Agenda Date: 5/21/14
Agenda Item: 8A

STATE OF NEW JERSEY

Board of Public Utilities
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Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

CLEAN ENERGY

ORDER DENYING MOTIONS FOR RECONSIDERATION

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, N.J.S.A. 48:3-87(T) – A PROCEEDING TO ESTABLISH A PROGRAM TO PROVIDE SOLAR RENEWABLE ENERGY CERTIFICATES TO CERTIFIED BROWNFIELD, HISTORIC FILL AND LANDFILL FACILITIES	)	DOCKET NO. EO12090862V
PENNONI ASSOCIATES, INC. 1845 DELSEA DRIVE – MOTION FOR RECONSIDERATION	)	DOCKET NO. EO13050387V
MILLENIUM LAND DEVELOPMENT, LLC LOVE LANE – MOTION FOR RECONSIDERATION	)	DOCKET NO. EO13050429V

Parties of Record:

Harvey C. Johnson, Esq., Pennoni Associates, Inc.
Justin Michael Murphy, Esq., Millenium Land Development, LLC

BY THE BOARD:

Millenium (sic) Land Development, LLC ("Millenium"), and Pennoni Associates, Inc. ("Pennoni") have moved for reconsideration of the Board's Order dated July 19, 2013, in the above-captioned matter ("July 19 Order") denying their applications for certification of solar electric power generation facility projects, pursuant to L. 2012, c. 24, sec. 3 ("Solar Act"), codified as N.J.S.A. 48:3-87 (t) ("Subsection t").

BACKGROUND

The Solar Act, a bi-partisan effort to stabilize the solar market, was signed into law by Governor

Chris Christie on July 23, 2012, and took effect immediately. Among other actions, the Solar Act requires the New Jersey Board of Public Utilities ("Board") to conduct proceedings to establish new standards and to develop new programs to implement the directives. Subsection t applies to solar generation projects located on land designated as a brownfield, an area of historic fill or a properly closed sanitary landfill facility. N.J.S.A. 48:3-87 (t).

Subsection t of the Solar Act 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[.] . . . . [F]or projects certified under this subsection, the board shall establish a financial incentive that is designed to supplement the SRECs generated by the facility in order to cover the additional cost of constructing and operating a solar electric power generation facility on a brownfield, on an area of historic fill or on a properly closed sanitary landfill facility.

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

The Solar Act defines the terms "brownfield", "area of historic fill," and "properly closed 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. "Historic fill" is "generally large volumes of non-indigenous material, no matter what date they were placed on the site, used to raise the topographic elevation of a site[.]" Ibid. A "properly closed sanitary landfill facility" means "a sanitary landfill facility, or a portion of a sanitary landfill facility, for which performance is complete with respect to all activities associated with the design, installation, purchase, or construction of all measures, structures, or equipment required by the [New Jersey Department of Environmental Protection "NJDEP".]" Ibid.

On October 4, 2012, the Board issued an Order directing Staff to initiate proceedings and convene a public stakeholder process to fulfill the directives of the Solar Act (Docket. No. EO12090832V) ("October 4 Order"). By Board Secretary Letter issued October 25, 2012, notice was provided, pursuant to the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., of a Stakeholder Meeting to discuss the Solar Act with descriptions of each of the subsections of the Act to be addressed which included:

> Initiation of a Proceeding to Establish a Program to Provide SRECs to Solar Generation Facilities on Brownfields, Historic Fill Areas, and Properly Closed Landfills pursuant to N.J.S.A. 48:3-87 (t).
>
> A proceeding to establish a program to provide SRECs to owners of solar electric power generation facilities certified as being located on a brownfield, historic fill area, or properly closed landfill must be completed by the Board in consultation with the NJDEP and NJEDA and after public comment and public hearing by

At the public hearing, Justin Murphy, Esq., a development attorney for several solar developers, including Millenium, stated that the Board needed to clarify whether the definition of a brownfield could extend to a rural property. He asserted the brownfield designation could apply to a vacant orchard even if not located in an urban zone if contaminated with "lead and arsenic poisoning [sic]." He stated that the intent of the Legislature concerning solar development under Subsection t was "to get solar panels [on]. . . contaminated sites." He further stated that he "wanted to make sure there was not going to be an extension [sic] between a brownfield in a rural area and a brownfield in an urban area." (T64:22-65:18).

In addition, written comments were received from Justin Murphy; Michael Torpey, A.F.T. Associations ("A.F.T."); PV One; SEIA; Ralph Laks, Day Four Solar, LLC; Felicia Thomas-Friel, Division of Rate Counsel ("Rate Counsel"); Michael Maynard, NJ Land, LLC ("NJ Land"); Anthony Favorito, Pittsgrove Solar, LLC ("Pittsgrove"); James J. Dixon, ConEdison Development ("Con-Ed"); Keissler Wong, Rock Solid Realty, Inc. ("Rock Solid"); John Jenks, Quantum Solar ("Quantum"); KDC Solar, LLC ("KDC"); MSEIA; David G. Gil, NextEra Energy Resources, LLC ("NextEra"); Lawrence D. Neuman, EffiSolar ("EffiSolar"); Brian Fratus and Tim Ferguson, Garden Solar, LLC ("Garden Solar"); Brent Beerley, Community Energy Solar, LLC ("Community Solar"); Scott Lewis, Green Energy Solar, LLC ("Green Energy"); Lou Weber, Mohawk Associates, LLC ("Mohawk"); David Van Camp; IREC; Trevan J. Houser, Land Resource Solutions, LLC ("LRS"); Henry King, Reed Smith; Kenneth Bob, RenewTricity; Michael Bruno, EAI Investments ("EAI"); Blue Sky; NJR; T&M Associates; PSE&G; Gary N. Weisman, New Jersey Solar Energy Coalition ("NJSEC"); Michael Bruno, Esq., on behalf of Holmdel Road Solar Project and Elmer Road Solar Project ("Holmdel"); Stephen Pearlman, Gabel Associates and Inglesino, Pearlman, Wyciskala & Tayor ("Pearlman"); George Piper; David Reiss; Jim McAleer, Solar Electric NJ, LLC; Stephen R. Jaffe, Brownfield Coalition of the Northeast ("BCONE"); Ryan J. Scerbo, Esq., on behalf of Beaver Run Solar Project ("BRSP"); Janice S. Miranov, New Jersey State League of Municipalities ("League"); Thomas and Mary Van Windergarden ("Windergarden"); Heather Rek, Pro-Tech Energy Solutions ("Pro-Tech"); Harlan Vermes, Absolutely Energized Solar Electric ("Absolutely Energized"); and Jim Baye.[1]

While the majority of the comments pertained to the potential availability, type and structure of a supplemental incentive for projects approved by the Board, some comments were received about land use eligibility. The following summarizes the comments provided to the Board regarding the implementation of Subsection t with respect to land use types eligible to participate. The Office of Clean Energy's ("OCE's") responses are also included.

Comment: Justin Murphy, Esq. asked whether a site that was assessed as farmland when operating commercially will be able to obtain designation as a brownfield, arguing that no distinction should be made between a contaminated site located in a rural area and one located in an urban area.

Response: The Solar Act includes a specific definition of "brownfield." See N.J.S.A. 48:3-51. The Board will consider projects proposed for certification under the subsection according to the statutory criteria.

Comment: A.F.T. commented on behalf of a client, described as "the owner and developer of a 20 MW solar farm in Tinton Falls." According to A.F.T., all of the necessary approvals and agreements for construction and operation from any agency or entity having jurisdiction over

[1] Only the comments pertaining to Subsections (t) and (u) are described in this order.

same were obtained and executed before the adoption of the Solar Act. Similarly, the client had obtained the PJM System Impact Study before June 30, 2011, signed a Wholesale Market Participant Agreement with PJM, and had its application to the SRP accepted before the adoption of the Solar Act. A.F.T. claims that the project would have been energized by the time these comments were submitted had it not been for the advent of Hurricane Sandy. Further, A.F.T. contends that it is not clear that the Solar Act applies to a project so close to completion. A.F.T. urges that any rules adopted include an exception for projects that had reached this level of development as of the date of the signature of the Solar Act.

Response: It is unclear from the comment whether the commenter's client seeks to apply under Subsection s or t of the Solar Act. If the commenter has applied under (s), its application is under review with all of the applications received pursuant to that subsection. If the commenter's client contemplates applying under (t), as noted above, that subsection is intended to incentivize solar development upon landfills and other environmentally compromised sites. Since the commenter states that its client had already obtained all necessary approvals and agreements prior to passage of the Solar Act, as noted above, the client appears to have made the determination to proceed without the need of an incentive. The Board does not concur that financial incentives under Subsection t should be applied retroactively.

Comment: LRS, a New Jersey-based brownfield and landfill redevelopment company, asks that the certification process allow for a conditional certification for solar generation located upon landfills, upon approval of a Landfill Closure Plan by the NJDEP. In addition, the commenter suggests that the Board work with DEP to determine the program under which sanitary landfill closures will be certified – Site Remediation Program or the Solid and Hazardous Waste Management Program.

Response: [Board Staff first noted that the conditional certification proposed by Board Staff was discussed in a later section of the Order.] Board Staff will work with NJDEP to determine the most appropriate program(s) under which landfills will be closed. Board Staff agrees that a conditional certification is appropriate for sites that require additional remediation.

Comment: SEIA, a national trade association for the U.S. solar industry, claims to include the entities responsible for over 60% of the solar MW currently operating in New Jersey. SEIA urges that development of a draft certification process and application for public comment is of critical importance in order that developers may know how to identify sites that will qualify for the program; SEIA asks for "straightforward" criteria, a simple process, and speedy certification for most, if not all, qualifying sites. SEIA hopes for a broad definition of qualifying sites, arguing that this will tend to produce lower-cost solar.

Response: Board Staff will continue to work with NJDEP and others to determine appropriate eligibility criteria and an efficient application process.

Comment: BCONE states that the remediation and redevelopment of brownfields and sanitary landfills is critical to the implementation of the "State Plan" and that identification of the costs of projects on these sites early in project development is critical to ensure financing. BCONE suggests that a percentage of the costs needed to develop solar on landfills be issued as a grant and approved at the beginning of a project.

Response: The Board recognizes the legislative policy in favor of developing solar generation on landfills/brownfields/historic fill as embodied in Subsection t of the Solar Act. With respect to the commenter's suggestions for such an incentive, the Board thanks the commenter for its

suggestions and they will be taken into consideration as Board Staff works with NJDEP, the New Jersey Economic Development Authority ("NJEDA"), and stakeholders to develop an appropriate incentive.

Comment: Pro-Tech states its belief that the Solar Act does not apply to it because it is not "farmland-accessed" and requests that the Market Manager approve an increase in the size of its project to 9.7 MW so that it can "operate under the system size requirements for a grid supplied project and stay below the 10 MW limit."

Response: The commenter appears to believe that only grid-supply projects located on farmland are impacted by the Solar Act. On the contrary, the several sections of the Solar Act addressing grid-supply projects affect all grid-supply projects in the State in one way or another. The commenter also appears to believe that grid-supply projects under 10 MW are exempt in some way from the restrictions the Act places upon these projects, when in fact the "10 MW limit" to which Pro-Tech refers is one of several restrictions found in Subsection q. That subsection also limits the total number of MW which may be approved under it in EY 2014, 2015, and 2016. The Market Manager's consideration of the commenter's request to increase its project size will be considered by the Market Manager in the normal course of business but any approval of a change in size should not be considered as granting a waiver from the requirements of any of the subsections of the Solar Act.

In addition, the League stated in its written comments that it was the intention of the Legislature to discourage grid-connected projects on farmland and instead encourage such projects at suitable sites, including but not limited to brownfields, parking lots, rooftops and landfills. The League also indicated in its written comments that the Board should also take into account Statewide as well as municipal planning goals and objectives. According to the League, these efforts are consistent with long-standing State policies, including the basic principles of the State Plan, the preservation of farmland and open space and the State Energy Master Plan ("EMP"). The League further comments that these policies are also consistent with local planning priorities, particularly municipalities who have zoned to accommodate both the preservation of farmland and renewable energy sites where appropriate.

David Van Camp also emphasized the need to preserve farmland and areas of open space in his written comments to the Board. He urged the Board to determine criteria for solar facility projects submitted under Subsections s, t and q that will limit the impact to open space and farmland. He stated that the criteria should also preclude the development of solar projects on Rural Planning Areas as defined by the State Development and Redevelopment Plan and preclude the development of large grid-supply solar projects on Agricultural Development Areas as find by the County and State Agricultural Development Boards.

In addition to taking into account comments provided by public stakeholders, Board Staff worked with staff of NJEDA and NJDEP toward fulfillment of Subsection t of the Solar Act.

Application Process and Initial Applications

Pursuant to the Board's January 23, 2013 Order, Docket No. EO12090862V ("January 23 Order"), an application process was approved for solar facilities seeking to be certified by the Board as located on brownfields, areas of historic fill, or properly closed landfills. The certification process provides three potential recommendations from Staff to the Board: full certification, conditional certification, or denial of certification. Conditional certification will be granted for projects located on sites which the NJDEP has determined require further remedial

action or, in the case of properly closed landfills, additional protective measures, and full certification granted for projects located on sites for which the NJDEP has determined no further remedial or protective action is necessary. The process incorporates the expertise of the NJDEP to confirm a potential project's land use classification for eligibility and to account for the state of remediation of the project site. January 23 Order at 12-13.

The Board found that an application for solar projects located on brownfields, areas of historic fill, or properly closed sanitary landfills was necessary in order to initiate the certification process and directed Board Staff to work with NJDEP to develop an application. January 23 Order at 13. On or about April 10, 2013, Board Staff distributed a Subsection t application form via the public renewable energy stakeholder email distribution list and the New Jersey Clean Energy Projects ("NJCEP") and Board websites.

Shortly after issuance of the Subsection t application, Board Staff received and reviewed the first five applications for certification pursuant to Subsection t. Board Staff subsequently transmitted them to NJDEP for determination of eligible land use type and status of remediation on the proposed sites. NJDEP reviewed each application and supplied an advisory memo to Board Staff on the land use classification and the closure or remediation status of each proposed site. Based upon NJDEP's determination, the information contained in the applications and the January 23 Order, Board Staff recommended that three of the applications be denied and the Board did so by Order dated July 19, 2013 ("July 19 Order"). The applications submitted by Millenium and Pennoni were among the projects denied in the Board's July 19 Order.

Pennoni

Pennoni submitted an application for a 5MW project located in Deptford, New Jersey referred to as "Delsea Drive." Pennoni represented in its application that the project was to be located on property where food wastes, comingled with non-food wastes, were disposed of improperly. Pennoni also represented that the site is zoned light-density residential and was used as farmland until it purchased the property two years ago. Board Staff forwarded Pennoni's application to NJDEP. Upon review of the application, NJDEP found that the site is a former pig farm, which contained an area of improperly disposed of inedible solid waste in the north and/or central area of the property. NJDEP also found that the site is zoned light-density residential and was continuously used for the pig farming operations until approximately 2 years ago, when Pennoni purchased the property. NJDEP concluded that the site was not a brownfield because it was never utilized for a commercial or industrial purpose and the waste on the site is not hazardous. On this basis, Board Staff recommended that the Board deny the application; the Board approved Staff's recommendation. July 19 Order at 6.

Millenium

Millenium submitted an application to the Board requesting that its proposed 12.5 MW "Love Lane" project in Upper Deerfield Township, on municipal Block 1301, Lot 1, be certified as being located on a brownfield. The proposed site is currently "owned by Westrum Corporation, and is leased to Millenium..." Attachment A to the Motion for Reconsideration, Certification of Bruce Martin at ¶ 4 ("Martin Certification"). In its application, Millenium represented that the project is located on a former apple orchard. Specifically, the proposed solar facility would be located on the northern section of the 222 acre property that harbored the former apple orchard. Most of Millenium's proposed facility would rest on the old apple orchard that contains soil contaminated with lead and arsenic.

Board Staff forwarded Millenium's application to NJDEP. NJDEP determined that, although soils at the site contain elevated levels of arsenic and lead, the site did not meet the definition of a "brownfield" since the contaminants were not present as a result of a "discharge." On this basis, Board Staff recommended that the Board deny the application; the Board approved Staff's recommendation. July 19 Order at 6.

MOTIONS FOR RECONSIDERATION

Pennoni

On August 7, 2013, Pennoni filed a motion for reconsideration with the Board requesting that the Board rescind its previous decision in the July 19 Order in which certification of the site in question was denied, and, in turn, certify the site as meeting the requirements of the Subsection t application process. As part of the motion for reconsideration, Pennoni filed a letter brief ("Pennoni Letter Brief"), along with a Preliminary Assessment/Site Investigation/Remedial Investigation Report and Remedial Action Work Plan ("Pennoni Preliminary Assessment") and a report prepared by the law firm of Duane Morris, LLP (Duane Morris Report) addressing the issue concerning the prior commercial use of the property.

Upon receipt of the motion for reconsideration, Board Staff scheduled a telephone conference with NJDEP Staff and representatives of Pennoni on August 22, 2013. In anticipation of the conference, Pennoni electronically filed a letter memorandum ("Pennoni Memo") with the Board on August 21, 2013 in which it summarized its position with regard to the motion for reconsideration.

Pennoni maintains the Board erred in denying its application for project certification for two reasons: (1) the Board erred when it concluded that the subject property had never been "commercial," and; (2) the Board inaccurately concluded the property in question failed to meet the statutory definition of a "brownfield." Pennoni Memo at 1.

To support its first contention, Pennoni points out that the land in question previously hosted a pig farm between 1971 and 1987 that contained four-hundred to five-hundred pigs, which would be raised and sold. Duane Morris Report at 1-2. According to the Petitioner, because pigs were sold on the property, it should be assumed that a commercial enterprise existed. And, by extension, it argues that a "legal nonconforming" use of land should apply so the land could be classified as having previously been used for commercial purposes. Pennoni Memo at 1.

Pennoni's second argument in support of its motion for reconsideration is that the parcel of land for the proposed project qualifies as a "brownfield" because it hosted a former commercial site, and contaminants were discharged on that land. The Petitioner states that the contaminants existing within test wells on the site are "arsenic, chromium, iron, lead, manganese, selenium and vanadium." Pennoni Memo at 2. Pennoni relies on the historic research and geophysical, soil boring and groundwater investigations conducted on the property, as detailed in the Preliminary Assessment for its argument. Pennoni Letter Brief at 2.

Millenium

On August 15, 2013, Millenium filed a motion for reconsideration with the Board requesting that the Board modify the July 19, 2013 Order and grant full certification to its Subsection t application for the Upper Deerfield Township, Love Lane project. As part of the motion for

reconsideration, Millenium filed a Notice of Motion for Reconsideration ("Millenium Notice of Motion") and the Martin Certification. Millenium also submitted a letter brief ("Millenium Letter Brief"), a Phase I Environmental Site Assessment (ESA), Phase II ESA, a Preliminary Remedial Action Workplan, and a Supplemental Remedial Action Workplan.

Millenium contends the Board acted in error in denying its application for project certification for three reasons: (1) The Board improperly relied on NJDEP's site determination in failing to independently consider The Spill Compensation and Control Act, N.J.S.A. 58:10-23 ("Spill Act"); (2) the Board misconstrued the definition of discharge as it relates to the Solar Act, and; (3) the Board failed to consider commercial farming activity as having resulted in the discharge. Millenium Notice of Motion at 2.

Millenium further claims that both ESAs and the Remedial Action Work Plans evidence that a discharge occurred on the property and support the notion that the "soils tested indicate impact resulting from historic pesticide contamination" and "the contaminants were 'applied' during farming activity." Attachment A at 2. According to Millenium, the Board misconstrued the definition of "discharge" as it relates to the Solar Act, the Spill Act and New Jersey Dep't. of Envtl. Prot. v. Dimant, 212 N.J. 153 (2012) because it erroneously implied that the contaminants had migrated to the site, were naturally occurring in the soil, or were introduced into the soil by a leaking container. As such, Millenium submits that NJDEP's determination that the contaminants were not "discharged" on the site is arbitrary and capricious. Millenium is requesting that the Board modify the July 19 Order and approve the solar project, thereby advancing the express intent of the Solar Act to permit solar development on contaminated parcels of property. See Millenium Letter Brief at 2.

DISCUSSION AND FINDINGS

A motion for reconsideration requires the moving party to allege "errors of law or fact" that were relied upon by the Board in rendering its decision. N.J.A.C. 14:1-8.6(a)(1). Generally, a party should not seek reconsideration merely based upon dissatisfaction with a decision. D'Atria v. D'Atria, 242 N.J. Super. 392, 401 (Ch. Div. 1990). Rather, reconsideration is reserved for those cases where (1) the decision is based upon a "palpably incorrect or irrational basis" or (2) it is obvious that the finder of fact did not consider, or failed to appreciate, the significance of probative, competent evidence. See, e.g., Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996). The moving party must show that the action was arbitrary, capricious, or unreasonable. D'Atria, supra, 242 N.J. Super. at 401.

In addition, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions. See In re Trantino Parole Application, 89 N.J. 347, 364 (1982). N.J.S.A. 48:2-40 provides that the Board may order a rehearing, and/or extend, revoke, or modify any order made by it. An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon v. Town of Belleville, 4 N.J. 99, 107 (1950).

This Board may modify an Order if there is a showing that the Board's action constituted an injustice or that the Board misunderstood or failed to take note of a significant element of fact or law. The Board has reviewed the motion for reconsideration, the supporting documentation, and Staff's prior recommendation. While the Board does not find that the issues raised by Pennoni or Millenium are sufficient to warrant reconsideration, new information developed by Staff as they reviewed the record supports the decision of the Board to reopen its prior decision on the matter. N.J.S.A. 48:2-40.

The motions of Pennoni and Millenium for reconsideration under subsection t of the Solar Act are **DENIED** on the grounds that both projects are proposed for construction on land which was devoted to "horticultural or agricultural use that is valued, assessed and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to -23.24, at any time within the ten-year period" prior to the Solar Act's effective date. As explained more fully below, such projects must be considered using the criteria provided in subsections q and s of the Solar Act, are not eligible for consideration under Subsection t and, therefore, must be rejected.

The Board is vested with the primary responsibility to prepare and oversee the state's EMP, the 10 year blueprint for the use, management and development of energy in New Jersey.[2] One of the goals of the EMP is to promote the installation of solar projects that provide economic and environmental benefits. 2011 EMP at 7. The EMP recommends that solar projects that offer a "dual benefit" for commercial, industrial, government and school applications should take priority for approval of Solar Renewable Energy Credit ("SREC") eligibility. The EMP also recommends that any legislative expansion of SREC eligibility should also provide the Board with the ability to limit subsidies for grid-supply projects to ensure compatibility with land use, environmental and energy policies. Id. at 106-107. Specifically, the EMP argues against the use of ratepayer subsidies to turn productive farmland into grid-supply solar facilities. Id. at 107. The Solar Act provides the Board with the discretion to make the solar market less volatile while implementing the policy guidance expressed in the EMP. 2011 EMP at 105.

At the same time, the EMP recognizes the need to promote solar on brownfields, landfills and areas of historic fill, land which is otherwise difficult and expensive to develop. "[B]rownfields and landfills, in particular, are well-suited for the development of large solar generation" because some of these properties cannot be developed for general commercial or residential purposes and may not provide adequate revenue to the municipalities and counties in which they are located. 2011 EMP at 107.

As the Board as previously noted, in enacting Subsection s of the Solar Act, the Legislature adopted the policy expressed in the EMP of limiting development of solar facilities on farmland.[3] The language of N.J.S.A. 48:3-87(s) ("Subsection s") makes this intention clear:

> [A] solar electric power generation facility that is not net metered or an on-site generation facility and which is located on land that has been actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c. 48 (C.54:4-23.1 et seq.) at any time within the 10-year period prior to [July 24, 2012] shall only be considered "connected to the distribution system" if (1) the board approves the facility's designation pursuant to subsection q. of this section; or (2) (a) PJM

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[2] The 2011 Energy Master Plan was released by Governor Chris Christie on December 6, 2011 and is available at http://nj.gov/emp/docs/pdf/2011_Final_Energy_Master_Plan.pdf.

[3] In the Matter of the Implementation of L. 2012, C. 24, Subsection S, Docket No. EO12080832V; In the Matter of the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(q), (r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System, Docket No. EO12090880V; Approval of Application for Sun Perfect Solar, Inc., W1-132, Docket No. EO12121101V, Approval of Application for OCI Power, LLC, W1-112, Docket No. EO12121106V, Approval of Application for NJ Clean Energy Ventures, W2-056, Docket No. EO12121142V (April 29, 2013) at 18.

issued a System Impact Study for the facility on or before June 30, 2011, (b) the facility files a notice with the board within 60 days of the effective date of P.L. 2012, c. 24, indicating its intent to qualify under this subsection, and (c) the facility has been approved as "connected to the distribution system" by the board. Nothing in this subsection shall limit the board's authority concerning the review and oversight of facilities, unless such facilities are exempt from such review as a result of having been approved pursuant to subsection q. of this section.

A solar facility proposed for construction on farmland may be eligible for characterization as "connected to the distribution system" under only Subsections q, s(1) or s(2), and, after EY 2016, under Subsection r.

Before reaching the question of whether the proposed projects are located on landfills, brownfields, or areas of historic fill, the Board must first ask whether, at any time between July 25, 2002 through July 24, 2012, the projects are located on land (1) that has been actively devoted to agricultural or horticultural use; and (2) was valued, assessed, and taxed pursuant to the Farmland Assessment Act of 1964. This law provides that land shall be deemed actively devoted to agricultural or horticultural use when it constitutes five (5) acres in area and produces $1,000 gross in horticultural or agricultural products per year during the two (2) year period immediately preceding the tax year in issue or clear evidence of yearly gross sales within a reasonable period of time. N.J.S.A. 54:4-23.5. The Farmland Assessment Act of 1964 also provides that "land shall be deemed to be in agricultural use when devoted to the production for sale of plants and animals useful to man, including, but not limited to: ...livestock, including ... swine." N.J.S.A. 54:4-23.3.

Pennoni

It is undisputed that the parcel of land selected for the construction of Pennoni's 1845 Delsea Drive solar project qualifies as land deemed actively devoted to agricultural use pursuant to the requirements set forth under the Farmland Assessment Act of 1964. Pennoni concedes that the parcel is comprised of 35.4 acres, between four-hundred and five-hundred pigs were raised on the property, and assumes those pigs were sold. Pennoni Memo at 1. Swine are clearly a classification of animals that have been identified under the Farmland Assessment Act as animals that are useful to man. N.J.S.A. 54:4-23.3 Pennoni has submitted no further evidence to demonstrate that the site has been utilized for any other purpose other than a pig farm.

A review of the tax records also reflects that the proposed site for Pennoni's 1845 Delsea Drive solar project is not a former or current commercial or industrial site and was rather zoned as farmland until 2013, at which time the parcel's zoning was reclassified as vacant[4]. While Pennoni attempts to characterize the site as a "commercial farm," the record is undisputed that the site's previous use was agricultural, rather than commercial or industrial. Pennoni's own report states the "subject property is located in a rural setting and is comprised of abandoned farmland" and was used as farmland until it was purchased by Pennoni two years ago. Pennoni Preliminary Assessment at 2. Any claim by Pennoni that the site is a former or current commercial or industrial site is not supported by the record and, as such, the Board **FINDS** that the parcel previously met the definition of farmland as contained in the Solar Act.

[4] The referenced tax records are available online at http://www.njpropertyfax.com/

The Board further notes that Pennoni submitted an application pursuant to Subsection q, which was conditionally certified by the Board's Order dated January 29, 2014[5]. The Subsection q application submitted by Pennoni was nearly identical to its Subsection t application, in that it sought approval for the construction of a five (5) MW project on the same parcel of land located at 1845 Delsea Drive in Deptford, New Jersey. This conditional approval under Subsection q of a virtually identical project calls into question Pennoni's filing of the motion for reconsideration. Subsections q, r and s of the Solar Act provide opportunities for the development of solar facilities on open space and farmland, with more restrictive requirements and Board discretion in support of the EMP policy of limiting solar development on farmland more actively than solar development on brownfields. A more liberal interpretation of these constraints would be contrary to this policy.

Accordingly, the Board **FINDS** that nothing in Pennoni's motion for reconsideration causes or requires the Board to reconsider its July 19 Order denying certification pursuant to Subsection t of its application for the construction of the solar generation facility referred to as 1845 Delsea Drive. Pennoni's request for reconsideration fails to provide a legal basis that would justify the Board's reversing its decision. Therefore, the Board **HEREBY DENIES** Pennoni's motion for reconsideration of its July 19 Order.

Millenium

It is undisputed that the parcel of land selected for the construction of Millenium's Love Lane solar project qualifies as land deemed actively devoted to agricultural use pursuant to the requirements set forth under the Farmland Assessment Act of 1964. The Phase I ESA prepared for Westrum Corporation in June 2005 indicates that the site was previously utilized as an apple orchard. As early as 1940, based on aerial photographs, the site was used as an orchard. By 1963, the orchard areas had been cleared for row crops, with some portions remaining forested until 2002. Up until 2003, no other significant changes were observed, other than increased residential development in the surrounding vicinity of the property. Attachment E to the Motion for Reconsideration at 4. The Phase I ESA noted that the subject property was operated as a tree and shrub nursery known as Hopewell Nursery. There were no structures present on the property at the time of the assessment, but a 550-gallon above-ground diesel fuel tank was located on the eastern portion of the site. Attachment E at 4.

A Preliminary Remedial Investigation/Remedial Action Work Plan was prepared and submitted to NJDEP in June 2005 in order to finalize the remedial investigation of the property. Attachment G to the Motion for Reconsideration at 1. The report also states that the study area was formerly utilized as an apple orchard, and encompasses 96.43 acres on the northern portion of the property. The report further indicates that the presence of the apple orchard was confirmed by a long-time resident and employee of the Cumberland County Planning Office. The report notes that that the remainder of the site appears to have been cultivated with row crops, with some portions remaining forested until sometime after 2002. Ibid. Apples are a type of plant that are utilized as a food source, and would, therefore qualify under the Farmland Assessment Act as plants that are useful to man.

[5] 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, N.J.S.A. 48:3-87(q), (r) and (s) – Proceedings to Establish the Processes for Designating Certain Grid-Supply Projects as Connected to the Distribution System – Subsection (q) Application Approvals, et al., Docket No. EO12090880V (August 21, 2013).

Millenium has provided no information pertaining to the current or former use of the site for commercial or industrial use. Moreover, although Millenium alleges that the site was previously utilized for an industrial or commercial purpose, a review of the tax records point to the contrary. Specifically, the "Open Space and Recreation Plan for the Township of Upper Deerfield, Cumberland County, New Jersey," prepared by the Delaware Valley Regional Planning Commission and published in 2007, identifies this site, Block 1301, Lot 1, as "Tax Class 3B" at table E-4, entitled Farmland Assessed Properties (Class 3A/3B). See Open Space and Recreation Plan for the Township of Upper Deerfield, Cumberland County, New Jersey[6] at 70. Tax Class 3B is defined as "farm property (Qualified) and such properties are assessed under the Farmland Assessment Act, P.L. 1964, c. 48. A review of current tax records for the municipality further reflects that the site is identified as Qualified Farmland. The owners of the parcel have, therefore, continued to receive a tax deduction under the Farmland Assessment Act, and yet Millenium is seeking to have the same parcel of land declared as a brownfield for purposes of receiving SRECs under Subsection t of the Solar Act. Any claim by Millenium that the site is a former or current commercial or industrial site is not supported by the record, and as such, the Board **FINDS** that the parcel previously met and continues to meet the definition of farmland as contained in the Solar Act.

Further, the record reflects that the proposed project site was previously planned as, and approved for, a residential subdivision, which is contrary to the intent of the Solar Act and EMP in directing solar development on land that is underutilized or difficult to develop. See Exhibit A, Martin Certification at ¶ 7. In fact, included with Millenium's original application for the project was a Resolution adopted by the Upper Deerfield Township Planning Board pertaining to its application for a use variance for solar production. Lawrence McKnight, the principal of Westrum Upper Deerfield Development, LLC testified before the Upper Deerfield Township Planning Board during the public hearings concerning the variance approval, and stated that "the recent recession and downturn in the economy has killed the previously approved 174-house subdivision project, making it no longer economically feasible." Resolution 23-2011 (November 21, 2011) at 5. Therefore, there is no basis for the Board to reasonably conclude that the property is underutilized or abandoned, which would justify the award of additional incentives provided for under the Solar Act for the construction of a solar facility on this parcel of land. In fact, the property would have been developed for homes had the economy not experienced a downturn.

Accordingly, the Board **FINDS** that nothing in Millenium's motion for reconsideration causes or requires the Board to reconsider its July 19 Order denying certification pursuant to Subsection t of its application for the construction of the Love Lane solar generation facility. Millenium's request for reconsideration fails to provide a legal basis that would justify the Board's reversing its decision. Therefore, the Board **HEREBY DENIES** Millenium's motion for reconsideration of its July 19 Order.

To summarize, the Board **FINDS** that the Pennoni and Millenium projects do not qualify for certification under Subsection t of the Solar Act on the grounds that both projects are proposed for construction on land which was devoted to "horticultural or agricultural use that is valued, assessed and taxed pursuant to the Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 to -23.24, at any time within the ten-year period" prior to the Solar Act's effective date and are therefore not eligible for consideration under Subsection t. Accordingly, the Board **HEREBY DENIES** the requests for certification of the Pennoni's 1845 Delsea Drive and Millenium's Love Lane projects.

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[6] A copy of the document is available online at http://www.dvrpc.org/reports/07023.pdf

In light of particular circumstances of the instant motions, the Board deems it necessary to clarify that solar projects proposed to be located on land that has been actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," P.L.1964, c.48 (C.54:4-23.1 et seq.) at any time within the ten-year period prior to July 24, 2012 will not be eligible for being designated on a brownfield, an area of historic fill or a properly closed sanitary landfill facility for purposes of qualify for SRECs under Subsection t of the Solar Act. The Board **FURTHER DIRECTS** Staff to promulgate regulations consistent with this decision.

The effective date of this Order shall be May 30, 2014.

DATED: 5/21/14

BOARD OF PUBLIC UTILITIES
BY:

DIANNE SOLOMON
PRESIDENT

JEANNE M. FOX
COMMISSIONER

JOSEPH L. FIORDALISO
COMMISSIONER

MARY-ANNA HOLDEN
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

IN THE MATTER OF 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 SOLAR RENEWABLE ENERGY CERTIFICATES TO CERTIFIED BROWNFIELD, HISTORIC FILL AND LAND FILL FACILITIES

PENNONI ASSOCIATES, INC., 1845 DELSEA DRIVE – MOTION FOR RECONSIDERATION

MILLENIUM LAND DEVELOPMENT, LLC, LOVE LANE – MOTION FOR RECONSIDERATION

BPU DOCKET NOS. EO12090832V, EO12090862V, EO13050387V and EO13050429V

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