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July 9, 2021

Ms. Dianne Martin
New Hampshire Site Evaluation Committee
21 South Fruit Street, Suite 10
Concord, NH 03301-2429

**Re: SEC Docket No. 2021-01
Petition for Jurisdiction over
Proposed Solar Energy Facility in Milford, NH**

Dear Chairwoman Martin:

On behalf of Milford Spartan Solar, LLC please find enclosed for filing in the above captioned matter a copy of Milford Spartan Solar's Reply to Brox Environmental's Supplemental Filing in Support of Petition. A copy of the enclosed filing has also been sent electronically to all persons listed on the Committee's official Service List for this docket.

Please let me know if you have any questions regarding this filing.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Needleman", written in a cursive style.

Barry Needleman

BN:rs3

Enclosure

cc: Service List

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2021-01

**PETITION FOR JURISDICTION OVER
PROPOSED SOLAR ENERGY FACILITY IN MILFORD, NH**

**MILFORD SPARTAN SOLAR, LLC'S REPLY TO
BROX ENVIRONMENTAL CITIZENS' SUPPLEMENTAL FILING**

Milford Spartan Solar, LLC (“Spartan Solar”) by and through its attorneys, McLane Middleton, Professional Association, submits this Response to Brox Environmental Citizens’ (“Brox” or “Petitioner”) July 2, 2021 Supplemental Filing in Support of Petition (“Supplement”).

1. Brox raises three issues in its Supplement supporting its request that the New Hampshire Site Evaluation Committee (“SEC”) assert jurisdiction in this case. Brox raised these issues in previous pleadings. None of them present legitimate reasons why the SEC should review this project.

2. First, Brox claims that SEC jurisdiction is necessary to maintain a balance between the environment and the need for new energy facilities. *See Supplement* at 2. Brox raised this issue already. *See Supplement* at 2-3. As Spartan Solar noted previously, local review of the proposed project will not interfere with State agency review or the need to obtain permits from State agencies such as the New Hampshire Department of Environmental Services (“DES”) and New Hampshire Fish & Game (“NHF&G”). *See Milford Spartan Solar LLC's Motion to Dismiss Petition for Jurisdiction* at ¶4 (March 26, 2021) (“*Motion to Dismiss*”). In fact, the Town’s process explicitly contemplates and requires such State agency involvement and review. *Id.*

3. The Supplement provides numerous supposed examples of why SEC review is necessary in the context of maintaining a balance between the environment and the need for new energy facilities. Yet in each case, the Town review, coupled with the State agency review that is already occurring or required, will ensure that environmental resources are protected. For example, Brox points to consideration of vernal pools. *See Supplement* at 3. Yet Spartan Solar's environmental consultant, TRC, already performed vernal pool mapping in order to avoid potential impacts.¹ Additionally, with respect to sensitive species, TRC has already engaged in consultations with DES, the NH Natural Heritage Bureau (NHB), the US Fish and Wildlife Service, and NHF&G. Moreover, pursuant to the Town's ordinance, project applicants are required to consult with NHB regarding rare, threatened, and endangered species. *See Milford Zoning Ordinance* at §6.04.5.² All of these consultative processes will continue.

4. Brox nevertheless implies that the death of a Spotted Turtle, on private property in 2019, wholly unrelated to any activity taken by Spartan Solar, somehow translates to a concern here that only the SEC can remedy. *See Supplement* at Exhibit 3b. However, all of the work necessary to protect such species is already occurring without SEC involvement. Moreover, there is no reason to believe, and the Petitioner provides no evidence to support the assertion, that the Project will cause turtle mortalities. In fact, Spartan Solar has focused on avoiding such impacts. For example, the Project expects to use environmental monitors and other Best Management Practices (to be determined in ongoing consultation with NHF&G).

¹ *See Supplement* at Exhibit 1 (the red and green hatched areas are vernal pools within the project area). This same map is also publicly available through the Town's website at the following link: https://www.milford.nh.gov/sites/g/files/vyhlf4701/f/agendas/2020.05.19_milford_spartan_solar_conceptual_review.pdf.

² Spartan Solar incorporates by reference the Milford Zoning Ordinance as part of the record in this matter. In lieu of providing a physical copy of the Ordinance, Spartan Solar provides the following link to a full version of the Ordinance: <https://www.milford.nh.gov/zoning-board-adjustment/files/zoning-ordinance>.

5. Ultimately, Brox is really making the strained argument that towns cannot appropriately review projects if threatened or endangered species have been seen on any portion of land considered for a project and, consequently, this warrants SEC review. Of course, that is not the case. Such species are present all over the State. Towns are familiar with such circumstances, they routinely evaluate projects where such species are present, and they regularly consult with NHF&G, NHB and DES when doing so. If the threshold for SEC review simply required a showing that such species are or have been present on any portion of a parcel related to a project, there would be no limit to SEC jurisdiction.

6. Second, Brox asserts that the Town does not have the ability to review the proposed project in an unbiased manner because it will gain additional tax revenue and lease income if the project is approved.³ *See Supplement* at 4.

7. As a threshold matter, alleged Town bias is not and never has been a factor as to whether the SEC asserts jurisdiction. Setting that point aside, Towns across the State almost always stand to gain financially through development in their community.⁴ Under Petitioner's view, Towns would be barred from reviewing any project that benefited their community (and presumably relegated only to reviewing projects that were either neutral or harmful to the community) – a patently absurd result.

8. Moreover, Brox asserts, without any factual support, that the Town “cannot be expected to effectively balance the competing site evaluation and permitting criteria against the Town's potential financial gain.” *Supplement* at 4. In fact, Spartan Solar's engagement with the

³ A portion of the tax revenue from this project will also go to the State. Based on Petitioner's logic, is the State therefore disqualified as well?

⁴ There is also nothing unique about the revenue the Town of Milford would gain here. For context, the operating budgets approved in March 2021 for the Town of Milford the Wastewater Department, and for water treatment were \$15,664,508, \$2,288,406, and \$1,589,652, respectively. In the Project's first year of operations, the direct revenue to the Town would be approximately \$168k, so less than 1% of these most recently approved budgets.

Town since 2018 undercuts that assertion. *See Motion to Dismiss* at ¶2 (For example, beginning in 2018, the Town negotiated the land lease option agreement as well as a PILOT with Spartan Solar. Negotiation of the land lease included agreement that those portions of optioned Town-owned land not ultimately required for the project would be released from the agreement and used for recreation and conservation or other uses as deemed prudent by the Town.). The Petitioner has not pointed to any instance during the course of the last three years where the Town acted in a biased manner or did not consider its review of the proposed project to be a serious aspect of land use planning. In fact, the ordinances require the Town to engage in a meaningful and complete review of any such proposed project. *Id.* at ¶3.

9. Third, Brox claims that Mr. Amato’s “significant” connection to the proposed project property has wrongfully “colored the opinions of the Board at large” and therefore SEC review is required to avoid unlawful prejudgment. *See Supplement* at 5. Petitioner claims the “significant” connection here involves Mr. Amato receiving mail for the proposed project and occasionally haying the property. *Id.* Spartan Solar addressed this issue as well. *See Objection to Motion to Amend Petition* at ¶17 (April 22, 2021).

10. As the Petitioner previously conceded, *Petitioner’s Motion to Amend* at ¶30 (April 12, 2021), Mr. Amato sold his interest in the proposed project property in 2017, prior to Spartan Solar’s consideration of the property for its project. It therefore appears Mr. Amato no longer has any pecuniary interest in the development of this site.

11. The only new information Brox provided is that, according to Brox, Mr. Amato currently hays the project property. *See Supplement* at 5. However, converting that interest into some type of disqualifying bias is an extreme stretch. Petitioner has not provided, and Spartan Solar is not aware of any pecuniary interest for Mr. Amato in the outcome here, or any other

interest that would warrant application of a per se rule of disqualification. *Plaistow Bank & Tr. Co. v. Webster*, 121 N.H. 751, 754 (1981). Moreover, contrary to Petitioner's argument, if Mr. Amato's haying activities are significant enough to create a conflict, Mr. Amato would actually benefit by a denial of the Project, not an approval.

12. Petitioner cites *City of Dover v. Kimball*, 136 N.H. 441 (1992) to support its contention that Mr. Amato has unfairly prejudged this project. *City of Dover* is inapposite here. In that case, the Court actually determined that a planning board member's discussion with a potential applicant in advance of submission of an application did not constitute inappropriate prejudgment of an application. *Id.* at 447.

13. Moreover, it is quite clear that the New Hampshire Supreme Court has not required recusal of board members for minimal connections to proposed projects. *See Webster v. Town of Candia*, 146 N.H. 430, 442 (2001)(holding that the trial court did not err in determining recusal of a planning board member was not required despite his wife's active involvement in campaigns to repeal the cluster zoning ordinance under which the proposed application was filed); *see also, Appeal of Grimm*, 141 N.H. 719, 721 (1997)(holding that the participation of two board members on an original panel was not sufficient grounds to require recusal from their participation on a second review panel.).

14. Alternatively, if Mr. Amato's involvement in reviewing the project would be so objectionable, Brox could have sought disqualification pursuant to RSA 673:14. *See Grimm*, 138 N.H. at 52 ("To disqualify an administrative official, the party should file a motion for recusal supported by a sufficient affidavit of personal bias or other disqualification.").

15. Petitioner has now had repeated opportunities to articulate a coherent theory of why the SEC should assert jurisdiction. Petitioner failed each time. Petitioner's arguments all

pertain to routine town planning and permitting functions; functions that Towns all over New Hampshire exercise every day and, as here, do so in consultation with State agencies and often build on the work done by those agencies (like in this case with the participation of NHF&G). If the SEC were to assert jurisdiction given these facts, it would be violating the wishes of the Town⁵, ignoring its own prior precedent,⁶ violating the intent of RSA 162-H, and interfering in a process that is robust, transparent, and more than capable of protecting all the various interests at stake.

16. For the foregoing reasons, Milford Spartan Solar reiterates its request that the SEC deny the Brox Petition for Jurisdiction.

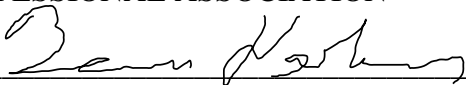
Respectfully Submitted,

MILFORD SPARTAN SOLAR, LLC

By its attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Dated: July 9, 2021

By:  _____

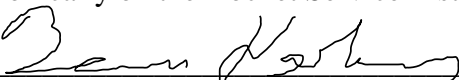
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⁵ See *Town of Milford's Notice of Joinder to Milford Spartan Solar, LLC's Motion to Dismiss Petition* (March 29, 2021).

⁶ See *Motion to Dismiss* at ¶¶6-9 (“[t]he determining factors for the SEC’s decision in each case appear to have been the stated preference of the affected municipalities and their respective capabilities to review the proposed project”).

Certificate of Service

I hereby certify that on the 9th day of July, 2021, this Reply to Brox Supplemental Filing in Support of Petition was served electronically on the Docket Service List.



Barry Needleman