

IN THE MATTER OF :
THE TOWN OF NEW MILFORD, :
PETITION FOR DECLARATORY RULING :

MARCH 14, 2019

DECISION NOT TO ISSUE DECLARATORY RULINGS

Pursuant to Conn. Gen. Stat. § 4-176(e) and R.C.S.A. § 22a-3a-4(c)(3), I am issuing this decision in response to a Petition for Declaratory Ruling submitted by the Town of New Milford.

A. BACKGROUND. Candlewood Solar, LLC (“Candlewood Solar”) is proposing to construct a 20 MW solar photovoltaic array on Candlewood Mountain Road in New Milford, Connecticut (“the Project”). In connection with the Project, on January 2, 2109, Candlewood Solar submitted a registration with the Department of Energy and Environmental Protection (“the Department”) seeking coverage under the General Permit for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities (“the General Permit”).¹

B. THE PETITION. On January 16, 2019, the Town of New Milford (“the Petitioner”) submitted a Petition for Declaratory Ruling (“the Petition”) to the Commissioner of Energy and Environmental Protection. The Petition seeks two rulings: one, that I exercise my authority under Conn. Gen. Stat. § 22a-430b(c)² and require that Candlewood Solar obtain an individual

¹ Candlewood Solar had previously submitted a registration seeking coverage under the General Permit for the Project on September 17, 2018. This earlier registration was rejected by the Department on October 18, 2018.

² Conn. Gen. Stat. § 22a-430b(c) provides in pertinent part that:

Subsequent to the issuance of a general permit, the commissioner may require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430 if the commissioner determines that an individual permit would better protect the waters of the state from pollution.... The commissioner may require an individual permit

discharge permit under Conn. Gen. Stat. § 22a-430 for the Project; and two, that I extend the public comment period regarding Candlewood Solar's registration under the General Permit.³ In addition, pursuant to Conn. Gen. Stat. § 22a-19, the Petitioner has requested party or intervenor status in the declaratory ruling proceeding and Candlewood Solar's registration seeking coverage under the General Permit.

On January 18, 2019, Rescue Candlewood Mountain, a voluntary association, submitted comments in support of the Petition and also, pursuant to Conn. Gen. Stat. § 22a-19, seeks to intervene as a party in the declaratory ruling proceeding and Candlewood Solar's registration seeking coverage under the General Permit.

Both the Petitioner and Rescue Candlewood Mountain have requested a hearing.

On February 5, 2019, Candlewood Solar submitted objections to the Petition and to the Petitioner's and Rescue Candlewood Mountain's requests to intervene. On February 13, 2019, the Petitioner submitted its response to Candlewood Solar's objections.

C. THE DECISION NOT TO ISSUE THE REQUESTED RULINGS. Conn. Gen.

Stat. § 4-176(e) requires that "[w]ithin sixty days after receipt of a petition for a declaratory

under this subsection in cases that include but are not limited to the following: (1) When the discharger is not in compliance with the conditions in the general permit; (2) when a change has occurred in the availability of a demonstrated technology or practice for the control or abatement of pollution applicable to the discharge; (3) when effluent limitations and conditions are promulgated by the United States Environmental Protection Agency or established by the commissioner under section 22a-430 for discharges covered by the general permit; (4) when a water quality management plan containing requirements applicable to such discharges is approved by the United States Environmental Protection Agency; (5) when circumstances have changed since the issuance of the general permit so that the discharger is no longer appropriately controlled under the general permit, or a temporary or permanent reduction or elimination of the authorized discharge is necessary; (6) when the discharge is a significant contributor of pollution, provided the commissioner, in making this determination, may consider the location of the discharge with respect to waters of the state, the size of the discharge, the quantity and nature of the pollution discharged to waters of the state, cumulative impacts of discharges covered by the general permit and other relevant factors; or (7) when the requirements of subsection (a) of this section are not met.... Any interested person or municipality may petition the commissioner to take action under this subsection.

³ The public comment for Candlewood Solar's January 2, 2109 registration was fifteen days, or from January 2, 2019 to January 17, 2019.

ruling” an agency must take one of five specified options.⁴ The last option under section 4-176(e), and the one I have decided to take in this case, is to decide not to issue a declaratory ruling and state the reasons for my action.

On March 14, 2019, the Department rejected the January 2, 2019 registration submitted by Candlewood Solar seeking coverage under the General Permit. (Copy attached). As such, there is no longer a registration pending with the Department. There being no registration, there is no reason to extend the public comment period regarding this registration. As such, I am deciding not to issue a ruling regarding that portion of the Petition seeking an extension to the public comment period for Candlewood Solar’s registration.

I am also, in this declaratory ruling proceeding, declining to exercise my authority to require that Candlewood Solar obtain an individual discharge permit for the Project, although not for any of the reasons cited in Candlewood Solar’s objections.⁵ I recognize that with the

⁴ Conn. Gen. Stat. § 4-176(e) provides that:

Within sixty days after receipt of a petition for a declaratory ruling, an agency in writing shall: (1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

The Department’s Rules of Practice also require compliance with section 4-176(e), see R.C.S.A. § 22a-3a-4(c)(3).

⁵ Candlewood Solar claims that the Petition is premature since its registration is still pending. I do not agree. The first sentence of section 22a-430b(c) states that “[s]ubsequent to the issuance of a general permit, the commissioner may require a person or municipality initiating, creating, originating or maintaining any discharge which is or may be authorized by a general permit to obtain an individual permit pursuant to section 22a-430....” (Italics added for emphasis). The language and plain meaning of this statute authorize me to require an individual permit anytime after the General Permit was issued, which in this case is October 1, 2018. See Conn. Gen. Stat. § 1-2z. Candlewood Solar’s claim confuses the submission of a registration with the issuance of a General Permit. Section 22a-430b(c) does not mention and does not require that I wait until a registration has been acted upon before I can require an individual permit. Indeed, provided a general permit has been issued, section 22a-430b(c) allows me to require an individual permit before or after a registration has been submitted. I can also require an individual permit even when a general permit does not require the submission of a registration. In short, I conclude that under Conn. Gen. Stat. § 22a-430b(c), as long as a general permit has been issued, I may require that an individual permit be

rejection of Candlewood Solar's registration, nothing prevents Candlewood Solar from resubmitting a revised registration seeking coverage under the General Permit. Nevertheless, with the rejection of Candlewood Solar's registration, there is no longer anything pending before the Department and it remains unclear, especially given the substantial nature and extent of the deficiencies in the last registration it submitted, if Candlewood Solar will make any resubmission – either in the form of a registration or an application for individual permit. Moreover, the Petitioner is seeking a hearing regarding the exercise of my authority under Conn. Gen. Stat. § 22a-430b(c), yet nothing in section 22a-430b(c) would require that I hold a hearing to exercise the discretion afforded by that statute. I am reluctant to expend limited Department resources on a hearing, especially when section 22a-430b(c) does not require a hearing and when it is not clear whether Candlewood Solar will even submit a revised registration or an application for an individual permit.

Having so concluded, I also want to make unmistakably clear that my decision in this matter does not, and is not intended to, foreclose the possibility that I may indeed exercise my authority under Conn. Gen. Stat. § 22a-430b(c) and require that Candlewood Solar obtain an individual discharge permit for the Project. I remain concerned about a number of the issues raised by the Petitioner and Rescue Candlewood Mountain. I have decided, however, not to exercise this authority in this context, at this time.

obtained, even if a registration is not required, a registration has been submitted, a registration is awaiting approval, or a registration has been approved.

Finally, given my decision not to issue the rulings requested in the Petition and the rejection of Candlewood Solar's registration, there is no longer any proceeding into which the Petitioner or Rescue Candlewood Mountain can intervene.⁶ As such, I am denying the Petitioner's and Rescue Candlewood Mountain's request for party or intervenor status.

D. CONCLUSION. For the reasons noted above, I have decided not to issue the declaratory rulings requested by the Petitioner and am denying the Petitioner's and Rescue Candlewood Mountain's request for party or intervenor status.



Katherine S. Dykes
Commissioner of Energy and Environmental
Protection

⁶ Candlewood Solar had challenged the adequacy of the affidavits submitted by the Petitioner and Rescue Candlewood Mountain regarding intervention under Conn. Gen. Stat. § 22a-19. Given my decision in this matter any ruling on this issue is unnecessary.

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