not the subject of a proceeding.[7] A D&M Plan is a condition of a final decision in a proceeding that must be met in order to commence facility construction.[8] Similar to the court's description of a D&M Plan in *Town of Middlebury* to "fill up the details" in the Council's final decision, the court described a D&M Plan in *Town of Westport* as the "nuts and bolts" of the facility approved by the Council in its D&O.[9]

Relevant to the Town's Petition are the following subparts of Condition 1 of the Council's D&O requiring CS to submit as part of its D&M Plan:

e. E&S control plan consistent with the *2002 Connecticut Guidelines for Erosion and Sedimentation Control* including, but not limited to, seeding the site for stabilization purposes prior to installation of racking systems and panels;
f. Site clearing, grubbing, stabilization, and stormwater controls phasing plan;
g. A stormwater management plan consistent with the *2004 Connecticut Stormwater Quality Manual*, including an analysis on the potential impact of driveways on stormwater flows, including but not limited to, potential diversion of stormwater away from wetlands;
h. Plans to comply with the recommendations from DEEP outlined in "Stormwater Management at Solar Farm Construction Projects" dated September 8, 2017;
k. Decommissioning plan; and
m. Final wildlife protection measures and/or seasonal restriction timelines for all DEEP-identified Natural Diversity Database species except for golden-winged warbler.

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[4] *Town of Middlebury v. Connecticut Siting Council*, 2002 Conn. Super. LEXIS 610 (Conn. Super. 2002).
[5] *Id.* at *17-18, citing *Town of Westport, supra* note 3.
[6] *Id.*; Conn. Gen. Stat. §4-176(e) (2019) (Within 60 days after receipt of a petition, an agency in writing shall: (1) issue a declaratory ruling; (2) order a public hearing; (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 stating the reasons.)
[7] Conn. Gen. Stat. §4-166(4)(2019) ("Contested case" means a proceeding, including licensing, in which the legal rights, duties or privileges of a party are required by state statute or regulation to be determined by an agency after a hearing is held.)
[8] *Town of Middlebury, supra* note 4; *Town of Westport, supra* note 3; R.C.S.A. §§16-50j-60 to 16-50j-62 (2019).
[9] *Town of Westport, supra* note 3.

The relevant subparts of Condition 1 of the Council's D&O are addressed in CS's D&M Plan as follows:

- Condition 1(e) is addressed in Appendix D and Section 2.5
- Condition 1(f) is addressed in Appendix D and Section 2.6
- Condition 1(g) is addressed in Appendix E and Section 2.7
- Condition 1(h) is addressed in Section 2.8
- Condition 1(k) is addressed in Section 2.11
- Condition 1(m) is addressed in Appendix F and Section 2.13

CS's D&M Plan is consistent with the Council's final decision in Petition 1312.

In lieu of submitting comments on CS's D&M Plan, an option granted to the Town under Condition 1 of the Council's D&O, the Town opted to submit a Petition that the D&M Plan conflicts and/or is inconsistent with the Council's December 21, 2017 final decision to approve the facility. The Town's Petition includes an affidavit from Milone and MacBroom, Inc. (MM), a consulting firm that was not a witness for the Town in the proceedings held on Petition 1312, contending that the D&M Plan is defective, unworkable or otherwise not in compliance with the Council's final decision in the following respects: unsuitability of construction plans, fundamental flaws in stormwater analysis, inadequacy of phasing plan, non-compliant with DEEP's guidelines for stormwater management at solar farm construction projects, non-compliant with the tree clearing schedule, and inadequate decommissioning plan.

1. DEEP retains final jurisdiction over stormwater management.

Based on statements in the MM Affidavit, the Town seeks a declaratory ruling that CS's D&M Plan:

a. fails to comply with the E&S control and stormwater pollution control standards set forth in the DEEP regulations and guidelines; and
b. fails to address or comply with accepted best engineering practices for controlling sedimentation, erosion and runoff.

It is well established that CS is required to obtain a General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities (General Permit) from DEEP pursuant to CGS §22a-430b. DEEP regulations and guidelines set forth standards for E&S control, stormwater pollution control and best engineering practices.[10] Both CS and DEEP acknowledged the General Permit requirement for construction to proceed in the record of Petition 1312.[11] CS submitted an application for a General Permit to DEEP on January 2, 2019.

On January 15, 2019, the Town submitted a petition for a declaratory ruling to DEEP (DEEP Petition), attached as Exhibit C, related to CS's application for a General Permit that requested:

1. A declaratory ruling that the project should proceed under a request for authorization for an Individual Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities rather than a General Permit; and
2. Intervenor status under CEPA pursuant to CGS §22a-19.

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[10] General Permit, DEEP-WPED-GP-015 (October 1, 2013).
[11] Petition 1312, DEEP September 21, 2017 comment letter ("...**DEEP retains final jurisdiction over stormwater management.**") (Emphasis added.); Petition 1312, DEEP September 19, 2017 responses to Town of New Milford interrogatories ("DEEP anticipates working with [CS] on [stormwater] issues in the future as the Environmental Assessment acknowledges that DEEP's General Permit is required."); Petition 1312, CS Environmental Assessment at page 16 (A General Permit is required to be obtained for the Project).

Also in its DEEP Petition, the Town made the following requests of DEEP:

1. Extend the time for public comment on CS's General Permit application until 90 days after the Commissioner rules on whether to require an Individual Permit, or in the alternative, until 90 days after the date the General Permit application was filed with DEEP; and
2. Schedule a hearing on the DEEP Petition pursuant to RCSA §22a-3a-4(c)(4).[12]

The bases, supporting materials and requests presented in the DEEP Petition are virtually identical to the subject Petition. On page 4 of the DEEP Petition, the Town states, "[MM] has reviewed the conceptual plans submitted by the developer to the [Council]. [MM] has also conducted an initial review of the [Stormwater Pollution Control Plan] (SWPCP) filed by the developer on January 2, 2019. Based on these reviews, [MM] members have prepared an affidavit which describes their numerous and significant concerns about the inadequacies in the SWPCP." On page 5 of the subject Petition, the Town states, "[MM] has reviewed the SWPCP and SMP and other plans submitted as part of the [D&M Plan]. Based on its review, [MM] members have prepared an affidavit which describes their numerous and significant concerns about the inadequacies in these plans."

DEEP retains final jurisdiction over stormwater management. DEEP is the issuing authority for a General Permit.[13] It is clear from the subject Petition that the Town recognizes DEEP regulations and guidelines set forth standards for E&S control, stormwater pollution control and best engineering practices. It is clear from the DEEP Petition that the Town recognizes DEEP is the issuing authority for a General Permit. CS submitted an application for a General Permit to DEEP on January 2, 2019.[14] A DEEP-issued General Permit for stormwater management is required prior to commencement of construction.

2. D&M Plans can be modified by the Council.

In its Petition, the Town contends there are additional material conflicts between the Council's final decision and the D&M Plan with regard to the tree clearing schedule and the decommissioning plan. Pursuant to RCSA §16-50j-61, the Council may order changes to a D&M Plan at any time during or after preparation of the plan. This provision allows the Council to order changes to a D&M Plan while it is under review. Pursuant to RCSA §16-50j-62, the facility owner shall provide the Council with advance written notice whenever a significant change of the approved D&M Plan is necessary. This provision allows the Council to order changes to a D&M Plan after it has been approved.

With regard to the tree clearing schedule, there is no condition in the Council's D&O that tree clearing shall be limited to between November 1 and March 30. Condition 1(m) of the Council's D&O requires CS to submit as part of its D&M Plan, "Final wildlife protection measures and/or seasonal restriction timelines for all DEEP-identified NDDB species except for golden-winged warbler." The November 15, 2018 DEEP NDDB Final Determination states, "Tree clearing should be limited to between November 1 and March 30." The January 28, 2019 D&M Plan specifically states at page 8, under the heading, Tree Roosting Bat Protection, "[CS] is working with DEEP NDDB on a potential modification to the tree-clearing window."

There is no prohibition on CS from consulting with DEEP relative to a modification of the tree clearing schedule nor is there a prohibition on DEEP, the agency with cognizance over protected species in the state, from exercising its discretion relative to a modification of the tree clearing schedule. If DEEP modifies the tree clearing schedule, CS is required to provide the Council with written notice of the modification. There is no material conflict between the Council's final decision and the D&M Plan with regard to the tree clearing schedule. If CS secures DEEP approval to modify the tree clearing schedule, the D&M Plan can be modified by the Council.

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[12] DEEP denied CS's application for a General Permit without prejudice and did not issue a declaratory ruling on March 14, 2019.
[13] *City of Waterbury v. Town of Washington*, 260 Conn. 506, 571 (2002) (There is a presumption that public officials entrusted with specific public functions related to their jobs properly carry out their duties.)
[14] DEEP denied CS's application for a General Permit without prejudice on March 14, 2019.

With regard to the decommissioning plan, there is no condition in the Council's D&O that the decommissioning plan "evidence" forest restoration, consent of the property owner or financial assurance as described on page 10 of the Town's Petition. Condition 1(k) of the Council's D&O requires CS to submit as part of its D&M Plan, "a Decommissioning Plan." First, it is the right of the property owner to determine how the site would be used at the end of the project's useful life. Neither CS, the Town nor the Council have any authority to make this determination. Second, the Town relies on a regulation specifically applicable to wind electric generating facilities for its position that CS's decommissioning plan is a "pig-in-a-poke promise" that does not include financial assurance.[15] This regulation does not apply to solar electric generating facilities.

The Town's financial assurance concern appears to originate from a provision it negotiated in the Payment in Lieu of Tax Agreement (PILOT) executed between CS and the Town on February 17, 2017 that a surety bond for the decommissioning plan would be provided to the Town at the end of the project's useful life.[16] Buried in footnote 2 of the Town's Petition, the Town accuses the Council of engaging in an impermissible delegation of its statutory authority by allowing the nature and scope of the decommissioning plan to be worked out between CS and the Town pursuant to the PILOT. However, the Council did not adopt nor incorporate the PILOT in its final decision. Rather, Condition 1(k) of the Council's D&O required the submission of a decommissioning plan. As required by Condition 1(k) of the Council's D&O, CS submitted a decommissioning plan in its D&M Plan.

CS's D&M Plan specifically states at pages 6-7, "The different steps below describe the process to decommission a PV solar ground mount system." CS's decommissioning plan is consistent in both size and substance with decommissioning plans submitted to the Council by other solar project developers, attached as Exhibit D. Decommissioning plans for solar facilities typically include, but are not limited to, decommissioning preparation, equipment removal and site reclamation. CS's D&M Plan includes, but is not limited to, decommissioning preparation, equipment removal and site reclamation. There is no material conflict between the Council's final decision and the D&M Plan with regard to the decommissioning plan. If CS seeks to further refine the decommissioning plan, the D&M Plan can be modified by the Council.

B. Request for CEPA Intervenor Status

The second part of the Town's Petition requests CEPA intervenor status in the proceedings on the declaratory ruling requested in the first part of the Town's Petition. The Town was a party to Petition 1312. Like RCM, the Town could have requested CEPA intervenor status in the proceedings on Petition 1312. It did not.

The Town indicates it has a direct interest in the D&M Plan "proceeding." As more fully described in Section IIA above, a D&M Plan is not the subject of a proceeding. A D&M Plan is a condition of a final decision in a proceeding that must be met in order to commence facility construction. As described by the court in the cases of *Town of Middlebury* and *Town of Westport,* the D&M Plan functions to "fill up the details" in the Council's final decision, the D&M Plan is the "nuts and bolts" of the facility approved by the Council in its D&O and ***the D&M Plan cannot provide a substitute for matters not addressed during the application process.***"(Emphasis added).[17]

The Town had a direct interest in the Petition 1312 proceedings, the Town was a party to Petition 1312 and the Town had a full and complete opportunity to present its case in Petition 1312.[18] It appears the Town is attempting to use CS's D&M Plan as a substitute for matters the Town did not address during the Petition 1312 proceedings, including,

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[15] RCSA §16-50j-94(i) (2019) ("Any application for a certificate for a **wind turbine facility** or petition for a declaratory ruling for a **wind turbine facility** shall contain a decommissioning plan… that shall include:…(6) financial assurance.") (Emphasis added).
[16] Petition 1312, Finding of Fact ¶25 (Provisions of the PILOT include, but are not limited to, surety bonds for roads and infrastructure, E&S controls and landscaping, decommissioning plan and bond, D&M Plan and Stormwater Management Plan.)
[17] *Town of Middlebury, supra* note 4 at *17-18, citing *Town of Westport supra* note 3.
[18] *Town of Westport* and *Concerned Citizens of Sterling, Inc., supra* note 3.

but not limited to, the Town's failure to request CEPA intervenor status. In the case of *FairwindCT v. Connecticut Siting Council*, the Supreme Court held "there is nothing in the record of this case that shows that [FairwindCT] has specific, personal interests that were affected by the conditions that the Council imposed on its approval. The conditions imposed no costs or burdens on them. Moreover, [FairwindCT] lacks standing as [CEPA intervenors] because the conditions themselves do not have the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state."[19]

Given the recommendation that the Council deny a declaratory ruling on the Town's Petition for the reasons stated in Section IIA above, the second part of the Town's Petition requesting CEPA intervenor status in the proceedings held on the Town's Petition is rendered moot.

III. Conclusion

Pursuant to CGS §4-176, with regard to **first part of the Town's Petition**, based on the reasons articulated in Section IIA above, staff recommends the Council deny the Town's Petition that CS's D&M Plan in Petition 1312 conflicts and/or is inconsistent with the Council's December 21, 2017 final decision.

With regard to the **second part of the Town's Petition**, based on the reasons articulated in Section IIB above and the recommendation to deny a declaratory ruling on the first part of the Town's Petition in Section IIA above, the request for CEPA intervenor status in the second part of the Town's Petition is rendered moot.

With regard to the **additional requests** in the Town's Petition:

1. Extend the time for review of the D&M Plan beyond the 60-day deadline set forth in Regulations of Connecticut State Agencies (RCSA) §16-50j-60(d).

   On March 5, 2019, the Council requested additional time to review CS's D&M Plan from the regulatory 60-day deadline of March 29, 2019 to May 10, 2019. CS granted the Council the extension on March 13, 2019. The Town's request for the Council to extend the time for review of the D&M Plan is therefore moot.

2. Schedule a hearing on the Petition and/or conduct further proceedings.

   Denial of a declaratory ruling on the Town's Petition that CS's D&M Plan in Petition 1312 conflicts and/or is inconsistent with the Council's December 21, 2017 final decision renders the request to schedule a hearing on the Petition and/or to conduct further proceedings moot.

Additionally, staff recommends that the Council accept the MM Affidavit attached to the Town's Petition as the Town's comments on CS's D&M Plan pursuant to Condition 1 of the Council's D&O in Petition 1312.

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[19] *FairwindCT v. Connecticut Siting Council*, 313 Conn. 669 at 688-689 (2014).

EXHIBIT A

Rescue Candlewood Mountain, et al v. Connecticut Siting Council, et al and Carl M. Dunham, Jr. v. Connecticut Siting Council, et al

Brief of the Defendant Connecticut Siting Council, September 24, 2018

DOCKET NO. HHB-CV-18-6042335-S	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, ET AL. *Plaintiffs*	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
CONNECTICUT SITING COUNCIL, ET AL. *Defendants*	:	SEPTEMBER 24, 2018

DOCKET NO. HHB-CV-18-5021642-S	:	SUPERIOR COURT
CARL M. DUNHAM, JR. *Plaintiff*	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	
CONNECTICUT SITING COUNCIL, ET AL. *Defendants*	:	SEPTEMBER 24, 2018

BRIEF OF THE DEFENDANT CONNECTICUT SITING COUNCIL

DEFENDANT
CONNECTICUT SITING COUNCIL

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TABLE OF CONTENTS

I. INTRODUCTION

These cases consist of two administrative appeals from a decision of the Defendant Connecticut Siting Council ("CSC" or "Council"), in CSC Petition No. 1312, entitled, "Candlewood Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt (MW) AC solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut," dated December 21, 2017, and mailed on December 22, 2017. *See Record, Volume 15 (Doc. # 122), (Bates Nos. CSC 1312-2423 to 2532) hereinafter the "CSC Decision." (Note: for further Bates number citations, only the last four numbers will be used as all the pages have the CSC petition number on them.*[1] The two cases are *Rescue Candlewood Mountain v. Connecticut Siting Council*, HHB-CV18-6042335-S ("*RCM v. CSC*") and *Dunham v. Connecticut Siting Council*, HHB-CV18-5021642-S ("*Dunham v. CSC*"). The five plaintiffs (collectively, Plaintiffs) are local residents and a local business. *See Complaint (Doc. # 100.31), ¶¶ 1-3 RCM v. CSC and ¶ 1 Dunham v. CSC.*

Plaintiffs essentially seek a judgment from the Court reversing the CSC Decision and directing the CSC to deny the Petition. Plaintiffs challenge CSC's decision on statutory, procedural and substantive grounds. Plaintiffs contend that the CSC failed to comply with Conn. Gen. Stat. § 16-50k(a), which was amended by Public Act 17-218 and took effect on July 1, 2017, after Candlewood Solar LLC's ("CS's") petition was submitted to the CSC. In doing so, Plaintiffs overlook the Connecticut statutory and caselaw rejecting retroactive application of substantive

[1] The CSC Decision consists of Findings of Fact (FOF), *Record, Vol. 15 (Doc. # 122), Bates Nos. 2423 to 2521*; Opinion, *Bates Nos. 2522 to 2530*; and Decision and Order ("D&O"), *Bates Nos. 2531 to 2532.*

changes in the law. Plaintiffs argue that Public Act 17-218 is merely procedural, directing the CSC to process CS's solar energy project through the certificate procedure (a contested case) rather than through the petition for declaratory ruling procedure, and should thus be applied retroactively. In making this argument, Plaintiffs are overlooking the fact that the careful consideration of all of the relevant factors in Conn. Gen. Stat. § 16-50p, including impacts to core forest and agriculture, in CSC's Decision. Plaintiffs claim that their due process rights were violated, yet failed to articulate any due process rights that were violated. The CSC provided extensive due process to all parties and intervenors, including rights to present witnesses and evidence, conduct cross-examination, and present briefs and arguments. Plaintiffs also claim that the CSC required CS to submit a decommissioning plan that did not comply with the requirements of Regs. Conn. State. Agencies Sec. 16-50j-94, yet Sec. 16-50j-94 applies to petitions and applications for *wind turbines*. Plaintiffs claim that the CSC erred in its language in its Opinion encouraging CS and the related company expected to acquire the site property to execute a conservation easement, notwithstanding that the CSC's language violated no statutory or regulatory requirement, and Plaintiffs have no standing to challenge the CSC's language as it neither harms Plaintiffs nor the environment. Finally, Plaintiffs claim that the CSC Final Decision was not supported by substantial evidence, yet the CSC Decision cited to extensive evidence to support its findings and conclusions.

II. BACKGROUD

A. *THE CONNECTICUT SITING COUNCIL*

The CSC is a Connecticut state agency established by the Public Utility Environmental Standards Act ("PUESA"), Conn. Gen. Stat. § 16-50g, *et seq*. The CSC is an agency of limited and specific jurisdiction. Besides being governed by the PUESA, the CSC is governed by the

Uniform Administrative Procedure Act ("UAPA"), Conn. Gen. Stat. § 4-166, *et seq.* Its main function is to grant or deny applications for certificates of environmental compatibility and public need ("Certificates") for facilities as defined in Conn. Gen. Stat. § 16-50i. See Conn. Gen. Stat. §§ 16-50k to 16-50q. Certain projects that ordinarily would require certificates have been specifically designated by the General Assembly to be approved by declaratory ruling. Conn. Gen. Stat. § 16-50k. The CSC considers these matters and other petitions for declaratory rulings. *Id.*; see also Conn. Gen. Stat. § 4-176. Hearings are required for Certificate proceedings in accordance with Conn. Gen. Stat. § 16-50m, making those proceedings contested cases under the UAPA. Conn. Gen. Stat. § 4-166 (2). There is no statutory provision *requiring* hearings for petition proceedings, but pursuant to Conn. Gen. Stat. §4-176, an agency may, in its discretion, order the matter set for specified proceedings, which could include public hearings. *See Conn. Gen. Stat. §4-176(g).* Agency determinations in contested cases and declaratory rulings are both appealable final decisions so that an aggrieved person may seek judicial review in the Superior Court. Conn. Gen. Stat. §§ 4-166 (3), 4-176, 4-183, 16-50q.

B. *CANDLEWOOD SOLAR'S PETITION*

On June 28, 2017, Candlewood Solar LLC ("CS") submitted a petition to the CSC for a declaratory ruling for the construction, maintenance and operation of a 20 MW solar photovoltaic electric generating facility at Candlewood Mountain Road in New Milford, Connecticut ("Petition") pursuant to Conn. Gen. Stat. § 16-50k(a).

CS's solar project is a "grid-side distributed resources" facility, as defined in Conn. Gen. Stat. §16-1(a)(37), because it involves "the generation of electricity from a unit with a rating of not more than sixty-five megawatts that is connected to the transmission or distribution system..." *See FOF 8, Record, Vol. 15, Bates No. 2474.* In its Petition, CS identified that the solar

project was submitted in a Request for Proposals jointly issued by the State of Connecticut, the State of Rhode Island and the Commonwealth of Massachusetts ("Tri-State RFP") for Class I renewable energy sources in 2015.[2] CS's project was selected by the Commonwealth of Massachusetts to enter into a Power Purchase Agreement (PPA) with Massachusetts utilities for the sale of electricity and renewable energy credits. *See FOFs 85, 88-90, Record, Vol. 15, Bates Nos. 2488-2490 and Opinion, page 1, Bates No.2522.*

At a meeting held on July 20, 2017, pursuant to Conn. Gen. Stat. §4-176(e), the CSC voted to hold a public hearing and approved a schedule for processing Petition 1312 with a public field review, evidentiary hearing session and public comment session in the Town of New Milford on September 26, 2017. *See FOF 13, Record, Vol. 15, Bates No. 2475.* By memoranda dated June 30 and July 24, 2017, the CSC provided notice of the proceedings and in accordance with Conn. Gen. Stat. §16-50j(g), solicited comments from the numerous Connecticut State agencies prior to commencing the hearing. *See FOF 39, Record, Vol. 15, Bates No. 2479.* Pursuant to Conn. Gen. Stat. §16-50m, the CSC also provided public notice of the hearing by means of publication in the *Danbury News Times* newspaper on July 26, 2017. *See FOF 15, Record, Vol. 15, Bates No. 2475.*

Pursuant to Conn. Gen. Stat. § 16-50m, the CSC, after giving due notice thereof, held a public hearing on Thursday, September 26, 2017, following its public inspection of the site. The site inspection began at 1:30 p.m., followed by an evidentiary hearing session at 3:00 p.m., and continued with a public comment hearing session at 6:30 p.m., with the hearings held at the Roger Sherman Town Hall, 10 Main Street, New Milford, CT. *FOFs 7, 9, Record, Vol. 15,*

[2] *See FOFs 46 to 90, Bates Nos. 2482 to 2490 for the Council's description of the regional integration of the New England grid. See also, Allco Finance Ltd. v. Klee*, 861 F.3d 82, 88-89 and 92-93 (2d Cir. 2017), *cert. den.*, 138 S.Ct. 926 (2018) for an explanation of the regional nature of the electric power market in New England generally and in renewable electricity specifically.

Bates Nos. 2474-2475. The CSC held additional evidentiary hearings on October 31 and November 14, 2017, in the CSC's hearing rooms at its offices in New Britain, Connecticut. *FOFs 19, 21, Record, Vol. 15, Bates No. 2476*. All of the Plaintiffs were admitted as parties before the CSC, pursuant to the UAPA, PUESA and Connecticut Environmental Protection Act ("CEPA"), Conn. Gen. Stat. §22a-19.[3] During the three days of evidentiary hearings, all parties and intervenors had the opportunity to submit evidence and cross examine witnesses. *See Transcripts, generally, Record, Vol. 7 (Doc. # 114), Bates Nos.1008 to 1542; see also Record, Vols. 8-14 (Docs. ##115 to 121), pre-filed testimony and exhibits*.

After conducting extensive hearings, and receiving evidence and hearing witnesses from the parties, the CSC approved the Petition on December 21, 2017, and mailed the Final Decision on December 22, 2017. *See Record, Volume 15 (Doc. # 122), (Bates Nos. CSC 1312-2423 to 2532)*. On February 1, 2018, Plaintiffs filed the instant administrative appeal. On August 9, 2018, Plaintiffs filed their brief in support of their appeal. The CSC respectfully submits this brief in opposition to said appeal.

III. THE STANDARD OF REVIEW

Judicial review of decisions of the CSC is governed by Conn. Gen. Stat. §§ 16-50q and 4-183. Conn. Gen. Stat. § 16-50q incorporates the provisions of Conn. Gen. Stat. § 4-183, rather than creating an independent right of appeal. *Brouillard v. Connecticut Siting Council*, 133 Conn. App. 851, 855-857, 38 A.3d 174 (2012), *cert. denied*, 304 Conn. 923, 41 A.3d 662 (2012). The scope of review in an administrative appeal under Conn. Gen. Stat. § 4-183 is limited. "Judicial review of [an administrative agency's action] is governed by the Uniform Administrative Procedure Act . . . and the scope of that review is very restricted." *Martorelli v. Dept. of Transportation*, 316 Conn. 538, 544-545, 114 A.3d 912 (2015).

[3] Mr. Dunham, the plaintiff in *Dunham v. CSC*, is also a listed member of plaintiff RCM.

The factual determinations of the agency are upheld if there is *substantial evidence* in the record to support such a finding. *FairwindCT v. Connecticut Siting Council*, 313 Conn. 669, 689, 99 A.3d 1038 (2014). Substantial evidence exists if the administrative record affords "a substantial basis of fact from which the fact in issue can be reasonably inferred." *Id.* If the specific evidence cited in support of an administrative agency's ultimate factual finding is inadequate to support that ultimate factual conclusion, a reviewing court should "search the record" of the entire proceedings to determine whether it does in fact contain substantial evidence from which the ultimate factual finding could reasonably be inferred. *Findley v. Inland Wetland Commission*, 289 Conn. 12, 38, 959 A.2d 569 (2008). On the other hand, questions of statutory and constitutional provisions are "question[s] of law and therefore [the Court's] review is plenary." *Davis v. City of Norwich*, 232 Conn. 311, 317, 654 A.2d 1221 (1995).

Merely finding error is insufficient for a reviewing court to reverse an agency decision. Section 4-183 (j) permits the Court to overturn an agency's decision only if "*the court finds that the substantial rights of the person appealing have been prejudiced*" because of certain enumerated errors or violations of law. Thus, the Court must also find that the plaintiff was materially prejudiced by the error. In *Tele Tech of Connecticut Corp. v. DPUC*, 270 Conn. 778, 812-815, 855 A.2d 174 (2004), the Connecticut Supreme Court upheld an agency decision, even after finding error, because the plaintiff failed to establish that the error prejudiced its substantial rights. *Id.* In *FairwindCT, supra*, the Court, in upholding a CSC decision, held, "we must conclude that, even if the council's actions were improper, they were harmless." *Id.*, 313 Conn. at 735. For the Plaintiffs to prevail, the Court must first find that the CSC committed error, and then find that the error(s) materially prejudiced the Plaintiffs.

IV. AGGRIEVEMENT

The CSC does not contest aggrievement and standing. Plaintiffs claim both statutory aggrievement pursuant to Conn. Gen. Stat. § 22a-19, the Connecticut Environmental Protection Act (CEPA), and classical aggrievement. Unlike the situation in *Burton v. Connecticut Siting Council*, 161 Conn.App. 329, 127 A.3d 1066 (2015), *cert. den.*, 320 Conn. 925, 133 A.3d 459 (2016), Plaintiffs pled facts sufficient to give them standing under both CEPA and classical aggrievement.

V. ARGUMENT

Plaintiffs present this Court with two broad areas of contention: 1) a claim that the CSC acted without statutory authority to render its decision on the merits of the petition, claiming that Public Act No. 17-218 deprived the CSC of jurisdiction; and 2) claims that the CSC Decision was not based on substantial evidence regarding vernal pools, core forests, decommissioning, conservation easements, potential alternative sites, stormwater management plans, and the completeness of the petition, as well as risks to aviation. None of these issues have any merit.

A. THE ENACTMENT OF PUBLIC ACT NO. 17-218 DID NOT DEPRIVE THE CSC OF JURISDICTION OVER ANY PETITIONS PENDING WITH THE CSC AS OF ITS EFFECTIVE DATE, INCLUDING THE INSTANT PETITION, AS THE ACT DID NOT APPLY RETROACTIVELY.

On July 10, 2017, Governor Malloy signed into law Public Act No. 17-218 ("the Act"), which, by its text, was effective on July 1, 2017.[4] The primary legal issue in this appeal is whether the Act is to be retroactively applied. The CSC is particularly affected by Sections 3 and 4 of the Act. Since this issue is a purely legal issue of statutory construction, the Court's review is de novo. *Davis v. City of Norwich*, 232 Conn. 311, 317, 654 A.2d 1221 (1995).

[4] Public Act No. 17-218 is entitled, "*AN ACT CONCERNING THE INSTALLATION OF CERTAIN SOLAR FACILITIES ON PRODUCTIVE FARMLANDS, INCENTIVES FOR THE USE OF ANAEROBIC DIGESTERS BY*

"Whether a new statute is to be applied retroactively or only prospectively presents a question of statutory interpretation over which we exercise plenary review." *State v. Nathaniel S.*, 323 Conn. 290, 294, 146 A.3d 988 (2016). The Court's "fundamental objective is to ascertain and give effect to the apparent intent of the legislature." *Okeke v. Commissioner of Public Health*, 304 Conn. 317, 325, 39 A.3d 1095 (2012). Pursuant to Conn. Gen. Stat. § 1-2z, the Court first considers the text of the statute and its relationship to other statutes. Conn. Gen. Stat. § 1-2z. "If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." *Okeke*, 304 Conn. at 325-326.

Prior to the enactment of P.A. 17-218, Conn. Gen. Stat. § 16-50k(a) required the CSC to approve the siting of solar electric generating facilities of less than 65 MW "by declaratory ruling . . . as long as such project meets air and water quality standards of the Department of Energy and Environmental Protection." Section 3 of the Act amended Conn. Gen. Stat. § 16-50k(a), expanding the requirements for declaratory rulings by requiring for solar projects on "prime farmland or forestland" a statement from either the Department of Agriculture (DOA) or the Department of Energy and Environmental Protection (DEEP), that the project would not "materially affect the status of such land" (on which the facility is to be built) as either prime farmland or core forest. The relevant provision, with the statutory changes marked, is as follows:

> Sec. 3. Subsection (a) of section 16-50k of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2017*):
>
> (a) Except as provided in subsection (b) of section 16-50z, no person shall exercise any right of eminent domain in contemplation of, commence the preparation of the site for, commence the construction or supplying of a facility, or commence any modification of a facility, that may, as determined by the council, have a substantial adverse environmental effect in the state without having

> first obtained a certificate of environmental compatibility and public need, hereinafter referred to as a "certificate", issued with respect to such facility or modification by the council. . . Notwithstanding the provisions of this chapter or title 16a, the council shall, in the exercise of its jurisdiction over the siting of generating facilities, approve by declaratory ruling (A) the construction of a facility solely for the purpose of generating electricity, other than an electric generating facility that uses nuclear materials or coal as fuel, at a site where an electric generating facility operated prior to July 1, 2004, and (B) the construction or location of any fuel cell, unless the council finds a substantial adverse environmental effect, 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]** (i) Such project meets air and water quality standards of the Department of Energy and Environmental Protection, (ii) the council does not find a substantial adverse environmental effect, and (iii) for a solar photovoltaic facility with a capacity of two or more megawatts, to be located on prime farmland or forestland, excluding any such facility that was selected by the Department of Energy and Environmental Protection in any solicitation issued prior to July 1, 2017, pursuant to section 16a-3f, 16a-3g or 16a-3j, the Department of Agriculture represents, in writing, to the council that such project will not materially affect the status of such land as prime farmland or the Department of Energy and Environmental Protection represents, in writing, to the council that such project will not materially affect the status of such land as core forest. In conducting an evaluation of a project for purposes of subparagraph (B)(iii) of this subsection, the Departments of Agriculture and Energy and Environmental Protection may consult with the United States Department of Agriculture and soil and water conservation districts.

Public Act No. 17-218, Section 3 (statutory changes underlined). Under the requirements of the Act, in order to file a petition for declaratory ruling under Conn. Gen. Stat. § 16-50k(a), a proposed solar facility now was required to have received representations in writing from DOA or DEEP that the project would not materially adversely affect the status of prime farmland or forestland. Otherwise, the project would have to go through the full certification process, meeting the requirements of Conn. Gen. Stat. § 16-50p. Thus, Section 3 added *substantive* additional factors that a solar project going through the petition process must meet, namely, obtaining statements from both DOA and DEEP that the solar project would not materially adversely affect the status of prime farmland or forestland. Put another way, after the passage of the Act, solar projects are no longer able to be sited on prime farmland or forestland unless two other state

agencies are persuaded that there will be no material impact on additional elements, under the petition process. Rather, these projects would need to meet the more stringent requirements of the § 16-50p certificate process. The Act injected a large procedural and substantive hurdle to solar projects.

Section 4 of the Act amends Conn. Gen. Stat. § 16-50p(a) to add any adverse effect on agriculture as one of the explicit environmental factors that the CSC must consider in evaluating applications for certificates of environmental compatibility and public need (certificate).

The impact of Sections 3 and 4 is significant. Prior to the Act, Conn. Gen. Stat. § 16-50k required proponents of electric generating facilities to go through an extensive application process for a certificate, but exempted solar facilities from that requirement, instead prescribing that proponents petition for a declaratory ruling in which the only requirements were that the solar project meet the air and water quality standards of DEEP. Section 3 takes away the automatic exemption from the certificate application process for solar facilities proposed to be located on "prime farmland or forestland." Thus, solar electric generating facilities proposed to be placed on prime farmland or forestland are required to obtain a certificate and be subject to the requirements of Conn. Gen. Stat. § 16-50p, as amended by Section 4 of the Act.

Both Sections 3 and 4 are effective as of July 1, 2017. There were several petitions filed with the CSC before July 1, 2017, but decided after that date, including the petition for declaratory ruling that is the subject of the instant appeal.[5] Because the underlying project on appeal is located on "prime farmland or forestland," if P.A. 17-218 applies retroactively, then it should have been decided (i) through the certificate process in accordance with Conn. Gen. Stat. § 16-50p; or (ii) subject to DEEP or DOA approval.

Plaintiffs assert that the Act deprives the CSC of jurisdiction over these petitions. A review of the statutory and case law demonstrates the Act is substantive and cannot be applied retroactively. Thus, the CSC properly evaluated the project as a petition under the legal standards in place prior to the effective date of P.A. 17-218.

The Uniform Administrative Procedure Act ("UAPA") mandates that an administrative agency act upon petitions for declaratory rulings within specified time frames and nothing in P.A. 17-218 modifies those provisions. Conn. Gen. Stat. §4-176(c) mandates that "within 30 days *after receipt of a petition for a declaratory ruling,* an agency shall give notice of the petition ..." (Emphasis added). Conn. Gen. Stat. §4-176(e) requires that "within 60 days *after receipt of a petition for a declaratory ruling,* an agency in writing shall" state how it will process the petition. (Emphasis added). Conn. Gen. Stat. §4-176(i) provides that "If an agency does not issue a declaratory ruling within one hundred eighty days *after the filing of a petition* ... the agency shall be deemed to have decided not to issue such ruling." (Emphasis added). Presumably, the CSC must still follow these statutory requirements with petitions that have been filed with it prior to the effective date of P.A. 17-218. Further, the effect is not limited to petitions for declaratory rulings. To follow Plaintiffs' logic, the CSC would have to reopen the evidentiary portion of all certificate proceedings in which the hearings were completed prior to July 1, 2017, but for which the CSC had not rendered a decision, in order to gather evidence regarding agricultural impacts in accordance with Section 4 of the Act.

There is a strong statutory presumption against retroactive application of substantive statutory changes. Conn. Gen. Stat. § 1-1(u) provides that, "The passage or repeal of an act shall not affect any action then pending." Conn. Gen. Stat. § 55-3 provides that, "No provision of the

[5] While the plain language of the Act excludes facilities selected by DEEP in any *solicitation* issued prior to July 1, 2017 (which could be the subject of petitions filed with the CSC both before and after July 1, 2017), it does not ad-

general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect." The Connecticut Supreme Court has "uniformly interpreted § 55–3 as a rule of presumed legislative intent that statutes affecting substantive rights shall apply **prospectively only**." *Investment Associates v. Summit Associates, Inc.*, 309 Conn. 840, 867, 74 A.3d 1192 (2013), emphasis added.[6] "The rule is rooted in the notion that it would be unfair to impose a substantive amendment that changes the grounds upon which an action may be maintained on parties who have already transacted or who are already committed to litigation." *Id.*, 309 Conn. at 867-868. The Court further held that "In civil cases, however, unless considerations of good sense and justice dictate otherwise, it is presumed that procedural statutes will be applied retrospectively." *Id.*, 309 Conn. at 868.

Whether Sections 3 and 4 of Public Act No. 17-218 should be applied retroactively depends upon whether the statutory changes are procedural or substantive. "[A] substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." *Investment Associates v. Summit Associates, Inc., supra*, 309 Conn. at 868. Some statutes that appear at first glance to be procedural are, in fact, substantive, and the Court held, "[A]lthough we have presumed that procedural or remedial statutes are intended to apply retroactively absent a clear expression of legislative intent to the contrary ... a statute which, in form, provides but a change in remedy but actually brings about changes in substantive rights is not subject to retroactive application." *Id.*, 309 Conn. at 868 (Internal citation and quotation marks omitted).

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dress those *petitions* pending before the CSC before July 1, 2017 that were not selected by DEEP.

[6] As to Conn. Gen. Stat. § 1-1(u), the Court held that "[O]ur case law indicates that § 1–1(u) generally has been treated as a reflection of the presumption against retroactive application of laws making substantive changes and

The present situation is informed by the Court's analysis in *D'Eramo v. Smith*, 273 Conn. 610, 872 A.2d 408 (2005). In that case, the plaintiff injured his wrist on or about February 3, 1998; while he was in custody of the Department of Corrections, surgery for his wrist was delayed until July 27, 1998, allegedly resulting in permanent injury to the plaintiff's wrist. On January 6, 1999, he filed a notice of claim with the State of Connecticut Claims Commissioner, said notice alleging that the delay by the Department of Corrections in providing him adequate medical care, even while being aware of the injury, resulted in permanent wrist damage. *Id.*, 273 Conn. at 613.

Between the plaintiff's surgery and the filing of his claim with the Claims Commissioner, the General Assembly enacted Public Act No. 98-76, now codified in relevant part at Conn. Gen. Stat. § 4-160(b). *D'Eramo v. Smith, supra*, 273 Conn. at 613. This section provides that, "In any claim alleging malpractice against the state, a state hospital or against a physician, surgeon, . . .or other licensed health care provider employed by the state, the attorney or party filing the claim may submit a certificate of good faith to the Office of the Claims Commissioner in accordance with section 52-190a. If such a certificate is submitted, the Claims Commissioner **shall** authorize suit against the state on such claim." Conn. Gen. Stat. § 4-160(b), emphasis added. In December, 2001, the plaintiff filed a certificate of good faith in accordance with Conn. Gen. Stat. § 52-190a, and subsequently filed a motion for authorization to bring a civil suit. *D'Eramo v. Smith, supra*, 273 Conn.at 613-614. The issue before the Connecticut Supreme Court was whether Public Act No. 98-76 applied, making the granting of permission to sue mandatory, or whether it did not apply, permitting the Claims Commissioner discretion to decide whether to

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the considerations of good sense and justice that may bar retroactive application of procedural statutes." *Investment Associates, supra*, 309 Conn. at 866, n.16.

permit the plaintiff the right to sue. (The case went up to the Supreme Court as a mandamus action.)

The Connecticut Supreme Court held that "[T] he effect of § 4–160(b) was to deprive the claims commissioner of his broad *discretionary* decision-making power to authorize suit against the state in cases where a claimant has brought a medical malpractice claim and filed a certificate of good faith. Instead, § 4–160(b) *requires* the claims commissioner to authorize suit in all such cases." *D'Eramo v. Smith, supra*, 273 Conn.at 622 (emphasis in original). Thus, "the effect of the statute was to convert a limited waiver of sovereign immunity to medical malpractice claims, subject to the discretion of the claims commissioner, to a more expansive waiver subject only to the claimant's compliance with certain procedural requirements." *Id.* The Court held that the change was substantive, rather than procedural, that the application of the change was not retroactive, and, since the effective date of the statute was October 1, 1998, the plaintiff's injury predated the statute and he could not benefit from it. *Id.*, 273 Conn. at 623-625.

D'Eramo does not stand in isolation, for the U.S. Supreme Court earlier held that, "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483 (1994). More recently, the Connecticut Supreme Court applied the presumption against statutory retroactivity to regulations, holding "This presumption against the retroactive application of statutes applies similarly to regulations that impose, in the parlance of § 55–3, 'new obligation[s]....'." *Shannon v. Commissioner of Housing*, 322 Conn. 191, 203, 140 A.3d 903 (2016).

In *D'Eramo*, the plaintiff received by the Court, to his detriment, the application of the status quo ante. In the instant case, the petitioners before the CSC also receive the application

of the status quo ante, but to their benefit. Public Act No. 17-218 certainly changed procedure, by directing certain solar energy projects from the § 16-50k petition for declaratory ruling route to the § 16-50p application for a certificate route. The Act, however, clearly changed substance. Before the passage of P.A. 17-218, Conn. Gen. Stat. § 16-50k(a) only required that the CSC determine compliance with DEEP's air and water quality standards, giving the CSC discretion to consider additional standards "as it shall deem appropriate." *See FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 697-704, 99 A.3d 1038 (2014) (CSC, in evaluating wind turbine petitions, once it determined compliance with DEEP air and water quality standards, was free to consider, if it chose to do so, noise, but not required to find compliance with DEEP noise standards). With the passage of P.A. 17-218, the CSC now must process most solar projects on farmland or forests under the certificate process provided by Conn. Gen. Stat. § 16-50p. The certificate process requires the CSC to "find and determine":

> 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,[7] (vi) forests and parks, (vii) air and water purity, and (viii) fish, aquaculture and wildlife.

Conn. Gen. Stat. § 16-50p(a)(3)(B). The CSC also then has to decide why "the adverse effects of conflicts" above do not constitute "sufficient reason" to deny the application. Conn. Gen. Stat. § 16-50p(a)(3)(C). The CSC also has to determine a "public benefit for the facility" and "consider[s] neighborhood concerns with respect to the factors" listed above, including public safety. Conn. Gen. Stat. § 16-50p(c)(1).

[7] Added by P.A. 17-218, § 4.

"A retroactive application of a law occurs only if the new or revised law was not yet in effect on the date that the relevant events underlying its application occurred." *Walsh v. Jodoin*, 283 Conn. 187, 195, 925 A.2d 1086 (2007). The relevant event before the CSC was the filing of CS's petition for a declaratory ruling, which began the running of the timing provisions of Conn. Gen. Stat. § 4-176. At the time of the filing of that petition, P.A. 17-218 had not been signed into law and Conn. Gen. Stat. § 16-50k provided that CS's solar project be considered under the petition for declaratory ruling *process* with the *substantive* factors being only compliance with DEEP's air and water quality standards, with the CSC having discretion, but not required, to consider additional standards "as it shall deem appropriate." Conn. Gen. Stat. § 16-50x(a). It "is generally agreed that a substantive law creates, defines and regulates rights while a procedural law prescribes the methods of enforcing such rights or obtaining redress." *Flanagan v. Blumenthal*, 100 Conn.App. 255, 260, 917 A.2d 1047 (2007). P.A. 17-218 altered CS's rights regarding the *grounds* on which its project would be evaluated, not just the *procedure or method* to obtain that approval. In fact, it significantly altered the substantive factors under which solar projects were reviewed under both the petition process and the certificate process, by adding farmland and forestland to the petition process (doubling the factors that must be reviewed), and the effect on agriculture to the certificate process. Its impact was substantive.

Thus, the Act did more than change procedure for certain solar projects, from a petition for a declaratory ruling for the more stringent application for a certificate. It changed the substantive requirements for such projects, from a minimum of air and water quality standards for petitions to adding farmland and forestland and, for certificate projects, adding agriculture to make a wider range of concerns enumerated in Conn. Gen. Stat. § 16-50p. This is in contrast to the situation in a case cited by Plaintiffs, *State v. Nathaniel S., supra*, where the Connecticut Su-

preme Court applied Section 1 of Public Act. No. 15-183 retroactively. The *Nathaniel S.* Court held, "There is no doubt that the amended statute, on its face, dictates only a procedure—automatic transfer—for adjudicating the cases of certain children accused of committing class A or class B felonies." *Id.*, 323 Conn. at 296. The Supreme Court held that P.A. 15-183 was a "facially procedural statute" even though it impacted substantive rights. In the instant case, P.A. 17-218 was not facially procedural, in that:

- Section 3 of the Act added substantive provisions for solar projects being considered by petition, including requirements for the determinations by DOA or DEEP that the project would not materially adversely affect the status of prime farmland or forestland, substantive factors not previously part of the petition determinations. This was in addition to changing the procedure for certain solar facilities from a petition for a declaratory ruling, where only two factors had to be examined, to an application for a certificate, where multiple factors had to be examined.
- Section 4 of the Act, on its face, substantively added for certificate cases for solar projects that the CSC had to "find and determine" the "nature of the probable environmental impact" on agriculture of a proposed solar project and decide whether any adverse effects on agriculture did not constitute "sufficient reason" to deny the solar project.

It also bears mentioning that in two of the more recent Connecticut Supreme Court cases applying statutes retroactively, the General Assembly expressly stated in the legislation that the acts were clarifying in nature. *Greenwich Hospital v. Gavin*, 265 Conn. 511, 519-523, 829 A.2d 810 (2003); *Estate of Brooks v. Commissioner of Revenue Services*, 325 Conn. 705, 721-723, 159 A.3d 1149 (2017).[8] In contrast, Senate Bill 943 contains the following statement of pur-

[8] In *Greenwich Hospital, supra*, the Court held that, "In the present case, the legislature has simplified our task of determining its intention in adopting P.A. 00–174 by incorporating into the text of the act an explicit statement of

pose: "To discourage the use of prime farmlands and forest lands as locations for the siting of utility-scale solar facilities."[9] This reveals that the purpose and intent of PA 17-218 was to change the existing law, rather than to clarify the existing law, and to require developers of solar projects to acquire a letter from DEEP that such project will not materially affect the status of core forest. Because P.A. 17-218 lacks language indicating that its intent was to clarify, and that S.B. 943 instead stated a purpose displaying an intent to change existing law, the Act does not apply to pending petitions.

An old line of cases required that local zoning commissions and inland wetland commissions apply the local regulations in effect at the time of the commissions' decisions, rather than at the time of the application. Despite the extensive statutory and case law jurisprudence establishing the legal standards for retroactive application of state statutes, plaintiffs erroneously rely upon this old line of cases for the proposition that the Siting Council must apply the statutory scheme in place at the time of its decision. *Plaintiffs' Brief, RCM v. CSC, page 19.* Plaintiffs' reliance is unavailing, for state statutes are not local regulations, some of the cases have been reversed by statute, and the Siting Council is not a local agency. Moreover, to the extent there is a conflict between the Siting Council's statutory scheme and other statutory provisions, the Siting Council's statutory scheme governs. See Conn. Gen. Stat. § 16-50w.

In one of Plaintiffs' cited cases, *McNally v. Zoning Commission of City of Norwalk*, 225 Conn. 1, 621 A.2d 279 (1993), the Court found that, "The rule followed in Connecticut at the time the defendant filed her application was that the **zoning law or regulation** in effect at the

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the legislature's intention," noting that the act in question specifically stated that its purpose was to "clarify" current law. *Id.*, 265 Conn. at 519. In *Estate of Brooks, supra*, the Court held that , "First and foremost, the legislature enacted express language manifesting its intention to clarify its original intent with respect to the relevant provision," with the legislature expressly saying that the act was "clarifying in nature" and applicable "to all open estates." *Id.*, 325 Conn. at 721.

[9] A copy of S.B. 943 is attached and it is also available at https://www.cga.ct.gov/2017/TOB/s/2017SB-00943-R00-SB.htm .

time the court rendered its decision controlled the outcome." *Id.*, 225 Conn. at 9 (emphasis added). The Court added, however, "Public Acts 1989, No. 89–311 changed this rule. Under that act, an application must be granted if it complied with the regulations in effect at the time the application was filed." *Id.* The other case cited by Plaintiffs, *Paupack Development Corp. v. Conservation Commission of Town of New Fairfield*, 229 Conn. 247, 640 A.2d 70 (1994), dealt with inland wetlands applications adjudicated by a municipal conservation commission. *Id.*

The CSC, however, is NOT a municipal zoning or inland wetlands commission. It is a state agency with its own statutory scheme. The CSC is governed by the Public Utility Environmental Standards Act (PUESA), Conn. Gen. Stat. § 16-50g, et seq. The CSC has a broad mandate that requires the CSC 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. . ." Conn. Gen. Stat. § 16-50g. The CSC's mandate requires it "to encourage research to develop new and improved methods of generating, storing and transmitting electricity" and "to require annual forecasts of the demand for electric power, together with identification and advance planning of the facilities needed to supply that demand and to facilitate local, regional, state-wide and interstate planning to implement the foregoing purposes." Conn. Gen. Stat. § 16-50g. It also has preemptive authority over contrary municipal regulations. Conn. Gen. Stat. § 16-50x(a). Further, "[i]n the event of any conflict between the provisions of [PUESA] and any provisions of the general statutes, as amended, or any special act, [PUESA] shall take precedence." Conn. Gen. Stat. § 16-50w. The CSC is not governed by the statutes governing municipal zoning, inland wetlands and conservation commissions. Approving a solar electric power generating facility relying upon the latest solar energy technology

that will provide clean renewable energy regionally meets the goals the General Assembly set for the Council, goals not contained in statutes governing municipal commissions.

Thus, the CSC is a state regulator of energy and telecommunication infrastructure with a mandate to ensure not only that the people of Connecticut receive these services, but do so while balancing environmental needs and to go beyond Connecticut's borders to engage in regional and interstate planning. This is a far cry from the role of a municipal commission.

The cases cited by Plaintiffs do not mention the Council, do not interpret either PUESA or the UAPA, and are contrary to binding jurisprudence governing CSC decisions. Courts have recognized that the CSC is NOT a zoning commission, holding:

> If this were a zoning appeal, his point would be dispositive. Abutting and nearby landowners are statutorily aggrieved in zoning cases. Under General Statutes § 8–8(a)(1), persons owning land within 100 feet of any portion of land involved in a zoning decision gives the landowner statutory standing in a zoning appeal. **This is not a zoning appeal, however.** His status as a nearby property owner does not confer standing.

Brouillard v. Connecticut Siting Council, 52 Conn.Supp. 196, 203, 39 A.3d 1241 (2010), *affirmed*, 133 Conn.App. 851, 38 A.3d 174 (2012), *cert. den.*, 304 Conn. 923, 41 A.3d 662 (2012) (emphasis added). "[L]ocal inland wetland bodies are not little environmental protection agencies. Their environmental authority is limited to the wetland and watercourse area that is subject to their jurisdiction. They have no authority to regulate any activity that is situated outside their jurisdictional limits." *Samperi v. Inland Wetlands Agency of City of West Haven*, 226 Conn. 579, 599, 628 A.2d 1286 (1993). Zoning commissions and local inland wetland bodies are also not little Connecticut Siting Councils. The CSC has a broad state mission and a governing statute, PUESA, that overrides conflicting statutes. The cases cited by Plaintiffs have no applicability to the CSC. Plaintiffs' argument is without merit and should be rejected.

Finally, Plaintiffs reliance upon two final cases is unavailing. Plaintiffs cite *Morrison v. Ocean State Jobbers, Inc.*, 180 F.Supp.3d 190 (D.Conn. 2016) for the proposition that an act shifting the burden of proof is procedural and can be applied retroactively. *Id.*, 180 F.Supp.3d at 196-197. The issue there involved the burden of proof, while Section 4 of P.A. 17-218 adds an additional factor that the CSC must examine in certificate applications, similar to adding an additional element that must be proved in a case, and Section 3 adds all of the additional factors in a certificate case for those solar facilities no longer eligible for approval through the petition process. The shifting of the burden of proof does not change what the trier must determine, only who has the burden.

Plaintiffs' reliance on *Investment Associates v. Summit Associates, Inc., supra*, is equally unpersuasive. There the Connecticut Supreme Court held that Public Act 09-215, by permitting a revival of judgment, was not substantive. *Id.*, 309 Conn. at 849-871. A revival of judgment motion is one to essentially create a "new" judgment from the existing judgment so that the judgment does not expire if the beneficiary of the judgment needs to enforce it in a foreign jurisdiction. It does not affect what a party has to prove to obtain a judgment, unlike P.A. 17-218, which 1) adds additional elements to be reviewed by additional agencies to determine if a solar project can be reviewed under the petition process; 2) adds multiple elements to be reviewed by the CSC by shifting the procedure from a petition process to a certificate process for most solar projects that could affect prime farmland or forestland; and 3) adds an element to be reviewed by the CSC to the certificate process. Neither case is relevant to the question at hand.

In sum, P.A. 17-218 made substantive changes to the criteria needed for the approval of a solar electric power generating facility and thus was not retroactively applicable to the instant

petition (pending before the CSC before it became law) and Plaintiffs' arguments to the contrary are without merit.

B. EVEN IF PUBLIC ACT NO. 17-218 WERE APPLICABLE TO THE SUBJECT PETITION, THE CSC DECISION MUST BE UPHELD AS IT PROVIDED ALL OF THE PROCEDURAL SAFEGUARDS OF A CERTIFICATE PROCEEDING AND DECIDED ALL OF THE ELEMENTS REQUIRED BY A CERTIFICATE PROCEEDING.

For the reasons noted above, Public Act No. 17-218 is not applicable to the subject petition. Even if it were applicable, the CSC's approval of the project must be upheld for the reason that the CSC, acting with an abundance of caution, provided all of the safeguards to Plaintiffs of a certificate proceeding.

Plaintiffs' argument for the applicability of the Act is that the Act is procedural, not substantive, and therefore should be applied retroactively to petitions already pending before the CSC when the Act became law. Plaintiffs' argument regarding P.A. 17-218 is thus that the CSC made a procedural error in not requiring the project to be processed under the certificate procedure, but "not all procedural irregularities require a reviewing court to set aside an administrative decision.... The complaining party has the burden of demonstrating that its substantial rights were prejudiced by the error." *Tele Tech of Connecticut Corp. v. Dept. of Public Utility Control*, 270 Conn. 778, 787-88, 855 A.2d 174 (2004) (internal quotation marks omitted); *see also* Conn. Gen. Stat. § 4-183(j). Ten years later, the Connecticut Supreme Court held that "even if the council's actions were improper, they were harmless," and the CSC's decision must be upheld. *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 735, 99 A.3d 1038 (2014). Here, Plaintiffs failed to demonstrate that any substantial rights were prejudiced by any alleged error of the Council not applying P.A. 17-218, and any alleged error was harmless. Since this

issue is a legal issue, the Court's review is de novo. *Davis v. City of Norwich*, 232 Conn. 311, 317, 654 A.2d 1221 (1995).

In *Tele Tech, supra*, the Department of Public Utility Control ("DPUC") failed to comply with the requirements of Conn. Gen. Stat. § 4–182(c) in initiating a license revocation proceeding. The Connecticut Supreme Court first held that such a failure did not deprive the DPUC of subject matter jurisdiction, noting that the DPUC's jurisdiction over revoking the license came from another statute, Conn. Gen. Stat. § 16–247g (g). *Tele Tech, supra*, 313 Conn. at 791-792. In the instant case, the CSC's jurisdiction over solar electric power generating facilities relies on Conn. Gen. Stat. § 16-50x(a) providing it exclusive jurisdiction over facilities, and in Conn. Gen. Stat. §16-50i (a)(3), defining facilities to include electric power generating facilities. Thus, any allegation that the CSC failed to apply P.A. 17-218, which amended Conn. Gen. Stat. §§ 16-60k and 16-50p, does not involve the Council's subject matter jurisdiction over the proposed solar electric power generating facility.

The *Tele Tech* Court then went on to examine the error committed by the DPUC and whether Tele Tech's substantial rights were prejudiced by the error. By failing to provide Tele Tech with adequate notice and an opportunity to correct its violations, the DPUC itself violated Conn. Gen. Stat. § 4-182(c). *Tele Tech, supra*, 313 Conn. at 802-812. That, however, did not end the matter, for the Court held, "[T]he complaining party bears the burden of demonstrating that its substantial rights were prejudiced by the administrative agency's error." *Id.*, 270 Conn. at 813. The Court further held, "When a procedural error has occurred, but a licensee has had an opportunity to offer evidence at a hearing militating against an agency's adverse action, and has had an opportunity to show compliance 'well in advance' of an agency's final determination, no such prejudice results." *Id.* In looking at the case before it, the Court noted that the DPUC later

provided sufficient notice of the basis of the action offered Tele Tech an "administrative hearing to offer evidence that would demonstrate compliance" or that it would comply with the requirements to hold its license." *Id.*, 270 Conn. at 814. The Court went on to find that Tele Tech failed to demonstrate "an eagerness to comply" with the DPUC's requirements. *Id.* The Court concluded that while the DPUC "violated the procedures set forth in § 4–182(c) by failing to provide Tele Tech with a 'second chance' to show compliance prior to the institution of agency proceedings on August 17, 2001, Tele Tech has not shown that this error prejudiced its substantial rights." *Id.*, 270 Conn. at 815. Therefore, the Supreme Court reversed the trial court's judgment sustaining Tele Tech's administrative appeal, and remanded the case back to the Superior Court with directions to "render judgment dismissing Tele Tech's appeal." *Id.*

In the instant case, Plaintiffs are claiming error by saying that the CSC should have required the petitioner to submit an application for a certificate, which under Conn. Gen. Stat. § 16-50m would have required a hearing, thereby making the matter a contested case as defined by Conn. Gen. Stat. § 4-166(4). While the UAPA does not require that an agency provide a hearing for a petition for a declaratory ruling, the CSC Record demonstrates that the CSC ordered a full hearing, with full opportunity for all parties (including Plaintiffs) to call their own witnesses, present evidence, and cross examine the petitioner's witnesses. The CSC even complied with Conn. Gen. Stat. § 16-50m(a)'s requirement of holding a hearing "in a location in the county" where the project is to be located (in this case, in New Milford, the very municipality where the project was to be located) and a session there held after 6:30 p.m. "for the convenience of the general public." Indeed, Plaintiffs did not raise any claims that they were prevented from calling any witnesses, offering any evidence, cross examining any adverse witnesses, obtaining any exhibits or presenting any arguments before the CSC. In the briefs submitted by

Plaintiffs, no claim is raised that the CSC denied Plaintiffs ANY procedural protections that would have been afforded in a certificate contested case proceeding.

Beyond any issues of procedure, the CSC examined every relevant substantive issue mandated by both Conn. Gen. Stat. § 16-50k for a petition for declaratory ruling and Conn. Gen. Stat. § 16-50p for a certificate proceeding. Conn. Gen. Stat. § 16-50k requires that the CSC find that a "project meets air and water quality standards of the Department of Energy and Environmental Protection" in order to approve such a project. Conn. Gen. Stat. § 16-50p requires that the "council shall not grant a certificate, either as proposed or as modified by the council, unless it shall find and determine" for applications for an electric generating facility:

- 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[10], (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture,[11] (vi) forests and parks, (vii) air and water purity, and (viii) fish, aquaculture and wildlife (Conn. Gen. Stat. § 16-50p(a)(3)(B));
- Why the adverse effects or conflicts referred to in Conn. Gen. Stat. § 16-50p(a)(3)(B) are not sufficient reason to deny the application (Conn. Gen. Stat. § 16-50p(a)(3)(C)); and

[10]The issue of electromagnetic fields ("EMF") is irrelevant to approving solar photovoltaic electric power generating facilities, such as the subject facility because "electric fields were negligible compared to IEEE and ICNIRP limits across the spectrum measured and when compared to the FCC limits (≥0.3 MHz)." See "Electromagnetic Fields Associated with Commercial Solar Photovoltaic Electric Power Generating Facilities", United States National Institutes of Health, at https://www.ncbi.nlm.nih.gov/pubmed/26023811. No party or intervenor raised the issue of EMF before the CSC or in the present administrative appeals.

[11] Added by P.A. 17-218, § 4.

- A public benefit for the facility and considers neighborhood concerns with respect to the factors set forth in Conn. Gen. Stat. § 16-50p(a)(3), including public safety (Conn. Gen. Stat. § 16-50p(c)(1)).

In its Final Decision (consisting of a Findings of Fact (FOF) portion, an Opinion portion, and a Decision and Order (D&O portion), the CSC examined:

- Public Benefit. See Record, Volume 15 (Doc. # 122), FOF 91-92 (page 17), Bates No. 2522 (only last four numbers cited); Opinion, page 1, Bates No. 2522;
- Neighborhood Concerns. See Rec., Vol. 15, FOF 296-301, Bates Nos. 2511-2512;
- Visibility. See Rec., Vol. 15, FOF 218-226, Bates Nos. 2503-2504;
- Public Health & Safety. See Rec., Vol. 15, FOF 165-172, Bates Nos. 2498-2499; Opinion, pages 3-4, Bates Nos. 2524-2525;
- Noise. See Rec., Vol. 15, FOF 227-231, Bates No. 2501;
- Scenic, Historic/Archaeological & Recreational. See. Rec., Vol. 15, FOF 232-237, Bates Nos. 2504-2505; Opinion, pages 4-5, Bates Nos. 2525-2526;
- Agriculture. See Rec. Vol. 15, FOF 277-293, Bates Nos. 2509-2511; Opinion, page 6, Bates No. 2527;
- Air Quality. See Rec., Vol. 15, FOF 183-185, Bates No. 2500; Opinion, pages 7-8, Bates Nos. 2528-2529;
- Water Quality (including Hydrology, Stormwater, Wetlands and Watercourses, and Vernal Pools. See Rec., Vol. 15, FOF 186-217, Bates Nos. 2500-2503; Opinion, pages 8-9, Bates Nos. 2529-2530;
- Wildlife. See. Rec., Vol. 15, FOF 242-267, Bates Nos. 2506-2508; Opinion, pages 6-7, Bates Nos. 2527-2528;

- Forest/Parks/Core Forest. See Rec. Vol. 15, FOF 268-276, Bates Nos. 2508-2509; Opinion, page 6, Bates No. 2527.

First, the CSC notes that to the degree that Plaintiffs are asserting that the CSC failed to address the additional issues required by Conn. Gen. Stat. § 16-50p constitutes an admission that P.A. 17-218 is indeed substantive, and not procedural. Second, while Plaintiffs have claims about the adequacy of the CSC's response and whether substantial evidence supports the CSC's findings, those are separate issues from the alleged procedural error of the CSC approving this project utilizing the petition for a declaratory ruling process rather than the application for a certificate process. The CSC provided Plaintiffs with all of the procedural safeguards of a contested case and examined the issues that would have been examined in a certificate contested case. Thus, "even if the council's actions were improper, they were harmless." *FairwindCT, Inc. v. Connecticut Siting Council*, 313 Conn. 669, 735, 99 A.3d 1038 (2014).

C. *PLAINTIFFS' COMPLAINTS ABOUT THE INSUFFICIENCY OF A DECOMMISSIONING PLAN LANGUAGE IN THE CSC's OPINION REGARDING A CONSERVATION EASEMENT ARE WITHOUT MERIT AS THERE IS NEITHER A STATUTORY NOR REGULATORY REQUIREMENT FOR DECOMMISSIONING PLANS FOR SOLAR FACILITIES.*

Plaintiffs' claim that the CSC "acted arbitrarily and without substantial evidence" in approving the subject petition "with a condition for an undefined and undrafted decommissioning plan." *Plaintiffs' Brief in RCM v. CSC, page 34*. Additionally, Plaintiffs complain the CSC "acted illegally and/or without substantial evidence" in approving the subject petition "on the assumption that the proposed conservation easement would be procured." *Plaintiffs' Brief in RCM v. CSC, page 35*. While Plaintiffs frame these issues as substantial evidence issues, they are essentially issues of statutory and regulatory interpretation with a de novo standard of review.

Davis v. City of Norwich, supra, 232 Conn. at 317; *Okeke v. Commissioner of Public Health, supra,* 304 Conn. at 325.

Neither Conn. Gen. Stat. § 16-50k for petitions nor Conn. Gen. Stat. § 16-50p for certificates require a decommissioning plan for solar facilities. The only statutory requirement for decommissioning plans is Conn. Gen. Stat. § 16-50kk requiring the CSC to adopt regulations for "the siting of wind turbines" which include "a requirement for the developer to decommission the facility at the end of its useful life."

The developer, CS, submitted to the CSC an Environmental Assessment ("EA") prepared by Amec Foster Wheeler Environment & Infrastructure, Inc. ("AFW"). *See EA, Record, Vol. 4 (Doc.# 111), Bates Nos. 204, et seq.* The EA was Exhibit A to CS's Petition for a Declaratory Ruling to the Council. *See Petition's Table of Contents, Record, Vol. 1, Bates No. 005.* CS's witness panel swore to the truth of the Petition and its Exhibits before the Council. *See Transcript of September 26, 2017, Record, Vol. 7, Bates Nos. 1015 to 1020.* The EA stated, "At the end of the operational life of the Project, anticipated to be 20 to 30 years, the Facility will be removed in accordance with decommissioning requirements and the Project Area will be allowed to revert back to natural habitat." *See EA, page 19 Record, Vol. 4, Bates Nos. 225.* In its Decision and Order portion of its Final Decision, the CSC required CS to submit a decommissioning plan as part of a Development and Management ("D&M") Plan.[12]

Pursuant to Conn. Gen. Stat. § 16-50kk, the CSC adopted Regs. Conn. State. Agencies Sec. 16-50j-94, of which subsection (i) requires, "Any application for a certificate for a wind turbine facility or petition for a declaratory ruling for a wind turbine facility shall contain a de-

[12] "Clearly, the D & M plan functions to 'fill up the details' in the siting council's final decision." *Town of Middlebury v. Connecticut Siting Council*, 2002 WL 442383 at *5 (Conn. Super. Feb. 27, 2002), copy attached, citations omitted.. At the same time, "The D & M plan cannot provide a substitute for matters not addressed during the application process." *Id.*

commissioning plan for the proposed site and any alternative sites. . ." Among the requirements of a decommissioning plan are "the projected useful life of the wind turbines" and the method by which "foundations, wind turbines, associated equipment and components will be dismantled and removed." *Id.* Regs. Conn. State Agencies § 16-50j-93 does have a provision stating that a petition for a declaratory ruling "filed with the Council shall also include additional information required to be submitted to the Council as part of the petition under Section 16-50j-94 . . ." Clearly this means that a petition for a wind turbine needs to include the information required by 16-50j-94.

Plaintiffs claim that 16-50j-93 makes the requirements of 16-50j-94 applicable to solar facilities. *Plaintiffs' Brief in RCM v. CSC, pages 34-35.* Plaintiffs' claims fail because 1) the language of Sec. 16-50j-94 specifically applies to wind turbines, including language dealing with tower heights, blade lengths, blade shear, ice throw, and shadow flicker, and cannot be applied to solar facilities; and 2) the statute authorizing the regulations, Conn. Gen. Stat. § 16-50kk, specifically required the CSC to adopt wind turbine regulations, and include in those wind turbine regulations a "requirement for the developer to decommission the facility at the end of its useful life." The legislature did not include solar facilities in the statute. An administrative agency's authority to promulgate regulations is limited by the enabling statute. "The power of an administrative agency to prescribe rules and regulations under a statute is not the power to make law, but only the power to adopt regulations to carry into effect the will of the legislature as expressed by the statute ..." *Salmon Brook Convalescent Home v. Commissioner on Hospitals and Health Care*, 177 Conn. 356, 363, 417 A.2d 358 (1979).

Applying the whole of 16-50j-94 to solar facilities, with its specific references to wind turbines and parts and characteristics of wind turbines, would be absurd and unworkable. "It is

axiomatic that courts will not construe statutes, ordinances or regulations to achieve an absurd or irrational result." *New Haven Firebird Society v. Board of Fire Commissioners of City of New Haven*, 32 Conn.App. 585, 591, 630 A.2d 131 (1993), *cert. den.*, 228 Conn. 902, 634 A.2d 295 (1993). Additionally, "Local regulations must be consistent with statutes, but [courts] are not obligated to read statutes so as to be consistent with local regulations." *Saybrook Point Marina Partnership v. Town of Old Saybrook*, 49 Conn.App. 106, 112, 712 A.2d 980 (1998), *cert. den.*, 247 Conn. 904, 720 A.2d 515 (1998). The same should apply to state regulations. The context of 16-50j-94 should be read in context of the statutory and regulatory scheme as a whole. The interpretation must be "reasonable" and "rational" when "read in context and applied to the facts of this case." *Greenwood Manor, LLC v. Planning and Zoning Commission of the City of Bridgeport*, 150 Conn.App. 489, 512, 90 A.3d 1062 (2014), *cert. den.*, 312 Conn. 927, 95 A.3d 521 (2014). Here, Plaintiffs are ignoring the context of the words they rely upon. They are taking a paragraph of a regulation promulgated for wind turbine petitions and applications pursuant to a statute requiring wind regulations in isolation and seeking to apply it to solar facilities. In *State v. Parnoff*, 329 Conn. 386, 186 A.3d 640 (2018), the Connecticut Supreme Court held that it was "unwilling to force a 'square peg [into a] round hole' by using an ill-fitting legal doctrine." *Id.*, 329 Conn. at 405. This Court should be equally unwilling to force a "square peg [into a] round hole" by applying an isolated provision from an ill-fitting wind turbine regulation to a solar facility. In so ordering CS to submit a decommissioning plan as part of its D&M Plan, the CSC was not bound by Sec. 16-50j-94, so it is irrelevant that it did not follow the wind turbine regulation in approving a solar facility. Thus, Plaintiffs' claim to the contrary has no merit.

The CSC did require CS to prepare a D&M Plan, which required a decommissioning plan, but the CSC was well within its authority to do so. Conn. Gen. Stat. § 16-50p(a) provides that the CSC may approve an application for a certificate "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate." The Appellate Court, citing this statutory language, held, "The council granted this certificate upon the condition that a landfill site permit be obtained. The council was well within its statutory authority in imposing such a condition, and we will not substitute our judgment for that of the council regarding the adequacy and reasonableness of the condition." *Town of Preston v. Connecticut Siting Council*, 20 Conn.App. 474, 491-492, 568 A.2d 799 (1990), *cert. den.*, 214 Conn. 803, 573 A.2d 316 (1990). Further, in a petition for declaratory ruling proceeding, the Supreme Court went even further in denying plaintiffs standing to the challenge conditions for a D&M Plan, holding:

> There is nothing in the record of this case that shows that the plaintiffs have specific, personal interests that were affected by the conditions that the council imposed on its approvals of BNE's petitions. The conditions imposed no costs or burdens on them. Moreover, the plaintiffs lack standing as intervenors pursuant to General Statutes (Supp.2014) § 22a–19 (a)(1) because the conditions themselves do not have "the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." Accordingly, we agree with defendants that the plaintiffs lacked standing to challenge the council's imposition of the conditions, per se. We therefore conclude that the trial court lacked jurisdiction to entertain the plaintiffs' claim that the council had no statutory authority to impose the conditions.

FairwindCT, supra, 313 Conn. at 688-689. Imposing a condition upon CS of presenting a decommissioning plan where none is required by either statute or regulation imposes "no costs or burdens" on Plaintiffs, nor does it have "the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." *Id.* Thus, whether the CSC's Decision is evaluated under the certificate standards of Conn. Gen. Stat. §

16-50p or the petition standards of Conn. Gen. Stat. § 16-50k, there is no error and Plaintiffs' claim regarding the decommissioning plan has no merit.

Plaintiffs' claims regarding a conservation easement are equally without merit. On page 35 of Plaintiff's Brief in *RCM v. CSC*, Plaintiff complains that language in the CSC's Opinion states that New Milford Clean Power, LLC "would deed approximately 100 acres . . . to a local land conservation trust as permanently conserved land" and that "The Council encourages CS to work with entities such as, the Town of New Milford, DEEP, Weantinoge Heritage Land Trust and/or other local conservation groups to prepare and finalize the conservation easement." *See Record, Vol. 15, Opinion, page 2, Bates No. 2523.*

Neither Conn. Gen. Stat. § 16-50k for petitions nor Conn. Gen. Stat. § 16-50p for certificates require a conservation easement for solar facilities. While Conn. Gen. Stat. § 16-50p(a) provides that the CSC may approve an application for a certificate "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the council may deem appropriate," the CSC did not insert a conservation easement as one of its conditions of approval of the Petition. The CSC used words of encouragement in its Opinion, but nothing more. Further, Plaintiffs have no standing to challenge these words of encouragement in the CSC Opinion that "imposed no costs or burdens on them" and do not have "the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." *FairwindCT, supra, 313 Conn. at 688-689.* In sum, this claim is without merit.

D. THERE IS SUBSTANTIAL EVIDENCE IN THE ADMINISTRATIVE RECORD TO SUPPORT THE CSC FINDINGS THAT THE APPROVED SOLAR PROJECT COMPLIED WITH BOTH THE REQUIREMENTS FOR A PETITION FOR DECLARATORY RULING PROCEEDING AND A CERTIFICATE PROCEEDING.

Plaintiffs' remaining claims are essentially claims that the administrative record does not support the findings of the CSC, namely that the CSC decision is not supported by substantial evidence. "Judicial review of an administrative agency decision requires a court to determine whether there is substantial evidence in the administrative record to support the agency's findings of basic fact and whether the conclusions drawn from those facts are reasonable...." *FairwindCT, supra*, 313 Conn. at 689. "This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review...." *Sams v. Department of Environmental Protection*, 308 Conn. 359, 374, 63 A.3d 953 (2013). The Court looks at whether the evidence in the record "affords a substantial basis of fact from which the fact in issue can be reasonably inferred." *FairwindCT, supra*, 313 Conn. at 689. The "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* The credibility of witnesses and the determination of factual issues are within the province of the agency, not the reviewing court. *Id.*, 313 Conn. at 689-690. "The plaintiff shoulders the burden of proof when challenging a decision of an administrative agency" and "the plaintiff must establish that substantial evidence does not exist in the record to support the agency's decision." *Keiser v. Conservation Commission*, 41 Conn. App. 39, 41, 674 A.2d 439 (1996). Thus, the burden is on Plaintiffs to demonstrate that there is not substantial evidence and Plaintiffs fail to meet that burden.

1) ALTERNATIVE SITES

Plaintiffs complain that "there was no substantial evidence that Petitioner had adequately considered potential alternative sites with less environmental impact." *Plaintiffs' Brief in RCM*

v. CSC, page 40. Plaintiffs particularly complain that CS "did not look at any site outside of New Milford." *Id.* The CSC found that:

> CS investigated four alternative site parcels for the proposed project: Kimberly Clark Property on Route 7; private farmland; property on Pickett District Road; and Candlelight Valley Country Club. All four sites were rejected for various reasons including, but not limited to, inadequate space, visibility to abutters, wetland issues, and steep grades. CS also considered use of a brownfield site known as the Century Brass Site, but found significant on-site wetland areas and insufficient area for a 20 MW AC solar array.
>
> CS did not specifically evaluate the New Milford Landfill as a possible solar site. However, the Council notes that, according to the record in this proceeding, it is not known who the landowner of the New Milford Landfill is or whether or not the property is available for use for a solar facility.

See Record, Vol. 15, Opinion, page 3, Bates No. 2524; see also FOFs 93-99, Bates Nos. 2490 to 2491 and portions of the Administrative Record cited. The Council concluded that, "The proposed site is the only site CS was able to secure that had willing landowners, adequate acreage and proximity to electrical infrastructure." *Opinion, page 3, Bates No. 2524.*

Plaintiffs cited neither statutes nor cases holding that a petitioner or applicant needs to look outside of the locale of the petition or application. Plaintiffs' position would put the burden on the CSC to show that there was not a suitable site anywhere else in Connecticut. The law does not require this. Indeed, in *City of Torrington v. Connecticut Siting Council*, 1991 WL 188815 (Conn. Super. Sept. 12, 1991), copy attached, the Court, dealing with a challenge by plaintiffs under CEPA, held:

> There is no requirement that the Council make an affirmative statement of no environmental impact or that it consider alternatives to the proposed facility unless it finds that the facility will cause unreasonable pollution or harm to the environment. The only requirement is that the Council **consider** these matters.

Id., 1991 WL 188815 at *13 (emphasis added).

The Council considered alternatives, but also noted that the petition was submitted to the CSC after being selected in the Tri-State RFP as a specific site. *See FOFs 81-90, Record, Vol. 15, Bates Nos. 2488 to 2490.* That potential sites (if any existed) outside of New Milford (but never identified by Plaintiffs) were not considered by the CSC may disappoint Plaintiffs, but were not required by any statute, regulation or case law.

2) AIR QUALITY

Conn. Gen. Stat. § 16-50k requires that the CSC find that a "project meets air and water quality standards of the Department of Energy and Environmental Protection" in order to approve such a project. Additionally, Conn. Gen. Stat. § 16-50p(a)(3)(B) requires that the CSC review "air and water purity" as factors to balance in granting or denying an application for a certificate. As to DEEP air quality standards, the CSC found, "During operation, the proposed project would not produce air emissions of regulated air pollutants or GHGs. Thus, no air permit would be required," and that, "Given the loss of carbon dioxide sequestration due to tree clearing versus the net carbon dioxide emissions reduction resulting from the solar facility displacing existing fossil fueled generation in the grid portfolio, the annual 'carbon debt payback period,' on average, would be less than one day of solar facility operation." *See FOFs 183, 185, Record, Vol. 15, Bates No. 2500.* The CSC's findings cite, in part, CS's Environmental Assessment, which was uncontradicted regarding air quality. *See EA, pages 1, 16, Record, Vol. 4, Bates Nos. 207, 222.* The CSC's Opinion concluded, "The proposed project would meet DEEP air quality standards." *See Record, Vol. 15, Opinion, pages 8-9, Record, Vol. 15, Bates No. 2527-2528.* Thus, there was no challenge to the solar project meeting DEEP's air quality standards.

3) WATER QUALITY

The CSC's Findings of Fact regarding water quality were divided into subheadings of Hydrology (*Rec., Vol. 15, FOFs 186-195, Bates Nos. 2500 to 2501)*, Stormwater (*FOFs 196-202, Bates Nos. 2501 to 2502*), Wetlands and Watercourses (*FOFs 203-208, Bates No. 2502*), and Vernal Pools (*FOFs 209-217, Bates Nos. 2502 to 2503*). Each finding cited a portion or portions of the Administrative Record for support, including the Environmental Assessment ("EA") prepared by Amec Foster Wheeler Environment & Infrastructure, Inc. ("AFW"), as well as the testimony of CS's witnesses (including the authors of the EA), and CS's Stormwater Management Report. *See citations to above FOFs; see specifically EA, pages 20-21 (water quality), 17-19 (flood plain, wetlands and watercourses, vernal pools) Record, Vol. 4 (Doc. # 111), Bates Nos. 226 to 227; 223 to 225, et seq.* CS submissions included (but were not limited to) the following:

- In CS's Interrogatory Responses to the CSC, Set One, CS stated, "The stormwater design at the site has been developed in accordance with the Connecticut Stormwater Quality Manual and will promote infiltration of stormwater into the ground to recharge the groundwater table." *See Rec., Vol. 8 (Doc. # 115), Interrogatory Responses, No. 55, Bates No. 1565.*
- CS also stated that the proposed project "will have no adverse impacts on groundwater. The solar array and associated appurtenances are all sealed units that do not contain hazardous materials." *See Rec., Vol. 8, Interrogatory Responses, No. 56, Bates No. 1565.*
- In response the CSC's construction questions, CS responded that "as detailed in Attachment D (Stormwater Management Report), Appendix D (Erosion and Sediment Control Plan), Section 3.0, the project has been developed in accordance with the 2002 Connect-

icut Guidelines for Soil Erosion and Sediment Control." *See Rec., Vol. 8, Interrogatory Responses, No. 62, Bates No. 1567.* CS then proceeded to provide construction details. *Id., Response Nos. 62-70, Bates Nos. 1567 to 1570.*

- CS also provided the Pre-Filed Testimony of Robert Bukowski and Pamela M. Chan of AFW and Brian O. Butler of Oxbow Associates, Inc. *See Rec., Vol. 8 (Doc. # 115), Pre-Filed Testimony, Bates Nos. 1645, et seq.* Specifically, the witnesses said that "The solar array, associated appurtenances, access road and tree clearing ares has been designed to avoid any direct impacts to wetlands or waterways." *Id., at Bates No. 1649.* The witnesses describes how the project would not have an adverse effect on aquatic resources, water supply areas and water quality, and would comply with requirements for storm-water management and erosion and sediment control. *Id., at Bates Nos. 1649 to 1655.*

The Council also notes that DEEP extensively commented on the proposed solar project. DEEP provided responses to interrogatories from the Town of New Milford. *See Rec., Vol. 5 (Doc. # 112), DEEP Responses to Interrogatories, Bates Nos. 806 to 822.* DEEP did not declare the project in violation of water standards, but rather noted some areas for improvement and stated multiple times, "DEEP anticipates working with the Petitioner on these issues in the future as the Environmental Assessment acknowledges that DEEP's General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities is required." *Id., Bates Nos. 809 to 813.* DEEP also attached as Exhibit A its guidance for solar projects, *Stormwater Management at Solar Farm Construction Projects*, dated September 8, 2017.

In response to the Council's request for comments, DEEP provided comments dated September 21, 2017, from Frederick L. Riese, Senior Environmental Analyst, which first described

the need for solar projects, the regional RFP, and that, while DEEP did not select CS's project in the RFP, the Commonwealth of Massachusetts did so:

> Candlewood Solar submitted this project into the New England Clean Energy Request for Proposals (RFP), a three state solicitation by DEEP, in conjunction with Massachusetts and Rhode Island. Connecticut solicited and selected renewable energy projects pursuant to Section 1 (c) of Connecticut Public Act 15-107, *An Act Concerning Affordable and Reliable Energy* (P.A. 15-107) and Sections 6 and 7 of Connecticut Public Act 13-303, *An Act Concerning Connecticut's Clean Energy Goals* (P.A. 13-303). The RFP process represents an important step forward in the implementation of Governor Malloy's vision for a cheaper, cleaner, and more reliable energy future for the ratepayers of Connecticut. Bringing more grid-scale renewable energy projects on line is instrumental in furthering this vision as these resources help diversify the regional fuel mix, assist the state in meeting its commitment to procure 20% of its electricity from Class I renewable sources by 2020, and also, contribute to the state's goal of reducing carbon emissions by 80% below 2001 levels by 2050. After reviewing all the projects bid into the RFP process, DEEP did not select the Candlewood Solar LLC proposal as one of the projects authorized to enter into a long-term power purchase agreement, however, the Commonwealth of Massachusetts, as another participant in the tri-state RFP process, did select this project.

See Rec., Vol. 5 (Doc. # 112), DEEP Letter of September 21, 2017, Bates Nos. 823 to 824.

DEEP commented extensively on the project and noted that:

> Though the **Petition does include a substantial amount of information on the Petitioner's plans for the management of stormwater from the site,** DEEP prefers not to evaluate those plans at this time since we will be reviewing more complete plans at a later date and we wish to avoid any potential for inconsistencies either in the material we are reviewing at different stages of development or for misunderstanding of guidance or comments offered at this more preliminary stage.

See Rec., Vol. 5 (Doc. # 112), DEEP Letter of September 21, 2017, Bates No. 828 (emphasis added).

The Council included DEEP's recommendations in its Findings of Fact. *Record, Vol. 15, FOFs 43, 140, 196-198, Bates Nos. 2430, 2450.* The Council also included DEEP's recommendations in its Opinion. *Record, Vol. 15, Opinion, page 9, Bates No. 2530.* Finally, the Council included DEEP's recommendations as conditions of approval. *Record, Vol. 15, Decision & Or-*

der, page 1, Bates No. 2531. The CSC routinely approves projects conditioned upon approval of recommendations from other governmental entities and those approvals have been upheld by Connecticut's courts. *See Town of Westport v. Connecticut Siting Council*, 260 Conn. 266, 274, 796 A.2d 510 (2002) (The Council "had recognized the town's concerns, including the factors encompassing environmental and residential objections, prior to the application approval, as evidenced, in part, by it conditioning its approval on Cellco's compliance with some of the town's recommendations."); *see also City of New Haven v. Connecticut Siting Council*, 2002 WL 31126293, 33 Conn. L. Rptr. 187 (Conn. Super. Aug. 21, 2002), copy attached, (Applicant Cross-Sound Cable required to cooperate with the U.S. Army Corp of Engineers for underwater cable in New Haven Harbor). *Id.*, at note 9. Conn. Gen. Stat. § 16-50k requires that the "project meets air and water quality standards of the Department of Energy and Environmental Protection." The Council's approval with its conditions ensures that the project meets those requirements.

The Council concluded that the proposed solar project "is a grid-side distributed resources project with a capacity of less than 65 MW under CGS §16-50k, it was selected through a Tri-State RFP under CGS §16a-3f, it is consistent with the state's energy policy under CGS §16-35k, and the proposed project would meet all applicable U.S. Environmental Protection Agency and DEEP Air and Water Quality Standards." *See Record, Vol. 15, Opinion, page 9, Bates No. 2530.*

Plaintiffs assert that their civil engineering consultant contradicted the CSC's findings that the project complied with DEEP requirements. *See Plaintiffs' Brief in RCM v. CSC, page 42.* The CSC, however, had neither the obligation to believe a particular witness or to come to the same conclusions. "In determining whether an administrative finding is supported by sub-

stantial evidence, a court must defer to the agency's right to believe or disbelieve the evidence presented by any witness, even an expert, in whole or in part." *Dore v. Commissioner of Motor Vehicles*, 62 Conn.App. 604, 610-611, 771 A.2d 962 (2001). The CSC "is not required to use in any particular fashion any of the materials presented to it so long as the conduct of the hearing is fundamentally fair." *Id.*, 62 Conn.App. at 611. Finally, while the CSC inserted both a revised erosion and sedimentation control plan and a stormwater management plan as part of the D&M Plan, the clear purpose was to accommodate the reduction in the project approved by the CSC. As the CSC noted:

> Specifically, the solar array has been reduced in physical size/footprint to allow the project and associated area of disturbance to avoid undisturbed slimy salamander habitat and to increase the size of the undisturbed buffer around the cryptic vernal pools. The revised array layout would also provide a buffer around an area of archaeological sensitivity. The angle of the panels with the horizontal was reduced from 15 degrees to 12 degrees, and the number of panels was reduced from 75,000 to 60,000. CS was able to maintain the same AC capacity of 20 MW (despite a decline in DC MW) by utilizing 400 Watt solar panels in the proposed revised project versus the originally proposed 350 Watt panels. The smaller angle reduces row-to-row shading and allows closer spacing of the solar panel row. This combined with less solar panels results in the fenced solar array area being reduced from about 67 acres to approximately 57 acres.

See Record, Vol. 15, Opinion, page 3, Bates No. 2524; see also Rec., Vol. 9 (Doc. # 116), Supplemental Pre-Filed Written Testimony of Robert Bukowski, Bates No. 1958. Notably, the CSC did not find the plans submitted by CS to be inadequate. *FairwindCT, supra,* 313 Conn. 689-696.

4) WILDLIFE

The CSC's Findings of Fact regarding wildlife quality covered wildlife generally, (*Rec., Vol. 15, FOFs 242-246, Bates No. 2506),* and were divided into subheadings of Birds (*FOF 247, Bates No. 2506*), Mammals (Bats) (*FOFs 248-249, Bates No. 2506*), Reptiles (Turtles) (*FOFs*

250-255, Bates No. 2507), and Amphibians (including Vernal Pools and the Slimy Salamander) (*FOFs 256-267, Bates Nos. 2507 to 2508*). Each finding cited a portion or portions of the Administrative Record for support, including the EA prepared by AFW, as well as the testimony of CS's witnesses (including the authors of the EA), and CS's responses to interrogatories. *See citations to above FOFs; see specifically EA, pages 19-20 (vegetation and wildlife generally), 7-10 (birds, rare species) Record, Vol. 4 (Doc. # 111), Bates Nos. 225 to 226; 213 to 216; see also Record, Vol. 9 (Doc. # 116), pre-filed written testimony of AFW's Patricia Foster, pages 6-8, Bates Nos. 1964 to 1966.* As noted in the above section, the CSC approved revisions in CS's original plan to reduce the project's footprint to avoid undisturbed slimy salamander habitat and to increase the size of the undisturbed buffer around the cryptic vernal pools. *See Record, Vol. 15, Opinion, page 3, Bates No. 2524.*

Plaintiffs complain that some of the CSC's findings did not comply with the Calhoun & Klemens technical paper or that the CSC "accepted without question" some of Petitioner's conclusions. *Plaintiffs' Brief in RCM v. CSC, pages 31-31.* That, however, is within the province of the CSC. *Dore v. Commissioner of Motor Vehicles, supra*, 62 Conn.App. at 610-611. Plaintiffs cited *Post Road Iron Works, Inc. v. Inland Wetlands*, 2018 WL 1459953, 2018 Conn. Super. LEXIS 351 (Conn. Super. Feb. 20, 2018), copy attached, as an example of the Superior Court upholding a municipal inland wetlands agency's decision rejecting a project, utilizing Dr. Michael Klemens' testimony. This case, however, was precisely an example of an agency making a choice between conflicting experts as there was a conflict between the project's expert, Michael Klein, and Klemens. *Id.*, 2018 WL 1459953 at *8. There the agency believed Klemens and his testimony provided substantial evidence. *Id.*, 2018 WL 1459953 at *8-11. The decision certainly did not require the agency to disbelieve Klein and to have believed Klemens.

Further, it is not required that the CSC deny a project if there is any disruption to wildlife, even in a certificate proceeding. The CSC must balance conflicting concerns, including environmental concerns and public need or benefit for a facility. Conn. Gen. Stat. § 16-50p(a)(3)(C); *Corcoran v. Connecticut Siting Council*, 50 Conn.Supp. 443, 449, 934 A.2d 870 (2006), *affirmed and adopted*, 284 Conn. 455, 934 A.2d 825 (2007). Connecticut places a high premium on combating global warming and climate change. *Rec., Vol. 15, FOFs 77-80, Bates No. 2487.* Without such action, perhaps all of the species with which Plaintiffs express concern will suffer – including humankind. The CSC Final Decision is supported by substantial evidence and must be upheld.

5) INCOMPLETENESS

Finally, the Plaintiffs' Brief in *RCM v. CSC* claims that CS's proposal should have been rejected as incomplete. *See Plaintiffs' Brief, RCM v. CSC, pages 43-46.* This argument is merely a re-hash of Plaintiffs' previous arguments. On pages 25-26 of this brief, the CSC points out that it examined the issues required to be so examined by both Conn. Gen. Stat. §§ 16-50k and 16-50p, and found that the CS project meet the statutory requirements. Of note, Plaintiffs cited *Montigny v. Town of Vernon*, 2004 WL 2440078, 2004 Conn. Super. LEXIS 2839 (Conn. Super. Sept. 30, 2004), copy attached, in their brief. The Superior Court there held that, "Connecticut courts are not obligated to overturn an inland wetlands commission's decision even if it is found that the application was incomplete." *Id.*, 2004 WL 2440078 at *4. The agency may approve an application if it is in "substantial compliance" with applicable statutes or regulations. *Id.*, 2004 WL 2440078 at *4-5. Here, CSC's proposal, whether considered as a petition for declaratory ruling (which the CSC properly did) or, in the alternative, as a certificate application, was in more than substantial compliance with statute and regulation.

Plaintiffs also cited *Gustafson v. East Haven Inland Wetlands and Watercourses Commission*, 2004 WL 1327084, 37 Conn. L. Rptr. 189, 2004 Conn. Super. LEXIS 2839 (Conn. Super. June 2, 2004), copy attached. There the Superior Court sustained an administrative appeal finding that both the approved application and the commission decision were uncertain of the existence of vernal pools on the subject property, and thus that the application approved by the commission was incomplete. *Id.*, 2004 WL 1327084 at *3-*4. By contrast, the instant petition and CSC decision dealt extensively with vernal pools. *Record, Vol. 15 (Doc. # 122), FOFs 209-217, Bates Nos. 2502 to 2503; Opinion, Bates Nos. 2527 to 2528 (wildlife in vernal pools); Bates No. 2529 (vernal pools themselves).* For all of the reasons cited, Plaintiffs' claims of incompleteness are without merit.

6) AVIATION SAFETY

The brief filed by Plaintiff Carl Dunham in *Dunham v. CSC* adopts the arguments of Plaintiff RCM, but adds one additional argument, namely that the CSC failed to adequately consider aviation safety, particularly glare. The CSC's Findings of Fact regarding aviation safety noted first:

> By letters dated July 17, 2017 and August 29, 2017, the Federal Aviation Administration (FAA) issued Determinations of No Hazard to Air Navigation (No Hazard Determinations) for the originally proposed project based on CS' filings for the center and various corners of the project and utility interconnection poles. The No Hazard Determinations require that CS provide notice to the FAA within 5 days after construction reaches its greatest height. (CS 8, No Hazard Determinations, p. 1.)

See Record, Vol. 15, FOF 174, Bates No. 2499. Note: the FAA Determinations of No Hazard to Air Navigation are located at Record, Vol. 8, Bates Nos. 1788 to 1877.

The CSC admitted that the FAA "No Hazard Determinations are based on the height and location of the proposed facility, not glare-related issues," (*FOF 176, Bates No. 2499)* but also found that:

> FAA does not require a glare analysis for this project. Notwithstanding, a glare analysis has been performed using the Solar Glare Hazard Analysis Tool developed by Sandia National Laboratory. The analysis shows that the glare hazard is minimal and at acceptable levels for safe airport operation. (Tr. 1, p. 16; Tr. 3, p. 78; CS 1, p. 26.)

See Record, Vol. 15, FOF 180, Bates No. 2499.

The CSC is within its authority to believe the glare analysis and determine that the glare hazard is minimal. *Dore v. Commissioner of Motor Vehicles, supra*, 62 Conn.App. at 610-611.

There is, however, another reason why Plaintiff Dunham's claim is without merit. The Federal Aviation Act evidences a clear congressional intent to occupy the entire field of aviation safety to the exclusion of state law. The Federal Aviation Act declares that "The United States Government has exclusive sovereignty of airspace of the United States," 49 U.S.C. § 40103(a)(1), and directs the FAA Administrator to "develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace." *Id.* § 40103(b)(1); *see also id.* § 40103(b)(2); *see also Goodspeed Airport, LLC v. East Haddam Inland Wetlands and Watercourses Commission,* 681 F.Supp.2d 182, 201 (D.Conn. 2010), *affirmed*, 634 F.3d 206 (2d Cir. 2011). Specifically, the Second Circuit held, "In *Air Transport Ass'n of America, Inc. v. Cuomo (ATA)*, 520 F.3d 218, 225 (2d Cir.2008), this Court observed that several of our sister circuits, and several district courts within our own circuit, have concluded that Congress intended to occupy the entire field of air safety and thereby preempt state regulation of that field." *Id.*, 634 F.3d at 210. The Second Circuit held that there was sufficient evidence of Congressional intent

to "centralize air safety authority and the comprehensiveness of regulations pursuant to that authority." *Id.* The Court, agreeing that Congress occupied the entire field of air safety, concluded, "Today we join our sister circuits." *Id.*

Conn. Gen. Stat. § 16-50k(d) states that, "This chapter shall not apply to any matter over which any agency, department or instrumentality of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of such matter by the state."[13] Because of the exclusive jurisdiction of the FAA over aviation safety, the CSC does not have jurisdiction over Plaintiff Dunham's claims regarding aviation safety. *See, e.g., Connecticut Coalition Against Millstone v. Connecticut Siting Council*, 286 Conn. 57, 77, 942 A.2d 345 (2008) ("In light of the federal legislation and regulations, and the Supreme Court's decisions interpreting them, we conclude that Congress impliedly intended to occupy the field of radiological risks and environmentally related effects of the storage of spent nuclear fuel," and "Therefore, considerations [by the Council] of environmental risks related to radiological safety fall squarely within the field preempted by federal law.").

Thus, because there was substantial evidence for the CSC to believe that any potential glare was minimal and within acceptable safe levels, and because Congress preempted the field of aviation safety, Plaintiff Dunham's contention that the CSC decision should be overturned due to aviation safety lacks merit.

[13] Additionally, the CSC requested the Connecticut Airport Authority (CAA) for comments on the project, but the CAA did not respond to this request. *See FOFs 39, 45, Record, Vol. 15, Bates Nos. 2479, 2481.*

IV. CONCLUSION

Because the issues raised by Plaintiffs lack merit, this Court should dismiss Plaintiffs' administrative appeal and uphold the CSC's Final Decision.

DEFENDANT,
STATE OF CONNECTICUT
SITING COUNCIL

GEORGE JEPSEN
ATTORNEY GENERAL

By: */s/ Robert L. Marconi*

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EXHIBIT B

Connecticut Siting Council December 21, 2017
Decision and Order in Petition No. 1312

PETITION NO. 1312 - Candlewood Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt AC (26.5 megawatt DC) solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut.	}	Connecticut
	}	Siting
	}	Council
		December 21, 2017

Decision and Order

Pursuant to Connecticut General Statutes (CGS) § 16-50k(a), CGS §4-176 and the foregoing Findings of Fact and Opinion, the Connecticut Siting Council (Council) finds that the construction, maintenance, and operation of a 20 MW Solar Photovoltaic Project on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut would not have a substantial adverse environmental effect, would meet all applicable U.S. Environmental Protection Agency and Connecticut Department of Energy and Environmental Protection (DEEP) Air and Water Quality Standards, and therefore, the Council will issue a declaratory ruling for the proposed solar photovoltaic electric generating project.

Unless otherwise approved by the Council, the facility shall be constructed, operated, and maintained substantially as specified in the Council's record in this matter, and is subject to the following conditions:

1. The Petitioner shall prepare a Development and Management Plan (D&M) for this site in compliance with Sections 16-50j-60 through 16-50j-62 of the Regulations of Connecticut State Agencies. The D&M Plan shall be served on the Towns of New Milford, Brookfield and New Fairfield for comment and all parties and intervenors on the service list, and submitted to and approved by the Council prior to the commencement of facility construction and shall include:

    a. A final site plan including, but not limited to, the solar array, fence design, and the electrical interconnection line and corridor;
    b. Consideration of locating a portion of the solar panels within the approximately 5-acre open field area and associated visual screening of such panels as necessary;
    c. Construction hours and days of the week;
    d. Construction traffic measures;
    e. Erosion and sedimentation control plan consistent with the *2002 Connecticut Guidelines for Erosion and Sedimentation Control* including, but not limited to, seeding the site for stabilization purposes prior to installation of racking systems and panels;
    f. Site clearing, grubbing, stabilization, and stormwater controls phasing plan;
    g. A stormwater management plan consistent with the *2004 Connecticut Stormwater Quality Manual*, including an analysis on the potential impact of driveways on stormwater flows, including but not limited to, potential diversion of stormwater away from wetlands;
    h. Plans to comply with the recommendations from DEEP outlined in "Stormwater Management at Solar Farm Construction Projects" dated September 8, 2017;
    i. FAA marking/lighting plan, as necessary;
    j. Vegetation Management Plan including, but not limited to, provisions for frequency of mowing and vegetation maintenance that incorporate any DEEP-required seasonal restrictions, post-construction site inspections on a quarterly basis, and removal of any accumulated sediment and debris that could affect stormwater patterns;
    k. Decommissioning plan;
    l. Plans to comply with the SHPO's recommended precautionary measures as specified in the letter dated November 28, 2017; and

m. Final wildlife protection measures and/or seasonal restriction timelines for all DEEP-identified Natural Diversity Database species except for golden-winged warbler.

2. Unless otherwise approved by the Council, if the facility authorized herein is not fully constructed within three years from the date of the mailing of the Council's decision, this decision shall be void, and the facility owner/operator shall dismantle the facility and remove all associated equipment or reapply for any continued or new use to the Council before any such use is made. The time between the filing and resolution of any appeals of the Council's decision shall not be counted in calculating this deadline. Authority to monitor and modify this schedule, as necessary, is delegated to the Executive Director. The facility owner/operator shall provide written notice to the Executive Director of any schedule changes as soon as is practicable;

3. Any request for extension of the time period to fully construct the facility shall be filed with the Council not later than 60 days prior to the expiration date of this decision and shall be served on all parties and intervenors;

4. Within 45 days after completion of construction, the Council shall be notified in writing that construction has been completed;

5. The facility owner/operator shall remit timely payments associated with annual assessments and invoices submitted by the Council for expenses attributable to the facility under Conn. Gen. Stat. §16-50v;

6. This Declaratory Ruling may be transferred, provided the facility owner/operator/transferor is current with payments to the Council for annual assessments and invoices under Conn. Gen. Stat. §16-50v and the transferee provides written confirmation that the transferee agrees to comply with the terms, limitations and conditions contained in the Declaratory Ruling, including timely payments to the Council for annual assessments and invoices under Conn. Gen. Stat. §16-50v; and

7. If the facility owner/operator is a wholly owned subsidiary of a corporation or other entity and is sold/transferred to another corporation or other entity, the Council shall be notified of such sale and/or transfer and of any change in contact information for the individual or representative responsible for management and operations of the facility within 30 days of the sale and/or transfer.

We hereby direct that a copy of the Findings of Fact, Opinion, and Decision and Order be served on each person listed in the Service List, dated December 12, 2017, and notice of issuance published in The Danbury News Times.

By this Decision and Order, the Council disposes of the legal rights, duties, and privileges of each party named or admitted to the proceeding in accordance with Section 16-50j-17 of the Regulations of Connecticut State Agencies.

EXHIBIT C

Town of New Milford Petition for a Declaratory Ruling and Request for Party Status under C.G.S. Section 22a-19 submitted to the CT Department of Energy and Environmental Protection, dated January 15, 2019

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January 15, 2019

Via First-Class Mail

RE: Candlewood Solar, LLC – 20 MW Solar Photovoltaic Project
New Milford Assessor's Map Parcels 26/67.1, 9.6, and 34/31.1
Candlewood Mountain Road, New Milford, Connecticut–
Petition by Town of New Milford for Declaratory Ruling and for Party Status under C.G.S. Section 22a-19

Dear Sir or Madam:

I am counsel to the Town of New Milford in the above matter. I write to advise you of the Town's recently filed petition to the Commissioner of the State Department of Energy and Environmental Protection ("DEEP") for a declaratory ruling and other relief as requested in the petition. I attach a copy of the petition for your convenience. (Note that the exhibits referenced in the petition are not included. Should you require copies of the exhibits, please no not hesitate to contact this office.)

The petition seeks a declaratory ruling that, among other things, Candlewood Solar, LLC, the developer of the above solar energy project to be located off of Candlewood Mountain Road in New Milford, should be required by the Commissioner of DEEP to file an individual permit request for permission to discharge stormwater and other wastewater dewatering activities associated with the construction of the project.

Please accept this letter as notice of the substance of the petition. As a person interested in the project, you are entitled to file comments and to request party or intervenor status in the proceedings under subdivision (c)(1) of R.C.S.A. § 22a-3a-4.

Please do not hesitate to call me if you have any questions on this notice or on the petition.

Very truly yours,

CRAMER & ANDERSON, LLP

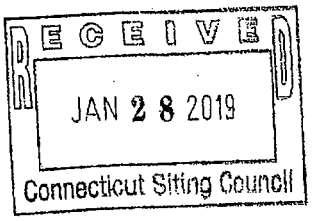
By _____
Daniel E. Casagrande, Esq., Partner

DEC/smc
Enclosure
cc: Town of New Milford
c/o Hon. Peter Bass, Mayor

STATE OF CONNECTICUT

DEPARTMENT OF ENVIRONMENTAL AND ENERGY PROTECTION

IN THE MATTER OF:	**APPLICATION NO: 201816062**
Candlewood Solar, LLC **20 MW Solar Photovoltaic Project** **New Milford Assessor's Map** **Parcels 26/67.1, 9.6, and 34/31.1** **Candlewood Mountain Road** **New Milford, Connecticut** **Petition by Town of New Milford for** **Declaratory Ruling and for** **Party Status under C.G.S. Section 22a-19**	**JANUARY 15, 2019**



The Town of New Milford ("Town") submits this petition pursuant to C.G.S. §§ 4-176, 22a-430b(c), and 22a-19, and R.C.S.A. § 22a-3a-4. The petition seeks two forms of relief. The first request is for a declaratory ruling pursuant to C.G.S. §§ 4-176, 22a-430b(c) and R.C.S.A. § 22a-3a-4. The declaratory ruling request itself is in two parts. First, the Town requests a declaratory ruling that the above project ("Project") should not proceed under a request for authorization under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities ("General Permit"). Rather, because of the massive adverse environmental impact of the Project, including the proposed destruction of some 54 acres of core forestland on Candlewood Mountain and the resulting potential for substantial stormwater runoff and erosion during and after construction, the Commissioner should require the developer to apply for an individual permit pursuant to her authority under C.G.S. § 22a-430b(c), because an individual permit will better protect the waters of the state from pollution. The individual permit process will also afford the Town and other stakeholders a meaningful opportunity to review and comment on the developer's proposed stormwater management plan. (See Part I below.)

In the second part of the Town's petition for declaratory ruling, the Town requests that the period for comments by the Town and other interested persons in response to the pending application for registration under the General Permit and accompanying Stormwater Pollution Control Plan ("SWPCP") be extended to 90 days after either 1) the Commissioner rules on the Town's request for a declaratory ruling requiring an individual permit application, or in the alternative, 90 days from the current due date for comments of January 17, 2019. (See Part I below.)

This petition is also brought pursuant to C.G.S. § 22a-19. The Town believes that the proposed project will or may unreasonably destroy or impair the public trust in the natural resources of the state, and thus seeks to be made a party or intervenor to the above-requested declaratory ruling proceeding as well as to the pending application for authorization under the General Permit. (See Part II below.)

I. Petition for Declaratory Ruling.

A. Name and Address of Petitioner and Petitioner's Counsel.

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B. **Facts and Circumstances Giving Rise to the Petition.**

On or about January 2, 2019, Candlewood Solar, LLC ("Developer") submitted an application to DEEP for registration under the General Permit. The application was made available on-line on or about January 3, 2019. Accompanying the registration application is a Stormwater Pollution Control Plan ("SWPCP") prepared by Wood Environmental & Infrastructure Solutions, Inc. ("Wood"). The SWPCP was submitted to DEEP as required by the Connecticut Siting Council ("Siting Council") as a condition of its December 21, 2017 issuance of a declaratory ruling in which it approved the Project.

The Town intervened as a party to the Siting Council proceeding to raise numerous concerns about the Project. In addition, Rescue Candlewood Mountain ("RCM"), an association of individuals concerned about the massive destruction of core forest and other environmental impacts to be caused by the Project, intervened in the Siting Council proceeding pursuant to C.G.S. § 22a-19 to oppose the Project due to its significantly adverse effect on the natural resources of the state. RCM and certain other persons adversely affected by the Project timely filed an administrative appeal pursuant to C.G.S. § 4-183 from the Siting Council's approval (the "Appeal"). A copy of RCM's complaint in the Appeal is attached hereto as Exhibit A and incorporated by reference. Trial of the Appeal in the Superior Court for the Judicial District of Hartford/New Britain (Cohn, J.) commenced on December 4, 2018 and is ongoing as of the date of this petition. Also attached hereto as Exhibit B and incorporated by reference herein are RCM's pre-trial briefs (main and reply) in the Appeal. These briefs outline the significant adverse impacts on the natural resources of the state, including its waters and wetlands, that the Town believes the Project will create.

The Town has retained the firm of Milone & MacBroom to review the Developer's plans for the Project. Milone & MacBroom is a professional engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut. To date Milone & MacBroom has reviewed the conceptual plans submitted by the Developer to the Siting Council. Milone & MacBroom has also conducted an initial review of the SWPCP filed by the Developer on January 2, 2019. Based on these reviews, Milone & MacBroom members Edward Hart, P.E., and Ryan McEvoy, P.E., have prepared an affidavit which describes their numerous and significant concerns about the inadequacies in the SWPCP, and also explains why, in their professional judgment, DEEP's review of the SWPCP under the individual permit process will better protect the waters of the state. A copy of the affidavit ("Hart/McEvoy affidavit") is attached hereto as Exhibit C and incorporated herein by reference.

C. **Statutes and Regulations at Issue.**

C.G.S. §4-176 provides that "[a]ny person" may petition a state agency for a declaratory ruling as to, among other things, "the applicability to specified circumstances of a provision of the general statutes." R.C.S.A. § 22a-3a-4 sets forth the requirements for a petition for declaratory ruling to the Commissioner of DEEP. This petition seeks a determination that the review of the Project under the General Permit otherwise authorized by C.G.S. 22a-430b is inapplicable to and inappropriate for the highly unusual size and scope of the proposed environmental impacts, and that the Commissioner should therefore invoke her right to require an individual permit application under Section 22a-430b(c). Thus the petition properly requests a declaratory ruling under Section 4-176.

C.G.S. § 22a-430b(c) allows the Commissioner to require any person "initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to [C.G.S.] section 22a-430 if the Commissioner determines that an individual permit would better protect the waters of the state from pollution." (For ease of reference the Town attaches a copy of § 22a-430b as Exhibit D.) The statute sets forth a non-exclusive list of the circumstances in which the Commissioner may require an individual permit. One of the listed factors is in subdivision (5), which allows the Commissioner to require an individual permit "when circumstances have changed since the issuance of the general permit so that the discharge is no longer appropriately controlled under the general permit." For the reasons stated in the Hart/McEvoy affidavit, and as discussed further below, the Town submits that the General Permit review process is simply unsuited to review of a project as huge and potentially environmentally disruptive as this; thus the project warrants the Commissioner's decision to require an individual permit application under subdivision (5).

Section 22a-430b(c) also provides that "[a]ny interested person or municipality may petition the Commissioner to take action under this subsection." This provision provides independent authorization for this petition.

D. <u>Bases for Declaratory Ruling Request</u>.

As the Hart/McEvoy affidavit indicates, their initial review of the SWPCP and related plans --made available approximately two weeks ago-- are deficient in numerous respects, and "lack the necessary information to assure that there will not be erosion and sedimentation caused by the [Project's] construction activities that could impact the waters of the state." (Hart/McEvoy affidavit, ¶ 11) Moreover, "disturbing 83 acres of steep woodland is an unusual phenomenon in Connecticut, something that was probably not

contemplated when the SWGP general permit regulations were adopted." (Id.) In Hart's and McEvoy's professional judgment, it would be appropriate and prudent in these unusual circumstances for the Commissioner to determine that an individual permit application is necessary in order to allow for a more extensive review of the plans by the Town and other interested persons.

Accordingly, the Town respectfully submits that an individual permit application will better protect the waters of the state. Moreover, given the scale of environmental disruption to be caused by the Project, the more public review required in an individual permit application is warranted in the interest of fundamental fairness to the Town and other persons who may be adversely affected by the Project.

In any event, and for the same reasons, the Town requests a declaratory ruling to extend the time period for public comment on the Developer's application for registration under the General Permit until either 90 days after the Commissioner rules on whether to require an individual permit as requested above, or in the alternative, until April 2, 2019, which is 90 days from the date the application was filed with DEEP. Should the Commissioner deny both the request for declaratory ruling and the request to extend the comment period, the Town respectfully requests the Commissioner to consider the comments herein and in the Hart/McEvoy affidavit as the Town's comments on the application for General Permit authorization.

Pursuant to R.C.S.A. § 22a-3a-4(c)(4), the Town further requests the Commissioner to hold a hearing on the Town's petition for a declaratory ruling. In a project of this scale and with such critical potential adverse impacts to the waters of the state, a hearing is necessary and appropriate to allow interested persons sufficient

opportunity to participate in this process and to ensure the completeness and transparency of DEEP's review.

Accompanying this petition, as required by R.C.S.A. § 22a-3a-4(a)(3), is an affidavit by undersigned counsel for the Town that the Town has given notice of the substance of the petition, and of the opportunity to file comments and to request intervenor or party status under subdivision (c)(1) of R.C.S.A. § 22a-3a-4, to all persons known by the Town to have an interest in the subject matter of the petition.

II. Request for Party/Intervenor Status Under C.G.S. § 22a-19.

Pursuant to C.G.S. § 22a-19, any political subdivision may intervene as a party in a state administrative proceeding based on facts alleged in a verified pleading that the proposed activity at issue has, or is reasonably likely to have, the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water, or natural resources of the state. The Town seeks party status under § 22a-19 in the proceedings on the declaratory ruling requested in Part I above. In the event that DEEP moves forward with the Developer's application for registration under the General Permit, the Town seeks Section 22a-19 party status in that proceeding. (The verification by Peter Bass, the Town's Mayor, of the facts alleged and referred to herein is appended to this petition.)

The Town has a direct interest in the proceedings because it has a duty to protect the public interests of its residents by preventing unreasonable impacts to the natural resources of the State located in New Milford. Specifically the Town seeks party status to protect the waters of the state which will or may be impacted by the Project.

The Town again incorporates by reference the Hart/McEvoy affidavit as well as the portions of its briefs in the Appeal dealing with the adverse effects of the Project pertaining to erosion and sedimentation from the construction and maintenance of the solar array,

as well as impacts to wetlands, vernal pools and associated critical terrestrial habitats of indicator species dependent on those habitats for survival. (Exhibit C)

As the Hart/McEvoy affidavit demonstrates, the SWPCP and related plans submitted to DEEP are wholly inadequate and do not provide assurance that the Project will not cause erosion and sedimentation. As the affidavit specifically details:

- The plans do not show the limits of clear cutting of the 54 acres of core forest to be destroyed, the grading plans do not show how the topography will be regraded after removal of the trees and stumps and before restoration and implementation of site improvements, the plans lack critical details relating to drainage structures customized for this Project, and the proposed solar panels are too close together to allow for adequate sunlight to promote vegetation, all in contravention of customary engineering practice. (Hart/McEvoy Affidavit, ¶¶ 7-8.4)

- The stormwater drainage analysis is "fundamentally flawed," for numerous reasons, including but not limited to these: 1) the plans are presented based on outdated and improper rainfall data, resulting in a 15-20 percent underestimation of projected rainfall; 2) no on-site soil testing has been performed to determine if surface sand filters are an acceptable stormwater practice; 3) vegetation under the panels will struggle to grow, thus undermining the plan's hydrologic assumptions; post-development peak discharge rates for parts of the site show an increase in runoff from pre-development conditions; 4) the fundamental nature of the discharge from the site will be altered resulting in long-term risk of erosion and sedimentation to downgradient properties; and 5) significant additional design defects and unsupported assumptions further undermine the basis of the SWPCP design. (Id., ¶¶ 9-9.18)

- The phasing plan for construction is "simplistic and does not adequately address the potential erosion and sedimentation that should be anticipated from the clearing of 83.4 acres on a steep hillside." (Id., ¶¶ 10-10.14)

The Town seeks § 22a-19 party status to introduce expert testimony and other evidence as outlined above regarding the inadequacy of the SWPCP in effectively controlling runoff, sediment and erosion from the Project site, thereby jeopardizing the on-site and off-site wetlands, vernal pools, and CTHs, as well as providing inadequate protection to downgradient properties.

The bar is quite low for filing an intervention petition, and thus § 22a-19 applications should not be lightly rejected. Finley v. Town of Orange, 289 Conn. 12 (2008) (an application need only allege a colorable claim to survive a motion to dismiss), citing Windels v. Environmental Protection Commission, 284 Conn. 268 (2007).

CEPA clearly and in broad terms indicates that any legal entity may intervene. This includes a municipality and officials. Avalon Bay Communities v. Zoning Commission, 87 Conn. App. 537 (2005).

An allegation of facts that the proposed activity at issue in the proceeding is likely to unreasonably impair the public trust in natural resources of the State is sufficient. See Cannata v. Dept. of Environmental Protection, 239 Conn. 124 (1996)(alleging harm to floodplain forest resources).

The Connecticut Appellate Court has noted that statutes "such as the EPA are remedial in nature and should be liberally construed to accomplish their purposes." Avalon Bay Communities, Inc. v. Zoning Commission of the Town of Stratford, 87 Conn. App. 537 (2005); Keeney v. Fairfield Resources, Inc., 41 Conn. App. 120, 132-33 (1996). In Red Hill Coalition, Inc. v. Town Planning & Zoning Commission, 212 Conn. 727, 734 (1989) the Supreme Court held that "section 22a-19[a] makes intervention a matter of right once a verified pleading is filed complying with the statute, whether or not those allegations ultimately prove to be unfounded." See Polymer Resources, Ltd. v. Keeney, 32 Conn. App. 340 (1993) ("[Section] 22a-19[a] compels a trial court to permit intervention in an administrative proceeding or judicial review of such a proceeding by a party seeking to raise environmental issues upon the filing of a verified complaint. The statute is therefore not discretionary."). See also Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 248 n.2 (1984).

The rights conveyed by CEPA are so important and fundamental to matters of public trust that the denial of a 22a-19 intervention itself is appealable. See CT Post Limited Partnership v. New Haven City Planning Commission, 2000 WL 1161131 Conn. Super. (Hodgson, J. 2000) (§ 22a-19 intervenors may file an original appeal for improper denial of intervenor status).

The Town's application for party status should be granted so that it may participate by presenting evidence and otherwise meaningfully assist the Commissioner in reaching a decision which minimizes the impact to the natural resources of the state.

III. Conclusion.

For the foregoing reasons, the Town respectfully requests the Commissioner to issue a declaratory ruling as described in Part I above, and to grant the Town's request for party status under § 22a-19 as discussed in Part II above.

Dated: January 15, 2019
Danbury, Connecticut

TOWN OF NEW MILFORD

By: _____

Daniel E. Casagrande, Esq.
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VERIFICATION

The undersigned, Peter Bass, duly authorized Mayor of the Town of New Milford, duly sworn, hereby verifies that the above petition is true and accurate to the best of his knowledge and belief.

Peter Bass

Subscribed and sworn to before me this 14th day of January, 2019.

Notary Public
My Commission Expires: 3/31/2022

LINDA D. HOLLINS
NOTARY PUBLIC OF CONNECTICUT
My Commission Expires 3/31/2022

AFFIDAVIT REGARDING NOTICE

Daniel E. Casagrande, being duly sworn, deposes and says:

1. I am over the age of eighteen and believe in the obligations of an oath.

2. I am counsel for the petitioner, Town of New Milford, and am fully familiar with the facts set forth herein.

3. On January 15, 2019, the petitioner, through undersigned counsel, gave notice of the substance of the petition, and of the opportunity to file comments and to request intervenor or party status under R.C.S.A. § 22a-3a-4 (c)(1), to all persons known by the petitioner to have an interest in the subject matter of the petition. Such notice was served, via first-class mail, upon the parties listed on the attached list.

Dated at Danbury, Connecticut, this 15th day of January, 2019.

Daniel E. Casagrande

Subscribed and sworn to before me this 15th day of January, 2019.

Sonia M. Christie
Notary Public
My Commission Expires: 12/31/2021

INTERESTED PARTIES

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Weantinoge Heritage Land Trust, Inc.
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Rivers Alliance of Connecticut
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Housatonic Valley Association
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Cornwall Bridge, CT 06754

EXHIBIT D

Decommissioning Plans for Solar Facilities

Appendix C

Decommissioning and Restoration Plan

GRE and/or its successor in interest will be responsible for decommissioning of the Project once it has reached the end of its operational lifespan. The Project is designed for an expected operational life of at least 30 years. As the Project approaches the end of its operation life, it is anticipated that technological advances will produce more efficient and cost-effective solar arrays which will economically drive the replacement of the Project.

Decommissioning of the Project is described as the removal of all system components and the return of the site to its condition before the construction of the Project. Deconstruction procedures are designed to ensure public health and safety, environmental protection, and compliance with applicable regulations. The Project owner will be responsible for:

- All decommissioning costs;
- Obtaining any additional permits required for the decommissioning, removal, and legal disposal of Project components prior to commencement of decommissioning activities;
- Complete decommissioning, including component removal and disposal, re-vegetation in accordance with applicable permits and in compliance with all applicable rules and regulations in effect governing the disposal thereof; and
- Any other measures that the Siting Council may require in its approval of the Project.

The following sections outline the plan for decommissioning of the Project and site reclamation.

Decommissioning

Estimated Cost and Financial Security

Given the expected overall cost of the Project components, and the estimated salvage value of the panels, racking system, inverters, and transformers, it is customary to expect that the salvage value of the system will exceed decommissioning costs for the life of the Project. The estimated cost of decommissioning and respective salvage value can be more specifically estimated once the Project achieves commercial operation. However, based on the current understanding of the salvage value of the components of the Project, it is anticipated that the salvage value of the Project's components will be greater than the costs associated with all decommissioning activities.

Preparation

Prior to start of decommissioning work, the site will be assessed for existing conditions. Decommissioning and removal of Project structures from the site is anticipated to occur within one year following discontinuation of operations on the Project site. Decommissioning and equipment removal can take up to six months to complete; therefore, assessment of site conditions is needed to ensure proper planning and management of the movement of materials and to protect surrounding natural resources. Erosion and sediment controls will be installed on the site prior to the formal start of decommissioning. Access roads and fencing will temporarily

remain in place for use by the decommissioning and site restoration workers until decommissioning activities are completed. Demolition debris will be placed in temporary on-site storage areas until final transportation and disposal/recycling is arranged. Erosion and sedimentation best management practicess will be installed prior to the commencement of any decommissioning activities with notification provided to the appropriate state and municipal agencies.

Photovoltaic Equipment Removal

The Project will be de-energized through disconnection from the utility power grid. All wirings, cables, and electrical interconnections will be disconnected. Equipment removal will include all facilities, including wiring, PV modules, module racking, string inverters, and panel boards. PV modules will be shipped to a recycling center for recycling and material reuse.

Steel pilings which supported the module racking will be mechanically removed and any resulting holes will be backfilled with locally imported soil to match existing site soil conditions. The concrete transformer and interconnection equipment pads will be broken up and removed.

The direct current/alternative current power collection system will be dismantled and removed. All conduits and cabling that is removed will be recycled. The overhead interconnection to the utility power grid will be removed unless the landowner determines that the electrical service line will be beneficial for future use of the site, in which case the line may remain after decommissioning.

The demolition debris and removed equipment may be cut or dismantled into smaller pieces that can be safely lifted or carried by the deconstruction equipment being used. The majority of glass and steel and aluminum will be processed for transportation and delivery to an off-site recycling center. Minimal non-recyclable materials are anticipated; these will be properly disposed of at a qualified disposal facility.

Access Road and Security Fencing Removal

The on-site access roads servicing the Project and the security fencing around the Project will remain in place during decommissioning activities to support the removal of equipment. Once removal activities are completed, discussion with the landowners will occur to determine if the roads or security fencing will be beneficial for future use of site. If the access roads or security fencing is determined to be beneficial for future use of site, these facilities may remain in place. Access roads that will not be utilized to support future use of the site will restored to pre-construction conditions. Aggregate base material of the roads will be removed and the compacted base section will be filled with locally imported soil to match existing onsite soils. The areas will then be seeded to match existing onsite groundcover. If the security fencing is not to be used, it will be removed and transported to the nearest recycling facility.

Site Reclamation

Once all Project equipment has been removed, additional activities will occur to return the property back to conditions similar to pre-construction. Reclamation will restore vegetative cover and hydrological function after the closure of the facility.

As previously discussed, any excavated areas remaining after the removal of equipment pads, access road based material, or fence posts will be backfilled with locally imported soil to match existing onsite soils.

Given the Project's construction plans, which call for for minimal disturbance of the earth surface, it is unlikely that any significant earthwork will be required. Efforts will be made to not disturb the natural drainages and existing natural vegetation that remain post-decommissioning.

Once landform features and soils are restored, a seed mix will be applied to match the existing onsite groundcover.

Health and Safety Concerns

Site decommissioning will entail the use of heavy equipment, transportation of materials and site restoration. A detailed site-specific Health and Safety Plan will be developed to assess the risks posed by the proposed activities, climate, hazardous materials and biological hazards. The plan will detail the stop work triggers, emergency procedures and reporting requirements should a dangerous condition be encountered. Additionally, training and personal protective equipment will be discussed. A Health and Safety tailgate meeting will occur prior to the commencement of each day's activities where the potential hazards and mitigation methods for the day's proposed activities will be discussed.

Abington Road Solar Project - Decommissioning Memo

This memo describes a Decommissioning Plan that establishes the approach to conduct decommissioning activities for the permanent closure of the Facilities at the end of the Facilities' useful life or the permanent cessation of the Facilities' operation, whichever comes first. The Plan describes the approach for removal and/or abandonment of facilities and equipment associated with the Facilities and describes anticipated land-restoration activities.

DECOMMISSIONING ACTIVITIES

Decommissioning will involve removal and disposal or recycling of all above-surface Project components. All recyclable materials will be transported to the appropriate nearby recycling facilities. Any non-recyclable materials will be properly disposed of at a nearby landfill. 95% or greater of the Facilities' components will be recyclable.

Decommissioning Preparation

The first step in the decommissioning process will be to assess existing site conditions and prepare the site for demolition. Site decommissioning and equipment removal can take up to six months to complete for a project of this size. Therefore, access roads, fencing, and electrical power will temporarily remain in place for use by the decommissioning and site restoration workers until no longer needed. Demolition debris will be placed in temporary on-site storage areas pending final transportation and disposal/recycling according to the procedures listed below.

PV Equipment Removal and Recycling

During decommissioning, all Facilities components will be either removed from the site and recycled or abandoned in place 12 inches below grade (for underground conduit and conductors). Equipment removal will include all pad-mounted cabinets, above ground wiring, solar modules, solar module racking, string inverters, and panel boards. Steel h-beams that supported the module racking and inverters/panelboards will be mechanically pulled out of the ground; any resulting holes will be backfilled with locally imported soil to match existing site soil conditions. The concrete transformer and interconnection equipment pads will be broken up and removed.

The demolition debris and removed equipment may be cut or dismantled into pieces that can be safely lifted or carried with the on-site equipment being used. The majority of glass and steel and aluminum will be processed for transportation and delivery to an off-site recycling center. The solar modules will be transported to and recycled at the nearest facility that will accept them. Minimal non-recyclable materials are anticipated; these will be properly disposed of at the nearest qualified disposal facility.

Internal Power Collection System

The DC and AC power collection system will be dismantled and removed. All underground cables and conduit will remain in place at a depth of 12 inches below ground surface. All conduit and cabling that is removed will be recycled.

Access Roads

The onsite 16-foot wide access driveway will remain in place to accomplish decommissioning at the end of the facility's life. At the time of decommissioning, if the landowner determines that this road will be beneficial for the future use of the site, the access road may remain after decommissioning. The future use of the site is undetermined at this time. Roads that will not be used will be restored to pre-construction conditions by removal of the aggregate base material, fill of the compacted base section with locally imported soil to match existing onsite soils, and a hydroseeding of a seed mix to match existing onsite groundcover.

Security Fence

The 7.5 foot high chain link perimeter security fence will remain in place during decommissioning activities for site safety and security purposes. At the time of decommissioning, if the landowner determines that this fence will be beneficial for the future use of the site, the fence may remain after decommissioning. The future use of the site is undetermined at this time. If the fencing is not used, it will be removed and transported to the nearest steel recycling facility. Holes left behind by the fence support posts will be backfilled with locally imported soil to match existing onsite soils, and a hydroseeding of a seed mix to match existing onsite groundcover.

Landscaping

The double row of screening vegetation along certain areas of the northern and western perimeter of the Site will remain in place during decommissioning activities for site safety and security purposes. At the time of decommissioning, if the landowner determines that this landscaping will be beneficial for the future use of the site, the landscaping may remain after decommissioning. The future use of the site is undetermined at this time. If the landscaping is not used, it will be removed and transported to the nearest plant material disposal facility for composting or mulching. Shrubs, bushes, and trees would be stump cut to just below ground level.

23 kV Interconnection Line

The overhead interconnection cabling that runs north from the project and across Williams Crossing Road to connect the Facilities to the CL&P distribution circuit will remain in place during decommissioning activities to provide electric service onsite during decommissioning. At the time of decommissioning, if the landowner determines that this electric service line will be beneficial for the future use of the site, the line may remain after

decommissioning. If the line is not used, it will be removed per CL&P guidelines and transported offsite to the nearest recycling facility. Underground cabling and conduit on private property will remain in place at a depth of 12 inches below ground level. Underground cabling and conduit within a public right-of-way will be removed completely, and the resulting trenches will be backfilled with locally imported soil to match existing onsite soils, and a hydroseeding of a seed mix to match existing onsite groundcover.

SITE RECLAMATION

After the Facilities are completely decommissioned, and all Facilities equipment has been removed from the Site, additional activities will be performed to return the resultantly vacant property back to pre-construction conditions.

Restoration Process

The decommissioning process will remove Project-related structures and infrastructure as described in the previous sections. Following decommissioning, site reclamation activities will occur. Reclamation will restore landform features, vegetative cover, and hydrologic function after the closure of the facility. The process will involve (where needed) the replacement of topsoil and vegetation, as well as modification of site topography where necessary to bring the Site back to pre-construction conditions. Restoration will bring the Site back to a natural pre-construction condition that is compatible with the adjacent surroundings.

If any excavated areas remain after removal of equipment pads or access road base material, these areas will be backfilled and compacted with locally imported soil to match existing onsite soils, and a hydroseeding of a seed mix to match existing onsite groundcover. Any other areas of lower than average ground surface level will receive the same treatment.

If any soils are determined to be compacted at levels that would affect successful revegetation, decompaction will occur. The method of decompaction will depend on how compacted the soil has become over the life of the Project. Following decompaction, re-contouring of the site will be conducted, if necessary, to return the Site to approximately match the pre-construction surface conditions and the surrounding area conditions. Original site drainage characteristics will be restored if they have not been maintained. It is unlikely that any or a significant amount of earthwork will be required, as the Project construction plan calls for minimal or no disturbance of the Site during Project construction. Grading activities will be limited to previously disturbed areas that require re-contouring. Efforts will be made to disturb as little of the natural drainages and existing natural vegetation that remain post-decommissioning as possible.

Any areas identified as remaining in bare earth will be hydroseeded with a seed mix to match existing onsite groundcover.

Site Restoration activities are anticipated to be very minimal, as the pre-construction conditions of the site are not planned to be significantly altered during Project construction.

However, these activities as described, as well as any others that become necessary, will be performed to return the Site to a pre-construction condition.

Monitoring Activities

The Site will be monitored after Site Restoration activities are complete to confirm that any earthwork and revegetation were performed correctly and last permanently. The Site will be periodically inspected (at least twice annually) to check for any eroded earthwork or failed revegetation. Any deficiencies will be immediately corrected. This monitoring will continue for a period of five years, or until the Site is re-developed for another future purpose, whichever comes first.