



February 23, 2018

Judith Judson
Commissioner
Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Re: Comments on Draft SMART Regulation Guidelines

Dear Commissioner Judson:

As practitioners and stakeholders in the Massachusetts renewable energy community, we would like to submit comments on the draft SMART Land Use and Siting Guideline (the "Land Use Guideline"), Guideline Regarding the Definition of Agricultural Solar Tariff Generation Units (the "Agricultural STGU Guideline"), Guideline Regarding the Definition of "Brownfield" (the "Brownfield Guideline"), and Statement of Qualification Reservation Period Guideline (the "Reservation Period Guideline").

Klavens Law Group, P.C. provides corporate, real estate and regulatory services and has been deeply involved in solar energy development in Massachusetts. Our clients include solar energy project developers, investors, EPC contractors and offtakers from Massachusetts and around the country who have been and continue to be key players in the growth and development of the flourishing Massachusetts solar energy sector. We have also been involved in redevelopment of brownfields and closed landfills for both solar energy use and other types of commercial development.

We have participated in multiple stakeholder processes throughout the development and implementation of the Green Communities Act and the regulatory proceedings that adopted the SREC I and II Programs, the Net Metering Program and, most recently, the SMART Program.

We recognize and appreciate the efforts of the Department of Energy Resources ("DOER") to develop and refine the SMART Program, incorporating valuable stakeholder input driven by the experience of developing, financing, constructing and owning solar energy projects under the Commonwealth's prior and existing net metering and solar compensation and incentive programs.

In August 2017, DOER filed its final SMART Program regulation, 220 CMR 20 (the "SMART Regulation"). On January 22, 2018, DOER released for public comment six draft Guidelines

regarding various components of SMART Program implementation. We respectfully provide the comments below regarding certain of those Guidelines.

I. Land Use Guideline

Category 1 Zoning Requirements. In defining the different land use categories, 225 CMR 20.05(5)(e)(1)(b) includes the following in Category 1:

Solar Tariff Generation Units ["STGUs"] that are ground-mounted with a capacity greater than 500 kW and less than or equal to 5000 kW that are sited within a solar overlay district or that comply with established local zoning that explicitly addresses solar or power generation.

In the Land Use Guideline, DOER has added some language interpreting this provision stating that STGUs "located in a solar overlay district or sited by as of right siting may fall under this categorization. If a project needs to seek a variance, special permit, waiver or other discretionary approval, it would not qualify under this categorization."

We understand the need to differentiate between Category 1 and 3 projects, and using zoning compliance is a reasonable tool to serve this purpose. It seems reasonable to clarify that the Category 1 zoning compliance standard would preclude solar energy use that is lawfully prohibited by local zoning. However, we believe the draft Guideline goes too far in several respects.

First, a use allowed by special permit is not a prohibited use but rather an *allowed use* that is simply subject to greater regulation. Solar energy use allowed by special permit does "comply with established local zoning." Indeed, the regulation already recognizes that a project sited in a solar overlay district can qualify for Category 1 even though a solar overlay district bylaw might still require a special permit. Accordingly, we suggest that "special permit" be removed from the list of zoning approvals that would take an STGU out of Category 1.

Second, while a *use variance* constitutes zoning relief to allow an otherwise prohibited use, a *dimensional variance or waiver of a dimensional zoning requirement* does not itself allow a land use that is otherwise prohibited; it just provides an exception from a particular dimensional requirement. For example, it is not uncommon for a zoning bylaw to impose off-street parking requirements that are not necessary for the typical unattended solar project. Receipt of a waiver of such off-street parking requirements (or other dimensional requirements) should not take a project out of Category 1. We suggest that the relevant phrase be changed to "a use variance or other discretionary approval permitting an otherwise prohibited use."

In addition, we note that it is not entirely clear what would constitute "established local zoning" within the meaning of the SMART Regulation. The phrase could be misinterpreted to

suggest that there might be some type of “local zoning” that is duly adopted and yet not “established”. To provide suitable clarification, we suggest that DOER insert the following: “The phrase ‘established local zoning,’ as used in the regulation, means local zoning that has been duly adopted by the municipality.”

Project Segmentation Rule - Flexibility. As part of the Land Use Guideline, DOER provides additional information on both compliance with the Project Segmentation Rule under 225 CMR 20.05(5)(f) and its categories of exceptions under 225 CMR 20.05(5)(g). A number of the exceptions also include production meter and interconnection point requirements. For instance, an STGU may be located across multiple parcels of land so long as the STGU is located behind a single production meter and interconnection point. Under the SMART Program, the utility controls the production meter, as well as its general control of the interconnection point, under relevant tariffs.

As DOER is aware, the Department of Public Utilities (the “DPU”) imposes similar requirements (*i.e.*, single net meter, single interconnection point) as part of its Single Parcel Rule adopted under D.P.U. 11-11-C. Subsequent to adoption of that rule, the Department in its Order D.P.U. 11-11-E, the DPU recognized there were many instances where the technical requirements of the distribution grid or the design of the project necessitated departure from the single meter/interconnection point requirements, allowing the utilities to approve alternative configurations on the basis of optimal interconnection. We suggest that DOER adopt a similar approach with respect to the Project Segmentation Rule, specifically allowing deviations from the single meter, interconnection point requirements under the rule where “the relevant local utility has approved an alternative configuration.”

We note that, while there are similarities between DPU’s Single Parcel Rule and the Project Segmentation Rule, there are also differences. It is highly likely then that as part of the transition from an SREC II/net metering project development regime to the SMART Program, projects that were designed with Single Parcel Rule compliance in mind may now have a Project Segmentation Rule issue. We suggest that additional flexibility is needed here as well to prevent unnecessary delays or costs in redesigning these projects for participation in the SMART Program. For example, consider a situation where a developer of 3 MW of solar generation with site control over two contiguous parcels needed to design the project as two facilities, siting 1.5 MW on each parcel of land in order to comply with DPU’s Single Parcel Rule. In transitioning the project to the SMART Program, however, the developer is unable to avail herself of the exception to the Project Segmentation Rule because the project has two meters and two interconnection points. At this advanced stage of development, there would be significant additional cost and lost time to redesign the project. Although we recognize that DOER views the good cause exception as an option of last resort, we believe a degree of flexibility is warranted as part of the transition to the SMART Program to accommodate such circumstances.

Project Segmentation Rule – Definition and Timing of Unaffiliated Status. One of the exception categories is for STGUs that are developed on the same or contiguous parcels of land by “unaffiliated” developers. While this may be a reasonable requirement, further clarification is warranted to facilitate compliance. Specifically, DOER should include a definition of what constitutes “affiliated” parties. We would suggest use of a common contractual definition of “affiliate”: namely, “with respect to any person, any other person that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person.” “Unaffiliated” parties could then be defined as parties that are not affiliates. In addition, it is not clear whether two STGUs on the same or contiguous parcels developed by unaffiliated developers can come to be owned by the same or affiliated parties without undermining SMART Program qualification. We would suggest clarification that there be no loss of SMART Program qualification, if, for example, two unaffiliated parties develop STGUs on contiguous parcels of land, and both end up selling the projects to the same buyer or affiliated buyers after the projects have been sufficiently developed to receive SQs (whether the sale is before or after interconnection).

Project Segmentation Rule – Definition of “Contiguous”. The draft Land Use Guideline also provides clarification and seeks to impose to certain requirements relating to what parcels would be considered to be “contiguous” within the meaning of 225 CMR 20.05(5)(f) and (g). The draft Guideline states: “Contiguous land shall be parcels sharing a border boundary. Land shall be deemed contiguous if it is separated from other land under the same ownership only by a public or private way or waterway. Land under the same ownership shall also be deemed contiguous if it [is] connected to other land under the same ownership by an easement for a water supply.” The first sentence appears to state a definition of “contiguous” consistent with general real estate law principles and common understanding. We believe the remainder of this clarification imposes requirements that not only go beyond the substance of the regulation but also diverge from general real estate law principles and common understanding. To take just one example, why should land on one side of a 6-lane highway be considered “contiguous” to land on the other side? In addition, an easement (whether for a water supply or anything else) does not itself represent a fee interest in any land so the mere presence or absence of an easement should not have any bearing on whether land is “contiguous”. We suggest that DOER delete all but the first sentence of this language.

II. Agricultural STGU Guideline

We applaud DOER for its forward-looking approach in providing a targeted incentive for dual-use of solar and agriculture. Finding ways to support sustainability in many farms, and alternative ways for farmers to participate in the clean energy economy as part of their operations supports multiple goals and policies of the Commonwealth.

One of the challenges in creating innovative programs is striking the right balance between establishing clear incentives for desired projects and providing enough flexibility to foster the

creativity necessary to achieve a wide range of positive outcomes. With this in mind, we recommend that DOER consider two changes.

Agricultural STGUs - New 2 MW Capacity Limit. The first change concerns the proposed 2 MW capacity limit on STGUs seeking this adder. Under 225 CMR 20.02, “Guidelines” are defined as “[a] set of clarifications, interpretations, and procedures, including forms, developed by the Department to assist in compliance with the requirements of [the SMART Regulation].” A Guideline by its own terms is a document that is meant to interpret or clarify what DOER has adopted through a regulation. The 2 MW limit falls outside the permissible scope of a Guideline under 225 CMR 20.02: it is not a clarification of the regulation but rather a new or additional requirement imposed for qualification for this adder. In addition, as part of its regulatory process adopting 225 CMR 20.00, DOER intentionally removed a proposed size limitation on Agricultural STGUs in the final version. In other words, not only does imposing a new requirement exceed the permissible scope of a Guideline, but imposing this new capacity limit is expressly contrary to the SMART Regulation itself. We believe that DOER should remove this capacity limit as unauthorized by its own regulation.

Agricultural STGUs – Flexibility on Technical Standards. The second change is to build some flexibility into the qualification requirements for this adder. While we appreciate that DOER needs to ensure harmony between the solar and agriculture use, with one not negatively impacting the other, this adder represents a tremendous opportunity for farmers and solar developers to collaborate in developing innovative project designs. In order to ensure that such desired outcomes are not stifled by one or more of the specific requirements, we suggest that DOER allow the Commissioner to waive a requirement of the Guideline if the waiver furthers the benefits of the dual use, or alternatively benefits the agricultural use. For example, if the agricultural use will consist of growing crops that flourish with greater shade, it may be appropriate to allow for a maximum sunlight reduction from the solar installation that is most conducive to the cultivation of such crop rather than strictly enforcing a maximum 50% reduction. This would be analogous to the authority the Commissioner currently has to waive requirements of the energy management services regulation under 225 CMR 10.09.

III. Brownfield Guideline

Unlike the Land Use Guideline, the Brownfield Guideline is presented as jointly issued by DOER and the Massachusetts Department of Environmental Protection (“MassDEP”). A Brownfield for purposes of SMART is a disposal site (as defined by 310 CMR 40.00) “the redevelopment or reuse of which is hindered by the presence of oil or hazardous materials, as determined by the Department, in consultation with MassDEP.” 225 CMR 20.02. STGUs on Brownfields are Category 1 Non-agricultural Land Uses. 225 CMR 20.05(5)(e)(1)(b). The Location Based Adder for STGUs on Brownfields is \$0.03/kWh. 225 CMR 20.07(4)(a).

Whether a particular solar project is ultimately feasible may wholly turn upon its ability to take advantage of these adders. In such cases, DOER's determination whether a project qualifies as a Brownfield for SMART Program purposes presents a critical go/no-go point for solar developers deciding whether to continue investing money in a potential project. While the Brownfield Guideline allows a developer to seek an advance determination, the Guideline also provides that the resulting Brownfield Pre-Determination Letter is not to be considered a final agency decision (for M.G.L. c. 30A appeal purposes) and is not binding on DOER or MassDEP, and that DOER may make a different determination in its Statement of Qualification, "should the information provided to the Department in connection with a Pre-Determination Request prove to be materially inaccurate or incomplete."

Considering the effort involved on the part of project proponents in preparing and submitting a Pre-Determination Request, and the significant financial decisions that will inevitably be made based upon DOER's issued decisions, along with the fact that for many projects pursuing a Brownfield Pre-Determination Letter will be a critical and necessary undertaking, not merely an option, it would be helpful to have greater clarification that a Pre-Determination Letter may reasonably be relied upon by a project proponent. First, while DOER can provide in a Pre-Determination Letter itself that the Department can make a different determination in the Statement of Qualification in the event that the project proponent provided materially inaccurate or materially incomplete information, absent such circumstances the Pre-Determination Letter should be binding on DOER. Second, we believe that DOER should allow a project proponent to seek reconsideration of an unfavorable decision and that an unfavorable decision issued upon reconsideration should be considered a final agency decision.

IV. Reservation Period Guideline

In the Reservation Period Guideline, the Department outlines four instances where an STGU may seek an extension of its Reservation Period. These are: (1) Extended Reservation Period for a Fee; (2) Extended Reservation Period for Legal Challenge; (3) Extended Reservation Period Pending Authorization to Interconnect; and (4) Extended Reservation Period for Good Cause. With regard to an extension for a fee, the Guideline states that the fee will be refunded if the STGU's achieves commercial operation before the end of the six-month extension period. Please note that, due to circumstances beyond the developer's control, in order to allow reasonable time to complete construction, an STGU may need an extension beyond the extension for a fee (*e.g.*, an extension due to a legal challenge or for good cause). In addition commercial operation requires that an STGU have received its authorization to interconnect the timing of which is generally in the control of the local utility. We suggest that DOER modify this Guideline to provide for refund of the fee if the STGU is mechanically complete by the end of its Reservation Period (as it may be extended), and achieves commercial operation during the Extended Period Pending Authorization to Interconnect.

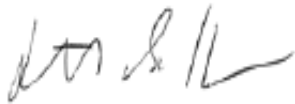
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Thank you for your consideration.

Sincerely,



Courtney Feeley Karp



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