

Orr&Reno

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July 31, 2020

VIA HAND DELIVERY & EMAIL

Thomas O'Donovan, P.E., Director
Water Division
New Hampshire Department of Environmental Services
29 Hazen Drive
P.O. Box 95
Concord, NH 03302-0095
THOMAS.O'DONOVAN@DES.NH.GOV

Re: *Application of Chinook Solar, LLC for Alteration of Terrain Permit – in connection with the 30MW Solar Electric Generating Facility proposed for Fitzwilliam, New Hampshire which is the subject of Site Evaluation Committee Docket No. 2019-02 – Partial Response to Alteration of Terrain Progress Report to the New Hampshire Site Evaluation Committee dated April 2, 2020*

Dear Director O'Donovan:

I am writing to you as counsel for Chinook Solar, LLC (“Chinook Solar”) in connection with the above-captioned matter and in a partial response to the progress report filed with the New Hampshire Site Evaluation Committee (“NHSEC”) concerning the 30MW Solar Electric Generating Project proposed for Fitzwilliam, New Hampshire (the “Project”) noted above.

Based on the schedule in this NHSEC docket the New Hampshire Department of Environmental Services’ (“DES”) final recommendation is due to be filed with the NHSEC by August 13, 2020. It is my understanding that the engineering firm working on the AoT permit for Chinook Solar, Tighe & Bond, will be filing more detailed comments and minor plan modifications next week. The purpose of this letter is to register on behalf of Chinook Solar its objection to the application of the 2020 guidance with regard to imperviousness of solar panels and the modeling of solar array areas issued by DES dated February 22, 2020 (the “Guidance”) to this alteration of terrain application.

As I believe you know, the Chinook Solar AoT application was filed with DES and the NHSEC on October 18, 2019. It was prepared in accordance with rules and guidance in place at that time. A considerable amount of effort and resources were devoted to making sure the plans for this Project were done in accordance with those rules and guidance. The April 2, 2020 progress report which DES filed with the NHSEC said that the analysis done by Chinook "does not make any consideration of the imperviousness of the panels. DES recommends using guidance provided by the Department, dated February 2020, to model the solar array areas as necessary."

We understand that Tighe & Bond has worked with DES on a number of issues associated with this Project, including the application of the Guidance to this Project. It is also our understanding that DES is still taking the position that the Project must adhere to this new Guidance and that modifications must be made to the Project so that it meets this Guidance.

We are writing to formally register our objection to the application of the 2020 Guidance to the Chinook Solar Project. Because the 2020 Guidance was not in place when the Application was filed, requiring this Application to meet subsequently imposed guidance would be a violation of the constitutional prohibition against retrospective laws. In addition and related to this objection is the fact that this Guidance has not been adopted as a rule pursuant to RSA 541-A. The Guidance clearly meets the definition of "rule" under the statute in that it constitutes a standard or statement of general applicability adopted by a state agency that would prescribe or interpret agency policy and would be binding on persons outside the agency. RSA 541-A:1, XV. As such, the guidance would have to be adopted pursuant to the procedures of RSA 541-A, which include issuing a rulemaking proposal, holding public hearings and taking public comment on the proposal, as well as submission to and review by the Joint Legislative Committee on Administrative Rules. This process ensures that any rule which is adopted is done so in a fair and deliberate manner, with public and legislative input. This also ensures that a rule, which has the effect of law, is within the authority of the agency, consistent with legislative intent, in the public interest, and deemed to have economic impact that has been recognized in a fiscal impact statement. Since none of these procedures were followed with regard to this Guidance, it is Chinook Solar's position that the Guidance cannot be applied to the AoT permit application that was submitted for this Project, that it would be unfair and illegal for DES to insist that the Project meet the requirements contained in the Guidance.

I want to emphasize that Chinook Solar has made every effort to comply with New Hampshire rules and statutes and that this Project if certificated and built will be done in accordance with conditions included in an order issued by the NHSEC. Chinook Solar is not in any way trying to shirk or avoid reasonable conditions and requirements that are consistent with policies that were in place when the Project was filed. Chinook Solar's objection is to the imposition of a new policy or standard that was not in place at the time the Project was submitted, was not properly vetted and adopted, and that would require significant modifications to the Project that could make it very difficult to meet the construction schedule and threaten the economic viability of the Project.

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Thank you for considering the issues raised in this letter. We would appreciate hearing from you whether you intend to apply the February 2020 Guidance to the Chinook application. Please feel free to contact me should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Patch', written over a horizontal line.

Douglas L. Patch

DLP/eac

cc. Robert R. Scott, Commissioner, Department of Environmental Services

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