IN THE MATTER OF THE NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C. 17 – APPLICATION FOR CERTIFICATION OF SOLAR FACILITY AS ELIGIBLE FOR TRECS PURSUANT TO SUBSECTION(T) OF THE SOLAR ACT OF 2012 – REEDER PROPERTY SOLAR FARM, LLC, BLOCK 7, LOT 11	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003975-23T4 **CIVIL ACTION** ON APPEAL FROM FINAL DECISION OF NEW JERSEY BOARD OF PUBLIC UTILITIES BPU DOCKET NO: QO21081095

APPELLANT'S BRIEF IN SUPPORT OF APPEAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' DECISION

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PRELIMINARY STATEMENT

This appeal is taken based upon the denial by the New Jersey Board of Public Utilities ("BPU" or "Board") to grant approval for a solar facility to be deemed eligible to receive Transitional Renewable Energy Certificates ("TRECs") in conformity with the New Jerey Solar Act, N.J.S.A. 48:3-87(t) based upon a claim that the prosed site – a brownfield – is ineligible as it was, at one time, assessed as farmland. The Board's decision, however, fails to accurately understand the Solar Act, misunderstands and misapplies the restrictions imposed by the Solar Act at its initiation, provides a violation of the Metromedia rulemaking requirements, and failed to provide a response to the Appellant in a timely manner. Each of these would be sufficient for reversal; all of them combined essentially demand it.

The Project in question was to be built upon a brownfield that had been inappropriately designated as farmland prior to the submission. The Appellant rectified this misapplication, returned all state funds received, and clearly indicated the nature of the property to show the significance of the brownfield designation. The Board refused to consider this.

Likewise, the Board refused to consider that the statutory obligations for approval under subsection (t) of the Solar Act, which applies to brownfields,

does not pull in the requirements of subsection (s) of the Solar Act, which was designed and implemented to ensure that the development of solar at the time of the Act's approval did not use significant amounts of farmland. The Board's decision to graft these subsection (s) requirements into subsection (t) is not just in violation of the statutory language, it creates the very difficulty seen in this case. Under the Board's reading, a property designated as farmland during a specific set of dates is, now and forever, not a brownfield no matter what happens on that property. This is nonsensical, and runs counter to the Solar Act, the State's Energy Master Plan, good governance, and the push to use underutilized property for a higher and best use than simply remaining fallow.

When all is considered, the Board's decision to look at the (incorrect and nonexistent version) express language rather than the clear intent of a statutory scheme is in violation of the law. Had the Board conducted the legally required rulemaking to impose this regime, the industry would have pointed out the misunderstanding; in the absence of a rulemaking in conformity with the State's Administrative Procedure Act, the Board's resulting unofficial rule unfortunately fails to provide the required level of conformity to the Solar Act to allow it to stand.

For this reason and others, the Appellant calls upon the Court to reverse the decision of the Board and to direct the Board to consider the solar project application in light of the express requirements and obligations of subsection (t) of the Solar Act.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

On June 27, 2024, the Board adopted I/M/O the New Jersey Solar Transition Pursuant to P.L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection(t) of the Solar Act of 2012 – Reeder Property Solar Farm, LLC, Block 7, Lot 11, Order, New Jersey Board of Public Utilities, Docket No. QO21081095, dated June 27, 2024 (001a)[2] (the "Denial Order"), denying Reeder Property Solar Farm, LLC ("CEP's") application ("Application") for conditional certification pursuant to subsection (t) ("subsection (t)") of the Solar Act of 2012, L. 2012, c. 24, codified at N.J.S.A. 48:3-51 et seq., with subsection (t) appearing at N.J.S.A. 48:3-87(t) ("Solar Act").

The Application involved a proposed solar development on an approximately 33.18-acre portion of a roughly 48.08-acre total property located along Reeder Road in Harmony Township, Warren County, New Jersey ("Project Site"). The Project Site is a portion of property formally designated on the Harmony Township tax map at Lot 7, Block 11. CEP is the ground tenant of

[1] Because of they are inextricably intertwined, Appellant combined the Statement of Facts and Procedural History into one statement for better clarity and for the court's convenience.

[2] References to Appellant's Appendix are in the form of XXXa.

the Project Site. CEP proposed to develop the Project Site with a solar power system consisting of a 15.2832 Megawatt ("MWdc") solar facility (the "Project"). CEP asserts that the Project Site is unquestionably a "brownfield" for purposes of the Solar Act.

The Solar Act itself was signed into law on July 23, 2012 and, at subsection (t), the Solar Act directs the Board to "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 [New Jersey Department of Environmental Protection ("NJDEP")], as being located 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 definition of "brownfield," for purposes of subsection (t), 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. This statutory definition of "brownfield" requires satisfaction of three prongs: 1. a former or current commercial or industrial site; 2. that is currently vacant or underutilized; and 3. on which there has been, or is suspected to have been, a discharge of a contaminant. Ibid. This definition is identical to the one promulgated by the Board in its regulations. N.J.A.C. 14:8-1.2 ("'Brownfield'

means 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.").

In the Denial Order, the Board notes that the NJDEP determined that the Project Site "constituted farmland under the Solar Act" and therefore "does not constitute a 'brownfield.'" Denial Order, at 6 (006a). In that Denial Order, the BPU admits that "the issue presented to the NJDEP was whether the proposed solar electric power generation facility project is located on a 'brownfield.'" Ibid. The NJDEP, however, never reached the issue presented by the BPU because the NJDEP instead made a determination that the Project Site was "farmland assessed" between 2002 and 2012 and, based upon that conclusion, appears to have conducted no further analysis. Ibid. This approach ignored the underlying reality that a property having been farmland assessed during the years of 2002 to 2012 does not define the reality of if the property is or is not a "brownfield" pursuant to statutory definition. Whether the Project Site is a "brownfield" is determined by examining the factors in the definition of "brownfield" set forth in N.J.S.A. 48:3-51 – a former or current commercial or industrial site that is currently vacant or underutilized; and on which there has been, or is suspected to have been, a discharge of a contaminant – and deciding

if the property meets that test. As the Denial Order makes clear, NJDEP simply identified the prior farmland assessment and conducted no further review as to the brownfield status.

In the NJDEP memo, attached to the Denial Order, the NJDEP states:

> Pursuant to the Solar Act of 2012 "Projects that are 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 (10) year period prior to July 24, 2012 will not be eligible for designation as being located on a brownfield, an area of historic fill, or a properly closed sanitary landfill facility for purposes of qualifying for SRECs under Subsection t." For this reason, the 33.18 acres requested does not constitute a "brownfield", and does not qualify for SRECs under Subsection t.
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> [New Jersey Department of Environmental Protection, Division of Climate, Clean Energy and Radiation

Protection, Memorandum, dated February 7, 2022, attached to the Denial Order (016a).]

This is not factually correct – the quoted language is nowhere to be found in the Solar Act, as it is not statutory language. See N.J.S.A. 48:3-87(t). The language instead comes from a prior Board interpretation and from the BPU's Subsection (t) application. Denial Order, at 6 (006a). This fundamental misunderstanding of the obligation's source, coupled with the Board's deliberate exclusion of the mistake from the language quoted in the Board's Order, provides a moment's pause in the review and decision-making process at play in this matter.

In the Application, CEP made clear that, based upon the plain text of the Solar Act itself, the Project Site qualified as a "brownfield." N.J.S.A. 48:3-51. With respect to the first prong of the statutory and regulatory definition, the Project Site was, from the 1970s until late 1980s, operated as an industrial sand and gravel mine and resource extraction operation. The Project Site qualifies as a "former industrial site." With respect to the second prong, following the Project Site's industrial use, the mining pit that was created by the resource extraction operation was filled with material of an unknown source. The grade of the pit was restored, and, despite local zoning allowing for a multitude of permitted uses, the Project Site has never been developed and remains vacant.

From a planning perspective, the Project Site is considered "underutilized," as it has never been developed for any use following the cessation of resource extraction operations.

Finally, with respect to the third prong of the "brownfield" definition, there is, in fact, a suspected discharge of a contaminant at the Project Site. As noted in the Denial Order, the presence of contamination at the Property, associated with the former industrial use of the site, has been reported to NJDEP by CEP's Licensed Site Remediation Professional ("LSRP") and documented as Program Interest No. 939124 and Activity LSR210001. Denial Order, at 5 (005a). While the Board observed that the "LSRP has not yet completed or submitted a report on the alleged contamination," the submission of a report is not the relevant trigger for purposes of the "brownfield" definition. Ibid. CEP's LSRP conducted preliminary sampling at the Project Site and made a determination that certain compounds in the soil of the area of the former pit exceed NJDEP permitted levels. CEP's LSRP not only shows a suspected discharge, it confirms one. That discharge will ultimately need to be remediated through the NJDEP and LSRP process – and such an NJDEP case has been created. The Project Site has, at a minimum, a suspected contaminant discharge.

As such, the three prongs necessary for NJDEP to find the Project Site to be a brownfield pursuant to statute and regulation have been met. N.J.S.A. 48:3-51.

With the above, the Project Site is, plainly, a "former or current commercial or industrial site that is currently vacant or underutilized, on which there has been, or is suspected to have been, a discharge of a contaminant." N.J.S.A. 48:3-51. The Project Site qualifies as a "brownfield" for purposes of subsection (t). On this point, the NJDEP Memo's failure to address the proper question is simply wrong. Despite this, the Board's Denial Order takes the NJDEP statement at face value and accepts that, because the Project Site was assessed as farmland within the 10-year period prior to July 24, 2012, it does not qualify as a "brownfield" under subsection (t). Denial Order, at 7 (007a).

The Denial Order then acknowledges that the Applicant made clear that the farmland assessment was mistaken for at least some period of time between 2002 and 2021, id. at 6 (006a), but that the NJDEP reviewed the tax records and aerial photography to determine that some farming took place, id. at 7 (007a). Despite this claim, the Applicant provided information showing that the farmland assessment was in error, and that the Mayor and Township acknowledged this error and adopted a resolution accepting that the Project Site should not have been assessed as farmland as it did not "qualify." Id. at 6 (006a).

The Township then directed the municipal tax assessor to correct the Township tax records, and authorized acceptance of reimbursement in the amount of $194,624.76 for the "benefits" received based upon the mistaken tax assessment status. Ibid. As such, at the time of the Petition, the Project Site was correctly assessed as commercial and industrial property, and the benefits received for the farmland assessment had already been returned through the reimbursement value. Ibid. Accordingly, when the Application was submitted, the Project Site was not assessed as farmland, had received no benefit from having been previously assessed as farmland, and was once again a former commercial site that is currently vacant or underutilized and upon which a contaminant had been discharged, in full compliance with the statutory and regulatory definition of "brownfield."

Despite all of the above, the Board refused to consider the Project Site as it existed at the time of the Application, and accepted the NJDEP determination that the property must be identified as farmland under the Solar Act. Id. at 10-13 (010a-013a). With that, the Board denied the application. Id. at 13 (013a).

This timely notice of appeal followed.

LEGAL ARGUMENT

THE BPU'S DECISION TO DENY THE APPLICATION IS ARBITRARY AND CAPRICIOUS (Order, at pp. 10-13)

A. The BPU's decision-making process is subject to judicial review for arbitrary and capricious failures.

It is axiomatic that the decisions, procedures, and actions of State administrative agencies, such as the BPU, are subject to "judicial review and supervision to assure fairness in the administrative process." Hospital Center at Orange. Guhl, 331 N.J. Super. 322, 333 (App. Div. 2000); In re Arndt, 67 N.J. 432, 436 (1975). Likewise, the Court is not bound by an agency's determination of a matter, but instead must ensure that the decision was founded upon sufficient credible evidence and appropriate policy considerations. Mayflower Securities Co., Inc. v. Bureau of Securities, 64 N.J. 85, 92-93 (1973). While an agency may have been granted the authority to implement a legislative policy based upon its expertise, that agency must actually implement the specific legislative policy provided by the Legislature. The grant of authority is directly tied to this obligation to implement the specific and explicit legislative policy provided by statute. Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985), quoting Gloucester County Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384, 390 (1983) ("the grant of authority to an administrative agency is to be liberally

construed to **enable the agency to accomplish the Legislature's goals**." (Emphasis added.) As such, the court must overturn those administrative actions and decisions that are "arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies." In re Failure by the Department of Banking and Insurance to Transmit a Proposed Dental Fee Schedule to OAL, 336 N.J. Super. 253, 263 (App. Div. 2001) (citing Campbell v. Dept. of Civil Serv., 39 N.J. 556, 562 (1963)); In re Herrmann, 192 N.J. 19, 27-28 (2007) ("An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record.").

Likewise, a reviewing court is "not bound by an unreasonable or mistaken interpretation of [a statutory] scheme, particularly one that is contrary to legislative objectives." McClain v. Bd. of Rev., 237 N.J. 445, 456 (2019). Even more significantly, a reviewing court must have a reasoned and explained analysis to review. See Matter of Thomas Orban/Square Properties, LLC, 461 N.J. Super. 57, 73 (App. Div. 2019) (the court "has no capacity to review at all unless there is some kind of reasonable factual record developed by the administrative agency and the agency has stated its reasons grounded in that

record for its action." (quoting In re Freshwater Wetlands Gen. Permits, 372 N.J. Super. 578, 595 (App. Div. 2004))).

This court, in reviewing an administrative action of the Board, is obligated to consider three overarching issues: "(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (quoting In re Stallworth, 208 N.J. 182, 194 (2011)). See In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 383 (2013); Mazza v. Bd. of Trs., Police & Firemen's Ret. Sys., 143 N.J. 22, 25 (1995). Of significance is the clear understanding that "[a]lthough administrative agencies are entitled to discretion in making decisions, that discretion is not unbounded and must be exercised in a manner that will facilitate judicial review." In re Vey, 124 N.J. 534, 543-44 (1991). As will be discussed, the Board's decision-making process in this matter is mistaken; in violation of statutory requirements; arbitrary, capricious, and unreasonable; and lacking support in the record.

B. The BPU's decision to deny the Project runs afoul of prior approvals in similarly-situated decisions.

The Board has previously approved at least one subsection (t) application where the subject property was mistakenly farmland assessed for a period of time, but was, at the time of application, a "brownfield." This result, in I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; I/M/O the Solar Transition Pursuant to L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Soalr Act of 2012; Holland Solar Farm, LLC / Hughesville Mill – Application for Subsection (t), Block 2, Lot 1.02, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, QO19010068, and QO20050345, dated March 3, 2021 (125a) ("Holland Order"), is inconsistent with the result in this case. In the current matter, although the Project Site was mistakenly farmland assessed for a period of time, the Board denied the Application, notwithstanding that the Project Site is, today, a "brownfield" pursuant to N.J.S.A. 48:3-51. In Holland, the property was mistakenly assessed as farmland in the **seven years immediately preceding the subsection (t) approval**, yet the Board approved the application because the property was not farmland assessed in the 12 years preceding the seven years in which it was farmland assessed. Holland Order, at 9 (134a). The logic of that decision is as confusing to understand as it is to set forth here.

In Holland, the Board considered the subsection (t) application of Holland Solar Farm, LLC for a solar project developed on property located in Holland Township, New Jersey. Holland Order, at 1 (125a). The property that was the subject of the Holland application was an approximately 23.5-acre portion of a larger site that had been in operation as a paper mill from 1893 until 2003. Id. at 5 (130a). An 80-acre portion of the overall site, known as "Area of Concern K" had been utilized as spray fields for processing wastewater associated with the mill operations. Ibid.

In considering the Holland application, NJDEP determined that the entirety of Area of Concern K constituted a "brownfield." Id. at 6 (131a). The solar facility was proposed to be located on a portion of that "brownfield." Ibid.. At the same time, the Board determined that from 2014 through 2020, the "brownfield" portion of the property had been assessed as "farmland" by the Holland Township tax assessor. Ibid.. The Board nonetheless recommended approval of the site as a brownfield predicated upon a refund of the tax benefits and a reclassification of the site. Id. at 7 (132a).

The Board approved the application in Holland and found the facts of Holland distinguishable from those in the Board's prior decision in In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J. Super. 73 (App.

Div. 2015) (hereinafter, "Millenium"). Millenium was a situation where the applicant was seeking subsection (t) approval for an apple orchard that had soil contaminated by arsenic and lead, but NJDEP determined that contamination had not occurred because the lead and arsenic where not present because of a discharge. Id. at 8. Therefore, the land was not a brownfield by definition. Ibid.

One key basis for distinguishing between Holland and Millenium was that in Holland, the NJDEP determined that the 23.5 acre subset of property proposed for solar development constituted a "brownfield" for purposes of N.J.S.A. 48:3-51, thus making it eligible for certification under subsection (t). This decision was made notwithstanding that the property was explicitly farmland assessed (albeit mistakenly) at the time of the Holland application. Despite this actual designation as farmland, NJDEP correctly, and, pursuant to the express language of subsection (t), determined that the property was a "brownfield" **because of the actual physical status of the property at that time.** That is the correct analysis under subsection (t) and the correct result in light of the Board's express desire – and the court's approval of the policy determination – to limit the development of solar on farmland and instead encourage development on brownfields. As the court explicitly noted:

> One goal of the EMP, as reflected in the Solar Act, is to encourage the construction of solar energy facilities on polluted former commercial and industrial land, which is not readily usable for general commercial or residential purposes. Thus, subsection (t) makes it relatively easy to obtain financial subsidies for those projects. On the other hand, as the Board's decision noted, in requiring farmland-sited solar projects to satisfy a higher standard, the Legislature also acted consistent with the EMP, which specifically discourages the use of agricultural land for solar projects. Those legislative purposes were confirmed in a press release issued by the Governor's Office on the day the Act was signed. (citations omitted).
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> [Millenium, 443 N.J. Super. at 79.]

It is unclear why, in this current matter, the NJDEP does not undertake the same analysis using the same guiding principles.

The Board discussed its concerns with the subsection (s) definition of farmland assessment of the property during the years of 2014 to 2020. In

Holland, the Board noted that it was "troubled by the idea that the property owner benefited from tax avoidance by having its property taxed as 'qualified farmland,' and will now receive additional benefits from the installation of a solar facility supported by an incentive designed for compromised or marginal land." Holland, at 7 (132a). Accordingly, the Board ordered the Holland applicant to pay Holland Township back taxes in an "amount equal to the difference in property tax payable for 'Industrial' versus '3B – Qualified Farm Property'" for the area of the property that would be the site of the solar farm. Ibid.

This approach in the Holland matter makes clear two Board concerns, and shows how the Board was able to deal with both of those issues. The first is that the Board does not want to approve any grid-supply solar project for subsection (t) certification if that project will be located on what is actually farmland. That is clearly supported by the Solar Act, the related legislative history, and 2011 EMP. In the current matter, as in Holland, and unlike in Millenium, the Property is not farmland – it is a "brownfield." In Millenium, the applicant sought subsection (t) certification for a property that was actually farmland – it did not meet the definition of "brownfield" in N.J.S.A. 48:3-51. The result in Holland, and as should be in this matter, would not be inconsistent with the Millenium

decision or thought process – the Board would be granting subsection (t) certification to a property that is a "brownfield."

Second, the Board is clearly concerned with property owners that obtain the benefit of farmland assessment and then the additional benefit of rate-payer funded subsidies. Here, CEP has already addressed this concern, by refunding the Township of Harmony $194,624.76, which the Township determined was the difference in taxes had the Property been appropriately assessed during the relevant time period. The Township of Harmony passed a resolution recognizing the mistaken tax classification and accepting the payment by CEP. No appeal, objection, or other action was taken upon this Ordinance. Unlike in Holland, where the tax payback was specifically made a condition of the subsection (t) approval, Holland, at 9 (134a), the tax payment here was made contemporaneously with the Application. And, yet, CEP is somehow penalized for **pre-emptively** addressing one of the Board's primary concerns with approving subsection (t) projects on land that was formerly, or mistakenly, farmland. It seems incongruous that, if CEP had waited for the Board to make the tax payback a condition of approval, like it did in Holland, the Board might well have reached a different result. That seems arbitrary at a minimum.

In fairness, the Board does attempt to distinguish Holland in the Denial Order. This is, however, a distinction without a difference. The Board indicates that, in Holland, the NJDEP determined that the property, although it had been farmland assessed in the year prior to the subsection (t) approval, constituted a "brownfield." The Board then states that here, in this matter, and unlike Holland, the Property was not determined to be a "brownfield." Yet the Board does not address the basic and elemental question: why is a property that is deemed a farmland more recently acceptable for brownfield designation while a property that was a farmland further back in time is not deemed a brownfield? The answer appears to be "because we said so." This is, hopefully, an error on the part of the Board.

The reality is that both the Project Site and the property in Holland were and are "brownfields" at the time of application. There is no distinction there. When juxtaposed with this case, the Holland case illustrates the absurdity of the Board's application of farmland designation criteria to subsection (t) projects. In Holland, the Board approved a subsection (t) project that is sited on land that was farmland assessed closer in time to the subsection (t) approval than with respect to the Project Site at issue in the appeal. If we take the Board at face value that the purpose of these requirements is to ensure that farmland is not

used and that rebates are not provided on top of previous farmland assessment funds, then Holland and this case differ only in the arbitrary dates picked. This seems to be nonsensical.

This is the true absurdity created by the Board's hopefully mistaken misapplication of the process. One property that was taxed under farmland status between 2002 to 2012 should not be rejected while a different property taxed under the same farmland status but in more recent years is approved. How is this possibly reasonable, rational, and appropriate? CEP asks only to be treated in a similar manner as other similarly-situated entities. Anything less is arbitrary, capricious, and should be reversed.

C. The Board's imposition of the requirement of the prior farmland assessment timeline is in violation of the intent and language of both subsection (s) and subsection (t) of the Solar Act.

The Board's imposition of the timeline and dates for the farmland assessment consideration appears to be predicated upon the statements issues by the Board in contradiction to the rulemaking requirements that an agency such as the Board is required to function under.

Subsection (s) of the Solar Act provides the farmland designation language, and notes that any grid-supply solar project 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] at any time within the 10-year period prior to [July 23, 2012]" is not eligible for Board designation as "connected to the distribution system" unless it meets very specific requirements, including that it received a PJM System Impact Study prior to June 30, 2011. N.J.S.A. 48:3-87(s). It is important to remember that this language was drafted for the 2012 Solar Act – that is, the dates chosen were designed to ensure that no property having been designated farmland in the years leading up to the Act would be considered for unavailable for solar development. See P.L. 2012, C. 24, noting an effective date of July 23, 2012.

Nothing in the express language of the Solar Act can be reasonably read to impose the subsection (s) "farmland lookback" requirement on projects seeking eligibility under subsection (t). Subsection (t) directs the Board to create a certification process for projects that meet one of three specific statutory definitions: "brownfield," "site of historic fill," or "properly closed sanitary landfill." N.J.S.A. 48:3-87(t). Subsection (t) requires only that the Board look at the current condition of the property for which an applicant seeks certification. The legislature did not include any language in subsection (t) relating back to subsection (s), or any indication that a "brownfield," "site of historic fill," or "properly closed sanitary landfill" would not be eligible

pursuant to subsection (t) if it was farmland assessed during 2002 to 2012. This is rational and logical, because subsection (t), when it was adopted, was meant to apply prospectively, whereas subsection (s) was meant to apply retroactively. Compare N.J.S.A. 48:3-87(s) with N.J.S.A. 48:3-87(t).

Prior to the adoption of the Solar Act, many developers had secured approvals for the development of large-scale grid-supply solar farms on farmland. During this period, there was no prohibition against obtaining state solar incentives for large grid-supply projects developed on farmland. In fact, such solar projects were considered an "inherently beneficial use" under the Municipal Land Use Law, which facilitated developers' effort to secure land use approvals for large-scale facilities, even if the properties proposed for development were not expressly zoned for solar facilities as a permitted use. N.J.S.A. 40:55D-4. This led to a proliferation of grid-supply facilities located on farmland and a massive pipeline of facilities in the PJM interconnection queue waiting to be constructed. This further resulted in an oversupply of SRECs, which led to steadily decreasing SREC values and the ultimate crash of the SREC market.

The 2011 Energy Master Plan ("EMP"), which was relied on heavily in creating the Solar Act, stated that "the development of solar projects should not

impact the preservation of open space and farmland." EMP at 7. As stated in the EMP, the "Christie Administration d[id] not support the use of ratepayer subsidies to turn productive farmland into grid-supply solar facilities." Ibid. Stated differently, according to the EMP, the State "should not subsidize the loss of productive farmland" in favor of utility-scale solar arrays. Ibid. The state was clearly concerned with limiting the development of solar arrays on property that was truly farmland. There was no such concern with respect to properties that are actually "brownfields."

The legislature adopted the Solar Act largely in response to the EMP. Millenium, 443 N.J. Super. at 79. The Solar Act contained a clear mechanism – embodied in subsections (s) and (q) – whose purpose was to limit further solar development on farmland. N.J.S.A. 48:3-87(s) and (q). Thus, solar projects proposed to be located on farmland could only be certified as "connected to the distribution system" if they met certain restrictive prerequisites. N.J.S.A. 48:3-87(s).

At the same time, the Solar Act sought to implement the goals of the 2011 EMP to shift large-scale solar development away from farmland and onto "brownfields," "properly closed sanitary landfills," and "sites of historic fill," which were considered to be contaminated properties that had no other potential

productive use. Millenium, 443 N.J. Super. at 79. This attempt to shift solar from farmland to brownfield is why subsection (t) has so few prerequisites to certification, unlike subsections (s) and (q). Under subsection (t), all that is required is that the facility be located on a "brownfield," "properly closed sanitary landfill," or "site of historic fill." N.J.S.A. 48:3-87(t). Subsection (t) does not require an investigation into the historical status of the property, or a determination as to the property's historic tax classifications. All that matters for purposes of subsection (t) is the current use of the property as it exists when the solar incentives are sought.

The purpose of subsection (s) is not to limit the application of subsection (t). A plain reading of subsection (t) suggests that the legislature intended to incent the redevelopment of contaminated sites. By reading in subsection (s) requirements into subsection (t), the Board is, perhaps inadvertently, excluding an entire category of properties that would otherwise be eligible for subsection (t), or, worse, that would become eligible for subsection (t) over time. It is not reasonable to suggest that the legislature intended to fix contaminated properties' status at a point in time by reference to their farmland assessment status in what amounts to a completely arbitrary time period. Why would the

legislature do this, when the express purpose of subsection (t) is to encourage the redevelopment of contaminated sites?

When subsection (t) was first enacted into law, it is unlikely that the legislature contemplated that its scope and purpose could be so easily be frustrated. There are doubtlessly countless scenarios in which a property, once assessed as farmland could, years later, be contaminated, and thereby become eligible for certification under subsection (t). Applying the Board's logic to its end conclusion would support an interpretation that the Solar Act was intended to create an incentive regime in which the classifications of properties are fixed in time. Under such an interpretation, changes with the passage of time to the character, environmental status, or usage of a property once deemed farmland would be irrelevant for purposes of certification under subsection (t). This cannot be the case. Apart from representing an absurd and tortured reading of the statute, as applied it would stand in stark contrast to the legislative intent and needlessly frustrate the goals of the EMP to incentivize solar development to reduce harmful greenhouse gas emissions. Moreover, no countervailing policy interest would justify allowing an otherwise unproductive, tainted property to remain a continuing blight on the towns they occupy.

D. The Board's imposition of the requirement of the prior farmland assessment timeline is in violation of the intent and language of the Solar Act.

The Board's imposition of the subsection (s) "farmland lookback" requirement to subsection (t) projects strains logic, ignores the clear legislative intent of the Solar Act, and constitutes improper rulemaking in violation of Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1983). It is possible that the Board did not mean to create the unintended consequences that have followed from its post-Millenium line of cases. In any event, the Denial Order should be reversed in light of the fact that imposing the "farmland lookback" requirement makes no practical sense when considering a "brownfield" solar project.

In 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; 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, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, EO12090862V, and EO131009V, dated January 24, 2013, (137a) (hereinafter, "The January 24, 2013, Order"), the

Board set forth the procedures that an applicant would need to follow to submit an application in subsection (t), in consultation with NJDEP, as directed by the Solar Act. Id. at 10 (147a). At no point in the January 24, 2013, Order did the Board indicate that subsection (s) criteria would apply to projects seeking certification under subsection (t). However, shortly after the January 24, 2013, Order, the Board decided the Millenium I and Millenium II decisions. 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; Millenium Land Development, LLC (Love Lane), Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, EO12090862V, and EO13050429V, dated July 19, 2013 (154a) (hereinafter "Millenium I"), and 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; Millenium Land Development, LLC (Love Lane) – Motion for Reconsideration, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, EO12090862V, and EO13050429V, dated May 21, 2014 (163a) (hereinafter "Millenium II").

In Millenium II, for the first time, over a year after the Board had already established the procedures for applying for subsection (t) certification, the Board, in an Order denying reconsideration to the Millenium applicant, without rulemaking, created an additional requirement that would apply prospectively to all future subsection (t) applicants. In Millenium II, the Board added the requirement that no project, regardless of whether it was located on a "brownfield," "site of historic fill," or "properly closed sanitary landfill" would be certified under subsection (t) if the property that was the subject of the application had been farmland assessed in the 10 years preceding the adoption of the Solar Act. Millenium II, at 10 (173a).

In Millenium I, the developer sought certification pursuant to subsection (t) to site a solar facility on land that had most recently been an apple orchard. The application was denied because the NJDEP found no evidence that the property met the statutory definition of "brownfield." The Board stated that "[although r]eview of the records of this location show elevated levels of arsenic and lead, [these] contaminants are not presents on the site as a result of a discharge of a contaminant and, therefore, the site does not meet the definition of a 'brownfield.'" Millenium I, at 4-5 (158a-159a).

That is significant, as in Millenium I, the Board denied the application because the NJDEP determined that the property that was subject to the application was not a "brownfield." In that case, the NJDEP did not determine that the property was ineligible because it had been farmland assessed between 2002 to 2012. Rather, the NJDEP did not even address that inquiry, at least initially. Simply put, there was nothing in the application to substantiate that the property was a "brownfield" for purposes of subsection (t). It is certainly true that if a property does not meet the threshold criteria for certification under subsection (t) – that is, it is not a landfill, brownfield, or site of historic fill – then it cannot qualify under subsection (t).

The Millenium I applicant then filed for reconsideration. In the Board Order denying reconsideration, Millenium II, the Board noted that "Millenium has provided no information pertaining to the current or former use of the site for commercial or industrial use." Millenium II, at 13 (176a). Further, the Board found that "[a]ny claim by Millenium that the site is a former or current commercial or industrial site is not supported by the record." Ibid. Once again, the Millenium applicant was unable to substantiate that the property that was the subject of that application was actually a "brownfield" pursuant to the statutory criteria. Id. at 12 (175a). However, in Millenium II, the Board, for the first time,

went further, by created the additional rule that not only must subsection (t) projects be located on land constituting a brownfield, site of historic fill, or properly closed sanitary landfill, but also, the land must not have been farmland assessed during the period from July 23, 2002 to July 23, 2012. Id. at 10 (173a). This was the first time that the Board had indicated that it would be applying the subsection (s) "farmland lookback" provision to subsection (t) projects. Perhaps that made sense in the context of the Millenium case, because the property at issue in Millenium had been previously reviewed by NJDEP and determined not to be a "brownfield." That property was truly "farmland."

CEP's questions whether the Board intended to create the situation that is has with its addition of this requirement in Millenium. Certainly, it is true that a farmland property that is not a "brownfield," or otherwise eligible under subsection (t), could not then seek certification under subsection (s) if it did not meet the requirements of subsection (s). But the Application, here, is different from the application in Millenium. In Millenium, the Board was confronted with a property that was not actually a "brownfield." Unlike here, however, in Millenium, the NJDEP made a determination with respect to the "brownfield" status of the property. It was not until after Millenium I, when the applicant filed

for reconsideration, that the Board directed the NJDEP to also look at the prior farmland assessment status of the property.

Perhaps the Board, at the time, was not considering the long-term impacts of applying the subsection (s) criteria to subsection (t) projects. But, as noted above, there are certainly instances where a property may have been farmland assessed in the early 2000s, only to later become a "brownfield" or, as seen both here and in Holland, circumstances where a property is mistakenly classified as farmland when it should not have been. To prohibit certification under subsection (t) for such a site does nothing to advance the purpose of the Solar Act. On the one hand, it does not allow the redevelopment of a truly contaminated site, which is the essential purpose of the Solar Act and subsection (t). Millenium, 443 N.J. Super. at 79. On the other hand, it does nothing to preserve farmland – all it does is preserve a "brownfield," and condemn it to the status quo. This does not seem to be a favorable result from a policy perspective and certainly could not have been intended by the drafters of the Solar Act.

The developer in Millenium appealed the Board's decision and the Appellate Division considered the matter in In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J. Super. 73 (App. Div. 2015) (hereinafter, "Millenium"). The Millenium court upheld the Board's determination. The

Board often cites the Appellate Division's decision in Millenium for the proposition that the Appellate Division has "upheld" the Board's application of subsection (s) criteria to subsection (t) projects. Holland, at 8 (133a). But that is too broad a reading of the Millenium decision.

In Millenium, the Appellate Division stated that a property cannot be considered for certification under subsection (t) when it is farmland. See Millenium, 443 N.J. Super. at 78. The Appellate Division went on to state that "farmland-based applications" are required to be submitted under subsection (s). CEP does not disagree. If the property is not a "brownfield" and is, in fact, "farmland," it cannot qualify for conditional certification under subsection (t). However, the Millenium court was not presented with an application like the Application at issue here. Here, the Property is a "brownfield." The question is whether a property that meets the definition of a "brownfield" in 2024 should be condemned to inutility because of the property's farmland assessment status more than a decade ago.

Post-Millenium, the Board, presumably emboldened by the Appellate Division's decision, created a new subsection (t) application that included "Minimum Qualification Requirements," including that the property subject to the application not have been farmland assessed between 2002 and 2012.

Additionally, the Board expanded the definition of "farmland" in N.J.A.C. 14:8-1.2 to include language that mirrors subsection (s). The result, based on several recently decided subsection (t) cases, including I/M/O the Implementation of L. 2012, C. 24, The Solar Act of 2012; I/M/O the Solar Transition Pursuant to P.L. 2018, C. 17; Esky Solar – Application for Solar Act Subsection (T), Block 57, Lot 9 (Partial), Lot 12, Lot 12.01 and Lot 13, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, QO19010068, and QO21081089, dated October 25, 2023 (178a); I/M/O the New Jersey Solar Transition Pursuant to P.L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Solar Act of 2102 – Miller Bros. Glassboro Boro SLF, Order, New Jersey Board of Public Utilities, Docket No. QO22060410, dated January 10, 2024 (189a); and I/M/O the New Jersey Solar Transition Pursuant to P.L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Solar Act of 2102 – Kober Solar Auto Parts, Inc., Order, New Jersey Board of Public Utilities, Docket No. QO21081098, dated June 27, 2024 (198a), is that the Board has denied applications, even where the property meets the threshold requirement of subsection (t), if the property was farmland assessed at any point between 2002 and 2012.

CEP submits that the Board's post-Millenium application of subsection (s) criteria to subsection (t) projects constitutes improper rulemaking. CEP suggests also, as noted above, that this may not have been the result intended by the Board when it created this new "rule" in Millenium. CEP urges the Court to consider the application of subsection (s) criteria to subsection (t) projects, since it creates a situation obviously not intended by the legislature and does nothing to advance the purpose of the Solar Act.

Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984), is the seminal case that informs determinations whether administrative decision-making should be deemed an administrative adjudication or a rulemaking. In Metromedia, the Supreme Court observed that the nature of a rule is its "widespread, continuing and prospective effect," and the intention that it be applied as a general standard with widespread coverage, and "not otherwise expressly authorized by or obviously inferable from the specific language of the enabling statute." Metromedia, 97 N.J. at 328-29.

In this regard, the Administrative Procedures Act defines a "rule" as "each agency statement of general applicability and continuing effect that implements or interprets law or policy". Ibid. Conversely, an "administrative adjudication"

involves the "resolution of the legal rights of individual parties to specific proceedings." N.J.S.A. 52:14B-2.

The Supreme Court has stated that "where the subject matter of the inquiry reaches concerns that transcend those of the individual litigants and implicate matters of general administrative policy, rulemaking procedures should be invoked:

> An agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group:
>
> (1) is intended to be applied generally and uniformly to all similarly situated persons;

> (2) is designed to operate only in future cases, that is prospectively;
>
> (3) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;
>
> (4) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Metromedia, 97 N.J. at 331-32.]

These relevant factors can determine, either singly or in combination, whether the essential agency action in a case must be rendered through rulemaking or adjudication. Ibid. All Metromedia factors do not need to be present to characterize agency action as a rulemaking, and the factors should not be merely tabulated but weighed. Id. at 332. The factors must be analyzed whenever there is a question as to the authority of an agency to act without

adhering to the formal rulemaking process found in the APA, i.e. by adopting orders, guidelines and protocols. Doe v. Poritz, 142 N.J. 1, 97 (1995). Metromedia requires a rulemaking where most, if not all, factors are present.

Perhaps the most critical Metromedia factor, and the one that should be entitled to the most weight, is that fact that nothing in the Solar Act itself can be reasonably read to apply subsection (s) farmland assessment criteria to subsection (t) projects. The Board has determined that no brownfield, landfill, or site of historic fill can be eligible for certification under subsection (t), notwithstanding the current status of the property, so long as the property was farmland assessed during what amounts to a completely arbitrary time period (July 23, 2002 to July 23, 2012). This time period is particularly arbitrary considering that the Board is ruling on these subsection (t) applications in 2024.

Nothing in the Solar Act suggests that this should be the case. At no point, in either the text of subsection (t) or the related definitions of "brownfield," "area of historic fill," or "properly closed sanitary landfill facility" set forth in N.J.S.A. 48:3-51 is there a reference to the prior "farmland" status of a property proposed for certification pursuant to subsection (t). Further, the Board's assignment of subsection (s) criteria to subsection (t) applications "reflects an administrative policy that (i) was not previously expressed in any official and

explicit agency determination, adjudication or rule" and "(ii) constitutes a material and significant change from a clear, past agency decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Metromedia, 97 N.J. at 331-32.

The January 24, 2013, Order, which was adopted immediately following the adoption of the Solar Act and set forth the original procedures determined by the Board and NJDEP to apply to subsection (t) projects states that: "To participate in the Certification Program, an applicant must first submit documentation that the proposed site is a brownfield, historic fill area, or landfill as defined by the Solar Act." January 24, 2013, Order, at 10 (147a). Again, the Solar Act contains no reference to the "farmland" status of such properties for purposes of subsection (t). With respect to "brownfields" the Solar Act only requires that the property be "any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been or is suspected to have been, a discharge of a contaminant." N.J.S.A. 48:3-51. The January 24, 2013, Order goes on to state that the NJDEP will review a proposed subsection (t) application, advise the Board of the remediation status, and recommend either a full or conditional certification." January 24, 2013, Order at 10 (147a).

At no point in the January 24, 2013, Order does the Board suggest that a project proposed to be sited on property that meets the definition of a "brownfield," would not be eligible under subsection (t) due to the farmland assessment status of the property at some arbitrary point in the past. The January 24, 2013, Order sets forth the process by which the Board will obtain NJDEP input for the certification of subsection (t) applications. Id. at 11 (148a). At no point in the January 24, 2013, Order is it indicated that the NJDEP will be asked to review the farmland assessment status of a proposed subsection (t) site during the arbitrary time period of July 23, 2002 to July 23, 2012. That is because it was obviously understood at that time that such an inquiry was not relevant for subsection (t) applications. Had it been intended to be relevant, it certainly would have been part of the procedures that the Board adopted for certifying subsection (t) projects.

Furthermore, the January 24, 2013, Order concludes by requiring the submittal to NJDEP of a map of the "portion of the relevant area which has been properly remediated or closed as well as a map of the area for which the applicant is seeking certification." January 24, 2013, Order, at 13 (150a). The January 24, 2013, Order does not require an applicant to include a map or any supporting documentation detailing what the land use or property status of the

subject property may have been during 2002 to 2012 or at any other time. Nor would there have been a legal basis for the Board to do so.

When the January 24, 2013, Order issued, the only information relevant to a subsection (t) application was whether the applicant could demonstrate that the property is a "brownfield," "properly closed sanitary landfill," or "site of historic fill" as defined by statute. As the Board points out in the Denial Order, shortly after the January 24, 2013, Order was adopted, the Board "distributed a [s]ubsection (t) application form, via the public renewable energy stakeholder email distribution list, and posted that form to the New Jersey Clean Energy Program and BPU websites." Denial Order, at 3 (003a).

Not surprisingly, the original "subsection (t)" application form did not use the word "farmland," at all. In fact, the original "subsection (t)" application includes the following "Minimum Qualification Requirements:"

> Only those applications for projects proposed to be located on sites meeting the definition of brownfield, and are of historic fill or a properly closed sanitary landfill facility, pursuant to N.J.S.A. 48:3-51, and which meet all the statutory requirements under N.J.S.A. 48:3-87(t)(1), will be considered as

> "connected to the distribution system" for purposes of SREC eligibility, pursuant to N.J.S.A. 48:3-87(t)(1).
>
> [Original Subsection (t) application (212a).]

To emphasize, the original application form, adopted shortly after the Board had created the process for certifying "subsection (t)" projects, without any reference to farmland assessment, included no reference to the prior farmland status of the property that was the subject of a subsection (t) application. According to the original form of application, the only relevant requirement is whether the property proposed for solar development meets the definition of "brownfield, area of historic fill, or properly closed sanitary landfill facility" and meets all relevant requirements of subsection (t).

Following the Millenium II case, the Board implemented a new subsection (t) application form that included the Minimum Qualification Requirements referenced in the Denial Order. This meant that, on a going forward basis, although it had not included this requirement before, every subsection (t) application form would now include an inquiry as to whether the "brownfield," "landfill," or "site of historic fill" had been farmland assessed between the arbitrary time period of July 23, 2002 to July 23, 2012. Also following Millenium II, in 2017, the Board amended its rules, specifically at N.J.A.C.

14:8-1.2 to add to the definition of "farmland." Originally, following the adoption of the Solar Act, the definition of "farmland" at N.J.A.C. 14:8-2.4(g) included "land actively devoted to agricultural or horticultural use that is valued, assessed and taxed pursuant to the 'Farmland Assessment Act of 1964.'" With the rule adoption in 2017 (See, R. 2017, d. 049), the Board amended that definition to include language from subsection (s) of the Solar Act so that the definition would read "means land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the [Farmland Assessment Act] at any time within the 10-year period prior to the effective date of the Solar Act." This definition must be read in parallel with the Board's rule at N.J.A.C. 14:8-2.4(g). That rule states that "[a]pplications for grid supply facilities on farmland shall be rejected."

The Board has noted this rule for the proposition that the Board's rules prohibit approval of applications under subsection (t), if the property that is the subject of the application meets the definition of "farmland" in N.J.A.C. 14:8-1.2, including stating as much in the Denial Order. Denial Order, at 11 (011a).

First and foremost, CEP disagrees that N.J.A.C. 14:8-2.4(g) prohibits the certification of subsection (t) facilities, since the initial part of that rule reads as follows: "A proposed grid supply facility that is not located on a brownfield,

properly closed sanitary landfill facility, or area of historic fill must satisfy the requirements of this subsection for the energy it generates to serve as the basis for creation of an SREC." N.J.A.C. 14:8-2.4(g) (emphasis added). Clearly, this rule is meant to apply to everything other than subsection (t) facilities. The language that states "[a]pplications for grid supply facilities on farmland shall be rejected" is simply a truism. If a property is farmland, the Board should reject the application in accordance with subsection (s). However, this rule has nothing to do with applications seeking certification under subsection (t).

It is only the Board's addition of language in the definitional section at N.J.A.C. 14:8-1.2 that brings this rule into play. The Board reads this as stating that "[a]pplications for grid supply facilities on farmland, including applications for grid-supply facilities located on brownfields, landfills, or sites of historic fill that were assessed as farmland between 2002 to 2012 shall be rejected." It is not the rule itself that is wrong, but the Board's application of the rule to limit the applicability of subsection (t) that is at issue.

If read reasonably, the rule at N.J.A.C. 14:8-2.4(g) clearly squares with the language of the Solar Act and the intent of the legislature. It means that applications for solar development on farmland that was assessed as such immediately preceding the Solar Act would be rejected and that going forward,

applications for actual farmland would be rejected. It also does nothing to limit what the legislature intended, that if a property were a brownfield, landfill, or site of historic fill, then it could be approved, regardless of its status between 2002 and 2012.

Again, it is not this rule, per se, that is problematic, but the Board's and, based on the NJDEP Memo, NJDEP's conflation of the concept that if contaminated site was farmland assessed between 2002 to 2012 it is somehow not a "brownfield" in 2024. That interpretation and the Board's application to prospective subsection (t) applications post-Millenium is what is so problematic in terms of Metromedia. Following Millenium, the Board abandoned its past agency determination and policy, as set forth in the January 24, 2013, Order, and imposed an additional requirement on all subsection (t) applications, without formal rulemaking.

With respect to a final Metromedia factor, it is clear, as evidenced by the Denial Order and other recent subsection (t) application denials referenced above, that the Board's application of subsection (s) criteria to subsection (t) applications was "intended to be applied generally and uniformly to all similarly situated persons" and that, following Millenium, the rule was intended to operate prospectively. The Board has just, within the past few months (in this matter and

Kober), denied two applications for certification under subsection (t) for properties that are clearly "brownfields" pursuant to the statutory definition. Separately, in Miller, the Board denied an application for development of a grid-supply solar array on a properly closed sanitary landfill, which had not been farmland assessed since 2015, because the property was farmland assessed between 2002 to 2012. Again - this is notwithstanding the fact that the property is actually a landfill.

Here we can see that the Board's imposition of subsection (s) criteria on subsection (t) projects, post-Millenium, implicates a number of Metromedia factors. The addition of this requirement – a requirement that is found nowhere in the Solar Act – constitutes rulemaking adverse to these types of applications without the formality of the APA rulemaking process. This is highly prejudicial to these applications and to the clear and express intent of the Solar Act. On this set of facts, the matter merits reconsideration.

E. Equity considerations merit reversal.

A surprisingly troubling aspect to the Denial Order is the timing. The Application was submitted to the Board on August 26, 2021. Denial Order, at 5 (005a). The Board admits that the Application was transmitted to the NJDEP on

December 1, 2021. Id. at 6 (006a). NJDEP issued an advisory memorandum only two months later, on February 7, 2022. Ibid.

Thus, the Board had the NJDEP's memorandum on February 7, 2022 and, presumably, based on the NJDEP's memorandum, knew exactly what it was going to do with the Application. That notwithstanding, the Board did nothing with the Application until issuing the Denial Order on June 27, 2024. That is a full two and a half years after the Board received the NJDEP memorandum.

In those two and a half years, CEP spent hundreds of thousands of dollars on engineering, environmental reviews, site plan approvals, interconnection studies, interconnection deposits, and the like. CEP did so at its own risk, to be sure, but certainly that extraordinary effort could have been avoided had the Board acted timely on the Application following receipt of the NJDEP memorandum. At a minimum, CEP would have expected that Staff would have contacted CEP to indicate that it had received the NJDEP memorandum, or give CEP an opportunity to react to the contents of the NJDEP memorandum.

This is type of "hide the ball" tactic is not what CEP, or any applicant, would expect of a governmental entity. Of course, the Board is familiar with the axiom that governmental entities are expected to "turn square corners" and act "scrupulously, correctly, efficiently, and honestly." F.M.C. Stores Co. v.

Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). Certainly, governmental entities are expected to act "in good faith and without ulterior motives." Ibid.

CEP does not understand the rationale for a two and a half year delay in acting on this Application, particularly if the Board's intention all along was to deny it and CEP believes that this alone merits reconsideration of the Application. For example, had the Board acted closer in time to its receipt of the NJDEP memorandum, CEP may have had the opportunity to "explore the possibility" of participation in the Competitive Solar Incentive Program, as suggested by Staff in the Denial Order.

CONCLUSION

For the foregoing reasons, and as discussed above, the decision on the part to the New Jersey Board of Public Utilities to deny the application of Reeder Property Solar Farm, LLC for approval of a landfill facility demands that this Court find the decision arbitrary, capacious, and thus the decision should be overturned and reversed.

Respectfully submitted,

GENOVA BURNS LLC

By: */s/ Kenneth J. Sheehan*
Kenneth J. Sheehan, Esq.
GENOVA BURNS, LLC
Attorneys for Appellant
Reeder Property Solar Farm, LLC

Dated: December 18, 2024

IN THE MATTER OF THE NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C. 17 – APPLICATION FOR CERTIFICATION OF SOLAR FACILITY AS ELIGIBLE FOR TRECS PURSUANT TO SUBSECTION(T) OF THE SOLAR ACT OF 2012 – REEDER PROPERTY SOLAR FARM LLC, BLOCK 7, LOT 11	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003975-23T4 CIVIL ACTION ON APPEAL FROM A FINAL AGENCY DECISION OF THE BOARD OF PUBLIC UTILITIES DOCKET NO. QO21081095

BRIEF ON BEHALF OF RESPONDENT, BOARD OF PUBLIC UTILITIES
Date Submitted: February 21, 2025

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

Appellant, Reeder Property Solar Farm, LLC ("CEP" or "Reeder"),[2] appeals a June 27, 2024[3] order of the New Jersey Board of Public Utilities ("Board") denying Reeder's application ("Application") for certification of a grid supply[4] solar facility as eligible for Transition Renewable Energy Credits ("TRECs") pursuant to N.J.S.A. 48:3-87(t) ("Subsection (t)") of the Solar Act of 2012, L. 2012, c. 24 ("Act"). (Pa1-15).[5] To qualify for the TREC subsidy, Reeder had to demonstrate that the proposed project site was a brownfield in accordance with Subsection (t), and that the site was not farmland during the period of 2002 to 2012 in accordance with N.J.S.A. 48:3-87(s) ("Subsection

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[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] Appellant CEP has another pending appeal under Docket Number A-000424-24 that has substantially similar facts and legal arguments to this appeal involving a Subsection (t) application.

[3] The order was issued June 27, 2024, with an effective date of July 5, 2024, the date on the notice of appeal.

[4] N.J.S.A. 48:3-51 defines grid supply solar facility as "a solar electric power generation facility that sells electricity at wholesale and is connected to the State's electric distribution or transmission systems."

[5] "Pa" refers to Reeder's appendix; "Pb" to Reeder's brief; and "Ra" to the Board's appendix.

(s)").[6] N.J.S.A. 48:3-87(s)-(t). After the statutorily required consultation with the New Jersey Department of Environmental Protection ("NJDEP"), the Board determined that Reeder's proposed project site was located on qualified farmland, and therefore ineligible for TREC's under the Act. (Pa12-13). This appeal followed.

New Jersey's Solar Program Prior to 2021

Prior to the passage of the Clean Energy Act,[7] the Board administered a program to incentivize solar development known as the Solar Renewable Energy Certificate ("SREC") program pursuant to the Act. (Pa3). The SREC program provided payment to solar energy generators in the form of SRECs, N.J.S.A. 48:3-51, and was the forerunner to the TREC program. (Pa4). The SREC program closed upon achieving a statutory threshold, and the Board created the TREC program as a transitionary solar incentive program while developing a new successor program dictated by the Legislature pursuant to N.J.A.C. 14:8-10.4. Ibid.

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[6] N.J.A.C. 14:8-1.2 defines farmland as "land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the 'Farmland Assessment Act of 1964,' N.J.S.A. 54:4-23.1 at any time within the 10-year period prior to the effective date of the Solar Act [L. 2012, c. 24]." ("qualified farmland") or ("Class 3B qualified farmland").

[7] L. 2018, c. 17.

The SREC program contained multiple subprograms to incentivize solar development throughout the State, some of which implemented specific statutory directives relating to the type of land on which a project was sited. (Pa137-153). One such statutory provision incentivized grid supply solar projects on properly closed sanitary landfill facilities, brownfields, and areas of historic fill. N.J.S.A. 48:3-87(t). To effectuate these land use preferences and to ensure only those project sites accurately identified under this provision receive the incentive, the Legislature mandated that the Board consult with NJDEP when developing the program and reviewing projects pursuant to Subsection (t). N.J.S.A. 48:3-87(t)(1). On January 24, 2013, the Board issued an order outlining the process for approving solar generation projects pursuant to Subsection (t)[8] in compliance with the Act. (Pa3; Pa137-153).

[8] Subsection (t)(1) 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 . . . ."

In 2018, the Clean Energy Act was signed into law and required the Board to close the SREC program to new applications once the Board determined that a solar generation milestone established by the Legislature had been met, and to complete a study for how to replace the SREC program to encourage continued solar development in the State. (Pa3-4). The closure milestone was met, and the Board closed the SREC program as mandated by N.J.S.A. 48:3-87(d)(3). The Board was required to "provide an orderly transition from the SREC program to a new or modified program." Ibid. To bridge this gap, the Board established the Transition Incentive ("TI") program by order on December 6, 2019, to provide eligible solar generation projects opportunity for incentives until the opening of a successor solar incentive program. (Pa4; Ra74-109). N.J.A.C. 14:8-10.1. Like the preceding SREC program, the TI program provides payments to eligible solar energy generators in the form of TRECs. (Pa4). Pursuant to the Board's December 6, 2019 Order and the TI program rules at N.J.A.C. 14:8-10.4, projects meeting the eligibility requirements of Subsection (t) and the Board's implementing orders were eligible to apply for TRECs using the application process for the SREC program. Ibid. (Ra103; Ra106). 52 N.J.R. 1850(a) (October 5, 2020). Thus, applications pursuant to Subsection (t) submitted through the TI program must have met the requirements of the January 24, 2013, order to be eligible for conditional certification. Ibid.

Appellant Reeder's Application

Reeder submitted its Application to the Board on August 26, 2021, seeking conditional certification of its 33.18 acre proposed project as eligible to receive TRECs in the TI program pursuant to Subsection (t). (Pa5; Pa86-87). The proposed project is an approximately 15.2832 megawatt ("MW") solar farm sited in Harmony Township, New Jersey, and the site is identified as Block 7, Lot 11 on the Harmony Township tax map. Ibid. The land is currently owned by Mr. Richard L. Hummer, Jr. ("Mr. Hummer"), who is leasing it to Reeder. Ibid.

According to Reeder, the project site was used for mining in the mid-1970s and later filled with foreign materials at some point in the early 1990s. (Pa5). Reeder claimed that this filling, as well as the existence of various "subsurface anomalies," resulted in soil sample data that exceeds various NJDEP contamination levels and remediation standards. (Pa81). Thus, Reeder claimed that the entire project site must be considered a brownfield under the Act. (Pa80; Pa82).

Reeder's Application acknowledged that the project site was classified as "prime farmland or soils of statewide importance," and maintained that the project site was not and had not been farmland during the years 2002 to 2021.

(Pa5-6; Pa82-83). While Reeder agreed the property had been partially assessed as farmland in the past, Reeder contended that this classification was in "error on the part of someone," and that the classification was no longer applicable because the "soils do not support a sustainable crop." (Pa6; Pa82). To that end, on August 18, 2021, Reeder wrote to the Mayor of Harmony Township and to the Township Committee "to bring this 'error' to their attention." (Pa6). On August 19, 2021, the Township Committee adopted a resolution directing the municipal tax assessor to retroactively change the Township tax records of Block 7, Lot 11 to reflect a tax assessment of industrial for 2002 to 2021. (Pa6; Pa113-114). The resolution also authorized the township to accept a $194,624.76 reimbursement, which "represent[ed] the difference between what was paid by the owner during that time and what should have been paid if the property was assessed as 'industrial' property." Ibid.

Board's Denial Order and NJDEP's Memorandum Findings

On December 1, 2021, the Board forwarded the Application to NJDEP seeking its analysis of whether the proposed solar project is located on a brownfield as required under Subsection (t). (Pa6). On February 7, 2022, NJDEP issued a memorandum ("NJDEP Memo") advising that the proposed site "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.) within the ten (10) year period prior to July 24, 2012." (Pa17). As a result, the NJDEP Memo concluded that the 33.18 acres did not constitute a brownfield and did not qualify for SRECs under Subsection (t). Ibid.

On June 27, 2024, after careful analysis of the NJDEP Memo, additional investigation into the project site's farming history, and full consideration of the record before it, the Board issued an order denying Reeder's Application ("Denial Order"). (Pa1-15). The Board determined that Subsection (s) of the Act imposed restrictions on solar development to land that had been "actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the 'Farmland Assessment Act of 1964,' . . . at any time within the ten (10)-year period prior to the effective date of the Solar Act . . . ."[9] (Pa11-12). The applicable time period is July 23, 2002, through July 23, 2012 ("prohibition period"), based on the July 23, 2012 effective date of L. 2012, c.

[9] N.J.S.A. 48:3-87(s) provides: "In addition to any other requirements of P.L.1999, c.23 or any other law, rule, regulation or order, a solar electric power generation facility . . . 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 the effective date of P.L.2012, c.24, shall only be considered "connected to the distribution system" if [additional approvals are made.]" None of those additional approvals are applicable here.

24. N.J.S.A 48:3-87(s). Similarly, N.J.A.C. 14:8-2.4(g) provides that "[a]pplications for grid supply facilities on farmland shall be rejected." (Pa11). Based on several key findings related to the project site's use and tax status as "qualified farmland," the Board denied the Application. (Pa13).

Specifically, the Board determined that the proposed site was qualified farmland during the prohibition period. (Pa10). To make that determination, the Board reviewed "current and historical aerial imagery" revealing the property was actively farmed in March and April 2012,[10] which is within the prohibition period. (Pa7). The Board during its review also examined images of the property from a popular realty website showing active farming. (Pa7; Pa69-79). The Board also determined that the property tax records for Block 7, Lot 11 showed that from 2002 to 2005, 37.8 acres of the 48.08 acres were taxed as Class 3B Qualified Farmland; from 2005 to 2011, 22.8 of the 48.08 acres were so taxed; and from 2012 through 2021, the record indicated that the entire property was taxed as 3B qualified farmland. Ibid.

[10] Specifically, NJDEP examined aerial imagery that was captured on the following dates: March 14, 2012; March 15, 2012; March 18, 2012; March 19, 2012; March 23, 2012; March 27, 2012; March 30, 2012; April 3, 2012; April 4, 2012; April 5, 2012; April 6, 2012; April 13, 2012; April 14, 2012; and April 16, 2012. (Pa69-79).

Upon further investigation, the Board determined that applications requesting farmland assessment of the property reported that, in 2002, 100 acres of corn and ten acres of hay (alfalfa) had been harvested, and in 2003, 169 total acres of corn and hay had been harvested. (Pa8-9). The Board found that the property owner, Mr. Hummer, had "verified the farmland status of these acres under penalty of perjury for the years 2002, 2003, 2014, 2019, 2020, and 2021." and "enjoyed the benefits of the 'qualified farmland' assessment for the majority of the proposed project site since 2002." (Pa11). The Board thus determined that Harmony Township's recent "amendment" of the tax records and acceptance of additional payment did not change that assessment, nor override the physical evidence of farming during the prohibition period. (Pa10-12).

Reeder's Motion for Reconsideration

On July 19, 2024, Reeder sought reconsideration of the Board's Denial Order pursuant to N.J.A.C. 14:1-8.6 alleging two primary errors. (Ra1-2). With respect to the Board's determination that the project site was assessed as qualified farmland during the prohibition period, and therefore ineligible for brownfield certification under Subsection (t), Reeder argued that the Board's findings were incorrect. (Ra3). Additionally, Reeder argued that the Board conflated Subsection (t) requirements with Subsection (s) farmland prohibitions, and that the only consideration for approving projects pursuant to Subsection (t)

is whether the property is a brownfield. (Ra2). The Board did not respond to the motion for reconsideration, and pursuant to N.J.A.C. 14:1-8.7(c), it was deemed denied by operation of law.

On August 19, 2024, this appeal followed.

ARGUMENTS

POINT I

THIS COURT SHOULD AFFIRM THE BOARD'S JUNE 27, 2024 ORDER DENYING REEDER'S APPLICATION BECAUSE IT WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL AND CREDIBLE EVIDENCE IN THE RECORD.

The Board's June 27, 2024 Denial Order should be affirmed. With this appeal, Reeder argues that its solar project is not located on farmland but instead is located on a brownfield eligible for certification under Subsection (t). (Pb19). Additionally, Reeder argues that the Board must ignore the statutory requirements of Subsection (s) when deciding to certify projects under Subsection (t). (Pb23). This interpretation is contrary to the plain language of the Act, contrary to the Board's consistent interpretation of the statute in question, and seeks to overturn appellate precedent. As the Board's decision is supported by substantial evidence in the record, this court should affirm.

A. The Board's Denial Order is Entitled to Heightened Deference.

When administrative agencies act "within the scope of legislatively-delegated authority, [the] administrative agents' actions are presumptively valid." Gormley v. Lan, 88 N.J. 26, 38 (1981); In re Restrepo Dep't of Corrs., 449 N.J. Super. 409, 417 (App. Div. 2017) ("An appellate affords a 'strong presumption of reasonableness' to an administrative agency's exercise of its statutorily delegated responsibilities.") (quoting Lavezzi v. State, 219 N.J. 163, 171 (2014)). The deference accorded to agencies flows from two central principles.

The first is rooted in the separation of powers. "In light of the executive function of administrative agencies, judicial capacity to review administrative actions is severely limited." In re Musick, 143 N.J. 206, 216 (1996). The second recognizes the subject-matter expertise of administrative agencies. See Gloucester Cnty. Welfare Bd. v. State Civil Serv. Comm'n, 93 N.J. 384, 390 (1983) (deference is owed because "the administrative agency acquires expertise in technical matters and a comprehensive knowledge of its particular field"); Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992) (same).

In the context of the Board's decisions, the level of deference afforded by a reviewing court is codified by statute. As our Supreme Court has recognized,

"[t]he Public Utilities Act specifically prohibits courts from reversing a BPU decision" unless it is for the grounds enumerated in N.J.S.A. 48:2-46. In re PSE&G Rate Unbundling, 167 N.J. 377, 393 (2001). Under that statute, "a reviewing court may set aside an order of the Board only 'when it clearly appears that there was no evidence before the board to support the same reasonably . . . .'" Ibid. (quoting N.J.S.A. 48:2-46).

Thus, when an administrative agency interprets a statute it is charged with enforcing, that interpretation "is entitled to great weight." Nelson v. Bd. of Educ., 148 N.J. 358, 364 (1997); see also Tall Timbers Prop. Owners Ass'n v. N.J. Dep't Cmty. Affairs, 413 N.J. Super. 54, 62 (App. Div. 2010) ("[A]n administrative agency's interpretation of a statute it is charged with enforcing will be upheld unless it is 'plainly unreasonable'") (citation omitted). A reviewing court gives "effect to the Legislature's intent as evidenced by the 'language of [the] statute, the policy behind it, concepts of reasonableness, and legislative history.'" Santaniello v. N.J. Dep't of Health & Senior Servs., 416 N.J. Super. 445, 457 (App. Div. 2010) (quoting D'Ambrosio v. Dep't of Health & Senior Servs., 403 N.J. Super. 321, 334 (App. Div. 2008) (additional citations omitted) (alteration in original)).

This case presents the exact type of scenario in which courts traditionally accord deference to agencies. The Act amended procedures related to

generation, interconnection, and financing of renewable energy, and tasked the Board with implementing new programs to carry out those objectives. (Pa2). At the same time, the Legislature understood the importance of maintaining the utility of New Jersey's farmlands and incorporated the means to protect them within the Act through Subsection (s). N.J.S.A. 48:3-87(s). In accordance with these statutory mandates, the Board launched the SREC program and established specific rules and procedures applicable to the different categories of solar projects that the Legislature had determined would be eligible for incentives. See (Pa137-153) (outlining the procedures for review and conditional certification of solar projects pursuant to Subsection (t)).

To effectuate the Legislature's intent, the Board issued a January 24, 2013 order describing the procedures for reviewing applications pursuant to Subsection (t). (Pa137). The Board's December 6, 2019 order launching the TI program incorporated the January 24, 2013 procedures, and later codified this treatment into the TI program rules at N.J.A.C. 14:8-10.4 in 2020. (Pa137; Ra103; Ra106). 52 N.J.R. 1850(a) (October 5, 2020). An agency has discretion to select the appropriate means to fulfill their statutory duties including, "the ability to select those procedures most appropriate to enable the agency to implement legislative policy." Texter v. Dep't of Hum. Servs., 88 N.J. 376, 385 (1982). In its January 24, 2013 order, the Board balanced the interests of the

natural environment with the highly technical economic implications of energy generation, and satisfied its statutory requirements to consult with NJDEP. (Pa138). And now, in part based on that order, the Board issued its Denial Order because it determined that the Application here failed to meet the requirements for a project pursuant to Subsection (t). (Pa6; Pa10). Administrative action of this nature represents precisely the kind of decision to which courts should accord significant deference and this court should affirm.

B. The Board's Determinations in its Denial Order Should be Upheld Because They Were Supported by Substantial Evidence in the Record.

An agency's factual determinations are also entitled to heightened deference. If the decision "could reasonably have been reached on sufficient credible evidence present in the record, considering 'the proofs as a whole,'" courts must respect the agency's conclusions. Jackson v. Concord Co., 54 N.J. 113, 117 (1969)) (quoting Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)); accord Messick v. Bd. of Rev., 420 N.J. Super. 321, 325 (App. Div. 2011) ("if [an agency's] factual findings are supported by sufficient credible evidence, courts are obliged to accept them") (quoting Self v. Bd. of Rev., 91 N.J. 453, 459 (1982)).

Here, Reeder argues on appeal that the Board's determination that Block 7, Lot 11 was qualified farmland during the statutory prohibition period is

incorrect. (Pb19). In its June 27, 2024 Denial Order, the Board determined that Reeder's proposed site was farmland based on three findings. (Pa10-11). First, the Board reviewed the site's tax assessment records during the statutory prohibition period and found that all or portions of the site had been assessed as qualified farmland during the prohibition period, and up until the year the Application was filed. (Pa6-7). Second, the Board found that the site's property owner, Mr. Hummer, certified the farmland status of Block 7, Lot 11 under penalty of perjury in a number of years during the prohibition period and thereafter, namely in 2002, 2003, 2014, 2019, 2020, and 2021. (Pa9). And finally, the Board relied on aerial imagery of the property that showed active farming in March and April 2012, which was during the statutory prohibition period. (Pa7; Pa69-79).

On this record, it was proper for the Board to rely on the evidence above as presented in the NJDEP memo to find that the project site was farmland during the prohibition period, and therefore ineligible for TRECs pursuant to Subsection (t). (Pa12-13). Indeed, Reeder fails to contest the Board's bases for concluding that the site was farmland during the prohibition period, besides the project site's tax assessment status from the years 2002-2021. (Pa21-67). Reeder instead contends on appeal that the site's tax assessment has been amended to reflect commercial and industrial property. (Pb10-11; Pb20). In

support, Reeder makes the unfounded assertion that the Board "acknowledges that the Applicant made clear that the farmland assessment was mistaken for at least some time between 2002 and 2021." (Pb10). The Board made no such acknowledgement and in fact explicitly determined that Harmony Township did not properly amend the tax assessment records. (Pb10-11; Pb20; Pa12). As the Board noted in the Denial Order, "[t]he statutory guidelines for farmland assessment are clear, and so is the appeal process. A taxpayer or taxing district who is 'aggrieved by the assessed valuation' may appeal to the county board of taxation by filing a petition." (Pa12) (quoting N.J.S.A. 54:3-21(a)(1)). And the Board specifically found that the applicant did not file any petition with the County Board of Taxation or the Tax Division. (Pa12).

Furthermore, "[t]he Appellate Division has determined that a Township governing body has no direct role in the assessment procedure and the appeal mechanism." (Pa12) (citing Appeal of Twp. of Monroe from Determination of Loc. Fin. Bd., 289 N.J. Super. 138, 145 (App. Div. 1995)). In fact, this court has determined that a township cannot "circumvent[] the tax appeal process" in an effort to "cure what it considered an improper act of the tax assessor." Appeal of Twp. of Monroe, 289 N.J. Super. at 144-45. Similarly, because Reeder here went through Harmony Township and not the relevant county board of taxation—among other timing issues—the Board appropriately determined that

Harmony Township's resolution did not impact the sites historical farmland assessment. (Pa12).

Moreover, because Reeder has failed to appeal or amend the tax assessment status of Block 7, Lot 11 in a legally sufficient manner, and because Reeder fails to contest the Board's bases for concluding that the project site was actively farmed on appeal, Reeder cannot now demonstrate that the Board lacked sufficient credible evidence in the record to determine that the project site was farmland during the prohibition period. (Pa8-11). Although Reeder urges this court to adopt an interpretation of the Act that is contrary to the law's plain language, and to effectively overturn a prior Appellate Division holding, In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J. Super. 73 (App. Div. 2015) ("Millenium") (Pb34), and as more fully addressed next, this court should reject that assertion as the determination that the property was farmland during the prohibition period is supported by sufficient credible evidence on this record.

C. This Court Should Uphold the Denial Order Because the Act Has Only One Reasonable Interpretation.

As the Appellate Division determined in Millenium, Subsection (s) of the Act unambiguously prohibits construction of solar generation projects on farmland pursuant to Subsection (t). Millenium, 443 N.J. Super at 80. (Pa12).

Under the general rules of statutory construction, "words and phrases shall be read and construed with their context, and shall . . . be given their generally accepted meaning . . . ." N.J.S.A 1:1-1. As the Supreme Court has explained, "[an appellate] court's objective in statutory construction 'is to effectuate legislative intent,' and '[t]he best source for direction on legislative intent is the very language used by the Legislature.'" Bozzi v. City of Jersey City, 248 N.J. 274, 283 (2021) (quoting Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 171-72 (2016) (second alteration in original)). Thus, a court's inquiry is often short-lived because, "[i]f the language [of a statute] is clear, the court's job is complete." Ibid. (quoting In re Expungement Application of D.J.B., 216 N.J. 433, 440 (2014)).

Here, Subsection (s) and Subsection (t) of the Act together can only be read in one reasonable way. Subsection (t) mandated the Board "establish a program to provide SRECs to owners of solar electric power generation facility projects certified by the board . . . as being located on a brownfield." Additionally, "[p]rojects certified under this subsection shall be considered 'connected to the distribution system' . . . ." Ibid. In developing the SREC program and ensuring that any project certified under Subsection (t) can be properly considered "connected to the distribution system," the Board was

informed by the requirements of the immediately preceding Subsection (s), which provides:

> In addition to any other requirements of P.L.1999, c.23 or any other law, rule, regulation or order, a solar electric power generation facility . . . 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 [between July 23, 2002 and July 23, 2012] shall only be considered "connected to the distribution system" if [additional approvals are made].
>
> [N.J.S.A. 48:3-87(s).]

Whether a project is "connected to the distribution system" is critical because such a designation is a prerequisite[11] to the to the Board awarding these solar incentives.[12] N.J.S.A 48:3-51.

Taking these provisions together, it is clear that the Board correctly interpreted the Act to require that, in the Subsection (t) program, before issuing

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[11] N.J.S.A. 48:3-51 provides: "'Solar renewable energy certificate' or 'SREC' means a certificate issued by the board or its designee, representing one megawatt hour (MWh) of solar energy that is generated by a facility connected to the distribution system in this State and has value based upon, and driven by, the energy market." (emphasis added).

[12] While N.J.S.A. 48:3-51 governs distribution of SRECs, the order launching the TI Program makes clear that "projects eligible for the TI must comply with all rules and regulations of the [SREC Program.]" and these statutory requirements are therefore also applicable to disbursement of TRECs. In re New Jersey Solar transition Pursuant to P.L.2018, c.17, No. Q019010068, final decision (Bd. of Pub. Util. Dec. 6, 2019) (slip op. at 96). (Ra106).

solar incentives to projects claiming to be located on a brownfield, the Board must determine that these projects also adhere to the farmland restriction outlined in Subsection (s). Millenium, 443 N.J. Super at 80. (Pa12). Specifically, Subsection (s) limits eligibility for projects on farmland and mandates additional approvals for such projects to be considered "connected to the distribution system." And since only projects deemed "connected to the distribution system" are eligible for these solar incentives, the Board correctly applied Subsection (s)'s restrictions to projects purportedly sited on brownfields pursuant to Subsection (t). Millenium, 443 N.J. Super at 80. (Pa12).

With respect to Subsection (s)'s farmland prohibition, in using the broad phrase "[i]n addition to any other requirements of P.L.1999, c.23 or any other law, rule, regulation or order . . . ," the Act directs the Board to apply the limitation to projects proposed under Subsection (t) as well, rather than the limited construction urged on the court by Reeder. N.J.S.A. 48:3-87(s) (emphasis added). (Pb23-26). The Legislature chose to require additional administrative requirements for solar projects seeking to receive solar incentives that are located on land that had been assessed as qualified farmland, and it made no exceptions for projects sited on land that might also have characteristics of brownfields. N.J.S.A. 48:3-87(s). The Board was correct to recognize this legislative policy choice here in rejecting the Application by Reeder. Millenium,

443 N.J. Super at 79 ("as the Board's decision noted, in requiring farmland-sited solar projects to satisfy a higher standard, the Legislature also acted consistent with the [Energy Master Plan], which specifically discourages the use of agricultural land for solar projects.").

D. Reeder's Interpretation of the Act is Inconsistent with This Court's Holding in Millenium.

Beyond running counter to the plain language of the Act, Reeder's interpretation urged on appeal here contradicts Appellate Division precedent as well. Reeder argues that its Application is distinguishable from the one rejected by the court in Millenium. (Pb28-35). However, with this appeal, Reeder fails to distinguish Millenium and effectively seeks, without basis, to overturn it. Specifically, Reeder argues that if a proposed project is located on a brownfield, Millenium does not control because that case concerned a site in which the Board determined did not meet the requirements of a brownfield. (Pb34). This limited interpretation of Millenium is incorrect.

While true that the proposed site in Millenium was not a brownfield, the court nonetheless analyzed the precise interplay of Subsections (s) and (t) that is at issue in this matter. In so doing, it held that "Subsection (s) unambiguously precludes a subsection (t) application for a solar project on . . . agricultural land that was valued, assessed and taxed as farmland within the ten-year period prior

to the effective date of the Solar Act." Millenium, 443 N.J. Super. at 80. (Pa12); see also Millenium, 443 N.J. Super. at 78-79 (the Millenium court agreed with the Board and held "[b]y its unambiguous terms, the Solar Act requires farmland-based applications to be submitted under subsection (s), unless they are 'net metered on an on-site generation facility.'"). Reeder's interpretation here, effectively rendering Subsection (s) inapplicable to Subsection (t) applications, is contrary to the Millenium holding and the plain language of the Act and must be rejected. In this context, the Board did not err in rejecting Reeder's Application through its Denial Order as consistent with Millenium.

E. The Board's Position in its Denial Order is Consistent with its Prior Subsection (t) Cases.

Reeder also argues on appeal that the Board's position in its Denial Order is inconsistent with the Board's prior determination in a Subsection (t) case, I/M/O Holland Solar Farm LLC/Hughesville Mill, No. QO20050345 Order (Bd. Of Pub. Util. March 3, 2021) ("Holland"). (Pb15-19). Reeder's reliance on Holland is misplaced and does not support a finding that its project must be approved as a brownfield pursuant to Subsection (t). In Holland, the Board considered the Subsection (t) application of Holland Solar Farm, LLC for eligibility to generate TRECs. (Pa125). The proposed solar facility was to be sited on property used as a paper mill and as spray fields for processing wastewater from 1893 until 2003. (Pa129). Two issues were addressed in

Holland, and neither are applicable to this case. The first issue was whether—considering Millenium—the Board could approve a solar project through Subsection (t) that was located on a lot with acreage taxed as qualified farmland during the prohibition period, but where none of the acres taxed as qualified farmland were part of the proposed solar project location. (Pa130-133). The Board's order in Holland found that it could approve the project because, while there was

> no dispute that during the years 2002 through 2012 as many as 39 acres of the 65.6 acre parcel was taxed as qualified farmland rendering development of that portion of the property ineligible for SRECs or TRECs. . . . [T]he tax records also indicate that at least 26.57 acres of the lot was classified as 4B – Industrial from 2002 through 2012.
>
> [Pa132-133.].

Because it was "wholly within these 26.57 acres that Holland Solar intend[ed] to locate its 23.5 acre solar facility," the court found that the Millenium decision did not weigh against development upon this site as it did in prior matters before the Board. Ibid. Here, Block 7, Lot 11—where Reeder wishes to construct their solar project—was the area determined to be farmland during the prohibition period. (Pa8-11). Thus, the logic of Holland is inapposite as that project was determined to not be located on qualified farmland during the prohibition period. (Pa10-13).

Similarly, the second issue in Holland was how to address the fact that the portion of the lot that Holland sought Subsection (t) certification on was taxed as qualified farmland from 2014-2020, which is after the prohibition period. (Pa130-133). While receiving the tax benefits of having land assessed as qualified farmland during that period was not necessarily impermissible under the plain text of the Act since it was not within the statutory prohibition period, Board staff was "troubled" by the idea of the property receiving both those benefits in addition to future TRECs. (Pa133). Therefore, the developer in Holland refunded the additional tax benefits from the site's farmland tax assessment during those post-prohibition period years. Ibid. This is not the same as the Application here, where Reeder attempted to return the allegedly improper tax benefits received from Block 7, Lot 11's classification as qualified farmland within the statutory prohibition period. (Pa82).

As discussed above, on this record, Reeder has neither demonstrated that the tax qualification was erroneous nor that an after-the-fact resolution circumventing the proper channels for challenging a property tax assessment through the local government was the appropriate means to rectify the alleged error. The Board found that the land in this matter was actively farmed during the prohibition period and thereafter and was properly assessed accordingly. (Pa21-67). That finding is supported on the record by the aerial imagery of land

being farmed, the farmland tax assessment applications with corresponding certifications from property owner Mr. Hummer, and the subsequent qualified farmland tax status of the site which undeniably demonstrate that Block 7, Lot 11 was farmland during the prohibition period. (Pa7-12; Pa69-79).

While Reeder seeks to break the direct connection between Subsections (s) and (t), its awkward attempt to retroactively remove the farmland designation must also be viewed as an acknowledgement and awareness of the Subsection (s) applicability to Subsection (t) projects; otherwise, it had no motive to pay a $194,624.76 "reimbursement" to Harmony Township before submitting its Application, and the record is void of any other explanation of why Reeder did so. (Pa6). Reeder's actions can only be viewed as an attempt to avoid the Subsection (s) prohibition period restrictions, as well as the Millenium decision, in light of the convincing evidence of farming on the parcel in question.

In short, the Board's interpretation of Subsection (t) and Subsection (s) in its Denial Order is supported by the plain text of the Act and this court's holding in Millenium. (Pa10-13). Having determined that the site was farmland, had been used for farming, and had obtained such tax treatment during and after the statutory prohibition period, the Board's actions in its Denial Order were well within its accorded discretion, and it correctly denied Reeder's Application. Ibid. This court must affirm the denial.

POINT II

THE BOARD'S JUNE 27, 2024 DENIAL ORDER WAS CONSISTENT WITH THE ADMINISTRATIVE PROCEDURE ACT AND THE METROMEDIA DOCTRINE.

Reeder argues that the Denial Order must be reversed because the Board's updated Subsection (t) application, in combination with the Board's decade-old Millenium Order,[13] constituted improper rulemaking in violation of Metromedia, Incorporated v. Director, Division of Taxation, 97 N.J. 313 (1984) ("Metromedia"). (Pb28). This position is belied by the text of Millenium, where the Appellate Division upheld the Millenium Order. Millenium 443 N.J. Super. at 78-80. The Board's actions in the Millenium Order generally, and the clarification of the requirements for Subsection (t) applications specifically, are consistent with the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15.

Whether an administrative agency's determination or action is an "administrative rule" requiring formal rulemaking consistent with the Administrative Procedure Act ("APA") depends on the presence of factors that

[13] 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; Millenium Land Development, LLC (Love Lane) – Motion for Reconsideration, Order, Nos. EO12090832V, EO12090862V, and EO13050429V (Bd. of Pub. Util. May 21, 2014) ("Millenium Order").

weigh in favor of the rulemaking process. Metromedia, 97 N.J. at 331. Those factors are whether an agency determination:

> (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.
>
> [Id. at 331-32.]

These factors may singly or in combination delineate whether an agency action requires formal rulemaking. Ibid. "The pertinent evaluation focuses on the importance and weight of each factor, and is not based on a quantitative compilation, of the number of factors which weigh for or against labeling the agency determination as a rule." In re the Provision of Basic Generation Serv., 205 N.J. 339, 350 (2011).

Here, the principle expressed by the Board in its Millenium order and clarified in the updated Subsection (t) application reflects a statutory

requirement that the Appellate Division repeatedly stated is "unambiguous," see Millenium, 443 N.J. Super. at 80, and does not deviate from any prior Board rule or practice. See N.J.A.C. 14:8-2.4(g) (Board's SREC program rules providing "[a]pplications for grid supply facilities on farmland shall be rejected."). And it does not violate the Administrative Procedure Act nor offend traditional notions of due process for the Board, a decade later, to issue a Denial Order relying on that settled law. A review of the Denial Order, as applied to Reeder, makes clear that the Board applied its existing rules and binding case law to the factual circumstances here. Millenium, 443 N.J. Super at 80. Thus, in this context and on this record, Rulemaking was not required, and Reeder's claim should be rejected.

CONCLUSION

For all of the foregoing reasons, the Board's June 27, 2024 order denying Reeder's Application should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
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BRIAN O. LIPMAN
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February 24, 2025

Via e-Courts Appellate
Joseph H. Orlando
Clerk of the Appellate Division
Hughes Justice Complex
25 W. Market Street
P.O. Box 006
Trenton, NJ 08625-0006

Re: In the Matter of In the Matter of the Solar Transition Pursuant to L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Solar Act of 2012 – Reeder Property Solar Farm, LLC, Block 7, Lot 11

BPU Docket Nos.
Appellate Division Docket No. A-003975-23T4

Respondent New Jersey Division of Rate Counsel's Letter Brief

Dear Mr. Orlando:

Please accept this letter brief in lieu of a more formal submission pursuant to R. 2:6-2(b), by the New Jersey Division of Rate Counsel ("Rate Counsel") in above-referenced matter.

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I. PRELIMINARY STATEMENT

At issue in this appeal is the Board of Public Utility's ("Board" or "BPU") factual determination that a certain property is farmland and not properly qualified for brownfield-designated incentives. Appellant CEP Renewables, LLC d/b/a Reeder Property Solar Farm, LLC ("CEP" or "Appellant") sought incentives for solar energy generation on the property. Eligibility for incentives for property designated as brownfields is determined through a factual investigation by both the BPU and the New Jersey

Department of Environmental Protection ("DEP"). In the present matter, the Board's factual determination is supported by credible evidence received from DEP. After cutting through all of the assertions in this matter, the sole issue before the Court is the challenge to the Board's factual determination. There was sufficient credible evidence in the record to support the Board's decision, and therefore the Board's Order should be affirmed.

II. COUNTER STATEMENT OF PROCEDURAL HISTORY AND FACTS[1]

On August 22, 2021, CEP applied to the BPU for certification of a proposed 15-plus megawatt solar array, to be located on approximately 33 acres of land that CEP characterized as a brownfield, and which, if certified as such, would be eligible for special incentives pursuant to N.J.S.A. 48:3-87 ("subsection t") (A80a).[2] While the municipality had assessed relevant portions of the property[3] as farmland from 2002 to 2021, CEP asserted in its application that those assessments were erroneous, claiming that the land was contaminated and incapable of sustaining agriculture. (A021a-A067a; A080a-A083a, A116a-A124a). The applications for the farmland tax assessments,

[1] The procedural history and facts of this matter are intertwined and are therefore set forth in a combined statement for the sake of clarity and brevity.
[2] Appellant's Appendix is referred to herein as A#a.
[3] The relevant property is Block 7, Lot 11 in Harmony Township ("Township"), Warren County, comprising a total of 48.08 acres, within which the Appellant applied to install a 33.18 acre solar array. (A005a).

however, include certifications from the property owner that the property was devoted to agricultural use and information about the specific acreages of crops produced. (A021a-A039a). As recently as 2022, the tax records reflect that all 48.08 acres of Block 7, Lot 11 were assessed as qualified farmland. (A055a).

On August 22, 2021 (five days before the TI program closed to applications and the new solar program opened) CEP petitioned the Board for certification of the proposed solar array to be located at Block 7, Lot 11, in the Township as a brownfield and thus eligible for TRECs under subsection (t) of the Solar Act. In re a New Jersey Solar Transition Pursuant to P.L. 2018, C. 17, 2021 N.J. PUC LEXIS 299 (July 28, 2021); (A080a). CEP stated that the proposed site was reportedly utilized as a sand and gravel pit during the 1970s until the early 1990s. (A080a). CEP stated that the pit was subsequently filled and graded, and from 2002 and until 2021 the municipal tax assessor assessed the site as farmland. (A080a-A082a).

CEP apparently informed the municipality on August 18, 2021 that, in its opinion, the proposed solar site's farmland assessment was not correct. (A006a). On August 19, 2021 the Township adopted a resolution directing the town's assessor to "correct" the Township's tax records and accept

reimbursement for unpaid taxes that otherwise should have been paid had the property not been assessed as farmland. (A112a-115a).

The Board forwarded the petition to the DEP for a determination as to whether the property was a brownfield. Upon review of the application, DEP determined that the site was assessed as farmland from 2002 to 2021. (A017a). DEP also stated that it consulted with the State Agriculture Development Committee staff, which advised that the site was identified in the Township's Comprehensive Farm Preservation Plan as a farm targeted for preservation. (A017a, A019-A020a). Additionally, according to DEP, current and historical aerial photographs showed that the site was actively farmed, including within the 10-year period prior to the 2012 enactment of the Solar Act. (A017a-A019a).

On June 27, 2024, the Board denied certification of CEP's proposed facility, noting DEP's findings and citing existing case law supporting the denial of subsection (t) applications when the proposed site is assessed as farmland within the 10-year period prior to the enactment of the Solar Act. (A010a-A014a). The Board also noted the statutorily required procedure for challenging tax assessments and held that the Township's resolution had no impact on the Board's analysis of the site's qualification as farmland. (A010a-A012a).

On July 19, 2024 CEP moved for reconsideration by the Board; to Rate Counsel's knowledge the Board did not act on CEP's motion.[4] CEP filed a Notice of Appeal of the Board's June 27, 2024 Order on August 19, 2024. (A224a).

III. ARGUMENT

A. Standard of Review

New Jersey appellate courts review agency decisions under an arbitrary and capricious standard. Zimmerman v. Sussex County Educational Services Com'n, 237 N.J. 465, 475 (2019). Courts accord a "strong presumption of reasonableness [to] an administrative agency's exercise of statutorily delegated responsibility." Newark v. Natural Resource Council in Dep't of Environmental Protection, 82 N.J. 530, 539 (1980). The burden of showing that an agency decision was arbitrary, capricious, or unreasonable is on the party challenging the decision. Lavezzi v. State, 219 N.J. 163, 171 (2014).

Upon review, the Appellate Court examines the following:

(1) Whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law;

(2) Whether the record contains substantial evidence to support the findings on which the agency based its action; and

[4] As such, the motion is deemed denied pursuant to N.J.A.C. 14:1-8.7(c).

(3) Whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Allstars Auto Group, Inc. v. New Jersey Motor Vehicle Com'n, 234 N.J. 150, 157 (2018).

New Jersey courts review decisions of agencies "entrusted to apply and enforce a statutory scheme under an enhanced deferential standard." East Bay Drywall, LLC v. Dept. of Labor and Workforce Development, 251 N.J. 477, 493 (2022). Specifically, a reviewing court may only disturb BPU decisions "when it clearly appears that there was no evidence before the board to support the same reasonably or that the same was without the jurisdiction of the board." In re PSE&G Rate Unbundling, 167 N.J. 377, 393 (2001) (quoting N.J.S.A. 48:2-46).

B. The Board Made a Reasonable Factual Determination in Accordance with the Applicable Statutory Framework

The Board reasonably assessed the facts of the petition at issue in this case and applied the recent and express statutory goals of New Jersey's solar programs to arrive at its decision to deny certification of CEP's subsection (t) project. The Board should deny CEP's attempts to receive higher incentives. It is especially important to note that CEP is very likely still eligible for other

incentives. While these incentives may be lower, the project will still likely receive ratepayer subsidized incentives.

The Solar Act of 2012, L. 12, c. 24 authorized the Board to establish a program to provide distinct incentives for solar developers who locate solar arrays on brownfields, areas of historic fill, or properly closed sanitary landfills. N.J.S.A. 48:3-87(t)(1). Under N.J.S.A. 48:3-51, and N.J.A.C. 14.8-1.2, a "brownfield" is defined as "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." Certification of site eligibility is determined by the Board in consultation with DEP. N.J.S.A. 48:3-87(t); N.J.S.A. 48:3-51. Under subsection (t), these incentives are intended to "supplement the SRECs [Solar Renewable Energy Certificates] generated by the facility in order to cover the additional cost of constructing and operating a solar electric power generation facility on a brownfield." N.J.S.A. 48:3-87(t)(1). It is important to understand that all solar incentives are ultimately paid for by electric utility ratepayers. (A011a).

Alternately, under N.J.S.A. 48:3-87(s) ("subsection (s)") solar projects sited on farmland are subject to different eligibility requirements to obtain incentives, with "farmland" defined as "land 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.)." This statutory provision specifically notes that solar projects located on land actively farmed and assessed as such for tax purposes at any time within the 10-year period prior to the effective date of the Solar Act of 2012 cannot be considered "connected to the distribution system" unless they meet separate requirements specified elsewhere in the statute. N.J.S.A. 48:3-87(s).

N.J.A.C. 14:8-2.4(g) also states that

> A proposed grid supply facility that is not located on a brownfield, properly closed sanitary landfill facility, or area of historic fill must satisfy the requirements of this subsection for the energy it generates to serve as the basis for creation of an SREC. Applications for grid supply facilities on farmland shall be rejected.

BPU regulations define "farmland" as "land actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the "Farmland Assessment Act of 1964," N.J.S.A. 54:4-23.1 at any time within the 10-year period prior to the effective date of the Solar Act." N.J.A.C. 14.8-1.2.

The Board's most recent Minimum Qualifications[5] for subsection (t) applications echo the statutory provision above. Under these qualifications,

[5] NJ Board of Public Utilities and NJ Department of Environmental Protection, Solar Act Subsection t Application Form, 1 (December 2017), available on New Jersey's Clean Energy Program website.

projects on land that has been actively devoted to agriculture or horticulture and that is valued, assessed, and taxed as such pursuant to the "Farmland Assessment Act of 1964," P.L. 1964, c.48, at any time within 10 years prior to the July 24, 2012 enactment of the Solar Act are not eligible for subsection (t) incentives.

On November 12, 2015, the Appellate Division affirmed the Board's position that "projects sited on agricultural property valued, assessed and taxed as farmland do not qualify as brownfields for purposes of subsection (t)" but rather are governed by subsection (s) which applies to land "actively devoted to agricultural or horticultural use that is valued, assessed, and taxed pursuant to the 'Farmland Assessment Act of 1964" at any time within the 10-year period prior the Solar Act. In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J.Super. 73, 76, 78 (App. Div. 2015).

Before December of 2019, the Board utilized an established solar renewable energy certificate ("SREC") program. The Clean Energy Act, P.L. 2018, c.17 ("Clean Energy Act" or "Act") required the Board to adopt rules and regulations to close the Solar Renewable Energy Certificate ("SREC") program upon attainment of 5.1 percent of the kilowatt-hours sold in the State by each electric power supplier and each basic generation provider from solar

electric power generators connected to the distribution system, and slated the SREC program for closure no later than June 1, 2021. N.J.S.A. 48:3-87(d)(3).

To prepare for this closure and a transition to a new program, the Legislature required the Board to complete a study by May of 2020 examining how to continue solar programs while reducing the costs of achieving the State's solar energy goals and encouraging market-based cost recovery mechanisms and maximum incentive caps for solar projects. Ibid. Because the Board was unable to meet the timeline set out in the Act, on December 6, 2019 the Board established the Transition Incentive ("TI") program in order to "provide a bridge between the SREC Program and a solar successor incentive program under development by the Board" at that time. In re a New Jersey Solar Transition Pursuant to P.L. 2018, C.17, 2019 N.J. PUC LEXIS 471 (Dec. 6, 2019). Transition Renewable Energy Certificates ("TRECs") under this temporary program were awarded to successful program applicants and held an established base compensation value, but varying point factors were assigned to different market segments. N.J.A.C. 14.8-10.5(a), (b). The actual TREC value was determined by multiplying the applicable point factor by the TREC base compensation value. N.J.A.C. 14.8-10.5(c). Landfills, brownfields, and areas of historic fill were eligible for a factor of 1.0, thus providing the maximum available TREC subsidy. N.J.A.C. 14.8-10.5(b)(1). The Board later

clarified that developers could apply for inclusion in the TI program up until the opening of the successor solar program, reasoning that there should be no gap in availability of incentives between the two programs. In re a New Solar Transition Pursuant to P.L. 2018, C.17, 2020 N.J. PUC LEXIS 280 (January 8, 2020).

Subsection (s) provides that projects proposed to be sited on land that has been actively devoted to agricultural use and taxed as farmland at any time during the 10-year period prior to the Solar Act shall only be approved pursuant to subsection (q)[6] only if they meet certain other requirements. Subsection (s), therefore, clearly applies to solar projects proposed to be sited on farmland, such as this one proposed by CEP. And, in accordance with the intent of the 2011 New Jersey Energy Master Plan ("EMP") and the Legislature's intention to discourage solar development on farms, this subsection prohibits certain agricultural properties from receiving solar incentives absent satisfaction of more stringent conditions distinct from those required for subsection (t) projects.

The Board previously applied this statutory provision and failed to grant certification when deciding a subsection (t) applicant's motion for reconsideration when the property was assessed as farmland in In re the

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

Implementation of L. 2012, C. 24, The Solar Act of 2012; In re 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 land Landfill Facilities; Milenium Land Development, LLC (Love Lane), 2014 N.J. PUC LEXIS 155 (May 21, 2014), *36-37 ("Milenium II"). The Appellate Division affirmed the Board's decision and emphasized the restrictions on siting solar projects on farmland "in requiring farmland-sited solar projects to satisfy a higher standard, the Legislature also acted consistent with the EMP, which specifically discourages the use of agricultural land for solar projects." In re the Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J. Super 73, 79 (App. Div. 2015).

CEP repeatedly mentions the 2002-2012 time period of tax assessments as part of its arguments against applying a 10-year look back period under the Solar Act of 2012, but the property was assessed as farmland and actively farmed until very recently, as the Board noted in its Order. (Aa013a). And although the Township passed a resolution directing the tax assessor to reclassify the property, the Appellant did not follow the appropriate statutory process. The resolution, therefore, had no bearing on the Board's decision since the Appellant essentially circumvented the tax appeal and assessment process to receive "relief when the ordinary statutory appeals method would

not have done so because it was not timely used." Appeal of Township of Monroe from Determination of Local Finance Bd., 289 N.J. Super 138, 146 (App. Div 1995).

Moreover, the farmland tax assessments were not the only factors the Board considered in reaching its decision, although they provide insight into the land use at the site. The property owner certified on the annual farmland assessment applications "under penalties provided by law" that the property was "farmed" and "actively devoted to agricultural and horticultural use." (A009a, A021a-A027, A032a-039a). The site was also targeted for preservation in the Township's Comprehensive Farm Preservation Plan as a farm targeted for preservation. (A017a, A019-A020a). Additionally, DEP and the BPU cited to aerial images of the site from 2012 that showed the site was being farmed "with hay bales visible." (A007a, A017a-A019a).

As CEP recognizes, the Board will not approve any project under subsection (t) if it is located "on what is actually farmland," which "is clearly supported by the Solar Act, the related legislative history and the 2011 EMP."[7] (Ab19). Based on the above-cited evidence in the record, the BPU correctly concluded that the land in question is "actually" farmland, despite the Township's resolution directing the change in its assessment and, as such, the

[7] Appellant's Brief will be cited hereinafter as "Ab."

project should not be certified as a being sited on a brownfield under subsection (t).

CEP cites to the Board's order in In re the Implementation of L. 2012, C. 24, the Solar Act of 2012; In re the Solar Transition Pursuant to L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Solar Act of 2012; Holland Solar Farm, LLC/Hughesville Mill – Application for Subsection (t), 2021 PUC LEXIS 75 (March 3, 2021) ("Holland") as an example of the Board approving at subsection (t) application when the property was erroneously assessed as farmland in years prior, but was a brownfield at the time of the filing of the application. (Ab15). In Holland, the Board certified the former paper mill site as a brownfield, despite portions of the property being assessed as farmland. However, unlike CEP's solar project, the acreage to be sited for the Holland solar project was wholly within the areas of the property that were assessed as industrial—not farmland—between 2002-2012. Holland at *18-19. It was not until 2014 that the tax assessor increased the portion of the property assessed as qualified farmland. Id. at *12-13. DEP also determined that the acreage proposed for the siting of the solar project in Holland constituted a brownfield, something it explicitly did not do in this matter. Id. at *18.

Additionally, the Board noted in Holland that the reason the tax assessor expanded the farmland assessment to the site beginning in 2014 was based on her stated authority to do so because the additional land was contiguous with the existing farmland. Id. at *13. Holland, therefore, was a factually unique set of circumstances, and that is the reason why, contrary to CEP's assertion that the Board treated it in an unreasonable and irrational manner, the Board decided that matter differently than in CEP's case. (Ab22).

The record in this case demonstrates that the Appellant applied for subsection (t) certification of its project days before the closure of the program on land that it knew was assessed as farmland, without including all information necessary to facilitate DEP's review of the application. The Appellant, therefore, had no reason to expect for certain that certification would be granted by the Board. In fact, the letter accompanying CEP's subsection (t) application sets forth all the reasons why its application was different and not contrary to the case law affirming the Board's decision on the prohibition of siting solar on property assessed as farmland. (Aa118a-124a). Accordingly, this is merely an attempt by the Appellant to force an unqualified project through subsection (t) so it can receive the highest incentive values as possible.

C. The "Square Corners" Doctrine Cited By the Appellant Applies Not Only to Solar Developers But to New Jersey Ratepayers and the Public At-Large

The Appellant argues that equity considerations merit reversal of the Board's order. Specifically, CEP alleges that the Board intentionally failed to act on the application after receiving DEP's recommendation memorandum and that the Board did not properly consider the expenditures it undertook in connection with the project during that two and half time period. CEP therefore claims that the Board did not turn "square corners" and act "scrupulously, correctly, efficiently, and honestly," citing F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418 (1985). (Ab48). The legislative goals of the Solar Act and Clean Energy Act, however, require consideration of more than the developers' interests, and the Board is required to strike that balance.

In F.M.C. Stores Co., supra, the Supreme Court held that "[i]n dealing with the public, government must 'turn square corners.'" Id. at *426 (citation omitted). Although the decision was not published, the Appellate Division applied the doctrine in a utility context in In re the Petition of the Pine Hill School District From the November 1, 2013 Denial of Incentives in Connection with its Energy Savings Plan, 2016 N.J. Super. Unpub. LEXIS 911

(App. Div. April 20, 2016)[8] ("Pine Hill") and affirmed the decision of the Board to deny incentives to an applicant that decided to invest in energy efficiency upgrades without pre-approval for the incentives from the Board, but who ultimately did not meet the program requirements. (RCa001). The Appellate Division reasoned that the applicant had been repeatedly told throughout the process that it needed approval from the Board for the incentives, noting that equitable estoppel of the denial would "interfere with governmental functions" and that the BPU had to "ensure that funds are granted only to those projects which meet the minimum program standards …." Id. at *17-*18 (RCa006). The Appellate Division further noted that when a project did not meet the technical standards under the program, there was no benefit to ratepayers and incentives would therefore not be approved. Id. at *3. (RCa002).

Similar to the energy efficiency incentives at issue in Pine Hill, the solar incentives awarded developers are ultimately paid by electric ratepayers as part of their utility bills and, therefore, ratepayers must also receive some benefit by their approval and the Board must ensure certification is granted only to those projects which meet the provisions applicable to subsection (t) projects. The subsection (t) incentives for solar development on brownfields are granted

[8] Rate Counsel has provided this unpublished decision to the Court and other parties to this case in its Appendix, which is referred to herein after as "RCa."

to further the State's policy of supporting solar development on compromised or marginal lands. For the same reason, the TI program provides such projects its maximum incentive amount. The Board owes a duty to turn square corners not only with the solar developer but with all affected parties. The Board's rationale to deny certification of subsection (t) projects based on certain circumstances in the interest of transitioning to lower incentives and lowering ratepayer costs serves as an example of evaluating both ratepayers and developers' interests, while also carrying out the Clean Energy Act's directive to the Board to "continually reduce, where feasible, the cost of achieving [the State's] solar energy goals." N.J.S.A. 48:3-87(d)(3).

Moreover, CEP filed its application very close to the closure of the TI program, citing an "an abundance of caution," while acknowledging that it was aware that the site was mapped as farmland or soils of statewide importance and that a portion of the property was assessed as farmland from 2002 to 2012 and it failed to include the pertinent information concerning the full agricultural history of the property. (A008a, A082a). The Appellant went so far as to set forth its position as to why the property was not farmland in anticipation of the BPU denying certification on the basis that the site was assessed as farmland. (Aa118a-124a). Therefore, CEP could not have reasonably expected with absolute certainty that its eleventh hour attempt to

receive approval under the TI program would be granted when there was a question as to whether the property was farmland. This is especially true given it did not include all of the necessary information for DEP to render a determination.

Additionally, CEP states as part of its "square corners" argument that it "spent hundreds of thousands of dollars" waiting for the Board to issue an order. (Ab48). It was not prudent to continue to invest funds in the project pending the Board's decision and CEP did so admittedly at "its own risk." Ibid. CEP was well aware that there were outstanding issues concerning the use and assessment of the property when it filed its application, which could have contributed to the Board's delay in rendering its decision following the receipt of DEP's memorandum.

IV. CONCLUSION

For all of the reasons above, Rate Counsel respectfully requests that this Court affirm the findings of the Board below.

Respectfully submitted,
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IN THE MATTER OF THE NEW JERSEY SOLAR TRANSITION PURSUANT TO P.L. 2018, C. 17 – APPLICATION FOR CERTIFICATION OF SOLAR FACILITY AS ELIGIBLE FOR TRECS PURSUANT TO SUBSECTION(T) OF THE SOLAR ACT OF 2012 – REEDER PROPERTY SOLAR FARM, LLC, BLOCK 7, LOT 11	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003975-23T4 **CIVIL ACTION** ON APPEAL FROM FINAL DECISION OF NEW JERSEY BOARD OF PUBLIC UTILITIES BPU DOCKET NO: QO21081095

APPELLANT'S REPLY BRIEF IN SUPPORT OF THE APPEAL OF THE NEW JERSEY BOARD OF PUBLIC UTILITIES' DECISION

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Dated: March 17, 2025

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PRELIMINARY STATEMENT

"There is nothing so stable as change." – Bob Dylan.

The refusal by the New Jersey Board of Public Utilities ("BPU" or "Board") to recognize that land once considered farmland can become a brownfield seems to form the foundation of their denial of this solar facility. Choosing to disallow Transitional Renewable Energy Certificates ("TRECs") under the New Jerey Solar Act, N.J.S.A. 48:3-87(t) because the nature of a piece of property failed to remain static and unchanged is not only unreasonable, it is nonsensical. Be it sea levels, global climate, or even just the local variations that impact every parcel in the State, asking for land and the environment to be locked into place on a date certain, never to change, is at best a fool's errand and at worst a fundamentally arbitrary and capricious act.

Additionally, this action calls into question the element of fairness. Not only did the BPU wait over 2 years to issue a decision from the date of receipt of the "advice" from the New Jersey Department of Environmental Protection ("DEP"), during which time appellant continued to work to clean up, prepare, and conduct remediation, but the Board then, upon receiving a Motion for Reconsideration, apparently could not be bothered to conduct an actual reconsideration. Traditionally, the Board has been capable and engaged enough

to issue a Secretary's Letter acknowledging the Motion for Reconsideration and tolling the time for decision; here – nothing. See, e.g., Letter, Secretary of the Board, Docket Nos. QO18060646 and QO20080556, dated December 16, 2020 (extending time and ensuring that the reconsideration remains open for Board action). The only explanation? "The Board did not respond." (Rb, at 10.)[1]

The Project was to be built upon a brownfield that had been inappropriately designated as farmland prior to the submission. The Appellant fixed this designation, returned all benefits received, and informed the Board in complete transparency as to the nature of the process. Both then and now, the Board refused to consider the actual situation. Instead, under the Board's reading, a property designated as farmland during a specific set of dates is, now and forever, farmland and not a brownfield, no matter what happens on that property. This is nonsensical, and runs counter to the Solar Act, the State's Energy Master Plan, good governance, and the push to use underutilized property for a higher and best use than simply remaining fallow.

This case calls for reversal and remand to the BPU to address and satisfy the statutory requirements, regulatory foundation, and common sense.

[1] "Rb" refers to the Board's brief.

LEGAL ARGUMENT

THE BPU'S DECISION TO DENY THE APPLICATION IS ARBITRARY AND CAPRICIOUS (Order, at pp. 10-13)

A. The BPU's decision-making process remains subject to judicial review for arbitrary and capricious failures and failure to abide by legislative intent.

The process by which a governmental regulatory agency such as the BPU makes decisions is bounded by the requirements of fact and law. Implementing legislative policy, based upon the legislative language and intent, is the core purpose of agency action. Barry v. Arrow Pontiac, Inc., 100 N.J. 57, 70-71 (1985), quoting Gloucester County Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384, 390 (1983) ("the grant of authority to an administrative agency is to be liberally construed to **enable the agency to accomplish the Legislature's goals**." (Emphasis added.) Accordingly, a reviewing court is "not bound by an unreasonable or mistaken interpretation of [a statutory] scheme, particularly one that is contrary to legislative objectives." McClain v. Bd. of Rev., 237 N.J. 445, 456 (2019). Here, Appellant seeks just such a review from the Court, which will see that the Board's interpretation is counter to legislative objectives, common sense, and good governance.

B. The BPU's decision to deny the Project misapplies prior Board decisions and is not predicated upon the Solar Act.

Reeder Property Solar Farm, LLC ("CEP's") does not dispute that the property was designated and identified as farmland within 10 years of July 24, 2012, the date set forth in the subsection (s) criteria in N.J.S.A. 48:3-87(s). What CEP claims, and the Board cannot refute, is that the significance of that subsection (s) date and declaration is immaterial to the determination of the applicability of subsection (t). In order for the Board's analysis[2] to make sense in this matter, in addition to believing that the legislature intended subsection (s) of the Solar Act to be read in conjunction with subsection (t), of which there appears to be no foundation, it needs to be reasonable and clear that the intention of the legislature was to have the status of a piece of property in 2012 be dispositive upon the use of that property in 2024.

[2] I/M/O the New Jersey Solar Transition Pursuant to P.L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection(t) of the Solar Act of 2012 – Reeder Property Solar Farm, LLC, Block 7, Lot 11, Order, New Jersey Board of Public Utilities, Docket No. QO21081095, dated June 27, 2024 (001a) (the "Denial Order"), denying CEP's application ("Application") for conditional certification pursuant to subsection (t) ("subsection (t)") of the Solar Act of 2012, L. 2012, c. 24, codified at N.J.S.A. 48:3-51 et seq., with subsection (t) appearing at N.J.S.A. 48:3-87(t) ("Solar Act").

The BPU had no difficulty accepting the word of the petitioner that the status from farmland had been changed in I/M/O the Implementation of L. 2012, C. 24, the Solar Act of 2012; I/M/O the Solar Transition Pursuant to L. 2018, C. 17 – Application for Certification of Solar Facility as Eligible for TRECs Pursuant to Subsection (t) of the Solar Act of 2012; Holland Solar Farm, LLC / Hughesville Mill – Application for Subsection (t), Block 2, Lot 1.02, Order, New Jersey Board of Public Utilities, Docket Nos. EO12090832V, QO19010068, and QO20050345, dated March 3, 2021 (125a) ("Holland Order"), where the Board accepted a change from farmland assessment to non-farmland assessment without any documentation or concern about the process. Specifically, in Holland, the Board noted that, **after** conditionally approved the application, the requirement that the "Applicant provide documentation that the tax classification of the … site has been changed to other than '3B Qualified Farm Property' and that an amount equal to the tax benefit received from its classification as qualified farmland … be paid or donated to the appropriate taxing authorities." Id. at 7. The Board was so unconcerned with who the appeal was made to, or even proof that such an appeal had occurred, that the documentation was an afterthought to allowing Holland to move forward under subsection (t) despite prior farmland assessment, Yet with CEP, explicit proof

of the change in designation and the repayment of the benefits was not worth considering, and in fact was, according to the Board, done so incorrectly as to be utterly unacceptable and not worthy of discussion. The distinction seems to be, at best, inconsistent.

This approval in Holland was explicitly distinguished from the Board's prior decision in In re Implementation of L. 2012, C. 24, N.J.S.A. 48:3-87(t), 443 N.J. Super. 73 (App. Div. 2015) (hereinafter, "Millenium"). Millenium sought subsection (t) approval for an apple orchard that had soil contaminated by arsenic and lead, and DEP determined that contamination had not occurred through a discharge, and thus the land was not a brownfield by definition. Id. at 8. Millenium was denied because the property in Millenium was not a brownfield. It had nothing to do with the date or the designation; it factually did not qualify.

In Holland, the DEP correctly determined, pursuant to the express language of subsection (t), that the property was not a "brownfield" **because of the actual physical status of the property at that time of the review.** That is the correct analysis under subsection (t) and the correct result in light of the Board's express desire – and the court's approval of the policy determination – to limit the development of solar on farmland and instead encourage

development on brownfields. If looking at the current state of the Holland property and deciding that it was not a brownfield, but was instead farmland, then by all means – review it as farmland.

In this case, DEP never considered if the property was a brownfield. Instead, despite CEP having sought and received a municipal determination that the farmland designation was incorrect, and despite CEP having refunded the Township of Harmony $194,624.76, which the Township determined was the difference in taxes, and in light of the Board's acceptance of such modifications in the past, the Board decided that the property was farmland and directed no other consideration of the brownfield status. The Board's "further review" of the site was without significance, and outside the scope of the Board's regulatory review and the statutory requirements.

C. The Board's imposition of the farmland assessment timeline is unfounded in the Solar Act.

The Solar Act does not impose the subsection (s) "farmland lookback" requirement on projects seeking eligibility under subsection (t). Farmland is not brownfield, and brownfield is not farmland. Subsection (t) expressly directs the Board to create a certification process for projects that meet one of three specific statutory definitions: "brownfield," "site of historic fill," or "properly closed

sanitary landfill." N.J.S.A. 48:3-87(t). The only requirement imposed by Subsection (t) concerns the current condition of the property. The Solar Act includes no language relating subsection (t) back to subsection (s), or any indication that a "brownfield," "site of historic fill," or "properly closed sanitary landfill" would not be eligible pursuant to subsection (t) if it was farmland assessed during 2002 to 2012. Subsection (t) was meant to apply prospectively, while subsection (s) was meant to apply retroactively. Compare N.J.S.A. 48:3-87(s) with N.J.S.A. 48:3-87(t).

The Board points to the Millenium decision for the premise that "Subsection (s) of the Act unambiguously prohibits construction of solar generation on farmland pursuant to Subsection (t)." (Rb, at 17.) This is both true and so reductive as to be meaningless. Of course a solar development on farmland is governed by subsection (s). Subsection (s) covers farmland. The question in this matter is not does subsection (s) apply to farmland; it is if subsection (s) applies to a brownfield. Nothing in the Act, the Millenium decision, or any other source of authority makes subsection (s) applicable to non-farm projects, such as this one.

Subsection (s) of the Solar Act was drafted for the 2012 Solar Act, and the dates chosen were predicated upon the pre-2012 solar industry's use of

farmland for solar development in the State. Pre-2102 Solar Act, the State did not prohibit the issuance of solar incentives for large grid-supply projects developed on farmland. This led to the overuse of farmland, underuse of brownfields and landfills, as well as a SREC market that went through a serous "boom and bust" cycle, ending in an SREC market crash.

The Solar Act, and the 2011 Energy Master Plan, sought to restrict large-scale solar development from farmland and move it toward "brownfields," "properly closed sanitary landfills," and "sites of historic fill," that is, contaminated properties with no other productive use. Millenium, 443 N.J. Super. at 79. This shift explains why subsection (t) has so few prerequisites to certification, unlike subsections (s) and (q). Under subsection (t), all that is required is that the facility be located on a "brownfield," "properly closed sanitary landfill," or "site of historic fill." N.J.S.A. 48:3-87(t). Subsection (t) does not require an investigation into the historical status of the property, or a determination as to the property's historic tax classifications. Is it a "brownfield" is the only question.

The legislature neither intended nor acted to set a contaminated property's status at a point in time other than when it was being reviewed. This is reasonable and rational, as the express purpose of subsection (t) is to encourage

the redevelopment of contaminated sites. To allow frustration of this goal by something as simple as a property having once been inappropriately assessed as farmland creates an untenable situation. The Solar Act was not intended to create an incentive regime in which the classifications of properties are fixed in time. If the changes that come with the passage of time are irrelevant for purposes of the description of the property, the Solar Act, the EMP, and the basic elements of legislative analysis would be frustrated. Finally, what would be the benefit of allowing an otherwise unproductive, tainted property to remain a continuing blight on the towns they occupy because of a now-fixed mistake?

D. The Board's imposition of farmland assessment timeline is an improper rulemaking.

The Board's imposition of the subsection (s) "farmland lookback" requirement to subsection (t) projects constitutes improper rulemaking in violation of Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1983). Imposing a new obligation that no project, regardless of whether it was located on a "brownfield," "site of historic fill," or "properly closed sanitary landfill," would be certified under subsection (t) if the property that was the subject of the application had been farmland assessed in the 10 years preceding the adoption of the Solar Act, has all the indicia of a rule with none of the rulemaking requirements.

As noted above, the Solar Act itself cannot be reasonably read to apply subsection (s) farmland assessment criteria to subsection (t) projects. At no point, in either the text of subsection (t) or the related definitions of "brownfield," "area of historic fill," or "properly closed sanitary landfill facility" set forth in N.J.S.A. 48:3-51 is there a reference to the prior "farmland" status of a property proposed for certification pursuant to subsection (t). Further, the Board's assignment of subsection (s) criteria to subsection (t) applications "reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule" and "(ii) constitutes a material and significant change from a clear, past agency decision on administrative regulatory policy in the nature of the interpretation of law or general policy." Metromedia, 97 N.J. at 331-32.

As discussed, the original procedures determined by the Board and DEP to apply to subsection (t) projects states that: "To participate in the Certification Program, an applicant must first submit documentation that the proposed site is a brownfield, historic fill area, or landfill as defined by the Solar Act." January 24, 2013, Order, at 10 (147a). The only information relevant to a subsection (t) application was whether the applicant could demonstrate that the property is a

"brownfield," "properly closed sanitary landfill," or "site of historic fill" as defined by statute.

N.J.A.C. 14:8-2.4(g) notes, in the initial part of that rule: "A proposed grid supply facility **that is not located on a brownfield, properly closed sanitary landfill facility, or area of historic fill** must satisfy the requirements of this subsection for the energy it generates to serve as the basis for creation of an SREC." N.J.A.C. 14:8-2.4(g) (emphasis added). Clearly, by its very language, this rule is meant to apply to everything other than subsection (t) facilities.

If read reasonably, the rule at N.J.A.C. 14:8-2.4(g) clearly squares with the language of the Solar Act and the intent of the legislature. It means that applications for solar development on farmland that was assessed as such immediately preceding the Solar Act would be rejected and that going forward, applications for actual farmland would be rejected. It also does nothing to limit what the legislature intended, that if a property were a brownfield, landfill, or site of historic fill, then it could be approved, regardless of its status between 2002 and 2012.

The Board's insistence that, if a contaminated site was farmland assessed between 2002 to 2012, it is somehow not a "brownfield" in 2024 is not based

upon the Solar Act or an appropriate rulemaking. Following Millenium, the Board abandoned its past agency determination and policy, as set forth in the January 24, 2013, Order, and imposed an additional requirement on all subsection (t) applications, without formal rulemaking.

The addition of this requirement – a requirement that is found nowhere in the Solar Act – constitutes rulemaking adverse to these types of applications without the formality of the APA rulemaking process. This is highly prejudicial to these applications and to the clear and express intent of the Solar Act. On this set of facts, the matter merits reconsideration.

E. Equity continues to merit reversal.

CEP remains surprised, concerned, and confused about the timing on this matter. As noted, the Application was submitted to the Board on August 26, 2021. Denial Order, at 5 (005a). The Board transmitted the Application to the DEP on December 1, 2021. Id. at 6 (006a). DEP issued an advisory memorandum only two months later, on February 7, 2022. Ibid.

The Board then did not act upon the Application for a full two and a half years.

In those two and a half years, CEP, at its own risk, nonetheless spent hundreds of thousands of dollars to prepare the site. Yet the Board said nothing.

The Board did nothing. No "heads up." No decision issued. No update. Nothing.

Then, once the decision was issued, CEP filed a motion for reconsideration. This was, for reasons CEP cannot articulate, simply ignored. Again – the Board did nothing.

Why? CEP does not know. But CEP is aware and believes that no party should expect this type of behavior from a governmental entity. CEP expected the Board to "turn square corners" and act "scrupulously, correctly, efficiently, and honestly." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985). CEP believed that the Board would act "in good faith and without ulterior motives." Ibid.

CEP does not understand the rationale for a two-and-a-half-year delay in acting on this Application, particularly if the Board's intention all along was to deny it, and CEP believes that this alone merits reconsideration of the Application. At a minimum, a timely decision for denial would have provided CEP with a contemporaneous opportunity to "explore the possibility" of participation in the Competitive Solar Incentive Program, as suggested by Staff in the Denial Order. Instead – the delay, cost, and approach has created an

environment where the next steps are subject to quite a bit of trepidation and dread. It is quite concerning, and not what one would expect from the Board.

CONCLUSION

For the foregoing reasons, and as discussed above, the decision on the part to the New Jersey Board of Public Utilities to deny the application of Reeder Property Solar Farm, LLC for approval of a landfill facility demands that this Court find the decision arbitrary, capacious, and thus the decision should be overturned and reversed.

Respectfully submitted,

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