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May 31, 2022

Aida Camacho-Welch
Secretary of the Board
44 South Clinton Avenue 1st floor
Post Office Box 350
Trenton, New Jersey 08625-0350

Re: Comments on Docket No. QO21101186
In the Matter of Competitive Solar Incentive Program
Pursuant to P.L. 2021, C169
Due May 31, 2022

Dear Ms. Camacho- Welch

Please accept these comments on behalf of CEP Renewables LLC. ("CEP"). CEP endorses, supports and welcomes the concept of providing criteria by which CEP, as a renewable energy solar developer, can identify and develop opportunities for grid supply solar. CEP is a long standing supporter and developer of grid supply solar in New Jersey. Over the past several years, CEP has developed grid supply solar farms on all types of sites and terrain, including super fund landfill sites such as the 28 MW solar farm on the North Combs superfund landfill site in Mount Olive, New Jersey, the 17 MW solar farm on the old clay mines, a historic fill site known as the Clay Pits in Old Bridge, New Jersey and the 18 MW solar farm site on the former Fibermark Paper company property in Holland, New Jersey to name just a few.

In reviewing the staff proposal under the above referenced docket number, we note several issues that must be addressed.

1. Section III 5 Siting of Solar Projects on Farmland

A. The STATEWIDE CAP

We believe that Section III 5 of the Straw Proposal misinterprets the statutory language and legislative intent of P.L. 2021, c. 169. The Straw Proposal attempts to treat the 2.5% Statewide cap on the use of ADA Prime and Statewide Importance Farmland for solar development and the

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county wide 5% cap as individual caps whereas the statute clearly only allows the 5% County Development limit to be applied after the 2.5% Statewide Threshold has been met.

Section 6(d) of the Act does not require a solar facility to seek a waiver pursuant to section 6(f) until the Board has determined that 2.5% of prime agricultural soils or soils of statewide importance have been utilized. Only upon a determination that the 2.5% Statewide limitation has been exhausted does a solar facility need to seek a waiver from the Board pursuant to 6(f).

Only facilities seeking waivers in 6 (f) are limited to not occupy more than five percent (5%) of the unpreserved land containing prime agricultural soils and soils of Statewide importance.

The legislature clearly made a policy determination that 2.5% (or 8,493 acres as calculated by the BPU) of ADA Prime and Statewide Important Farmland may be used for larger solar facilities without seeking waivers. Once that limit is reached and Developers start requesting waivers, the BPU may consider the individual Counties 5% limit.

We do not find staffs argument that the caps are to be levied simultaneously are persuasive. We believe that the staffs argument misapplies Section 6(b)'s language. 6(b) states that "In addition to implementing the provision of 6 c. through f of this section, the siting criteria shall...." The Agency must first implement section c and f, setting a Statewide cap before addressing a County's individual cap. The straw proposal attempts to justify the position taken by using language in 6 b. (2) which states the Board is to "minimize, as much as is practicable, potential adverse environmental impacts;" The BPU is making a policy determination that solar facilities present a more adverse environmental impact than farming. There is no justification for that policy decision and in fact just the opposite is true. Various management practices on agricultural soil can result in emissions of nitrous oxide due to the application of fertilizers and adverse irrigation practices. Solar facilities, planted with Rutgers mixes of field grass etc., demonstrably improve soils conditions, preserves moisture in the soils, does not generate greenhouse gases, and reduces reliance on electricity generated from fossil fuels which do generate greenhouse gases. Once the solar facility is decommissioned the soil is returned to farmland. These are policies the legislature was aware of when passing P.L. 2021, c. 169.

The result of the foregoing misinterpretation is to substantially and unnecessarily reduce the amount of acreage intended to be available without a waiver and is inapposite to the stated policy goals of the Grid Bill legislation and the Legislature.

B. COUNTY WIDE CAP

County by County 5% Development limits.

Appendix A of the Straw proposal sets forth County by County 5% Development limits. We must point out those limits assign usable acres to Counties where it is well known there is little to no opportunity to develop grid supply solar because there is no infrastructure. For example, of the 8,493 acres available for development without seeking waivers, Salem, and Cumberland County each have greater than 1,000 acres assigned for grid supply solar facilities, Atlantic County close

to 500 acres, but none of these Counties have the infrastructure to support grid supply solar farms. Accordingly, development of grid supply solar facilities in those Counties is unlikely and will not occur. Juxtaposing the lack of infrastructure with the current PJM moratorium makes grid supply solar farm development in these Counties a nonevent. This is a well-known fact and raises questions as to the objectivity of those drafting these straw rules. Allocating so much acreage to areas that will not be developed substantially reduces the land available for solar where it can be produced. This outcome is contrary to the spirit of the Grid Supply Act sponsored by Senator Smith and adopted by the Legislature. We suggest a mechanism or adjustment be available in the waiver process that would allow the acreage to be permissibly redistributed to Counties where interconnection is feasible due to adequate interconnectable infrastructure such as Gloucester, Warren, Sussex and Hunterdon Counties.

2. The Waiver Process

A. Prohibited Areas and
Section III C Waiver Process & Limits on Waiver

The Straw Proposal understands that some proposed solar facility projects will be located on preferred siting areas, like landfills, brownfields areas of historic fill and contaminated sites which may have a simultaneously prohibited designation because it is located in a prohibited area, for example Pinelands Preservation Area or the Highlands Preservation Area. While it is incontrovertible that the sites would otherwise be eligible for subsidy because of the existence of the impaired and regulated ground, the Straw proposal provides that these sites must petition the Board for a waiver setting forth the character of the specific parcel and seeking approval notwithstanding the existing condition. Then the Board will consult with the DEP or Secretary of Agriculture to consider such a waiver.

We argue that when the subject property is a landfill, brownfield, area of historic fill or contaminated parcel that is located in a prohibited area, there be a process akin to a "Waiver By Rule" that automatically exempts the Property from the Waiver process provided the developer establishes the fact that the property is in fact a landfill, brownfield, area of historic fill or contaminated site. The reason for this request is that the developer of these types of lands must know up front if the property is eligible for subsidy. The amount of investment required to control, test, and evaluate these types of impaired sites will deter any developer from undertaking same without knowing with certainty that there is a path to subsidy at the outset.

Staff suggests that there be developed an expedited process involving a Memorandum of Understanding. For those of us who have undertaken Memorandums of Understanding, we know that a Memorandum of Understanding is time consuming to negotiate, is subject to change and is not a public process, therefore not predictable. All the foregoing will subject the developer to unnecessary development risks and uncertainty.

All these sites would require detailed applications to the Department of Environmental Protection for solid waste approvals or soils remedial action work plans. Located in the Pinelands or the Highlands means the properties will undergo detailed applications to the Pinelands Commission and or the Highlands commission. If the developer is able to obtain approval from the foregoing agencies, there should be no reason for a second round of approval, the Waiver, by the BPU, which has literally no agency expertise in reviewing the applications. In our opinion, it should be highly unlikely that the BPU Board will overrule an approval by a sister agency. Therefore, to provide a level of certainty to the developer, we argue that the BPU should develop a standard approval process, a waiver by rule, that relies on their sister agency's approval. The DEP has this type of process called "permit by rule." If a certain set of factors exist as set forth in an APA compliant rule, then the waiver is approved.

A waiver approval embodied in regulations substantially reduces the uncertainty and risk of the waiver process and will allow for expedited waivers given the statutory policy preference for such projects. If such a process is not developed, that is tantamount to a decision by the BPU that there are to be no grid supply solar farms in these areas as no developer will undertake the uncertainty created by the process. Once again, we are diluting the areas available for solar development when the purpose of the Grid Supply bill was to create more opportunities.

3. Forested Lands

Section III B 3 Siting of Solar Projects on Forested Lands.

A. Use the Correct Level in the Definition of Forest

The Straw Proposal proposes to use a GIS data layer developed by DEP namely the modified Anderson Code Classification of Forested Lands (4000 series) Level 1 data, as the tool to determine whether a potential solar site is on forested lands. Using the level 1 data, the straw proposal would define a forest as a parcel with a 10% crown closure.

For the purpose at hand, Level 1 is grossly overbroad, and will include lands that do not truly represent a forest. An example of non-forested lands which would be captured using the proposed methodology include phragmites covered fields. Phragmites is a non-woody invasive species, which would not fulfill the 10% crown cover requirement and certainly does not constitute a forest. Another example of this methodology mischaracterizing "forest" is the inclusion of old fields with less than 25% brush in the 4000 series. Again, this habitat is clearly not a forest, but in both examples the mapped habitat does not have any other appropriate series within the Anderson Code Classification and is, therefore, included in the 4000 series of Forested Land.

If the Anderson code Classification system is to be used, we argue that the sublevels to be applied in this exercise should be limited to 4120 (deciduous forest), 4220 (coniferous forest), and 4322 (mixed forest). These designations are most consistent with other definitions of forested land seen throughout NJDEP Regulations. More significantly, the definition of forest for these designations carries a closure of 50% as opposed to 10% and better reflect what is traditionally consider a forest. Additionally, due to the crude nature of land use aerial interpretation, specifically for the

classification of forested land, we propose that a survey methodology may also be utilized to ground truth the mapping. Neither the Coastal Zone Management Rules (N.J.A.C 7:7-13.5), nor the Highlands Rules (N.J.A.C. 7:38-3.9) define forested land based on the Anderson Code Classification, but instead rely on a more quantitative evaluation.

Additionally, the proposed methodology, overlooks any consideration of habitat quality. This is particularly significant due to the prevalence of dead or dying ash trees throughout New Jersey because of the Emerald Ash Borer infestation. This infestation has led to drastically altered condition of previously forest areas. Similarly, the recent infestation of spotted lantern flies has negatively impacted Ailanthus and other host trees in the region. We feel additional consideration should be taken for forested areas that are dominated by invasive species or impacted by these infestations, as they do not provide the same ecological value as native and unimpacted forests.

By taking these factors into account, you will allow for solar development on the widest possible area, while more appropriately protecting the natural forested areas throughout New Jersey. Once again, we find in the straw proposal, provisions that use definitions that unnecessarily restrict solar development as opposed to encouraging same.

B. Why Exclude Commercially Harvested Lands from Solar

The definition of forested land in the Straw proposal includes land that has or has had within the past ten years been forested as per the definition. The prohibition of siting of solar projects on forested lands should include an exception for those lands that have been harvested for commercial purpose unrelated to the purpose of installing solar projects Harvesting woodlands for profit is a common farming activity permitted by law in all jurisdictions. There is literally no justification to say to a landowner that if he or she has engaged in commercial harvesting over the past ten years that they are now precluded from selling or leasing to a solar developer. An exception to this provision must be included in the rules.

4. Section III B. 5. d. Construction Requirements Applicable to Certain Farmlands.

As with other sections on siting on Prime Agricultural Soils/ Soils of Statewide Importance within an ADA, Staff and/or its Sister Agencies have misinterpreted the statute. Nowhere in the statute has the Legislature requested, directed, or authorized BPU or its sister Agencies to develop regulations for the construction of Solar facilities on Prime Agricultural Soils/ Soils of Statewide Importance within an ADA.

The Straw Proposal cites Subsection 6.b.(2) as the basis for developing these *construction* requirements as part of the *siting* regulations for solar facilities. Subsection 6.b.(2) states the BPU, in addition to implementing subsections c. through f., "the siting criteria", shall, in (2), "*minimize, as much as is practicable, potential adverse environmental impacts;*". As was previously discussed, a solar facility is better for the environment than farming the land. Additionally, nowhere in that subsection, or the entire Act, does it state that construction requirements are to be promulgated as regulation

The Straw proposal states that a reason for these requirements, is to allow the property to be restored to farming at the conclusion of the useful life of the solar facility because they view the solar facility as: potentially temporary; and seeks to ensure the opportunity for the farmland hosting the solar project to be restored to its pre-project state. This reasoning is speculative, as indicted by Staff's use of "potentially" and "opportunity" qualifiers in the statement. Staff is attempting to regulate the fate of the land 25 years into the future on the "potential" for it to be farmed, and to provide the opportunity for it to be farmed. Both goals are speculation on staff's part and infringe on a property owner rights.

In the Act, the Legislature recognized that to reach the State's goal for Sustainable Energy, that certain land uses would have to be made available for siting solar facilities. The legislature also recognized that certain land uses would not be made available for solar facilities. For Prime Agricultural Soils/ Soils of Statewide Importance within an ADA, the Bill Statement for the Act clearly stated the limits the Legislature was placing on those lands. The bill statement states:

The bill would provide that grid supply solar facilities or net metered solar facilities greater than five megawatts in size may be sited on certain prime agricultural soils or soils of Statewide importance without the necessity for a special authorization from the BPU, for the first 2.5 percent of such lands in the State. After 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)

Simply put, BPU lacks the statutory authority to regulated construction requirements, and the reason given to provide that authority is unsupportable and speculative. There is no legislative intent to direct BPU to establish construction requirements. The Legislature specifically stated that for Prime Agricultural Soils/ Soils of Statewide Importance within an ADA, solar projects on the first 2.5%, should be "without the necessity for a special authorization". Staff should delete this entire section from any further proposals.

Notwithstanding the lack of authority, we offer the following comments to BPU and its sister agencies to assuage their concerns regarding soil compaction, preservation of topsoil, and preventing erosion.

The Agencies should consider establishing guidance for landowners, and best Management Practices (BMPs) that provide landowners, developers, and EDCs the tools to be good stewards of the land. The potential for the land to be returned to farming is the choice of the landowner and should not be infringed. If a Farmer owns the land, chooses to lease the property for use as a solar facility, and chooses to farm the land after the solar facility is no longer viable, than any special requirements to fulfill that chosen use should be a contractual matter between the landowner and the developer. BPU and its sister agencies should not infringe on that private contractual matter. Providing that Farmer/Owner with guidance that would assist them in negotiating those contractual matters, would be a fair position to take by the Agencies. That would ensure that any construction related matters would be "practical and economically feasible" as was stated in the Straw proposal. Individual negotiations will address the Straw Proposal's issue related to "potential "future faming. If the landowner wants to farm the land in the future, they can ensure that through the negotiation

of the lease and the Agencies should only assist the Farmer/Owner with guidance, and not try and require it for all projects based on speculation of future land use.

Specific to preventing Soil Erosion, there are already rigorous regulations for Soil Erosion and Sediment Control (SESC) that do not require any special amendments for constructing a solar facility, since they adequately apply to all construction. Also, unlike many developments, Solar panels are considered permeable, and therefore, solar facilities don't significantly add to stormwater runoff which causes soil erosion.

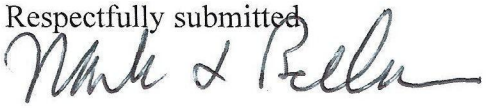
Specific to soil compaction, BPU and its Sister Agencies appear to be presuming that the construction and operation of a solar facility will compact the soil to a point that would render it useless for future farming or cause excess runoff and soil erosion. However, they do not provide any research for this claim. The workshop presented a few photos of solar facilities with erosion problems, but they also showed a few photos presented as successful installations without erosion problems. So, it's not a problem that is systemic to the industry, it's simply an isolated site-specific problem. Again, this would only need to involve issuing guidance or BMPs to contractors and owners that would provide the proper tools. Enforcement is still available under the existing SESC regulations should runoff and erosion problems arise on a specific project.

Specific to the preservation of topsoil, any removal of topsoil again is a landowner's prerogative within existing laws and regulations. Erosion and topsoil removal is addressed within existing SESC regulations and local ordinances.

Appendix B of the straw proposal identifies specific practices for "regulating" the construction and decommissioning of solar facilities but presents them as "Mitigation Guidelines". Again, the proposal fails to show, with research, that there is an adverse effect that requires mitigation. Many of these practices are already addressed in existing regulation, as presented are overkill, and based on the speculation that the land is going to be returned to the same agricultural use that currently exists.

As in the preamble to our comments, we fully support the BPU in its implementation of the Grid Bill. We urge the BPU to take another look at the rules discussed in this letter using the lens of encouraging grid supply solar as was intended by the Legislature as opposed to unduly restricting and limiting the lands available for grid supply solar, a policy that is not supported by the Legislature or the Governor's Office. stated

Respectfully submitted,



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