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December 11, 2019

Planning Board  
Town of Farmington  
1000 County Road 8  
Farmington, NY 14425

**Re: Revised Application of Delaware River Solar to construct a 7 MW solar facility at 466 Yellow Mills Road**  
**SEQRA Determination of Significance**  
**PB # 1003-18 Preliminary Four-Lot Subdivision Plat**  
**PB # 1004-18 Preliminary Site Plan**  
**PB # 1006-18 Special Use Permit**

Dear Planning Board Members:

We represent a group of landowners and residents with respect to the following applications by Delaware River Solar, LLC ("Delaware") to construct a 7 MW solar facility at 466 Yellow Mills Road (the "Project"):

**SEQRA Determination of Significance**  
**PB # 1003-18 Preliminary Four-Lot Subdivision Plat**  
**PB # 1004-18 Preliminary Site Plan**  
**PB # 1006-18 Special Use Permit**

For the reasons set forth in this letter, we ask you to rescind the August 7, 2019 Negative Declaration of Environmental Significance ("Neg Dec") and issue a Positive Declaration of Environmental Significance ("Pos Dec") for the Project or, in the alternative, deny Delaware's applications for subdivision approval, site plan approval, and a special use permit.

## **SEQRA REQUIRES LITERAL COMPLIANCE WITH ITS PROCEDURAL REQUIREMENTS**

Compliance with SEQRA is mandatory. “No agency involved in any action shall carry out, fund or approve the action until it has complied with the provisions of SEQRA.” 6 NYCRR 617.3(a).

SEQRA requires “literal compliance” with its procedural requirements because the Legislature directed that the policies of the State and its political subdivisions shall be administered “to the fullest extent possible” in accordance with SEQRA. ECL 8-103(6); *Matter of Rye Town/ King Civic Association v. Town of Rye*, 82 AD2d 474 (2d Dept. 1981), app. dismd. 55 NY2d 747 (“Rye Town”).

For Type I actions, the Lead Agency may issue a positive declaration (“Pos Dec”) requiring preparation of an Environmental Impact Statement (“EIS”), indicating that the action may include the potential for at least one significant effect on the environment or a negative declaration (“Neg Dec”), indicating that the action will have no adverse environmental impact. 6 NYCRR 617.7(a).

However, a Lead Agency may not issue a Neg Dec based on the results of future review of potentially significant environmental impacts.<sup>1</sup> A Neg Dec must be based on the facts available to the lead agency at the time of its determination.<sup>2</sup>

## **FUTURE REVIEW OF THE PROPOSED PROJECT’S STORMWATER IMPACTS CIRCUMVENTS SEQRA**

Because the Proposed Project disturbs more than one acre, DRS must obtain coverage under the NYS DEC’s State Pollutant Discharge Elimination System (SPDES) permit. DRS must also prepare a Stormwater Pollution Prevention Plan (SWPPP). The purpose of a SWPPP is to mitigate impacts during construction, not to evaluate whether and to what extent an impact will occur as required under SEQRA.

The November 26, 2019 Bergmann letter to DRS reviewing the draft SWPPP reveals that construction and post-construction stormwater runoff resulting from the Proposed Project will be mitigated through practices which are yet-to-be determined.

For example, the letter states:

- “The applicant will be required to adhere to the standards of the SPDES General Permit. In addition, the Town of Farmington is an MS4 community so the Town will have to review and approve the SWPPP for compliance with NYSDEC regulations.”<sup>3</sup>

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<sup>1</sup> SEQRA handbook, p. 95. Available at [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/seqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf)

<sup>2</sup> Id.

<sup>3</sup> November 26, 2019 Bergmann Letter to DRS regarding SWPPP, p. 4.

- “Regarding of the temporary erosion control methods, the terms of the SPDES permit will require weekly inspections by a qualified professional in which any tracking or inability of the rock construction entrance to perform will be documented and the contractor will be required to take corrective measures.”<sup>4</sup>

These responses amount to mitigation measures which rely on future review of potentially significant environmental impacts, and would therefore make the Neg Dec an impermissible Conditioned Negative Declaration (CND) for a Type I action in violation of SEQRA.

A Conditioned Neg Dec is a Neg Dec which contains mitigation measures for one or more significant adverse environmental impacts which will modify the proposed action so that no significant adverse environmental impacts will result. 6 NYCRR 617.2(h). A Conditioned Neg Dec can only be issued for an unlisted action. *Id.*

It is impermissible for the Planning Board to issue a Neg Dec based on the mitigation conditions contained in the declaration itself. This makes the Neg Dec an impermissible Conditioned Negative Declaration (CND) for a Type I action. *Citizens Against Retail Sprawl ex rel. Ciancio v Giza*, 280 A.D.2d 234, 239 (4th Dep’t 2001); *Ferrari v. Town of Penfield*, 181 A.D.2d 149, 151 (4th Dep’t 1992). It also violates both the letter and the spirit of SEQRA. *Shawangunk Mountain Environmental Ass’n v. Planning Bd. of Town of Gardiner*, 157 A.D.2d 273, 275-76 (3d Dep’t 1990).

#### **LEAD AGENCY MAY NOT DELEGATE ITS DECISION-MAKING AUTHORITY UNDER SEQRA**

Additionally, an important limiting principle is that SEQRA does "not change the jurisdiction between or among state agencies and public corporations." ECL § 8-0103(6); 6 N.Y.C.R.R. § 617.3(b). The SEQRA review process and individual agency permitting processes are different reviews governed by different laws and standards. A lead agency may not delegate its decision-making authority under SEQRA to another agency involved in an environmental permitting or oversight process related to the Project.

Here, the Neg Dec relies on future plans to be developed and implemented to mitigate any reasonably foreseeable construction and post-construction stormwater management impacts. The fact that the DEC may (or may not) issue a SPDES permit in the future does not eliminate the need for independent review of stormwater impacts by the Lead Agency during its SEQRA review to determine any potentially significant impacts associated with the Proposed Project. A lead agency may not delegate its decision-making authority under SEQRA to another agency involved in environmental permitting, such as the NYS DEC.

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<sup>4</sup> *Id.*

## CONCLUSION

For the foregoing reasons, we request that the Planning Board rescind the August 7, 2019 Neg Dec, issue a Positive Declaration of Environmental Significance, and require preparation of an Environmental Impact Statement.

Thank you for reviewing this letter. If you have any questions please do not hesitate to contact me.

Sincerely,  
  
Frances Kabat

Cc: Jeffrey D. Graff, Esq.  
Terence Robinson, Esq.  
Jim Foley, Esq.  
Jim Falanga