Docket No. QO21101186, IN THE MATTER OF COMPETITIVE SOLAR INCENTIVE ("CSI") PROGRAM PURSUANT TO P.L. 2021, C. 169

Joint Comments of the Solar Energy Industries Association, New Jersey Solar Energy Coalition, MAREC Action, and the American Clean Power Association

May 25, 2022

I. Executive Summary

The Solar Energy Industries Association (SEIA), New Jersey Solar Energy Coalition (NJSEC), and Mid-Atlantic Renewable Energy Coalition Action (MAREC Action), and the American Clean Power Association (ACP)[1] appreciate the opportunity to offer input to the New Jersey Board of Public Utilities (BPU or Board) regarding the design and establishment of siting rules applicable to all projects eligible to participate in the Competitive Solar Incentive (CSI) program. We appreciate BPU Staff, the State Agriculture Development Committee (SADC) and the New Jersey Department of Agriculture (NJDA) for their hard work in putting together preliminary suggestions for the implementation of Section 6 of the of the Solar Act of 2021.

In brief, we believe that a workable siting process is imperative for the solar industry to achieve the CSI Program goal of constructing at least 1,500 megawatts of large-scale solar facilities by 2026, as well as Gov Murphy's broader energy master plan goal of 12.2 GW of solar by 2030, and 17.2 GW by 2035. The solar industry is strongly committed to responsible land use, community partnership, and being good stewards of the sites that host solar facilities. As an industry, we take seriously our ability to support landowners and farmers with additional revenue streams and farmer income and seek to maximize preservation of our natural capital and enhancement of ecosystem services, which includes minimizing permanent negative impacts on land.

While we appreciate the BPU's stated preference for solar projects that make use of the built environment and that minimize impacts on open space (e.g., rooftops and similar installations on the built environment), we also recognize that a key motivation behind the Solar Act of 2021 was the need to establish an appropriately sized market for large-scale solar projects so that New Jersey can be on track to achieve its laudable solar goals.

However, the current Straw proposal and draft agricultural mitigation guidelines for grid-scale construction projects on specific farmlands in agricultural development areas contain significant issues and, in some cases, fails to provide the clarity required by project stakeholders to confidently develop and build under the CSI program.

[1] For ease of reference throughout the remainder of this document, we will call the commenting entities herein: "SEIA."

We look forward to working with the BPU to further refine implementation of Section 6 of the Solar Act of 2021 in a way that balances the need for permitting more solar projects with protecting property rights and sensitive ecosystems and would be pleased to meet with Staff to discuss any of the recommendations contained in these comments.

II. Staff's proposal to enforce the 2.5% Statewide Threshold and the 5% County Development Limits Concurrently is Unsupported by Statutory Text and Should Be Modified

Staff proposes to "allow[] solar development on the first 2.5% of Prime Agricultural Soils/Soils of Statewide Importance that are in ADAs statewide ("2.5% Statewide Threshold"), subject to the limitations found in Section 6(f) that limit total development within a given county." Straw proposal, at 13. While Section 6(f) does contain a limitation on development that is not found in Section 6(c),[2] the text of Section 6(f) is internally inconsistent, lacks the organization of Section 6(c) on restrictions, and is therefore ambiguous.

Section 6(f) generally addresses waivers to the 2.5% Statewide Threshold. It directs that "in no case shall the projects *approved* ... *pursuant to this section*" exceed a 5% County Threshold (emphasis added). Yet Section 6 ("this section") does not govern project approvals; approvals are governed by Section 4, N.J. Stat. 48:3-117. Moreover, if the legislature intended the 5% County Threshold to serve as an additional limitation, it would have placed it in the enumerated list of restrictions in Section 6(c). SEIA believes that the text of Section 6(f) is therefore ambiguous.

Faced with ambiguous statutory text, Staff should instead look to highly probative legislative history which suggests that the 5% County Threshold was not intended to operate concurrent with the 2.5% Statewide Threshold. For example, the Assembly Budget Committee's Statement of June 22, 2021, notes that "[a]fter the 2.5 percent threshold is reached, a waiver would be a required for the remaining 2.5 percent of the lands with agricultural soils *until* the five percent cap on the use of lands with those soils for solar facilities is reached." (emphasis added). Here, "those soils" clearly refers to the statewide figure, not to specific counties. Similarly, a Senate statement accompanying the adopted amended language states "[a]fter the 2.5 percent threshold is reached, a waiver would be a required for the remaining 2.5 percent of the lands with prime agricultural soils until the five percent cap on the use of lands with those soils for solar facilities is reached[.]"

A final consideration is that the absence of a bright-line, administrable rule like we propose here will chill developers from investing in the state. This in turn will disincentivize large commercial and industrial users from being able to procure clean energy in New Jersey, and they may seek opportunities elsewhere. These effects were clearly not intended by the legislature in enacting the Solar Act.

In light of the ambiguous text of Section 6(f), its inconsistency with Section 6(c), and the explanatory statements from both houses of the legislature, SEIA believes that the waiver provision in Section 6(f) should apply on a statewide basis beyond 2.5% of restricted state soils, regardless of the 5% County Threshold, in order to give effect to the clear intent of both houses of the legislature.

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[2] "[I]n in no case shall the projects approved by the board pursuant to this section occupy more than five percent of the unpreserved land containing prime agricultural soils and soils of Statewide importance ... located within any county's designated Agricultural Development Area[.] N.J. Stat. 48:3-119(f). Section 6(c) is otherwise the exclusive source of siting restrictions within the statute. *See* N.J. Stat. 48:3-119(c).

III. SEIA recommends additional clarity around siting constraints, waivers, and project registrations

SEIA, NJSEC, MAREC Action, and ACP agree with staff that it is critical to have clear and transparent solar project siting criteria that apply across the State. However, we believe that the Solar Siting Straw proposal would benefit from additional clarity.

We appreciate staff's proposal to create a public "dashboard" that will track the most current calculation of Statewide and County development limits, updated at least quarterly, and recommend that the state also provide GIS data layers that show where prime agricultural soils/soils of statewide importance are located.

However, while the BPU has made it clear that they intend to create a registration system for projects in the CSI program, Staff should clarify what they mean when they suggest that "solar projects selected for participation in the CSI program would submit their intention to construct on Prime Soils or Soils of Statewide Importance within ADAs." Based on the CSI Straw proposal released on April 26th, it now appears the Staff is proposing that approximately one month before any solicitation, projects will need to pre-register and indicate an intent to site on land in restricted categories, such as farmland. While the CSI straw proposal clarifies that projects intending to construct on restricted categories will only achieve pre-qualification, and thus be able to bid in a solicitation (if there is room under a given threshold), lack of clarity around how and when a project reserves their spot within the registration system for projects subject to caps is concerning—especially given the BPU's stated intent to enforce the 2.5% statewide threshold and 5% county development limit independently.

Because siting solar on types of agricultural land will be subject to limitations, it is critically important that a workable, transparent, and efficient queuing mechanism be established and enforced. Applicants to the CSI Program must have a clear understanding of the parameters by which their projects will be reviewed, and those standards must be consistently applied. Otherwise, queues could grow unacceptably long, slowing siting and discouraging investment. This could dramatically impair the success of the CSI program before it even gets off the ground.

As a result, we support the suggestion to enforce a "siting constraint" in the CSI program if the amount of percentage thresholds on the statewide or county levels are exceeded in any given solicitation. However, we recommend clearly outlining how or when a project reserves their spot in counting towards the statewide or county development limit for prime agricultural soils/soils of statewide importance within ADAs. We also recommend clarifying what would happen when two projects with exactly the same bid price, taken together, exceed the amount of percentage threshold on the statewide or county level. We recommend that in such a scenario, the winning bidder should be the project with an interconnection agreement; or, if none, the project with the greatest number of other non-ministerial permits.

More generally, the current Straw proposal fails to articulate any intelligible standards governing waiver requests, burdens of proof, adjudication, and appeals. In order to fully determine the extent of the proposal's impact on new solar facilities, industry needs more information to evaluate the burden and feasibility of seeking and obtaining a waiver. A purely discretionary system, as may be contemplated here, is arbitrary, capricious, deprives applicants of due process, and will significantly frustrate the state's renewable energy policy goals.

IV. SEIA believes Appendix B's construction and restoration requirements are overly broad and proscriptive.

The solar industry appreciates staff's proposal for agricultural mitigation guidelines for grid-scale construction projects on specific farmlands in agricultural development areas. We share the desire to ensure the integrity of agricultural land impacted by solar development, so that these lands can be returned to agricultural use after the solar system is decommissioned, if so desired. However, we are concerned that the combination of proposed restrictions in Appendix B are overly broad and proscriptive. The Guideline, as currently written, is inflexible and will introduce significant additional costs for solar developers that are not justified.

Specifically, we note the following:

- The Guidelines should clarify that the required "environmental inspector" can be an employee of a developer rather than a third party, and that the requirement to "ensur[e] compliance" does not contemplate additional BPU enforcement authority.
- "Agricultural land" required to be mapped should be more clearly defined to specific land used to grow principal vegetables, fruit, or named specialty crops. It should also exclude inactive cropland.
- Similarly, by restricting development on prime soils in addition to Class II and III soils, the state may prevent larger solar projects from moving forward, which benefit from being less costly due to economies of scale. We encourage staff to examine a soil map of an example county or engage its consultant to use GIS for such an analysis, which would reveal that this broad restriction eliminates many parcels of land that would otherwise be eligible for solar development – as one parcel of land can resemble a marble, containing many different soil classifications.
- Soil compaction testing every 250 feet both pre- and post-construction is unduly burdensome and impractical for larger facilities. Soil compaction may be incidental at solar facilities but is largely only a concern at access roads and laydown areas. Thus, this requirement is excessive and should be removed. At a minimum, we think the BPU, SADC, and NJDA should provide reasoning for these onerous obligations and clarify whether the requirement applies to soils above which no solar equipment is mounted, which can represent 20-50% of the total project area. The same comment applies to topsoil removal provisions, which also will add additional cost to these projects
- The way Appendix B reads the vegetation removal procedures create a de facto landowner veto. It's in the best interests of our members to be working closely with landowners where solar is sited, but BPU should amend this to require landowner consultation only prior to vegetation removal.
- The dispute resolution provisions in subsection H of Appendix B makes mandatory a requirement to get a soil conservation opinion but is silent with respect to who pays for the opinion, whether the opinion is binding, and, if so, whether the opinion can be appealed.
- BPU should further justify the prohibition on concrete or other permanent groundmounting. Such installations can already be constructed in a manner that minimizes soil impacts and can be removed in the process of decommissioning the project
- The topsoil removal and storage requirements are grossly excessive and administratively burdensome and should be removed. BPU, SADC, and NJSAC have not adequately explained why removal should be determined by licensed geologist or soil scientist, and these requirements

could be impractical and unduly burdensome depending on the size of the facility and will add additional cost to these projects

- Seeding and mulching within 7 days of disturbance may be impractical in certain seasons or given other operational requirements. This should be expanded to 90 days or the length of the planting season for the contemplated seed mixture, whichever is longer. By providing greater flexibility on seeding and mulching timing, developers have more opportunities to plant native or pollinator friendly vegetation, as well as deep-rooted vegetation that can optimize facility hydrology.
- The justification for six-year monitoring and remediation is unclear, and appears arbitrary and excessive.

V. Additional Considerations

SEIA, NJSEC, MAREC Action, and ACP appreciate that the Board has a stated preference for solar projects that make use of the built environment and that minimize impacts on open space (e.g. rooftops and similar installations on the built environment). As a result, we support the concept of an expedited siting process for solar projects on the built environment or impervious surfaces.

However, the BPU's proposed definition of "Forested Lands" is unworkable and should be modified. By defining this classification to cover the entire 4000 Series, BPU admits that it would encompass "*any* lands covered by woody vegetation," a facially overbroad and unduly restrictive category. SEIA recommends that "Forested Lands" include only sublevels 4120 (deciduous forest), 4220 (coniferous forest), and 4322 (mixed forest).

Furthermore, we agree with the BPU's assessment that the new definition for the term "contaminated site or landfill" will increase the number of sites eligible for the CSI program. Likewise, we agree with Staff's proposal that gravel, sand, other historic mining sites where a discharge as defined under the Act has occurred, and which currently constitute contaminated sites, will also be covered under the new definition.

In addition, floating solar has not been covered in this straw proposal. There are many industrial applications where floating solar would not interfere with open space and staff should clarify whether floating solar is considered within the built environment and thus subject to the proposed expedited siting process.

We support staff's proposal to develop standardized tools to facilitate the determination as to whether a proposed location for a solar project is suitable, including by making use of GIS software, where useful, to help evaluate compliance with the statutory restrictions. However, although the GIS data is important, GIS data should not be determinative. We don't believe it alone should drive regulatory decisions like whether or not a solar project is permissible in a given area. Despite well-intended best efforts, GIS data is often incomplete or out of date, and therefore must be accompanied by on-the ground verification of its accuracy to be used in case-by-case siting decisions.

Finally, many of the requirements proposed in Appendix B will add costs to project development, as well as ongoing maintenance and operating expenses. While the details of the CSI Program will be developed in a parallel stakeholder process, if the Board will be setting a cost ceiling above which all bids will be

rejected, we suggest that the value of the cost ceiling take into account the cost resulting from the Appendix B in any given solicitation.

VI. Conclusion

We appreciate the hard work by BPU Staff, the State Agriculture Development Committee (SADC) and the New Jersey Department of Agriculture (NJDA) for their hard work in putting together preliminary suggestions for the implementation of Section 6 of the of the Solar Act of 2021. However, we strongly recommend that the BPU make these essential changes to the guidelines to create the conditions necessary to meet BPU's laudable goal of incentivizing the construction of at least 1,500 megawatts of large-scale solar facilities by 2026.

Thank you for considering these recommendations.

Sincerely,

Scott Elias
Director of State Affairs, Mid-Atlantic
Solar Energy Industries Association
selias@seia.org

Fred DeSanti
Executive Director
New Jersey Solar Energy Coalition (NJSEC)
fred.desanti@mc2publicaffairs.com

Bruce Burcat
Executive Director
Mid-Atlantic Renewable Energy Coalition Action
bburcat@marec.us

David Murray
Director, Solar Policy
American Clean Power Association
dmurray@cleanpower.org