



STATE OF NEW JERSEY
Board of Public Utilities
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CLEAN ENERGY

ORDER

IN THE MATTER OF THE IMPLEMENTATION OF)	
L. 2012, C. 24, THE SOLAR ACT OF 2012)	DOCKET NO. EO12090832V
)	
IN THE MATTER OF THE IMPLEMENTATION OF)	
L. 2012, C. 24, <u>N.J.S.A.</u> 48:3-87(T) – A PROCEEDING)	
TO ESTABLISH A PROGRAM TO PROVIDE SRECS)	
TO CERTIFIED BROWNFIELD, HISTORIC FILL AND)	DOCKET NO. EO12090862V
LANDFILL FACILITIES)	
)	
PRO-TECH ENERGY SOLUTIONS, LLC)	
FLORENCE LAND RECONTOURING LANDFILL:)	DOCKET NO. QO15050543
BROWNFIELD APPLICATION)	

Party of Record:

Dennis M. Toft, Esq., of Chiesa, Shahinian & Giantomasi, PC, on behalf of Pro-Tech Energy Solutions, LLC¹

BY THE BOARD:²

This Order addresses Pro-Tech Energy Solutions, LLC’s (“Pro-Tech”) application seeking approval of its proposed solar facility construction as located on a “brownfield” pursuant to N.J.S.A. 48:3-87(t) so that Pro-Tech is eligible to generate solar renewable energy certificates (“SRECs”).

¹ While the Subsection (t) Brownfield Application identifies only Pro-Tech as the applicant, the cover letter filed with it characterizes A&S Transportation Co. (“A&S”) as the applicant. Notably, a July 27, 2015 letter by Mr. Toft identifies the applicant as Pro-Tech. This Order will rely upon the actual application and refer to Pro-Tech rather than A&S as the applicant. Also, because some documents identify Mr. Toft as representing Pro-Tech and A&S while others, specifically the July 27, 2015 letter, identify Mr. Toft as representing A&S, a clarification was sought from Mr. Toft. On October 22, 2015, Mr. Toft indicated that he represents Pro-Tech and A&S. Again, this Order concerns Pro-Tech’s application.

² Commissioner Upendra J. Chivukula did not participate in discussion, deliberation, or vote on this matter.

BACKGROUND

On July 23, 2012, L. 2012, c. 24 ("Solar Act") was signed into law by Governor Chris Christie. The Solar Act amends certain aspects of the statute governing generation, interconnection, and financing of renewable energy.

The Solar Act, specifically, N.J.S.A. 48:3-87(t)(1) ("Subsection (t)"), provides that:

No more than 180 days after [July 23, 2012], the board shall, in consultation with the Department of Environmental Protection and the New Jersey Economic Development Authority, and, after notice and opportunity for public comment and public hearing, complete a proceeding to establish a program to provide SRECs to owners of solar electric power generation facility projects certified by the board, in consultation with the Department of Environmental Protection, as being located on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility. . . . Projects certified under this subsection shall be considered "connected to the distribution system" [and] shall not require such designation by the board[.]

[N.J.S.A. 48:3-87(t)(1).]

The Solar Act defines the terms "brownfield," "area of historic fill," and "properly closed sanitary landfill." A "brownfield" is "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant." N.J.S.A. 48:3-51.

In an Order dated January 24, 2013, the Board approved a certification process for proposed projects seeking approval pursuant to Subsection (t) to be eligible to generate SRECs.³ January 24 Order at 12-13. Consistent with the Solar Act, the process incorporates the expertise of the Department of Environmental Protection ("DEP") to confirm eligibility of a potential project by land use classification, and to account for the state of remediation of the project site. Id. Applicants must provide a map of the portion of the relevant area which has been properly remediated or closed, as well as of the location where the solar facility is proposed to be sited. Id. at 13. DEP reviews this material in making its recommendation to the Board. Id.

Before describing Pro-Tech's Subsection (t) Brownfield Application, it is necessary to briefly describe another application filed by Pro-Tech. On July 14, 2014, Pro-Tech submitted an application to the Board to have its project certified as being located on a properly closed sanitary landfill facility pursuant to N.J.S.A. 48:3-87(t) ("the Subsection (t) Landfill Application"). In that application, Pro-Tech sought to construct a 9.2 MW dc project as five arrays, "A" through "E", on approximately 68 acres on the former Florence Land Recontouring ("FLR") Landfill Superfund site in Florence Township, Burlington County, New Jersey. To its Landfill

³ I/M/O the Implementation of L. 2012, c. 24, the Solar Act of 2012; I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – a Proceeding to Establish a Program to Provide SRECs to Certified Brownfield, Historic Fill and Landfill Facilities; and I/M/O the Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(u) – a Proceeding to Establish a Registration Program for Solar Power Generation Facilities, Dkt. Nos. EO12090832V, EO12090862V and EO13010009V (January 24, 2013) ("January 24 Order")

Application, Pro-Tech attached a record of the United States Environmental Protection Agency ("USEPA") that described the site as 60 acres with a 29-acre landfill.⁴

On December 19, 2014, DEP issued an advisory memorandum ("DEP December 2014 Memo") to Board Staff on the land use classification and the closure or remediation status of the proposed project. DEP noted that following investigation by both itself and USEPA and the placement of the FLR Landfill as a Superfund Site on the National Priorities List, USEPA had selected a remedy, with DEP's consent, that included installation of a new cap over the 29-acre landfill and a new leachate collection system. DEP December 2014 Memo at 2. Based on its review of the Application and of the investigations conducted by DEP and USEPA, DEP determined that "only the 29-acre landfill area covered by the cap meets the definition of a "properly closed sanitary landfill facility." Id. DEP further advised that based on the figures included in the Application, which showed the proposed placement of the five separate solar arrays and the depiction of the "landfill area," Arrays B, C, and D are within the "landfill area" boundary that constitutes the properly closed sanitary landfill facility, and Arrays A and E are outside of the boundaries of the properly closed sanitary landfill facility. Id.

Based on the Landfill Application and DEP's advisory memorandum, the Board granted conditional certification to the portions of the FLR Landfill project, specifically, Arrays B, C and D, which are located on land that constitutes a properly closed sanitary landfill facility. Accordingly, the Board directed Pro-Tech to revise its application so that all proposed capacity was located upon the 29 acres which constitute a properly closed sanitary landfill facility as defined by the Solar Act. I/M/O Implementation of L. 2012, c. 24, N.J.S.A. 48:3-87(t) – Proceeding to Establish a Program to Provide SRECs to certified Brownfield, Historic Fill and Landfill Facilities and I/M/O Pro-Tech Energy Solutions, LLC Florence Land Recontouring Landfill, Dkt. Nos. EO12090862V and QO14070714 (January 21, 2014) ("January 21 Order").

On February 27, 2015, Pro-Tech filed a motion for reconsideration of the Board's January 21 Order. The merits of that motion are the subject of a separate order.

Project Description

FLR Brownfield Portion – (Florence Township) – No. QO15050543

On May 7, 2015, Pro-Tech filed its Subsection (t) Brownfield Application seeking approval for the "remaining 38+ acres," as a "brownfield."⁵ See, Cover letter to Application at 2. In response to Question E of the Application, Note 2, Pro-Tech states that 3.25 MW dc of solar generation is proposed to be located on the alleged brownfield portion of the project.⁶ Question 21 of the Application asks Pro-Tech to submit a delineated map of the portion of the site for which it is seeking certification. In response, Pro-Tech references Attachment 5. See, Application at 9.

⁴ Pro-Tech's application described the site as approximately 68 acres.

⁵ Pro-Tech annexed, among other things, the following attachments to the Application: 1) Attachment 2, a copy of the Phase I Environmental Site Assessment, dated December 2013 ("Phase 1 ESA"); 2) Attachment 3, a copy of the United States Environmental Protection Agency Second Five-Year Review Report, dated July 2009 ("July 2009 USEPA Five-Year Report"); and 3) Attachment 4, a copy of a September 23, 2013, USEPA Fact Sheet showing that the FLR Landfill was delisted from the National Priorities List ("NPL") on May 13, 2004.

⁶ The response to Question E identifies the acreage for the entire solar project as 67.972. If the 29 acres certified as a properly closed sanitary landfill facility in the January 21 Order are subtracted from this number, the remainder is 38.972. Pro-Tech refers to this amount as "38+" acres; DEP refers to it as "39" acres. In this Order, the Board will use DEP's number except when quoting Pro-Tech.

Question 22 of the Application requests Pro-Tech to provide the acreage of the portion of the site for which it is seeking certification. In response, Pro-Tech writes, "Approximately 38 acres – This Application – See Attachment 5." Id. In Attachment 5, Pro-Tech states:

The plan of the Brownfield portion of the FLR site is provided in Figure 2. Array E of the proposed solar development is located entirely within the Brownfield portion of the FLR site. The Brownfield portion of the FLR site that we are seeking certification for is located entirely within Block 173, Lot 1, Township of Florence, Burlington County, New Jersey. The approximate size of the Brownfield portion of the FLR site is 38 acres.

[Attachment 5.]

Consistent with the Subsection (t) certification process, Staff forwarded the application to DEP for review and a recommendation. While the Brownfield Application was pending, on July 27, 2015, Pro-Tech submitted a letter to DEP regarding the Subsection (t) Landfill and Brownfield applications ("July 27 Letter"). In this letter, Pro-Tech requests that DEP recommend to the Board that it grant the "pending application for certification of the portion of the site outside the [29-acre landfill] area as a brownfield." July 27 Letter at 1. In addition, Pro-Tech submits that the entire former FLR Superfund site constitutes a brownfield because it is a former industrial site, which is currently vacant, and on which there was a discharge of a contaminant. Id. at 2.⁷ Pro-Tech also alleges that the remediation status of a property should not disqualify the project from receiving BPU certification as a brownfield. Id. at 2-3.

Pro-Tech further maintains that the FLR site is the type of site the legislature envisioned should be certified when it adopted Subsection (t). Id. Pro-Tech asserts that the purpose of Subsection (t) is to incentivize and promote solar generation on brownfields, landfills, and areas of historic fill and that these terms should be read broadly. In support of its position, Pro-Tech says that Subsection (t) should be read in the context of other provisions which were intended to discourage the development of large solar on farmlands. Id.

DEP Review of the Brownfield Application

On September 11, 2015, DEP issued a comprehensive memorandum ("DEP September 2015 Memo"), advising Board Staff that it has reviewed the application and found that neither the entire site nor the remaining 39 acres on which Pro-Tech proposes to locate Array E constitute a "brownfield." DEP September 2015 Memo at 5-6. DEP began its analysis by citing the statutory definition of a "brownfield." N.J.S.A. 48:3-51 defines a brownfield as "[a]ny former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant."

Consideration of 68 acres as a Brownfield

DEP first addresses Pro-Tech's argument that the entire 68-acre area is a former industrial site. DEP notes that the "area on which Array E is proposed to be located is not part of the former 'industrial site' (i.e., the former FLR landfill)," and that the activities associated with the former

⁷ The July 27 Letter also asserts that the entire former Superfund site is a landfill. The Board will address that discussion in a separate Order disposing of Pro-Tech's motion for reconsideration regarding its landfill application. Id. at 2.

landfill took place outside the Array E area. DEP September 2015 Memo at 3. Specifically, DEP advises:

[T]he National Priorities List (NPL) Listing History for FLR Landfill published by the USEPA on September 23, 2013 indicates that the former Superfund site contained a 29-acre landfill, two lagoons, and a pond. The lagoons and ponds are not located where Array E is proposed, but rather to the north and west of the boundaries of the capped landfill. Thus, the area on which Array E is being proposed was not part of the former FLR landfill, and is not part of the FLR industrial site.

[Id.]

DEP explains that an NPL designation alone “is not determinative of what constitutes an ‘industrial site’ when applying the Solar Act’s definition of ‘brownfield.’” Id. DEP notes that USEPA itself qualifies its delineation of NPL sites by stating that “site boundaries are not necessarily “limited to [a] facility’s property and will vary over time.” Id. (internal quotations omitted), citing Clarifying the Definition of “Site” Under the National Priorities List, USEPA, OSWER Directive 9820.2-10FS (May 1996) (“Clarifying Definition of Site”). DEP states,

The purpose of NPL designation is to identify those sites that may warrant further investigation to assess the nature and extent of the public health and environmental threats associated with the site relative to other candidate sites. That purpose is not instructive in determining what constitutes an industrial site under the Solar Act’s definition of a brownfield. USEPA states that it uses the NPL primarily to identify those sites that appear to present a significant threat to public health or the environment and for which more study is needed. In naming the site, the agency [USEPA] does not judge owner or operator activities An NPL site also does not necessarily correspond to boundaries of any specific property that may give the site its name. Further, the name itself does not imply that the site is within the property boundary of a certain plant or installation or that all parts of the named property are contaminated.

[DEP September 2015 Memo at 3, quoting Clarifying the Definition of Site.]

Accordingly, DEP must make an independent determination as to what qualifies as a commercial and industrial site and is not limited to the boundaries of the NPL delineation. DEP advises that Pro-Tech has not established that the entire former Superfund site is a former commercial or industrial site under the Solar Act because the entire site was not used for industrial purposes. Pro-Tech had not demonstrated that the area on which Array E is proposed to be built was part of the operations of the former FLR landfill. DEP September 2015 Memo at 4.

Consideration of 39 acres as a Brownfield

DEP next addresses Pro-Tech’s argument that the 39 acres outside of the closed landfill area constitute a brownfield because there has been or there is suspected to be a discharge on the

39-acre area. DEP determined that this portion of the property is not a brownfield as defined by the Solar Act.

Relying on the 1986 USEPA Record of Decision, DEP advises that the landfill waste and contamination were confined to the capped portion of the property.⁸ Indeed, DEP notes that the NPL Listing History confirms that in 1975, DEP “investigated chemical waste disposal at the site and found hazardous wastes . . . were illegally disposed of at the site. Elevated levels of hazardous substances were discovered in soils and ground water within the landfill.” DEP September 2015 Memo at 4; see also, Brownfield Application, Attachment 4 at 2 (Emphasis added).

DEP also notes that the reports relied upon by Pro-Tech are insufficient to establish that there is a known or suspected discharge in the alleged brownfield portion of the property. Specifically, although Pro-Tech cited to a July 2009 USEPA Five-Year Review Report, which stated that higher downgradient concentrations of manganese detected at the time may be an indication that the landfill was leaching “to the surrounding areas . . . beyond the slurry wall,” DEP notes that the more recent 2014 USEPA Five-Year Review Report reflects that “groundwater monitoring data do not indicate the presence of groundwater contamination outside the landfill at concentrations that are of concern . . . The comparable levels of manganese upgradient and downgradient is most likely attributable to background.” Additionally, “[b]ased on the current data, [leaching from the landfill] is no longer a concern.” DEP September 2015 Memo at 5.

Similarly, DEP observes that the Phase I ESA, Attachment 2 of the Application, indicates that there is no suspected discharge of a contaminant at the 39-acre portion of the property. Notably, this report concludes that “the only [Recognized Environmental Condition] was associated with the operation of the subject property as a sanitary landfill . . . [and] that [n]o other areas of potential environmental concern were identified at the subject property where corrective measures or further investigation are recommended.” DEP September 2015 Memo at 5; see also, ESA at Executive Summary and at 24.

In sum, DEP determined that there has not been, nor is there presently suspected to have been, a discharge of a contaminant at the portion on which Pro-Tech proposed to construct Array E. Therefore, the 39 acre area does not constitute a “brownfield” under the Solar Act. DEP September 2015 Memo at 5-6.

STAFF RECOMMENDATIONS

Based upon the Application, the July 27 Letter, and DEP’s advisory memorandum, Staff recommends that the Board deny the Subsection (t) Brownfield Application, because Pro-Tech has failed to demonstrate that its proposed 3.25 MW dc solar project, Array E, is located on a “brownfield.”

FINDINGS AND CONCLUSIONS

The Board **FINDS** that, as required by Subsection (t), Staff transmitted the Brownfield Application to DEP for a determination of eligible land use type and status of remediation on the proposed site. Considering information provided by Pro-Tech and the comprehensive analysis provided by DEP, the Board **FINDS** that the DEP determined that Pro-Tech’s application for certification of the proposed 3.25 MW dc solar project, Array E, is not located on property

⁸ See, USEPA Record of Decision at 2,

<http://cumulis.epa.gov/superrods/index.cfm?fuseaction=data.siterods&siteid=0200625>

qualifying as a "brownfield" under the Solar Act. The Board **FURTHER FINDS** that DEP found that 1) the entire 68-acre area is not a former commercial or industrial site as the area on which Array E is proposed was not used for commercial or industrial purposes; and 2) there has not been, nor is there suspected to have been, a discharge of a contaminant on the 39 acres outside of the closed landfill.

Accordingly, the Board **HEREBY FINDS** that the proposed 3.25 MW dc solar project does not qualify for certification under Subsection (t) and, as such, the Board **DENIES** Pro-Tech's Subsection (t) Brownfield Application.

In Pro-Tech's letter dated July 27, the company raised various arguments surrounding the legislative intent of the Solar Act. The Board rejects those arguments and the Board continues to support the development of solar on landfills, brownfields, and areas of historic fill, as permitted by the Solar Act. The Board's limited determination here – that the property does not constitute a brownfield – for purposes of review pursuant to Subsection (t), does not bar the construction of a solar facility at the FLR Landfill property. It merely bars Pro-Tech from eligibility for ratepayer subsidies in the form of SRECs as to Array E. Notably, the Board granted conditional approval of Pro-Tech's proposed construction of Arrays B, C and D. See, January 21 Order.

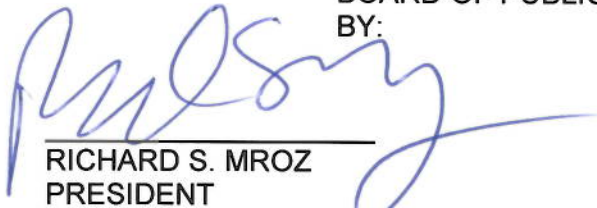
This Order shall be effective on November 26, 2015.

DATED: 11-20-15

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
COMMISSIONER




RICHARD S. MROZ
PRESIDENT



MARY-ANNA HOLDEN
COMMISSIONER



DIANNE SOLOMON
COMMISSIONER

ATTEST: 

IRENE KIM ASBURY
SECRETARY

In the Matter of the Implementation of L. 2012, C. 24, The Solar Act of 2012; In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t) – A Proceeding to Establish a Program to Provide SRECs to Certified Brownfields, Historic Fill and Landfill Facilities; Pro-Tech Energy Solutions, LLC Florence Land Recontouring Landfill – Brownfield Application

Docket Nos. EO12090832V, EO12090862V, and QO15050543

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