

November 24, 2015

*By E-Mail*

Kimberlee J. Sturtevant  
Burlington City Attorney's Office  
149 Church Street  
Burlington, VT 05401

Re: PSB Docket No. 8600 –South Forty Solar Project

Dear Kim,

In furtherance of our discussion last week, I am writing to summarize South Forty Solar's ("SFS") understanding of the status of issues raised by the Conservation Board in 2014 concerning the Project, and the City's further participation in the section 248 proceeding. First, here is a brief chronology of what occurred:

- On October 21, 2013, the City Council took up the Project's power purchase agreement with BED, and authorized its negotiation and execution. The resolution included the following:

BE IT FURTHER RESOLVED that the applicant has committed to meet with the Conservation Board to address the stormwater run-off issues and wetland buffer zones in conformance with applicable state rules prior to submitting their petition for a certificate of public good with the Public Service Board.

The "in conformance with applicable state rules" language is significant, obviously, but especially because the original motion put before the Council was amended to include this language to recognize that the review should be made under an accepted standard - the state rules.

- SFS first met with the Conservation Board on November 4, 2013 to discuss the Project.
- Vermont Wetlands Permit application filed with the VTDEC in December, 2013.
- 45 Day Notice letter filed with the Burlington City Council and Burlington Planning Commission on March 5, 2014.
- Second meeting with the Conservation Board on March 10, 2014. As a result of that meeting, the Conservation Board asked SFS to respond to a series of technical questions concerning wetland and stormwater issues pertaining to the wetlands application.

- SFS responded to the Conservation Board’s questions on April 2, 2014 with 150 ± pages of plans and analyses regarding wetland and stormwater issues. The plans included supplemental stormwater detention on-site, in response to concerns raised by the Strathmore Homeowner’s Association.
- Third meeting with the Conservation Board on April 7, 2014 to further discuss the issues addressed in SFS’s written responses.
- Conservation Board filed comments with the PSB on April 17, 2014.
- SFS provided supplemental materials to VTDEC for the wetlands permit application, with final revision submitted on October 20, 2014.
- SFS filed its Notice of Intent for Coverage under the Vermont Stormwater Construction General Permit 3-9020 (“VCGP”) on October 31, 2014.
- VTDEC granted authorization for coverage under the VCGP on December 8, 2014.
- VTDEC issued Individual Wetland Permit on May 8, 2015.
- SFS filed its Section 248 Petition on August 14, 2015.
- SFS met with Conservation Board again on September 14, 2015, to provide an update.

Based upon the above, SFS respectfully submits that the letter and spirit of the City Council resolution regarding review of the Project by the Conservation Board have been met. The Board raised questions, and SFS responded to them in good faith and at substantial time and expense. SFS then went through a rigorous state review process that lasted over a year, and that resulted in the issuance of a wetland permit and stormwater permit by the only entities authorized under Vermont law to implement those state programs. The permits were not appealed and are now final. Thus, the Project “conform[ed] with applicable state rules prior to submitting [its] petition for a certificate of public good with the Public Service Board.” Any issues raised in the Conservation Board’s letter of April 17, 2014 are resolved by the fact that the Project is in compliance with the applicable state rules based on the issuance of the VTDEC permits.

The City Council resolution set clear expectations concerning the Project and wetland and stormwater issues, and SFS diligently worked to successfully meet the standards set in the resolution. It would be patently unfair for the City Council to change the rules now, especially given the considerable investment in time and money made by SFS. Moreover, it would require the City to overcome the PSB’s presumption deeming environmental permits, such as the VTDEC permit here, prima facie evidence of compliance with the relevant Section 248 criteria. *See Amended Petition of*



*Entergy Nuclear Vt. Yankee, LLC*, Docket No. 7862 (Vt. Pub. Serv. Bd. June 19, 2013).<sup>1</sup> If the City wished to rebut the presumption created by SFS's Individual Wetland Permit, it would need to produce "clear and convincing evidence" to overcome the presumption that a decision made within an agency's expertise is "correct, valid, and reasonable." *Gasoline Marketers of Vt., Inc. v. Agency of Natural Resources*, 169 Vt. 504, 508 (1999).<sup>2</sup> VTDEC conducted an able and searching review of SFS's wetland permit application, including input from not just its Wetlands Office staff but also from highly experienced staff from the Vermont Department of Fish and Wildlife in the fields of wildlife biology, ecology, and botany; its findings will stand up to scrutiny if challenged.

Nonetheless, to the extent it is useful to you, each of the Conservation Board's issues from the April 17, 2014 letter are addressed below:

- 1. Calculation of wetlands impact - only 84 square feet of direct wetland impact and only 6 SF of wetland buffer impact, rather than using 10-13 acres of open wetland meadow and forested wetland that would be cleared, converted or otherwise intensively managed in order to construct and maintain the 18-acre solar array.**

*Since the Conservation Board's letter, VTDEC reviewed the Project and granted an Individual Wetland Permit, based upon its findings concerning the amount of wetland impacts to Class II wetlands under the VT Wetland Rules. With all due respect to the work of the Conservation Board members, there is no basis to substitute its judgment for those of the agency with statutory authority to issue and enforce the Wetland Rules.*

- 2. The board is not satisfied that the impacts from the clearing and managing of the forested wetland and shrub wetland have satisfactorily shown to not be unduly adverse.**

*See Response #1. This has been definitively addressed in the Individual Wetland Permit.*

- 3. The board is also not satisfied that the buffer to the known vernal pool on the property is adequate.**

*See Response #1. This has been definitively addressed in the Individual Wetland Permit (it is also worth noting that additional field studies were conducted in the Spring of 2014, after the Conservation Board's letter, which found no amphibians using the vernal pool. This information was provided to the VTDEC as supplemental materials for the permit application, by memo from Trudell dated 9/26/14.*

---

<sup>1</sup> The PSB specifically applied this presumption to an Individual Wetland Permit in *Petition of Central Vermont Service Corp.* Although the project there had permanent impacts on a Class II wetland, VTDEC had determined that there would be no undue adverse impacts on the wetland's protected functions, and had therefore issued the developer a permit. The PSB ruled that the Project would not have an undue adverse impact with regard to wetlands under Section 248(b)(5), relying wholly on the presumption created by the VTDEC permit. Docket No. 7887 (Vt. Pub. Serv. Bd. Sept. 13, 2012).

<sup>2</sup> The City would bear the burden of producing evidence to counter VTDEC's findings. *See Godin v. Godin*, 168 Vt. 514, 530 (1998) (discussing law of rebuttable presumptions).



4. **The board is concerned about the potential hydrological changes as this relates to the storm storage and surface/groundwater protection functions, and questions the assumptions made for the post-development cover type in the modeling, specifically whether the assumed cover type is functionally equivalent to the current wetland vegetation.**

*See Response #1. The “storage and surface/groundwater protection functions” are part of ANR’s review under the VT Wetland Rules and have been definitively addressed in the Individual Wetland Permit.*

5. **The board questions of March 10<sup>th</sup> included a request that the applicant monitor post-development stormwater impacts to verify the results of the report conclusions, but the applicant did not agree that monitoring is necessary.**

*See Response #1. The stormwater function of the wetlands have been addressed in the Individual Wetland Permit. ANR included all conditions it deemed necessary to find that the Project would not have an undue adverse effect to this function. Further, the Project complies with Vermont stormwater regulations – it obtained the VCGP, and does not require a stormwater operational phase permit because less than 1 acre of impervious surface is being created. Beyond those state programs, SFS is directly engaging with Strathmore concerning their specific stormwater concerns related to properties adjoining the project parcel to the west.*

We believe that at this stage, the most appropriate role for the City to play in the section 248 process is to represent City-wide interests in the protection of the sewer line, an issue SFS is actively engaged in solving with the Department of Public Works. The “neighbor” issues being raised by other parties relate to private interests that SFS is addressing directly (for example, aesthetic concerns of Curtis Avenue neighbors). Strathmore and Sunset Cliff neighbors are ably represented by counsel to ensure that their private property interests are protected.

Please let me know if you have any further questions concerning the above.

Sincerely,



Andrew N. Raubvogel, Esq.

DUNKIEL SAUNDERS ELLIOTT RAUBVOGEL & HAND, PLLC  
*Attorneys for South Forty Solar, LLC*

