Klavens Law Group

June 1, 2020

Kaitlin Kelly
Deputy Director
Massachusetts Department of Energy Resources
100 Cambridge Street, Suite 1020
Boston, MA 02114

Dear Deputy Director Kelly:

Thank you for the opportunity to submit comments on the emergency regulation issued by the Department of Energy Resources ("DOER"), 225 CMR 20.00, which modifies the Solar Massachusetts Renewable Target Program (the "SMART Program").

Klavens Law Group, P.C. provides corporate, real estate, environmental, and energy regulatory services and has been deeply involved in solar energy development in Massachusetts. Our clients include solar energy project developers, investors, and other stakeholders from Massachusetts and around the country who have been and continue to be key players in the growth and development of the flourishing Massachusetts solar energy sector. We have also been involved in redevelopment of brownfields and closed landfills for both solar energy use and other types of commercial development.

We have participated in multiple stakeholder processes throughout the development and implementation of the Green Communities Act and the regulatory proceedings that adopted the SREC I and II Programs, the Net Metering Program, and the SMART Program.

We appreciate DOER's expansion of the SMART Program to support an additional 1,600 megawatts ("MW") of new solar generating capacity. The SMART Program's total capacity of 3,200 MW is a good step toward increasing solar development and achieving the Commonwealth's limit of net zero greenhouse gas emissions by 2050. We are pleased to provide comments on some of the changes made and are hopeful that doing so assists DOER in crafting revisions to the emergency regulation that are in line with the overall purpose of the Commonwealth's SMART Program – to encourage and support the continued use and development of solar communities throughout the Commonwealth. Our specific comments are provided below:

The BioMap2 Planning Tool Should Not Be Used to Exclude Sites From the SMART Program.

We understand that BioMap2 was an effort to identify core habitats and supporting natural landscapes so that information could be used to inform land use planning decisions. We recognize and appreciate

the goals and value of BioMap2 for its intended purpose, but BioMap2 was never intended to be codified in the way that DOER has done here. According to the BioMap2 summary report,[1] the Core Habitat and Critical Natural Landscape designations cover approximately 2.1 million acres, which is a monumental 40% of land in the Commonwealth. We have to wonder how DOER can accomplish the sort of expansion of solar that it intends (and which is required in order to meet the Commonwealth's clean energy mandates) if, by using BioMap2 as an exclusionary tool, almost half of the state is eliminated from consideration for solar projects. In fact, not only has DOER proposed to eliminate the 40% of land in the state that is included in BioMap2 areas, but the regulation goes even further by also rendering ineligible unknown amounts of additional land in cases where 50% of the parcel is included in BioMap2 areas. This strikes us as unreasonable and extreme, in direct conflict with the Commonwealth's clean energy mandates generally and with DOER's significant expansion of the SMART Program in particular. Moreover, we cannot imagine that DOER intended to create an incentive to "game" the parcel size, giving an advantage to larger parcels and landowners with lots of land that can combine parcels to avoid the 50% threshold.

Imposition of a prohibition based on BioMap2 conflicts with and is duplicative of the federal, state and local permitting requirements to which solar projects are already subject (*e.g.*, protection of Priority and Estimated Habitats under the state Endangered Species Act and protection of wetlands under the Wetlands Protection Act regulations). Since all the designated Priority Habitat is included in BioMap2, projects are already being evaluated for impacts to those resources and will continue to be – notwithstanding DOER's duplicative and substantially expansive BioMap2 ineligibility.

In addition, effectively banning solar energy development on all BioMap2 areas may have dramatic unintended consequences that undermine the goal of protecting important features of BioMap2 areas. Given that BioMap2 is merely a planning tool and not a regulatory framework, nothing is preventing conventional development of most of the included land for purposes other than solar energy. The effect of banning solar in these areas is to eliminate the option of a private landowner (or a municipality involved in permitting for non-Public Entity projects) to choose between much longer-term and more environmentally damaging development of these lands and substantially less damaging solar energy projects that could be designed to co-exist with and in some cases even enhance certain kinds of habitats. Through the BioMap2 prohibition, DOER is essentially eliminating preferable alternatives to strip malls and condo complexes for land in BioMap2 areas.

The Commonwealth has always had to balance what sometimes can seem to be competing goals – here, renewable energy development and land conservation. We appreciate that that isn't easy but, as DOER has already done in the case of other elements of the SMART regulation, DOER can better harmonize these two goals by providing appropriate safety valves to avoid strict and arbitrary ineligibility.

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[1] *BioMap2: Conserving the Biodiversity of Massachusetts in a Changing World* at 32 (Mass. Dept. of Fish & Game and The Nature Conservancy 2010) (available at https://www.mass.gov/doc/biomap2-summary-report/download).

We suggest that development of SMART projects in BioMap2 areas be treated in a manner similar to that of SMART projects in wetland resource areas and on historic properties. While Section 20.05(5)(e)(5)(b) of the SMART regulation does not allow Solar Tariff Generation Units ("STGUs") in wetland resource areas, the regulation tempers that exclusion by clarifying that an STGU may be within a wetland buffer zone and also that an STGU may be within a wetland resource area itself if "authorized by all necessary regulatory bodies." Similarly, pursuant to Section 20.05(5)(e)(5)(c) of the SMART regulation, while an STGU is generally not allowed on a property included in the State Register of Historic Places, an STGU on an historic property may still be allowed if "authorized by all necessary regulatory bodies." Where a proposed STGU is located in a BioMap2 area, we propose that applicants for SMART qualification should be required to disclose that fact in their application but the STGU should be allowed as long as the project has obtained all of the permits and approvals it requires from federal, regional, and local environmental regulatory authorities.

If DOER nonetheless determines that the BioMap2 planning tool must be used to render sites ineligible, we ask that DOER provide for the possibility of an exception in certain appropriate circumstances. In other instances with the SMART regulation, DOER has provided a safety valve by allowing exceptions for good cause. For example, Section 20.05(5)(g)(8) of the SMART regulation permits exceptions to the project segmentation rule upon a showing of good cause. If there is a presumed prohibition based on BioMap2 data, there should likely be some opportunity for an applicant to demonstrate that, despite being included within the broad net of the BioMap2 planning tool, a particular site should be excepted from blanket ineligibility. By way of illustration, this might be the case where prior use of a site calls into question its suitability as habitat or where an applicant can otherwise demonstrate through suitable expert evidence that the habitat or landscape value of the particular site is not as presumed by the BioMap2 planning tool. It should also be possible to demonstrate good cause for an exception where the applicant can show a countervailing improvement in protection of important habitat or landscape through such means as habitat or landscape enhancement (on-site or off-site), off-site replication, or subjection of other land to conservation restrictions.[2]

It also seems fairly arbitrary and patently unfair that Public Entity projects are exempt from the application of BioMap2 ineligibility altogether (as Category 1), merely because they are Public Entity projects and without any consideration of impacts to BioMap2 areas. This is also ironic as municipalities were among the primary targets of BioMap2 data for their own land use planning purposes. It strikes us as hard to rationalize the case where a Public Entity project could qualify for SMART without any demonstration related to impacts on BioMap2 areas but a private developer would be strictly prohibited from participating in SMART in such an area even if the site is demonstrably void of substantial habitat value and the solar project could actually serve to enhance habitat by the installation of plantings and other features after construction. We note that municipalities impose requirements for vegetative and habitat improvements all the time through local

[2] We note that even the Massachusetts Endangered Species Act provides an opportunity for parties to petition for relief from a Priority Habitat designation, s*ee* 321 CMR 10.12(8).

zoning and wetlands permitting. We assume that this is an unintended consequence of the emergency regulation as initially drafted.

A Longer Transition to Implementation of Provisions Would Be More Equitable and More Aligned With Economic Recovery Goals.

In addition to the challenges discussed above with the proposed new land use criteria, we believe that DOER should provide a longer runway to apply these new provisions to applicants that have sufficiently advanced their projects.

As DOER is aware, with the increase in affected system operator ("ASO") studies, development timelines for projects have shifted and gotten longer. The timeframe for successful completion of interconnection review has grown longer and more unpredictable and remains decidedly in the hands of the distribution companies (and ISO New England). This has not just lengthened the time to obtain an executed interconnection service agreement ("ISA") but has also had spillover effects on permitting timelines. Due to prolonged uncertainty about the economic feasibility of interconnection, together with a concern about obtaining permits too far in advance of construction (many permits have provisions for commencement or completion of construction to remain valid), many developers have felt a need to manage risk and costs by holding off on certain permit applications until they have better line of sight on the successful conclusion of the interconnection review process. As a result, while DOER's decision to allow for an additional 6 months to execute an ISA is helpful, we don't believe that it is sufficient.

In addition, imposition in the emergency regulation of the new, breathtaking BioMap2 exclusion has come as a surprise to many developers that had proceeded in good faith, expending significant resources to advance the development of projects on the reasonable assumption that the regulation would resemble in broad strokes the elements of the straw proposal DOER released on September 5, 2019. This exclusion would come after the expenditure of resources not just by project developers but also by municipalities (and other government agencies) in processing some of the permits. It would also derail financial benefits municipalities had been expecting through new sources of property tax collections or payments in lieu of property taxes.

We understand that the straw proposal had anticipated some changes to the greenfield subtractor but, even with respect to the new application of and greater greenfield subtractor, developers reasonably anticipated that such changes would not apply to projects at a sufficiently advanced stage of development.

Application of a provision to exclude projects on large swaths of land in Massachusetts and without prior notice to stakeholders, as well as application of the new greenfield subtractor provisions, not only has an immediate, disruptive effect on the large number of projects that would otherwise have applied to the SMART Program but also a chilling effect on the clean energy sector in Massachusetts. Parties seeking to develop new solar projects in Massachusetts, and parties seeking to acquire and/or finance

projects in Massachusetts, are likely to be more conservative in their financial decisions in Massachusetts because of such a sudden rule change. At a time when the Commonwealth is facing a forty percent reduction in discretionary spending in its annual budget, regulatory changes that have chilling effects on already disrupted markets have the potential to deepen the economic downturn within the clean energy sector. We suggest that, to ensure a robust recovery, this a time to stabilize and grow regulatory programs that have contributed to the Commonwealth's economic strengths.

For the reasons outlined above, we ask that DOER exempt from application of the new land use provisions: (1) projects that obtain all non-ministerial permits by October 15, 2020 (6 months from the Publication Date); and (2) all projects that had a complete interconnection application

by October 15, 2019 (6 months prior to the Publication Date). We think this timeframe (using a project's date of complete interconnection application), more accurately reflects evidence of advanced project development within the control of the developer, and removes the vagaries and uncertainties of ISA execution, which is controlled primarily by the distribution companies.

While ESS Is Vital to Clean Energy Goals, DOER Should Not Require ESS in All Instances.

As part of the emergency regulation, 225 CM § 20.05(5)(k) requires that energy storage systems ("ESS") be co-located with all solar projects greater than 500 kilowatts ("kW") in size, with limited exceptions. While inclusion of storage where feasible is a worthy goal, mandating it in all instances will particularly disadvantage projects with space constraints, such as building-mounted projects or agricultural projects ("dual use" or "agrivoltaic" projects).

There are likely areas where including ESS would provide significant grid benefits, and that should certainly be incentivized. At the same time, there will also be areas where solar energy facilities would be able to interconnect but inclusion of ESS would yield marginal, negligible or even negative grid benefits. Uniformly requiring projects greater than 500 kW to include storage seems unnecessary and likely to lead to unfortunate market distortions. We suggest that the goal of promoting storage would be better served by reviewing the storage adder and providing extra incentives for co-locating ESS with solar where it would be most beneficial. Alternatively, we encourage DOER to use its regulatory power to grant exceptions to a broader population of solar projects, especially those projects under development that should be eligible for Statements of Qualification ("SQ") without needing to comply with the ESS requirement.

DOER Should Issue SQs Upon Adoption of Final Regulation.

DOER has stated that it intends to wait until the Department of Public Utilities ("DPU") approves a revised tariff filed by the distribution companies to comport with the updates to the SMART Program. While we understand the SMART Program has unique complexities as it is ultimately governed by both a regulation and a company tariff, we believe that issuing SQs to projects upon adoption of the

final regulation will enable smoother development timelines, reduce uncertainty and the associated increased soft costs, and is wholly consistent with the plain language of the regulation.

Specifically, 225 CMR 20.06(3) states: "If the Department finds that a Generation Unit meets the requirements for eligibility of a Solar Tariff Generation Unit pursuant to 225 CMR 20.00, the Solar Program Administrator will provide the Owner of such Unit or the Authorized Agent of the Owner with a Statement of Qualification."

If an application is otherwise administratively complete, and since 225 CMR 20.00 has provided 3200 MW for the program, it would appear that the regulation itself requires Statements of Qualification to be issued to applicants. Such issuance would not be in conflict with the tariff as the Incentive Payment Effective Date is defined as when it is "eligible to begin receiving incentive payments." Any project with a SQ is still required to enroll in the SMART tariff to receive incentive payments, and it will not be able to do so until DPU approves a revised tariff for 3200 MW. As such, there is no bar to issuance of SQs after the regulation is finalized, even prior to modification of the tariff.

Providing projects with SQs before the tariff is amended will allow projects to proceed with financing and other late stage activities, enabling the industry to continue to grow, employ workers, and otherwise contribute to the Commonwealth's economy. Merely growing the waiting lists until the tariff is finalized will continue to stall some projects, perpetuate the hills and valleys of the "solar coaster" and potentially result in significant job loss. We urge DOER to reconsider its position on the timing of issuing SQs for the expanded capacity of the program.

DOER Should Modify the* ASTGU *Adder Classification to Maximize the Success of Agrivoltaic Projects.

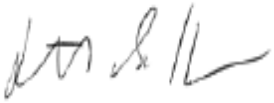
Throughout the development of the SMART Program, we have supported DOER's emphasis on developing solar energy to work in tandem with agricultural activities. We believe that this dual use of agriculture and solar – or "agrivoltaics" – offers significant, multiple layers of value to the solar industry, the agricultural community, and the Commonwealth at large. Continuing to enable creativity in adoption of these projects is critical to their success. Given the diversity of agricultural activities and solar arrays, DOER should incentivize the development of solar projects that can deliver both energy and agricultural benefits. As the SMART Program has unfolded, review of eligibility for the Agricultural Solar Tariff Generation Unit ("ASTGU") adder has proven to be an involved process requiring review of both the solar and the agricultural components of the projects. Also, unlike other predetermination reviews such as the predetermination review for the brownfield adder, which looks largely at past actions (*e.g.*, contamination of the land), the review for the ASTGU adder involves looking into the future through an examination of growing plans, yields, etc. that requires significantly more time. As such, we recommend that DOER remove ASTGUs from the location-based adder category under 225 CMR 20.07(4)(a), and instead create a stand-alone adder for ASTGU and require submission of the predetermination letter at the time a SMART claim form is submitted and not at the time of submission of the Statement of Qualification Application.

We thank the Department and its staff for its hard work in its review of the SMART Program and proposed changes, and are grateful for the opportunity to comment and look forward to continued engagement in the next steps of this process.

Sincerely,

Courtney Feeley Karp

Dawn Stolfi Stalenhoef



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