By email: ken.ayars@dem.ri.gov

October 22, 2018

Ken Ayars, Chief
Division of Agriculture, RIDEM
235 Promenade Street
Providence, RI 02908

Re: DEM Proposed Amendment to Rules and Regulations for Enforcement of the Farm, Forest, and Open Space Act (Rule Identifier 250-RICR-40-20-1) – Dual Use Renewable Energy Standards

Dear Mr. Ayars:

Conservation Law Foundation ("CLF"), Rhode Island Land Trust Council ("RILTC"), Audubon Society of Rhode Island ("ASRI"), Land for Good ("LFG"), Save the Bay, and American Farmland Trust ("AFT") thank you for the opportunity to comment on the Rhode Island Department of Environmental Management's ("RIDEM") proposed revisions to RIDEM's Farm, Forest, and Open Space ("FFOS") rules and regulations to address dual use renewable energy generation on farmland. We support RIDEM's efforts to establish thoughtful guidelines for what constitutes dual use of farmland for both renewable energy generation and agricultural production, but believe the proposed regulations still require substantial revision as is set forth below.

Previously, on December 6, 2017, CLF, RILTC, ASRI, and LFG submitted comments on the November 11, 2017 proposed FFOS regulations and reiterate below our concerns at that time that remain unaddressed or are inadequately addressed in the current proposed regulations.

Beyond the comments submitted here, we are happy to work with RIDEM further on specific language to achieve the regulations' important policy goals of supporting farmers who are interested in developing renewable energy facilities and retaining farmland in production for current and future agricultural operations.

1. **The final regulations should clarify the definition of "Farmland" in 1.4(A) (12) to explicitly state the requirements of a conservation plan.**

The current proposed regulations define "Farmland" as having a "Farm, Forest, and Open Space conservation plan, either applied for or in force within the past 10 years that is consistent with the U.S. Department of Agriculture standards." We respectfully request the following modifications to that definition to promote greater clarity:

"Farmland" means any tract(s) of land, exclusive of house site, that has a current conservation plan being implemented or followed that is consistent with the U.S. Department of Agriculture best practices.

The revised definition substitutes "Farm, Forest, and Open Space conservation plan," an undefined term, with the defined term, "conservation plan." The consistency will provide for greater clarity. In addition, the USDA does not currently have defined standards for conservation plans, therefore, following USDA best practices is a more meaningful requirement. Finally, because there is no current system for monitoring or inspecting farmland to ensure the consistent implementation of a conservation plan, the 10 year standard should be replaced with a standard that requires current implementation.

2. **The final regulations should clarify and define "renewable energy project" in 1.6(D)(5)(g).**

In the proposed regulations, "renewable energy system" in 1.5(A) and "renewable energy project" in 1.6(D)(5)(g) are undefined. The purpose of these regulations is to allow for FFOS taxation on farmland that are generating renewable energy without disrupting the ongoing viability of the farmland, therefore, it is important to limit what is considered an appropriate renewable energy project. Further, Rhode Island General Laws §44-27-10.1(a) requires these regulations to include a definition of "renewable energy system" that includes "any buffers, access roads, and other supporting infrastructure associated with the generation of renewable energy." We respectfully request that "renewable energy project" be changed to "renewable energy system" and that a definition is added as follows:

"Renewable energy system" means a system of dual-use generation units as defined in 1.4(A)(9) including any buffers, access roads, and other supporting infrastructure associated with the generation of renewable energy.

3. **The final regulations should include in the definition of "Farmland" minimum standards for conservation plans to qualify for FFOS taxation and require a periodic monitoring of implementation of those plans.**

The regulations' requirement that qualifying for FFOS taxation is dependent on a having a conservation plan consistent with US Department of Agriculture (USDA) standards is admirable. However, because the USDA does not have conservation plan standards, RI DEM should promulgate minimum standards for a conservation plan. These standards should go beyond the vague and incomplete standards in RIDEM's guidance document entitled "A Citizen's Guide to the Farm, Forest, and Open Space Act" (which is not referenced in the Rules).

It is our understanding that the deletion of the language of the standard for meeting minimum criteria in 1.6 (C) is to address regulatory reform interest of removing the appendix. The

minimum criteria requirement for forest plans is re-established in 1.6 (C) and 1.6 (D). However the proposed rules do not establish minimum standards for an agriculture conservation plan required for enrollment in the Farm Forest and Open Space Program.

By defining meaningful minimum standards for FFOS conservation plans, the RI DEM will be fulfilling the spirit of R.I. Gen. Laws § 44-27-10.1. A similar requirement is already included in 1.4(A)(14) requiring satisfaction of minimum criteria for forest stewardship plans and RIDEM has adopted specific standards for forest stewardship plans. Some of the performance standards that we suggest later in this letter for Dual Use projects should be adopted by RIDEM as core standards for a conservation plan.

Further, implementation of FFOS forest stewardship plans is monitored by RIDEM. We respectfully request that a monitoring provision be added to these rules for conservation plans on farms enrolled in FFOS. This monitoring should be done by RIDEM Division of Agriculture or delegated by the Division to the Conservation Districts that approve the conservation plans.

4. **The term "Generation unit" is not well defined and then not used in the rules. The final proposed should delete the term and use "Dual use generation unit" throughout the regulations.**

The current proposal defines “dual use generation unit” in 1.4(A)(9); however 1.4(A)(15) adds an additional definition for “generation unit.” Throughout the proposal, “generation unit” is only used in 1.6(D)(5) and appears to be used synonymously with “dual use generation unit.” The separate definition of “generation unit” creates confusion. To clarify, we respectfully request that “generation unit” be replaced with “dual use generation unit” or be defined as follows:

> “Generation unit” means “dual use generation unit” as defined in 1.4(A)(9).

5. **These rules should be revised to clarify that the development of renewable energy systems on up to 20% of the total acreage of land actively devoted to agriculture without a land use conversion tax penalty can only occur once.**

The proposed regulations do not prevent a farmer from developing 20% of their farmland for a renewable energy facility and then a year or two later developing 20% of the remaining farmland. This could progressively develop renewable energy on shrinking portions of the farmland without the farmer incurring the conversion tax penalty.

6. **To avoid confusion and for clarity, the final regulations should consistently use the defined term "Dual Use Generation Unit." That term should replace "Generation Unit" in subsections 1.6 (D)(5) (a); 1.6 (D)(5) (b); and 1.6 (D)(5) (c) of these rules.**

The term "Generation Unit" is used in subsections "a, b, and c" which provide details for 1.6(D)(5) which uses the term "Dual Use Generation Units." Dual Use Generation Units is well defined in these rules and should be used consistently throughout the rules and replace the term "Generation Units" in these subsections. We respectfully request that 1.6 (D) (5) be revised as follows:

a. the Dual Use Generation Unit will not interfere with the continued use of the land beneath the unit or around the structure for agricultural purposes;

b. the Dual Use Generation Unit is designed to optimize a balance between the generation of electricity and the agricultural productive capacity of the soils;

c. the Dual Use Generation Unit is a raised or freestanding structure allowing for continuous growth of crops underneath the solar photovoltaic modules or around the turbine, with height enough for labor and/or machinery as it relates to tilling, cultivating, soil amendments, harvesting, etc. and grazing animals.

7. **The final regulations should explicitly require that conservation plans are being implemented.**

In order to make the implementation of conservation plans explicitly required, we respectfully request that 1.6(D)(5)(g) be revised as follows:

Applicants are required to submit a current conservation plan to the department that is being implemented to ensure continued viability of the farmland during and after the prescribed life of the renewable energy project.

8. **The final regulations should add an additional condition to FFOS taxation for Renewable on Farmland/Dual Use Generation Units to ensure continued compliance.**

The current proposed conditions to qualify for FFOS taxation under the category "Renewable on Farmland/Dual Use Generation" should have an additional condition that requires that the operator affirm that they are in compliance with their current conservation plan. We respectfully propose 1.6(D)(5)(d)(6) be added as follows:

> An affirmation that the farm operation is consistent with and is implementing the current conservation plan.

9. **RIDEM should add a requirement that Dual Use projects' continued eligibility for FFOS taxation is contingent on continued dual use for farming and energy generation.**

As we suggested in our previous joint letter, the annual reporting requirements will allow RIDEM to explicitly require that continued eligibility for FFOS taxation be dependent on continued dual use of the land. The requirement of continuous dual use of the land would help to avoid the abandonment of agricultural activities during the lifetime of the energy generation project. We respectfully requested that the following language be included:

> If at any point the information reported to the Division of Agriculture under 1.6(D)(5)(d)fails to demonstrate that the land beneath the Dual Use Generating Units is being used for agricultural production as determined by the Division of Agriculture, the land shall no longer be "farmland" eligible for taxation according to agricultural use under R.I. Gen. Laws § 44-27-2(1)(iii) and shall be subject to the land use change tax established by R.I. Gen. Laws § 44-5-39, unless the land is returned to agricultural production within one year.

We respectfully reiterate our previous comment that explicitly conditioning FFOS eligibility on continued agricultural production would carry out the goals of the General Assembly in passing R.I. Gen Laws § 44-27-10.1 and help Rhode Island avoid losing farmland to energy generation.

10. **The final regulations should include a requirement that system design plans be filed and recorded with the RIDEM.**

In our previous letter we had noted that the "system design information" was not required to be reported or kept on file. In this proposal the provision for system design information has been completely removed. We believe that the systems design information is important and should be recorded properly so that RIDEM has access to it. We reiterate that we have no preference on whether RIDEM has a right to approve the system design or merely receives a report or engineering plans, so long as they are recorded.

11. **Delete the reference to applicable Fire Safety Code Board of Appeal and Review regulations and State Building Code commission regulations.**

Section1.6 (D)(5)(e) of the proposed rules single out required compliance for two regulations and is an incomplete list of regulations that need to be followed for development of renewable energy facilities. If the rules are going to reference compliance with regulations by name, they should

include all other relevant regulations including sediment and erosion control, stormwater management and wetlands. The Rules should not single out two regulations for compliance.

12. The final regulations should clearly state that solar installations built on crushed stone surfaces are not qualified as dual use facilities.

The current proposed language in 1.6(D)(5)(f) reads "projects *are not required* to build their solar systems on crushed stone surfaces anymore." This language makes it a choice on whether to build on crushed stone or not, however, solar installations built on top of crushed stone are not compatible with dual use. Therefore, we respectfully request that the language be modified to explicitly prohibit crushed stone as follows:

> f. All ground mount solar generation projects must develop a vegetative management plan (annual landscaping, mowing, etc. surrounding the generation unit) with the local fire official for a fire permit to be issued for the project. Under this requirement projects built on crushed stone are not eligible for treatment as dual use facilities.

13. The final regulations should include provisions in 1.9 and 1.10 that provides for Conservation Districts to notify RIDEM and tax assessors when a farm enrolled in FFOS is out of compliance with their conservation plan.

Conservation Districts are the ones that approve the conservation plans and are the ones that are in the local communities. Therefore, Conservation Districts are most likely to observe actions that are inconsistent with the farm's conservation plan. Providing that Conversation Districts should alert the tax assessors and the RIDEM when a farm is not in compliance with their conservation plan is another mechanism that will ensure the land is protected and remains viable and productive.

14. The final regulations should include performance standards for appropriate siting of dual use installations.

In our joint letter we highlighted that the proposed regulations at the time contained no meaningful siting standards and emphasized the importance of siting standards because Rhode Island does not have statewide siting criteria. The intention of this program is to allow for renewable energy generation on farmland, while still preserving and protecting the farmland for future use. Including well-articulated siting standards in the final regulations will help prevent projects from being installed using techniques that are harmful to the long-term health of the underlying land and soil.

Although the proposed regulations do require an applicant to submit a conservation plan that "ensures continued viability of the farmland during and after the prescribed life of the renewable energy project," we believe that in addition to RIDEM adopting minimum standards for a

conservation plan, more rigorous siting standards are appropriate for dual use to adequately protect our farmland. Accordingly, in our joint letter we suggested that the proposed regulations adopt the siting standards from Massachusetts's Solar Massachusetts Renewable Target (SMART) program,[1] which follow. We believe that some of these standards should be included in the minimum standards that RIDEM adopts for a conservation plan.

> Performance Standards: All ground-mounted Solar Tariff Generation Units with a capacity greater than 500 kW must provide a certification from a professional engineer that the construction of the Solar Tariff Generation Unit complied with the following standards when installed on Land in Agricultural Use, Prime Agricultural Farmland, or other pervious open space:
>
> a. no removal of all field soils;
>
> b. existing leveled field areas left as is without disturbance;
>
> c. where soils need to be leveled and smoothed, such as filling potholes or leveling, this shall be done with minimal overall impact with all displaced soils returned to the areas affected;
>
> d. ballasts, screw-type, or post driven pilings and other acceptable minimal soil impact methods that do not require footings or other permanent penetration of soils for mounting are required, unless the need for such can be demonstrated;
>
> e. any soil penetrations that may be required for providing system foundations necessary for additional structural loading or for providing system trenching necessary for electrical routing shall be done with minimal soils disturbance, with any displaced soils to be temporary and recovered and returned after penetration and trenching work is completed;
>
> f. no concrete or asphalt in the mounting area other than ballasts or other code required surfaces, such as transformer or electric gear pads;
>
> h. limited use of geotextile fabrics; and
>
> i. maintain vegetative cover to prevent soil erosion.

In addition, in our joint letter we also respectfully suggested that RIDEM consider additional siting standards for dual use facilities. Again, we are requesting that RIDEM adopt solar siting standards including the following:

> (1) A dual use generation unit shall not:

[1] 225 C.M.R. 20.05(5)(e)(5)

(A) Be sited on prime farmland when alternative sites are feasible on the farm;

(B) Be on land protected by a conservation easement or on land with the development rights conveyed to the federal, state and/or local government or non-profit organization for conservation purposes, unless deemed consistent with the restrictions on the property;

(C) Be deemed by the holder of any conservation easement on any portion of the farm to be inconsistent with any restrictions set forth in the easement; or

(D) Interfere with state, local, federal, or private grant restrictions placed on funds used to purchase a conservation easement on any portion of the farm, if applicable.

(E) be placed within any rare species habitat as determined by RIDEM.

(F) be placed within any wetland area as defined by the rules and regulations governing the Enforcement and Administration of the Freshwater Wetlands Act.

(2) With respect to any solar dual use generation unit, the owner of the unit shall make all reasonable efforts to ensure:

(A) That the solar dual generation units are buffered to avoid visual impacts on neighboring properties, provided that buffers may be farmed or left in a natural state;

(B) That any stormwater generated from the solar dual use generation unit is managed in accordance with the Department of Environmental Management's stormwater manual, prioritizing green infrastructure best management practices, or in accordance with a conservation plan developed by the USDA's Natural Resources Conservation Service; and

(C) That, to the extent practicable, power distribution lines are located underground.

(3) Any dual use generation unit located within a special flood hazard area as defined by the Federal Emergency Management Agency shall be anchored in a manner sufficient to resist collapse, flotation, or movement during flood or storm events;

(4) No top soil shall be disturbed except for routine agricultural activity consistent with an adopted conservation plan for the farm and no soil will be removed from the site of the dual use generation unit

except as is necessary for the installation of the facility;

(5) No dual use generation unit may be sited unless:

(A) In the case of any dual use generation unit owned by a party other than the farm owner, the third-party owner agrees to a bonded reclamation plan approved by the municipality in which the farm is located; or

(B) In the case of any dual use generation unit owned by the farm owner, the owner shall be responsible for the removal of the unit within ninety days from cessation of operation and the prompt restoration of the land to predevelopment condition. Any such removal and restoration shall be carried out by the farm owner or an agent of the farm owner at the farm owner's expense. If the farm owner fails to carry out the required removal and restoration, then the city or town in which the facility is located may, at its election, enter the property and effect the removal and restoration at the farm owner's expense.

We respectfully reiterate our previous comments that these siting standards are necessary to protect valuable farmland. The purpose of these regulations is to allow for the installation of dual use generation units while still qualifying for agricultural use taxation, therefore, it is essential that RIDEM ensures that the land remains usable for agricultural purposes, now and in the future. These siting standards will help protect the long term health and productivity of the land.

15. Certain terms in the proposed regulations are unclear and should be defined or redefined in the final regulations.

The following terms in the proposed regulations are unclear or undefined and should be replace, clarified, or defined in the final regulations: "continued viability of the farmland" and "optimize a balance."

We request that "continued viability of the farmland" be narrowed to express what viability entails. In addition, "optimize a balance," as we noted in our previous letter, is a vague term that RIDEM should consider eliminating or replacing with a clearer statement of policy.

16. The final regulations should adjust the required annual gross income to qualify as "farmland" for purposes of FFOS taxation to a more meaningful contemporary standard.

Currently, 1.4(A)(12)(b), requires an annual gross income of $2500 to qualify as farmland for purposes of FFOS taxation. The $2500 standard was a meaningful threshold in 1980, when it was originally adopted. However, the $2500 standard has not been adjusted upwards in the last

38 years. Therefore, we respectfully request that annual income threshold be adjusted upward to account for inflation.[2]

Thank you for your work to promote thoughtful and appropriate integration of renewable energy projects on farms. Please do not hesitate to reach out to use if we can be of any assistance in revising the proposed regulations for Renewable on Farmland/Dual Use Solar Generation Units.

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[2] The Bureau of Labor Statistics online "inflation calculator" calculates the value of $2500 1980 dollars at around $7500 in current dollars.