

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 00-F-2057 - Application by Besicorp-Empire Development Company, LLC for a Certificate of Environmental Compatibility and Public Need to construct and operate a 505 megawatt, combined cycle cogeneration plant in the City of Rensselaer, Rensselaer County.

OPINION AND ORDER GRANTING CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

Issued and Effective: September 24, 2004

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NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

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BY THE BOARD:

I. INTRODUCTION

On December 20, 2001, the Besicorp-Empire Development Company, LLC (the Applicant), filed a joint Draft Environmental Impact Statement (EIS) with the New York State Department of Environmental Conservation (DEC) and application for a Certificate of Environmental Compatibility and Public Need with the New York State Board on Electric Generation Siting and the Environment (Siting Board), for a proposed Empire State Newsprint Project ("proposed project" or "proposed facility").¹ The proposed facility consists of a recycled newsprint manufacturing plant (RNMP) and a nominal 505 MW combined cycle cogeneration plant (or "cogeneration" or "generating" facility, or "power plant").

The proposed project would be located in the City of Rensselaer, Rensselaer County, on an 88-acre former industrial manufacturing site, owned by the BASF corporation (BASF), situated to the south of another industrial site and between Riverside Avenue and the Hudson River on the west and the Port Access Highway on the east and south. The cogeneration plant, which falls within the jurisdiction of the Siting Board under Article X of the Public Service Law (PSL), would provide steam and approximately 55 MW of electricity to the RNMP. The remainder of its electricity would be sold in the wholesale electricity market.

A new approximately 8.1-mile transmission line, now the subject of a separate proceeding under PSL Article VII,² would connect the generating facility's switchyard to an existing major Niagara Mohawk Power Corporation (NMPC) transmission substation located at Reynolds Road in North Greenbush. To provide natural gas, which would be its primary

¹ The Applicant submitted a supplemental filing on May 8, 2002, in response to questions posed by State agencies.

² Case 03-T-0644.

fuel,³ a new dedicated service lateral is proposed to be constructed to the generating facility from the Tennessee Gas Pipeline's No. 200 transmission pipeline in the Town of Schodack, about 4.5 miles away.⁴ Process water for the proposed facilities would be obtained from the Hudson River, while cooling water for the power plant would be supplied by the Albany County Sewer District (ACSD) South Plant, via a pipeline to be constructed beneath the Hudson River.

In a letter dated May 28, 2002, the Siting Board Chairman found that the Application complied with the requirements of PSL §164, and DEC simultaneously issued draft air and water permits. The hearing process began with public statement hearings and a joint DEC/Article X issues conference, held on July 9-11, 2002. A further issues conference was held on August 29, 2002. The subsequent issues ruling by Examiners Jacyn A. Brillling and P. Nicholas Garlick⁵ was later affirmed on appeal.⁶

Meanwhile, pursuant to a notice filed by the Applicant on October 9, 2002, negotiations among the parties began and the hearing schedule was postponed. Several months later, the Applicant filed a Joint Settlement Agreement (JSA) which

³ Low sulfur (0.05%) and/or ultra low sulfur (0.0015%) distillate oil could be used, for limited hours, as a secondary fuel for the combustion turbines, heat recovery steam generator (HRSG) duct burners, or the auxiliary boiler.

⁴ PSC Article VII case, Case 04-T-0112.

⁵ Case 00-F-2057, Ruling Specifying Article X and NYSDEC Issues, Setting Schedule, Awarding Supplemental Funding and Other Matters (issued September 27, 2002).

⁶ Case 00-F-2057, Order Granting Interlocutory Review and Affirming Examiners' Ruling (issued August 28, 2003), affirming the exclusion of BASF site pollution remediation issues from the Article X proceeding. In a separate order, we also rejected the City of Rensselaer's (the City) request for a general delegation of local permitting authority. Case 00-F-2057, Order Denying Motion (issued August 28, 2003).

resolved many of the issues among the parties,⁷ and following additional filings of information, statements, and pre-filed testimony, hearings on the remaining issues were held September 17-26, 2003. Following the filing of initial briefs on October 21 and 22, 2003 and reply briefs on October 28 and 29, 2003 a Recommended Decision (RD) was issued by Examiners J. Michael Harrison and P. Nicholas Garlick on January 9, 2004.

The Examiners concluded that the record needed supplemental information on vehicle traffic impacts, and the Applicant was afforded an opportunity to supplement the record. The Applicant elected to provide the additional information and did so in a filing dated January 23, 2004. At the request of the Examiners, the Applicant on February 4, 2004 filed additional information sought by DPS Staff. Denying requests for additional hearings by DPS Staff and the City, the Examiners on March 3, 2004 issued their Supplemental Recommended Decision (SRD), in which they concluded that no material issues of fact had been presented regarding the Applicant's supplemental traffic submissions and offered their final substantive recommendations on traffic issues.

Briefs on exceptions to both the RD and the SRD were filed on April 6, 2004 by the Applicant, DPS Staff, DEC Staff, the City, and the Rensselaer County Greens (RCG). Briefs opposing exceptions were filed on April 19, 2004 by the Applicant, DPS Staff, the City, and RCG.

Subsequently, the Applicant and the City reached agreement on a new "Exhibit 114 Revised," containing revised certificate conditions relating to the traffic issues, which they jointly submitted on June 15, 2004. Comments on this joint submission were filed on June 29 by DEC Staff and on June 30 by DPS Staff.

⁷ Ex. 48. The JSA was signed by the Applicant, DEC Staff, Staff of the New York State Department of Health (DOH Staff), Rensselaer County Environmental Management Council (RCEMC), Niagara Mohawk Power Corporation (NMPC), Sierra Club Hudson Mohawk Group and, with reservations, Staff of the Department of Public Service (DPS Staff), and the City of Rensselaer (the City).

II. DISCUSSION

A. The Required Findings

As detailed in the RD,⁸ in order to grant a Certificate of Environmental Compatibility and Public Need the Siting Board must first find:

- That the construction of the facility is reasonably consistent with the policies and long-range energy planning objectives and strategies contained in the most recent state energy plan, or that the facility was selected pursuant to an approved procurement process.⁹
- That the nature of the probable environmental impacts, including predictable adverse and beneficial effects on (a) the environment and ecology, (b) public health and safety, (c) aesthetics, scenic, historic, and recreational values, (d) forest and parks, (e) air and water quality, and (f) fish and other marine life and wildlife, have been evaluated.¹⁰
- That the facility minimizes adverse environmental impacts, considering the state of available technology, the nature and economics of reasonable alternatives required to be considered under PSL §164(1)(b), and the interest of the State in aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations.¹¹
- That the facility is compatible with public health and safety.¹²
- That the facility will not be in contravention of water quality standards or be inconsistent with applicable DEC regulations.¹³
- That the facility will not emit any pollutants into the air that will be in contravention of applicable air emission control requirements or air quality standards.¹⁴

⁸ RD, pp.5-7.

⁹ PSL §168(2)(a), as implemented by 16 NYCRR §1001.5.

¹⁰ PSL §168(2)(b).

¹¹ PSL §168(2)(c)(i).

¹² PSL §168(2)(c)(ii).

¹³ PSL §168(2)(c)(iii).

¹⁴ PSL §168(2)(c)(iv).

- That the facility will control the runoff and leachate from any solid waste disposal facility.¹⁵
- That the facility will control the disposal of any hazardous waste.¹⁶
- That the facility will operate in compliance with applicable state and local laws and associated regulations, except that the Siting Board may refuse to apply specific local laws, ordinances, regulations, or requirements it finds to be unduly restrictive.¹⁷
- That the construction and operation of the facility is in the public interest, considering its environmental impacts and the reasonable alternatives considered under PSL §164(1)(b).¹⁸

With respect to air and water quality, the Examiners observed, the Siting Board defers to the judgment of the DEC Commissioner, to the extent that she has been delegated responsibility to issue permits from the United States Environmental Protection Agency (EPA) pursuant to the Federal Clean Air Act (CAA) and the Federal Clean Water Act (CWA).

The JSA reached agreement on many of the issues affecting the cogeneration plant and this proceeding, on the one hand, and the RNMP and the companion DEC proceeding on the other. Because the two related proceedings have been adjudicated on a joint record, the issues remaining to be decided in both proceedings are similar in their scope and detail.¹⁹ Some of the issues that have been resolved (such as air and water impacts) and some of the issues remaining in dispute (such as visual and traffic impacts) are similar and to varying degrees coextensive in both proceedings. Of course, there are some issues (such as decommissioning costs) that are unique to the Article X proceeding.

¹⁵ PSL §168(2)(c)(v).

¹⁶ PSL §168(2)(c)(vi).

¹⁷ PSL §168(2)(d).

¹⁸ PSL §168(2)(e).

¹⁹ The findings that DEC is required to make ECL §8-0109(8) following a "hard look" at environmental impacts are similar to the findings that the Siting Board is required by PSL §168(2) to make after an examination of environmental impacts.

The RD comprehensively discussed the record basis for all of the findings we are required to make. In addition to the areas that remain in dispute, the subjects covered include air quality, water resources, cooling technology, groundwater, aquatic and biological resources, geology, soils and seismology, solid waste and hazardous materials, noise, cultural resources, land use, community character and property values, community services, the approved procurement process for generating facilities, reasonable alternatives, other public interest considerations, Coastal Zone management, major onshore storage facilities, and transmission interconnections.

There have been no exceptions relating to these listed topic areas, and we adopt the Examiners' findings with respect to them. The remaining issues in dispute are discussed next.

B. Visual Impacts

The Examiners presented a comprehensive discussion of visual impacts.²⁰ They pointed out that the Applicant, after the application had been filed, provided additional studies and proposed additional mitigations, including structural modifications, in response to visual impact concerns of the parties; notably, a hybrid cooling tower would be employed to prevent cooling tower plumes at temperatures above 20° F.

The Examiners concluded that the generating facility would be located amidst other industrial and transportation uses, away from sensitive receptors: "Indeed, in our view, it is the kind of facility one expects to encounter in the Industrial and Commercial Mixed zone where the site is located."²¹ They determined that the view from the area's arguably most visually sensitive "Government Center" zone, located across the Hudson River in downtown Albany, would not be "excessive or out of character with the surroundings."²²

²⁰ RD, pp. 64-96.

²¹ Id., pp. 95-96.

²² Id., p. 95.

RCG filed a brief on exceptions and a reply brief, challenging most of the Examiners' recommendations concerning visual impacts, and urging the Siting Board to reject the application on the grounds that the visual impacts of the proposed project are unacceptable, even considering mitigation measures. According to RCG, the power plant as proposed would have "enormous adverse visual impacts@ that would "severely degrade the visual resources of this community and this region."²³ This assertion is based on its arguments advanced at the hearing and evaluated by the Examiners. RCG acknowledges that it offers no additional measures to further mitigate visual impacts, but it argues instead that the power plant should be reduced in capacity and size, so as to be only large enough to provide power to the RNMP.

RCG argues: (1) that the simulations and analysis provided by the Applicant regarding visual impacts are deeply flawed; (2) that the Visual Resources Assessment Procedure (VRAP) process used to evaluate the visual impacts is fatally flawed; and (3) that the only reliable representations of the visual impacts of the proposed project are provided by the RCG simulations.

1. The Photosimulations

RCG argues first that the Examiners erred in relying on the Applicant's photosimulations of the proposed project. In the application materials, the Applicant submitted small photosimulations of what the proposed project would look like. Critical of these as too small, and in an effort to show how poor the Applicant's photosimulations are, RCG introduced larger versions of the Applicant's simulations, created from computer files secured from the Applicant.

In its brief on exceptions, RCG objects to any reliance on even the larger versions of the Applicant's simulations, maintaining they are flawed. RCG points out, moreover, that the layout of the facility has changed (as a

²³ RCG's Brief on Exceptions, pp. 17-18.

result of negotiations among the parties to mitigate visual impacts), and argues that many of the Applicant's simulations are therefore no longer even relevant, because they do not accurately represent what the final project would look like if built.

In response, the Applicant argues that objections to the quality of its photographs were fully aired in the RD, and that RCG offers nothing new in this regard on exceptions. It concedes there are distortions in the larger versions, caused by enlarging them from smaller versions, but argues the Examiners indicated they used the larger versions mainly to get an accurate sense of the scale of the proposed facility.

To be sure, the Examiners did agree with RCG that the original simulations were too small to get a sense of the scale of the project's visual impacts. They did, in fact, rely on the larger versions (together with RCG's own simulations) to assess the visual impacts, and they found them useful for that purpose despite flaws that had been identified by RCG. While it is true that certain aspects of the facility's appearance have changed as additional mitigation measures have been agreed to, the Applicant did provide four new simulations showing the final design of the project. Contrary to RCG's contention, these new simulations are useful in evaluating the visual impacts of the proposed project, and we conclude that the Examiners did not err in relying on them in making their recommendations.

2. The VRAP Process

RCG argues further in its exceptions that the VRAP process undertaken by the Applicant was flawed and unreliable. Because additional mitigation measures have been agreed to by the Applicant since the VRAP was completed, RCG also maintains, the VRAP is no longer relevant.

In response, the Applicant asserts the Examiners fully considered RCG's criticisms of the VRAP process, and properly found that criticisms of viewpoint selection, photography, or impact assessment did not disqualify the procedure used. The Examiners properly concluded, the Applicant continues, that the

VRAP did not need to be updated because of changes in the project which, at the suggestion of some of the other parties, were designed to mitigate visual impacts; the Examiners were satisfied that the new photosimulations sufficiently portrayed the changes in appearance caused by this mitigation.

The final configuration of the proposed project has changed since the VRAP was completed, but even RCG itself concedes that these changes have further reduced the visual impacts of the proposed project, in at least some respects.²⁴ We agree with the Examiners that the VRAP assessments are still relevant in this circumstance.

The Examiners fully evaluated all of the RCG allegations of VRAP flaws, including arguments about viewpoint selection, the quality of the photos used to create the simulations, the problems with the public panel, and the alleged bias of the professional panel used to score the impacts of the proposed project. They provided a detailed analysis of the VRAP process, agreed that there were some problems with the process, and rejected the public panel analysis entirely. While the VRAP process was not without faults, we find, upon review of the discussion provided in the RD, that the Examiners gave the appropriate evidentiary weight to the findings of the VRAP process, and we reject RCG's argument that the entire process was unreliable or irrelevant.

3. The RCG Simulations

RCG's final argument is that the only reliable representations of the visual impacts of the proposed project in the record are provided by its own simulations. RCG argues that its simulations, produced from photos taken with a 50 mm lens (instead of a 35 mm lens used by the Applicant) demonstrate the unacceptable impacts of the proposed project.

²⁴ There is, principally, a subjective dispute as to whether one thick smokestack, as originally proposed, is more or less visually intrusive than the two slender stacks. The change was made to reduce the apparent mass and, thus, visual impact.

In response, the Applicant argues that there are problems associated with the RCG photosimulations, such as their unrepresentative depiction of cooling tower plumes, selection of color for the facility, and other factors that exaggerate facility size. Moreover, the Applicant continues, because both the Applicant and RCG simulations show a proposed industrial use in an industrial setting, there is no inherent reason to conclude that viewers would consider one more intrusive than the other.

While the RCG simulations are larger in size than those of the Applicant, and the photos were taken with a different lens, the RCG simulations are not without significant deficiencies, including the depiction of plumes. The record shows that the RCG expert created the plumes on its simulations without any experience with cooling tower plumes, or with the type of plume abatement technology planned for the proposed project, which led to an overstatement of the expected plume. We cannot fault the Examiners, therefore, for concluding that the RCG simulations somewhat overstated the proposed facility's visual impacts.

4. Summary and Conclusions

We agree with the Examiners' conclusions that the record identifies the probable visual impacts of the proposed project, and that the proposed mitigation measures minimize visual impacts. The record contains numerous simulations, including those depicting the older plant layouts, the final layout, and those advanced by RCG, and each has its strengths and weaknesses. Overall, a review of the entire record allows us to comprehend the likely visual impacts of the proposed project in general and the cogeneration facility in particular. Although the proposed project will be visible from multiple viewpoints in Albany and Rensselaer Counties, we agree with the Examiners' conclusion that this proposed cogeneration facility, in its proposed industrial setting, is not out of character with its surrounding area, and that the remaining visual impacts are

not unacceptable. We find no reason to disturb the recommendations of the Examiners.

C. Traffic Impacts

Among the required findings under Article X are that predictable impacts on public health and safety have been identified, that the facility is compatible with public health and safety, and that construction and operation of the facility is in the public interest.²⁵ Traffic impacts during construction and operation of the facility must be evaluated in connection with these findings.

Traffic impact was a major area of contention throughout this proceeding. The controversy has centered on street and road congestion during the construction phase due to employee, construction worker, and construction vehicles. In the RD, the Examiners discussed the various issues in detail,²⁶ finding that the greatest degree of concern relates to the intersection of Routes 9&20 with South Street. They found that controlled release of vehicle traffic from the construction site at the peak afternoon hour, together with the use of traffic control officers, would adequately mitigate the most severe expected impacts. Many of the details of the mitigation programs, they concluded, should be left for development in a compliance filing.

The Examiners determined, however, that additional traffic counts and specific traffic release constraints needed to be considered for the shoulder peak hours. In the SRD, the Examiners found that the supplemental information on shoulder peaks and certificate conditions proposed by the Applicant would resolve the remaining traffic issues.

Exceptions were filed by the Applicant, the City, DEC Staff, and DPS Staff. The Applicant generally supported the recommendations, but argued for some modification of vehicle count and traffic control officer criteria recommended for the

²⁵ PSL §§168(2)(b), (2)(c)(ii), and (2)(e).

²⁶ RD, pp. 22-49.

afternoon traffic release program. DEC Staff objected, essentially, to proposals made in both this proceeding and the SEQRA proceeding relating to DEC monitoring and enforcement of traffic mitigation measures. The City agreed with DEC Staff, arguing that primary approval, monitoring and enforcement authority should be given to the City of Rensselaer and its Police Department. DPS Staff argued that the hearings should be reopened for further record development on a variety of issues concerning, principally, traffic control, parking, and vehicle release. In the alternative, DPS Staff argued for acceptance of transportation certificate conditions it jointly proposed with the City.²⁷

Following the submission of briefs on exceptions and briefs opposing exceptions, negotiations among the parties resulted in a settlement of all outstanding traffic issues between the City and the Applicant. As noted above, their Settlement Agreement was jointly submitted by the Applicant and the City on June 15, 2004, together with their proposed modifications to the certificate conditions that had been presented earlier by DPS Staff and the City. Other parties were given an opportunity to comment on the proposed settlement of traffic issues, and only DPS Staff has filed objections.

The Settlement Agreement differs from the RD in several respects, but mainly in authorizing the City to monitor and enforce traffic-related certificate conditions. The details involving traffic control and parking are similar, but are augmented to resolve problems raised in the exceptions process. In these circumstances, the issues remaining before us are those raised by DPS Staff in its comments on the Settlement Agreement.

DPS Staff requests that the Siting Board either remand the matter to further develop the record or modify the settlement agreement to reflect its concerns. DPS Staff proposes several amendments to the proposed certificate conditions, discussed below.

²⁷ DPS Staff's Brief on Exceptions, App. A.

1. Structural Modifications

In the RD, the Examiners recommended that trailblazer signs - signs placed along streets to guide construction and operation traffic to and from the project site via preferred arrival and departure routes - be located at ten specific locations, and proposed certificate condition language providing that "the design and final approved locations of trailblazer signs shall be provided in a Compliance Filing." In the Settlement Agreement the City and the Applicant suggest amending the recommended certificate conditions to require the Applicant to submit a report on compliance stating either that it has completed installation of the trailblazer signage or that it has been unable to obtain the permits from the New York State Department of Transportation (DOT). In its June 30, 2004 response, DPS Staff argues that final trailblazer signage locations should be approved with certification by the Siting Board.

The Examiners also discussed in the RD existing problems relating to the ramp from South Street to Routes 9&20 northbound, noting that the problems were under the jurisdiction of NYS DOT, and were the subject of recently completed studies. They further noted that it was not clear from the record whether the ramp could be widened in the absence of other improvements contemplated for Routes 9&20, or that any improvements to the ramp could be completed before the proposed project was constructed.²⁸ Because plans were being developed to address the problems, the Examiners concluded that requiring a financial contribution of \$20,000 from the Applicant toward the cost of ramp widening would be a reasonable mitigation of traffic impacts.

In the Settlement Agreement, the City and the Applicant agree to drop the requirement of a financial contribution for ramp widening. Instead, the Settlement Agreement proposes to require the Applicant to make a \$100,000 contribution toward the cost of a traffic gate at the intersection of Riverside Avenue and Bellmore Place. The Applicant and the City agree that the gate is a more appropriate

²⁸ RD, pp. 34-35.

mitigation of traffic impacts.²⁹ The \$100,000 would be provided to the City before construction commences, and the City would use a public bidding process to select a contractor to build the gate. Because the concept of a traffic gate was developed after the RD was issued, no mention of it has been made by the Examiners.

DPS Staff expresses concern that the \$100,000 contribution for the traffic gate might not be provided prior to construction. DPS Staff also continues to argue that the ramp widening should be undertaken and fully funded by the Applicant, beginning within 60 days of certification, subject to a work permit obtained from DOT.

With respect to the trailblazer signs, we find that the ten locations where they are to be placed are adequately identified in the recommended certificate conditions. A more precise specification is unnecessary at this time.

DPS Staff does not address the apparent inconsistency of its proposal for a ramp widening project funded by the Applicant with DOT's intention to widen the ramp at a later date. DOT states in a recent letter that it expects to consider the ramp widening to be part of the capital project to replace the Route 9&20 structure over Amtrak, currently scheduled for 2010.³⁰ Moreover, the ramp's shortcomings are a pre-existing problem not caused by construction of the proposed facility, and even a contribution from the Applicant toward the widening would not likely advance the completion date of DOT's project. Finally, the \$100,000 for the proposed traffic gate is to be provided prior to the commencement of construction, under the terms of the Settlement Agreement. Accordingly, we find the certificate conditions jointly proposed by the Applicant and the City to be acceptable on these issues, and we approve them.

²⁹ The purpose of the gate is to prohibit non-emergency traffic from traveling between the residential areas of the Fort Crailo neighborhood and the adjoining industrial area to the south.

³⁰ Ex. 170.

2. Enforcement Personnel

To address concerns regarding the enforcement of traffic conditions, the Examiners recommended that DEC Staff employ a traffic expert as a traffic monitor. DEC Staff objected to assuming this responsibility, and in the Settlement Agreement, the City and the Applicant have agreed that the traffic monitor should be chosen by and report to the City, with the approval of the Applicant. The Examiners also recommended requiring the Applicant to contract with a police agency to supply uniformed officers to manage traffic during hours of peak traffic. In the Settlement Agreement, the Applicant and the City have agreed that the City's Police Department will be contracted to provide necessary traffic control, and that whenever a sufficient number of uniformed officers is unavailable from the City's police force, the Applicant may arrange for substitution by uniformed officers from another police agency.

In response, DPS Staff objects to the provision for the Applicant's approval of the monitor and suggests that the City choose the monitor, with the Applicant only making recommendations. DPS Staff also argues that the arranging of substitute officers should be done by the City, not the Applicant.

Since the City will be the entity most directly involved with construction-related traffic impacts, and has agreed to the language in the Settlement Agreement, we find its proposed terms acceptable on these issues and approve them.

3. Parking Issues

The Examiners recommended, and the parties continue to support, a certificate condition requiring the provision and maintenance during construction of on-site, controlled-access parking areas sufficient for parking of 550 project construction and delivery vehicles, construction worker vehicles, and shuttle buses. The Examiners included language in the recommended certificate conditions that would require the Applicant to notify the City Mayor's Office, the City's Planning Office, the City's Police Department, the Rensselaer County Sheriff's Office, any other law enforcement agency providing traffic control, DEC

Staff, and the City School District when the total workforce at the site exceeds 550 workers. Similar language is agreed to by the City and the Applicant in the Settlement Agreement. DPS Staff requests that notification of expected vehicle numbers be made every week, regardless of the number of workers at the site.

In the RD, the Examiners also recommended certificate conditions that would require the Applicant to provide satellite parking when the need for vehicle parking exceeds 550 vehicles. The Settlement Agreement incorporates this language. DPS Staff argues, however, that the Applicant could allow workers to drive to the site and later seek satellite parking if the lot is full, thereby entailing additional vehicle trips to the construction site and defeating traffic limits during the arrival hour. DPS Staff argues, therefore, that the Applicant should be required to contractually prohibit first-arrival parking at the site.

Another issue, raised by the parties after the issuance of the RD, relates to on-street parking. The Settlement Agreement provides that the Applicant shall prohibit all construction and delivery vehicles, construction worker vehicles and shuttle buses from on-street or street-shoulder parking at any point on Riverside Avenue, the Port Access Highway, or any public street in the Fort Crailo neighborhood to the north of the site. DPS Staff, in response, argues that since on-street parking would undermine the purpose of the on-site parking limits the Applicant should be required to contractually prohibit vehicles from parking on streets. If contracts prove ineffectual, DPS Staff proposes, it must reduce its on-site parking to compensate. DPS Staff suggests detailed certificate condition language on this point.

DPS Staff does not explain why weekly notification of expected vehicle or worker volumes is necessary, especially since on-site parking is intentionally limited to manageable levels. Similarly, the record does not explain or support DPS Staff's suggestion for a "contractual" prohibition of first-arrival or on-street parking. Although issues related to satellite parking were raised at the hearing, these particular concerns were not raised before issuance of the RD.

The City and the Applicant have reached agreement regarding the appropriate times and circumstances for notification and the appropriate enforcement conditions. Moreover, the City is the entity most directly affected by construction-related traffic impacts and will, together with the monitor, be well situated to enforce the traffic restrictions. Both the PSC³¹ and DEC, moreover, have ongoing certificate/permit administration and enforcement responsibility on traffic issues. Accordingly, we find the certificate conditions proposed by the City and the Applicant acceptable, and we approve them.

4. Traffic Control Issues

The Examiners recommended a certificate condition directing the Applicant to include in its contracts with construction suppliers a requirement to avoid scheduling deliveries during the hours of 7:30 a.m.-8:30 a.m. and 4:30 p.m.-5:30 p.m. The Settlement Agreement incorporates the Examiners' recommendation verbatim. In its June 30, 2004 response, DPS Staff argues that deliveries should be scheduled to avoid the full peak periods of traffic.

In the RD and SRD, the Examiners proposed staggering the release of construction worker vehicles from the facility site during the afternoon hours to prevent unacceptable traffic impacts. The number of vehicles to be released in any given hour was based upon detailed traffic analyses conducted by the Applicant. The Settlement Agreement incorporates the Examiners' recommended limits on releases.

First, DPS Staff argues that deliveries should be scheduled to avoid the full peak periods of traffic. Second, DPS Staff argues that the Settlement Agreement provides no method for counting vehicles or otherwise determining compliance with on-site parking and vehicle release controls. DPS Staff recommends the use of low-cost automatic vehicle counters to create a written log for counting vehicles or otherwise determining compliance with on-site parking and vehicle release conditions.

³¹ PSL §168(2) provides that the PSC "shall monitor, enforce, and administer compliance with any terms and conditions set forth in the [Siting Board's] order."

Third, DPS Staff contends that the most egregious defect in the joint proposal by the City and the Applicant relates to the timing of the release of vehicles from the site. Because of a discrepancy between the computer model and the settlement terms, DPS Staff argues, the correct levels of service (LOS) for the intersections near the project have not been adequately calculated.

Specifically, the computer models used to estimate traffic impacts assumed that traffic would be released from the site regularly over the course of an hour. The Settlement Agreement, however, would not prohibit the Applicant from releasing all of the traffic at one moment, thus overwhelming the capacity of the intersection. DPS Staff acknowledges that the uniformed traffic control officer present at the critical intersection will go a long way towards maintaining public safety, but argues that the officer cannot be expected to manage gridlock on the scale contemplated. To remedy this alleged problem, DPS Staff proposes that the Siting Board modify the release schedule so that the number of vehicles to be released is calculated on a half-hour basis.

With respect to the scheduling of deliveries, DPS Staff does not define what it means by full peak periods,³² and this is an issue it did not raise in its testimony. The Applicant and the City have accepted the Examiners' proposed certificate condition. Similarly, DPS Staff's witness, who dealt with traffic count, LOS computation, and vehicle release issues, neither argued for the use of an automatic traffic counter nor suggested that the computations were flawed as now alleged. These issues were not raised in connection with the supplemental traffic count information either, or in the DPS Staff Brief on Exceptions.³²

There is no evidence supporting use of either the automatic vehicle counters or one-half hour releases. The Applicant's analysis does appear to contemplate a steady volume of vehicles during each hour. However, to conclude that the Examiners' recommended certificate conditions are flawed, we

³² This issue is hinted at in DPS Staff's Brief Opposing Exceptions, but the argument is not developed there nor is the proposed solution discussed.

would have to conclude that vehicles will not be released as necessary to mitigate traffic impacts. It will be the monitor's function to determine whether the conditions agreed to by the parties are being met, and traffic impacts are being minimized. Although the Applicant may decide to use automatic vehicle counters, or decide upon a one-half hour release schedule, we conclude that it should retain the flexibility to decide, in consultation with the monitor, the City, and DPS Staff, how release restrictions should be applied to ensure minimal traffic impacts. Accordingly, we find the certificate conditions acceptable as proposed, and approve them.

D. Local Laws

In order to grant a certificate for the proposed cogeneration facility, we must determine that it will comply with the substantive requirements of local laws, and we may waive the application of any provisions that we find to be unreasonably restrictive, in view of existing technology or the needs of or costs to ratepayers.³³ We may also, in our discretion, expressly authorize the municipality to require approvals or permits for the construction or operation of the facility that would be needed in the absence of PSL Article X.³⁴

The Examiners recommended that we find the screening requirements of §179-33 of the City Code unreasonably restrictive, insofar as it requires a complete screening of the cogeneration plant from view along Riverside Avenue and the Port Access Highway. They also recommended a similar finding in connection with the 70-foot height restrictions of §179-15 of the City Code, because the turbine buildings, HRSGs, and exhaust stacks must be higher for design and public health and safety reasons. They also concluded that the proposed wastewater treatment plant, which would serve both the cogeneration plant and the RNMP, falls within our Article X jurisdiction, and they recommended waiver of zoning code variances that would be needed with respect to yard regulations (City Code §179-16), maximum

³³ PSL §168(2)(d).

³⁴ PSL §172(1).

lot coverage (City Code §179-18), and wall and fence height restrictions (City Code §179-24). Finally, rejecting both the City's request that it be authorized to issue all permits and approvals required by City Law and the Applicant's position that the City should not be granted any authorizations, the Examiners recommended that the City be authorized to administer some specific approvals and permits.

Various exceptions to these recommendations have been taken by the Applicant, the City, and DPS Staff.

1. Building Height and Screening

Although the City has not opposed waiver of the building height and screening restrictions, DPS Staff has taken exception, contending that the record is inadequate to support the recommendation.

With respect to the height restriction, DPS Staff agrees that it cannot be met, but asserts that a waiver cannot properly be granted without an assessment of "precedents from the City of Rensselaer as to what mitigation measures (location, texture, screening, unique community attitudes as to design and architecture) would be appropriate to satisfy the interests protected by the local law."³⁵ According to DPS Staff, such an inquiry is not part of the "overall mitigation" under Article X, but rather "specific mitigation related to a provision of local law,"³⁶ and DPS Staff objects that it was prevented from cross-examining the Applicant's local law compliance witness on mitigation issues.³⁷

In response, the Applicant asserts that DPS Staff attempts to rewrite law and precedent. With respect to waivers of local laws, the Applicant maintains, "[t]here is nothing in the Public Service Law about a separate mitigation analysis,"³⁸ nor does Article X "require that the Applicant review and

³⁵ Staff Brief on Exceptions, p. 71.

³⁶ Id. at 72.

³⁷ Tr. 2461-68.

³⁸ The Applicant's Reply to Exceptions, p. 25.

analyze local precedent (none exists anyway) or consult with local planning officials."³⁹

With respect to screening, as noted above, the issue relates to a requirement for complete screening of the cogeneration facility from views along adjoining thoroughfares. DPS Staff asserts that on the existing record "it cannot be said with any certainty that any waiver is even required, much less whether the local law as applied is unreasonable."⁴⁰ Again, Staff emphasizes, the Applicant's witness on local law compliance did not address the feasibility of tree plantings, nor were the City's planning officials consulted as to how the local law would ordinarily be interpreted or applied. According to DPS Staff, "[i]t is likely that plantings designed to quickly grow into a permanent screen that would obscure the Facility from view would be all that is sufficient to comply with the local law."⁴¹

In response, the Applicant argues that the waiver request is well supported and reasonable. The Applicant observes that another of its witnesses, a landscape architect, did address questions relating to the reasonableness of screening the facility from view.⁴² The existence of other nonconforming industrial sites in the area and even abutting the project site, the Applicant adds, indicates that noncompliance would not be contrary to public health, welfare, or community character.

We find it unnecessary to reopen the record with respect to either the height restrictions or the screening restrictions. The City has neither challenged these waiver requests nor sought to introduce evidence relating to visual impact mitigation. It is uncontested that the height restrictions cannot be complied with for legal and engineering reasons. DPS Staff's witness addressed mitigation of visual

³⁹ Id. at 26.

⁴⁰ Staff's Brief on Exceptions, p. 72.

⁴¹ Ibid.

⁴² Tr. 1680-81, 1690-91; Ex. 39.

impacts and, indeed, the design of the proposed facility's stacks and other modifications were made by the Applicant to meet visual impact concerns of the parties. No reference has been made by any witness, however, to any local mitigation standards that might apply and, as noted, the City did not address these issues at all. DPS Staff's suggestion that such mitigation would be "specific" rather than "general," as a basis for concluding that the record has been inadequately developed, is unavailing. All mitigation is applied in a "specific" manner; moreover, the height restrictions do not (unlike the screening restriction) relate to the mitigation itself.

The record shows that strategic tree plantings are planned to mitigate visual impacts of the facility from both nearer and farther distances. The record also demonstrates that it would be both undesirable and impractical to require tree plantings along Riverside Avenue of a sufficient height (28.9 feet, within 11 feet of the curb) to attempt to completely obscure the street-side view of the stacks. We agree with the Examiners, therefore, that this screening restriction could not reasonably be met and will refuse to apply it, finding it unreasonably restrictive in view of the existing technology.

DPS Staff's exceptions are denied.

2. Interconnection Facilities

Certain interconnection facilities, including Hudson River water intake and a wastewater treatment plant (WWTP) and discharge facilities, are to be used by both the cogeneration facility and the RNMP. Throughout the proceeding prior to issuance of the RD, the parties had agreed that these facilities were not part of the power plant covered by Article X and would be considered part of the RNMP and addressed under SEQRA in the DEC proceeding. Because the proposed generating plant could not be operated without these interconnection facilities, however, and because "[t]he Siting Board has always exercised authority over cooling water intake and output facilities and exercised its authority, where appropriate, to waive the application of

local laws,"⁴³ the Examiners concluded that the Siting Board has jurisdiction over the interconnection facilities. Because the proposed WWTP facilities could not be constructed and operated consistent with the various zoning code restrictions listed above, moreover, the Examiners recommended waiving the application of these restrictions to the WWTP as unduly restrictive.⁴⁴

In its brief on exceptions, the Applicant states that, notwithstanding its earlier position, it now agrees with the Examiners that the WWTP falls within Siting Board jurisdiction under Article X: "The Examiners are correct that the Siting Board has always exercised authority over such facilities (as long as they were not subject to Article VII of the PSL), where appropriate, to waive the application of local laws."⁴⁵ A recent Siting Board decision in TransGas Energy,⁴⁶ the Applicant asserts, further supports the Examiners' recommendation. With

⁴³ RD, p. 110, citing Case 97-F-1563, Athens Generating Company, L.P., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued June 15, 2000), pp. 83-84.

⁴⁴ The Examiners also concluded that there was no reason to consider delegating variance approvals to the City, since the City had raised no issues requiring its involvement. They noted as well that the City had raised no concerns with the WWTP, and no substantive objections to the variances.

⁴⁵ The Applicant's Brief on Exceptions, p. 32, citing Athens, supra, pp. 14-15. The Applicant also cites Case 00-F-1256, Wawayanda Energy Center, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued October 22, 2002), App. 1, pp. 1-2, in which, the Siting Board exercised jurisdiction over an off-site potable water supply line; Case 00-F-0566, Brookhaven Energy Project, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued October 24, 2002), App 1, p. 1; and Case 99-F-1314, East River Generating Station, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued August 30, 2001).

⁴⁶ Case 01-F-1276, TransGas Energy Systems, LLC, Order Concerning Motions for Interlocutory Review (issued October 16, 2003), pp. 6-9.

respect to a proposed 6.4-mile water pipeline to be constructed along Brooklyn roads, the Examiners in that proceeding had ruled that whether Transgas Energy had to obtain local approvals was an issue for adjudication. Also at issue was whether the Siting Board or the PSC had jurisdiction over a 1.25-mile steam line under the East River. On appeal, the Siting Board held that the proposed water lines and steam facilities should be fully considered in the Article X proceeding, including the issue of whether state and local agencies should be authorized to grant permits pursuant to PSL §172(1).

It is not relevant, the Applicant argues, whether any party requested the Examiners to rule as they did; moreover, there is no need for a remand for further factual development. The record shows, the Applicant asserts, that the cogeneration facility cannot operate without the interconnection facilities, and the joint record in the Article X and DEC proceedings has identified potential environmental impacts and provided for adequate mitigation measures.⁴⁷

The City and DPS Staff take exception to the Examiners' recommendations. Both parties stress the prior agreement of the parties that the interconnection facilities would be covered in the companion DEC proceeding. Because the parties had assumed that the WWTP would be subject to the City's zoning and permitting authority, the City continues, there is no evidence in the record from any party either supporting or opposing the application of the zoning code to the WWTP. The City maintains that, due to the operative assumptions on jurisdiction during the case, it was never afforded an opportunity to present evidence in support of its zoning restrictions. In its brief on exceptions, the City argues that either the Examiners' recommendations must be rejected and the jurisdictional status of the WWTP restored as originally assumed, or the issue must be remanded for further evidentiary

⁴⁷ In its brief opposing exceptions, the Applicant argues that the need for easements for the water lines in question - a point raised in DPS Staff's exceptions - does not prevent issuance of an Article X certificate, and is irrelevant.

hearings. In a June 14, 2004 letter responding to the Siting Board's request for clarification on this matter, however, the City indicates that it takes no position on where jurisdiction over the interconnection facilities lies, that it has no additional proof to offer on this issue, and that it "urges that the record should not be reopened."

DPS Staff maintains that the record is deficient as to the application of local laws to the WWTP, and that it must be reopened on that issue if jurisdiction is to be asserted by the Siting Board.⁴⁸ The record lacks information about other alternatives allegedly considered and rejected by the Applicant for the provision of water to the power plant, DPS Staff argues, and therefore it fails to support, as a factual matter, the conclusion reached by the Examiners that the zoning restrictions they recommend waiving are unreasonably restrictive.

DPS Staff also challenges the Examiners' basis for assertion of Siting Board jurisdiction, arguing that this case is substantially different from the other Article X cases in which the Siting Board has exercised jurisdiction over the associated interconnection facilities. Unless these interconnection facilities are approved by the City as part of its approval of the RNMP,⁴⁹ DPS Staff points out, the Article X facility can only go forward, on its own, under an amended application including interconnection facilities sized to handle only the water needs of the Article X facility, which are less than ten percent of the designed capacity of the proposed facilities; thus it is unclear whether such redesigned facilities would even require zoning code variances. In fact, DPS Staff reasons, because the size and capacity requirements

⁴⁸ In a June 21, 2004 letter to the Secretary, DPS Staff attributes the City's change of position as to whether a remand is needed to an agreement, reported in the press, by the City to discontinue its opposition to the proposed facilities in the Article X or any companion permitting state or federal permitting proceedings.

⁴⁹ DPS Staff notes that the City must also provide easements across City highways for the connecting water lines to be possible.

for water supply and wastewater treatment for the RNMP are the controlling factors in the design of the proposed interconnection facilities, these facilities cannot reasonably be considered part of the Article X facility, however necessary they may be to its operation.⁵⁰

Moreover, DPS Staff continues, Siting Board jurisdiction over such facilities entails more than just reviewing the application or waiver of local laws; it involves, as well, site plan review, construction management and compliance monitoring, and on-going operational oversight during the life of the facilities. In the circumstances of this case, this would entail a Public Service Commission (PSC) relationship with the operator of the RNMP, a non-jurisdictional facility.

We conclude that the Examiners' recommendations should be rejected, and we decline to reach the jurisdictional issue. We agree with DPS Staff and the City that the record as currently developed does not support a waiver of the local zoning restrictions as unduly restrictive. The Examiners should have alerted the parties during the hearings that they perceived a jurisdictional issue, and offered an opportunity for the necessary record development. As matters stand, there is little or no information in the record, as DPS Staff points out, addressing whether the proposed facilities can be modified to comply with the restrictions, or whether there are viable alternatives. Without a remand for additional information, therefore, there would be an inadequate basis for any conclusion on whether the local restrictions are unreasonably restrictive.

With the City declining to contend for application of the local restrictions to the WWTP, the waiver issue is not presented in any event. Only if the City were to argue for application of its restrictions would we be called upon to decide whether the restrictions would be unduly restrictive. As

⁵⁰ DPS Staff argues that the circumstances of this case are probably most nearly analogous to Waywayanda, supra, because that Article X facility did not include the municipal wastewater treatment plant to which the generating plant would interconnect.

DPS Staff persuasively argues, the issue cannot arise at all in these circumstances, so long as the City approves the RNMP proposal. That is, a need to address the application of local laws to the interconnection facilities arises only if the RNMP is rejected, and the Applicant elects to pursue the cogeneration facility independently, and we cannot now know whether the smaller facilities required in that instance would even be in non-compliance with local restrictions.

Because no waiver issue is presented at this time, we need not, and indeed should not, resolve the question as to which agency has jurisdiction over the WWTP. The uniqueness of the circumstances of this case relating to the joint use of these facilities, as well as the further circumstance that Article X has expired, also counsels against reaching the jurisdictional question.

Moreover, we note, as does the DEC Commissioner in her companion decision in the DEC proceeding, that there is no need to decide the jurisdictional issue in order for the agencies to issue their respective approvals for these facilities. No issues regarding the Article 15 permit have been raised or adjudicated, and it is of no consequence whether DEC will issue the permit by its own independent authority or, as recommended by the Examiners, pursuant to a delegation from the Siting Board, or pursuant to some other arrangement between the agencies.⁵¹ Similarly, the environmental review of the interconnection facilities has taken place on a joint record, and both DEC and the Siting Board may appropriately consider the entire project, including the interconnection facilities, in making their respective environmental impact findings.

Accordingly, we reject the Examiners' recommendations regarding the WWTP.

⁵¹ Assuming without deciding that it is necessary to do so, we hereby delegate to DEC the authority to issue, administer and enforce the Article 15 permit.

3. Local Permitting Authorization

Article X states that "no . . . municipality or agency thereof may, except as expressly authorized under this article by the [Siting Board], require any approval, consent, permit, certificate or other condition for the construction or operation of a major generating facility. . . ." ⁵² Siting Boards typically have not granted authorization to host municipalities to issue permits or approvals, except in cases where applicants have agreed to obtain them. Earlier in this proceeding, when the City sought plenary authorization to issue permits and enforce its local laws, we denied the City's motion, determining that we would address the question whether local approvals may be required only after hearings were held. ⁵³

Throughout the hearings, the City requested authorization to issue all permits and approvals required by City law, ⁵⁴ while the Applicant objected to any such delegation. The Examiners recommended authorizing the City to administer some, but not all, of the approvals and permits. The Examiners listed several City Code sections they concluded would be "more suitably administered at the municipal level" and were of the type municipalities were "routinely" authorized to require in other Article X cases. ⁵⁵ Other permit requirements, however, such as local zoning review, were found to entail "a second, redundant review of the project and its mitigation conditions" and therefore were of the type Article X intended to override. The Examiners acknowledged that permits and approvals for which municipal authorization was requested would be needed for the proposed RNMP in any event, but were not persuaded that fact argued in favor of granting the requested authorizations.

Several exceptions have been taken to these recommendations. The Applicant maintains that the Examiners

⁵² PSL §172(1).

⁵³ Case 00-F-2057, Order Denying Motion (issued August 28, 2003).

⁵⁴ Ex. 26.

⁵⁵ RD, p. 115-16.

erred in several specific respects, and also continues to urge denial of all authorizations, arguing that the City has failed to meet its burden of providing justification for them, and that the City's interests are adequately served by its continuing participation in this proceeding. "[T]he City as a party will have the opportunity to review whatever plans are prepared by the Applicant," it states, and "can utilize this process to review plans for consistency with its Code without having to issue its own permit with conditions."⁵⁶ Fairness also dictates that it should not be subjected to the local approval process, the Applicant adds, in view of the City's official antagonism to the projects.

The City does not reassert its position that it should have full permitting authorization but, along with the Applicant and DPS Staff, it takes exception to several of the specific recommendations.

First, the City and the Applicant both note that the RD is inconsistent in not recommending authorization to administer Special Use Permits⁵⁷ while recommending authorization to administer the Flood Damage Prevention Law,⁵⁸ because the Flood Plain Development Permit is a Special Use Permit.⁵⁹ The City argues that this inconsistency must be resolved. The Applicant reiterates its opposition to authorizing the City to administer any development permits or zoning-type approvals, and urges that the Examiners be reversed with respect to administration of the Flood Damage Prevention Law.

Second, the City observes that the Examiners recommend self-certification by the Applicant of compliance with the New York State Uniform Fire Prevention and Building Code,⁶⁰ but also recommend that the City be authorized to administer its own Fire

⁵⁶ The Applicant's Brief on Exceptions, p. 28.

⁵⁷ City Code, Chapter 179, Article VI.

⁵⁸ Id., Chapter 105

⁵⁹ Id., Chapter 179-27.

⁶⁰ Together with the NYS Energy Conservation Construction Code, referred to as the "State Building Code."

Prevention and Building Code.⁶¹ The problem here, the City continues, is that there is no separate City Fire Prevention and Building Code; rather, the City in this section of the Code has merely adopted and agreed to administer the State Building Code. The City argues that this inconsistency must be reconciled and, moreover, because the City's Building and Zoning Administrator lacks the expertise to oversee the construction process and to certify compliance with the State Codes, the Applicant should be required to hire an independent, third-party firm to perform these tasks.

DPS Staff agrees that the RD is inconsistent on this point, adding that City Code Chapter 101 is merely a substantive provision and, as such, cannot be delegated; the section which can be delegated - although the Examiners did not recommend doing so - is Chapter 179, Article X, which would require "building plan review, a building permit, inspections, and a certificate of occupancy upon the inspection and completion of construction."⁶² DPS Staff reiterates its agreement with the City's position that, to avoid an apparent conflict of interest, the Applicant should be required to hire an independent inspector to certify Fire Prevention and Building Code compliance. Authorization to administer Chapter 179, Article X could be given to the City, DPS Staff posits, in which case the Applicant should be required to reimburse the City for the cost of the consulting architect or engineer that would be necessary for the building inspection.

The Applicant agrees with the City and DPS Staff that authorizing the City to enforce City Code Chapter 101 is inappropriate, stressing that it lacks independent standards to enforce, and that the City acknowledged its Building and Zoning Administrator is not qualified to make the necessary certifications. The Applicant argues further that the City and DPS Staff have not justified hiring an independent third-party engineer to certify compliance with the State Building Code, and

⁶¹ Id., Chapter 101.

⁶² DPS Staff's Brief on Exceptions, p. 45.

that the certificate conditions recommended by the Examiners are consistent in this respect with conditions imposed in other Article X proceedings.

Third, the Applicant objects to authorizing the City to administer a permit for connecting the cogeneration plant site to the Rensselaer County Sewer District, for the discharge of sanitary waste.⁶³ This connection will be reviewed in the compliance filing process, the Applicant asserts, so there is no need for the City to require a separate permit. Moreover, although Section 143-19 requires the Plumbing Inspector to approve the size and slope of the building sewer, the Applicant avers that no such City position exists. In response, the City indicates that the responsibilities of Plumbing Inspector are filled by the City Engineer, working, as needed, with the City Building Inspector.

Fourth, the Applicant objects to authorizing the City to require a permit before openings are made in any sidewalk, street, or pavement.⁶⁴ These permits involve the City's Common Council, which the Applicant observes has officially resolved to oppose the project; moreover, the Applicant argues, approvals required by the Commissioner of Public Works could be used to thwart construction. The City does not comment on this exception.

Finally, exceptions are taken to the Examiners' treatment of the City's subdivision process. The Examiners observed: "All of the parties have assumed that the matter of approval of plats for subdivisions would be beyond the Siting Board's purview, and the Applicant intends to seek and obtain necessary approvals from the City."⁶⁵ However, procedures for land subdivision involve permits and certificates of occupancy which, they concluded, could compromise a Siting Board certification. The Examiners recommended that we explicitly

⁶³ City Code, Chapter 143.

⁶⁴ City Code, Chapter 147.

⁶⁵ RD, p. 119.

authorize the City to administer its subdivision regulations, subject to our continuing jurisdiction.

Taking exception to this recommendation, the Applicant argues that the Planning Commission, which would decide on the subdivision application, includes a community member opposed to the project. Consistent with its opposition to the project, the Applicant adds, the City even refused to hold the usual pre-application meeting with the Applicant.

For its part, the City takes exception to the Examiners' recommendation that the City's subdivision approval should be subject to continuing Siting Board jurisdiction. No continuing oversight by the Siting Board is required, the City asserts, because the various permits and certificates of occupancy mentioned in the City Subdivision Regulations are only for buildings that may be constructed in a newly approved subdivision,⁶⁶ and are not related to the subdivision approval itself.

In response to the Applicant, the City maintains that it declined to proceed with subdivision approval only because the Siting Board had not yet determined that it could do so. In response to the City, the Applicant argues that the fact subdivision approval is a prerequisite to building permits and certificates of occupancy is all the more reason for not allowing the City to administer its subdivision approval here.

DPS Staff also takes exception, arguing that the subdivision of a parcel of land, owned by BASF,⁶⁷ for potential sale or ownership is not a municipal "approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility" proscribed by Article X,⁶⁸ and it therefore has not been preempted by Article X. The proposed cogeneration plant could be constructed

⁶⁶ Subdivision Regulations, Article IV, §§6A, 6B.

⁶⁷ According to DPS Staff, the Applicant intends to create three entities to separately hold leases on the (subdivided) project lot, from BASF.

⁶⁸ PSL §172(1).

and operated without subdivision approval which, DPS Staff argues, is being proposed merely for commercial convenience, so that BASF will be permitted to sell or lease its property in subdivided parcels.

Conceding that it is applying for subdivision approval as an agent for the owner, BASF, the Applicant nonetheless asserts that how it structures its corporate leasehold or ownership interests is beyond the scope of this proceeding. Moreover, the Applicant avers, the subdivisions are not merely a matter of commercial convenience; it must obtain the subdivision approvals in order to obtain financing and commence construction of the project.

With respect to these exceptions, we note that at the time of the RD the City was hostile to the projects, opposed the cogeneration plant, and appeared poised to reject the RNMP. Because there now appears to be agreement between the Applicant and the City to proceed with the projects, we need not consider as seriously as we otherwise might the Applicant's concern that manipulation of permit approvals or other consents might be used to frustrate the terms of certification or the construction or operation of the proposed cogeneration facility.

Nonetheless, no authorizations to the City have been shown to be appropriate. The Examiners are correct that Article X does not contemplate redundant review of issues addressed by us in the certification process, and that many of the applicable requirements in the Rensselaer City Code would entail such a redundant review. The Applicant is also correct that the City has failed to provide specific justification for any of the requested authorizations, and the Examiners erred where they inferred such justification, as the parties have pointed out. The City will be able, through its participation in review of compliance filings, to assert the City's interests and ensure

that the substantive provisions of City law are complied with.⁶⁹ Therefore, we grant the Applicant's exceptions and decline to authorize the City to administer any of its permits or authorizations. Consistent with Siting Board decisions in other Article X cases, we also decline to require the Applicant to hire an independent contractor or engineer to inspect and certify compliance.

We grant the City and DPS Staff exceptions regarding subdivision approvals and decline to exercise authority over that process. We agree with DPS Staff that, as the Applicant and all of the parties assumed at the outset, the subdivision approval process is beyond the purview of Article X, as is the ownership or leasehold interests the Applicant decides to obtain. Because the subdivision approvals are beyond the reach of PSL §172(1), we have no responsibility to ensure that they are complied with and no basis for authorizing the City to administer them.

E. Decommissioning and Site Restoration

Our regulations require a description of the financial resources available to restore disturbed areas of the generating facility site, in the event the plant is abandoned or cannot be completed, and the provision of a decommissioning plan.⁷⁰ Proposals for a decommissioning fund were advanced by the Applicant, DPS Staff, and the City. The Examiners recommend adoption of, essentially, the City's proposed fund amounts.

⁶⁹ Inasmuch as the City Code's Flood Damage Prevention Law (City Code Chapter 105) constitutes a special use permit, it need not and should not be authorized. Similarly, there is no need to authorize the City to administer City Code Sections 143 and 147, with respect to connections to the sewer system and openings in sidewalks, streets or pavement. However, the City may issue such permits if the applicant seeks them. If not, these matters would be reviewed and controlled in the compliance filing process. All that is required with respect to the State Building Code is certification of compliance, moreover, and there is no need for the City to administer City Code Chapter 101.

⁷⁰ 16 NYCRR §1001.7(b).

They also recommend the Applicant's proposed certificate conditions relating to the type of financial security to be provided.

1. The Decommissioning Fund Amount

The various proposals call for a decommissioning fund increasing in stages, prior to the commencement of commercial operation, with adjustments thereafter for inflation. The Examiners rejected the Applicant's proposed \$2.8 million amount and DPS Staff's proposed \$14 million amount, accepting a variation of the City's proposal pursuant to which \$530,000 would be in place before a first phase of construction, \$4.05 million would be in place before a second phase, and \$6.25 million would be in place before a third construction phase.⁷¹ At the commencement of commercial operation, the fund would be increased to \$7 million, kept in an interest bearing account, and adjusted biennially under the administration of the PSC for inflation of relevant costs. The Examiners considered the recommendations adequate to account for contingent factors, such as complications from site contamination.

On exceptions, the Applicant argues that the recommended amounts are too large, that the weight of the evidence supports its proposal, and that the City and DPS Staff both agreed to the terms of the JSA in this regard.⁷² DPS Staff's witness, the Applicant observes, testified that \$2.8 million would be a reasonable pre-startup amount for "equipment removal demolition and site restoration."⁷³ According to the Applicant, this estimate was based on actual quotes for demolition of facilities at the existing BASF site, and the

⁷¹ The Examiners adopted the City's witness' definition of the construction phases.

⁷² The Applicant cites the DPS Staff and City JSA signature pages, which stated that they "do not assent to any matters involving. . . the amount of any cash bond, performance bond, or letter of credit to be posted as financial assurance of site restoration upon decommissioning of the Cogeneration Plant."

⁷³ Tr. 2194.

Applicant argues that it comprehensively covers demolition and removal costs for all buildings and equipment,⁷⁴ and was based on consultations with DPS Staff. Moreover, the Applicant asserts, the City's witness used R.S. Means Construction Cost data, which it asserts are imprecise. The Applicant argues that the same witness' proposal in another Article X proceeding, using this data, was rejected by the Siting Board.

DPS Staff also takes exception, arguing that the recommended amounts are too small. DPS Staff recommends doubling the recommended amounts, at a minimum, so that the fund would be at least \$14 million at the commencement of operation. According to DPS Staff, there are three cost components that were not covered by the estimates. First, DPS Staff asserts, although pre-construction site remediation is to be performed by BASF, the valuations do not include any added contingency for residual or as-yet-undiscovered hazardous wastes that might be encountered upon decommissioning of the facility. Second, DPS Staff asserts, the cost of decommissioning the WWTP and Hudson River intake and discharge facilities is not included in the estimates, and there is no record basis for the amount of increase that would be necessary to cover these facilities and the associated residual risk of hazardous waste contamination. Third, DPS Staff argues, decommissioning of the gray-water pipeline, intended to carry water from the Albany County Sewer District Plant under the Hudson River to the RNMP and the cogeneration plant, was excluded from the estimates. Short of remanding the proceedings, DPS Staff avers, at least doubling the amount of the decommissioning fund is "the only way to ensure that the Facility minimizes adverse environmental impacts, is compatible with public health and safety, will control the disposal of hazardous waste, and is in the public interest."⁷⁵

The City did not reply to these exceptions. The Applicant, in reply, argues that Staff's concerns about the

⁷⁴ Ex. 132.

⁷⁵ DPS Staff Brief on Exceptions, p. 61.

relationship of site remediation to decommissioning lack merit. The Applicant points out that remediation of toxic wastes is not within the purview of an Article X proceeding and falls under distinct DEC enforcement jurisdiction.⁷⁶ Moreover, according to the Applicant, the concern that residual contamination after remediation will complicate decommissioning at the end of the facility's life is overblown. If there are any hazardous constituents remaining after remediation, the Applicant argues, they will be identified during the construction phase, and therefore there should be no new residual hazardous wastes to be encountered during decommissioning.

The record shows, the Applicant continues, that the decommissioning cost estimates conservatively included the cost of removal of foundations and paved roadways, even though decisions of DEC's Division of Environmental Remediation or other factors might preclude removal of such infrastructure.⁷⁷ Thus, the Applicant concludes, the record shows that even the fund amounts it recommends may be too high, while DPS Staff offers no record support for its assertions.

With respect to the WWTP and the water intake facility, the Applicant asserts the funds are adequate to cover decommissioning of these facilities as well, but that should the Siting Board desire to reevaluate the fund for coverage of these facilities, there is precedent for doing so in a compliance filing, rather than a remand.⁷⁸ On this point, in its reply brief, DPS Staff argues that the Applicant cannot reasonably increase the scope of the Article X facility significantly (by

⁷⁶ Case 00-F-2057, Order Granting Interlocutory Review and Affirming Examiners' Ruling (issued August 28, 2003), p. 7.

⁷⁷ Tr. 2249-50.

⁷⁸ Citing Case 99-F-1625, KeySpan Energy - Ravenswood, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued September 7, 2001), Appendix B, Section VII.B.

agreeing with the Recommended Decision on that issue) without presenting necessary evidence in support of the change.⁷⁹

We conclude that the fund amounts recommended by the Examiners are reasonable, and we deny the Applicant and DPS Staff exceptions. The question whether the public interest finding under Article X requires fund amounts sufficient to cover decommissioning of the WWTP, Hudson River water intake facilities, or the gray-water access facilities turns on their inclusion under the statute as part of the power plant. The Applicant and the parties elected at the outset of this proceeding to exclude these facilities from Article X review and, as discussed earlier, there is no need at this juncture to assert jurisdiction over the WWTP in connection with local law waiver issues as recommended by the Examiners. Accordingly, we need not factor decommissioning costs for these associated facilities into our assessment here.

We find no basis in this record for the assertion that the recommended amounts are inadequate to cover risk associated with the pre-construction site remediation which is to be conducted, under DEC control in a separate proceeding, by BASF. There is no evidence that post-remediation problems with contamination during the decommissioning phase will be likely, and the record shows that some costs included in the decommissioning fund may not actually be incurred, due to DEC remediation restrictions. Moreover, the Examiners included a contingency buffer in their recommended fund amounts, and noted as well that some amount of salvage could reasonably be expected upon decommissioning, and that any salvage value would provide an additional buffer for contingencies, since no salvage offset was included in the cost estimates.

We also reject the Applicant's arguments that the amount of the recommended fund is too high. The Applicant is simply wrong in suggesting that DPS Staff and the City agreed

⁷⁹ If the decommissioning fund amount is to be re-evaluated in a compliance filing, DPS Staff suggests, the Applicant should be required to fund the services of an independent contractor for a detailed cost estimate.

with a total amount of \$2.8 million. These parties expressly stated otherwise in signing the JSA, and they have challenged the Applicant's position that a total amount of \$2.8 million would be adequate. The Applicant does not acknowledge the Examiners' basic reason for rejecting its cost estimation approach, namely, that the demolition of the BASF structures has not been shown to be as involved or costly as decommissioning of the power plant will be. We conclude that the Examiners have properly resolved the competing issues and arrived at a reasonable result.

2. The Type of Financial Security

Noting that the Applicant has agreed, at the suggestion of DPS Staff, to establish a standby trust agreement, if necessary, to avoid problems created by providing money directly to a State agency, the Examiners approved the Applicant's proposed certificate conditions. These conditions require a performance bond or other "appropriate" or "comparable" financial instrument. DPS Staff argued that the certificate conditions should be modified to limit the type of security to a performance bond, a cash or escrow deposit, or a letter of credit. The Examiners declined to limit the specific form of security, noting that DPS Staff had presented no evidence on the subject.

On exceptions, DPS Staff posits that testimony is unnecessary on this topic, and repeats arguments it made to the Examiners. In those arguments, DPS Staff noted that reliance on parent company guarantees is not an issue here, but faulted the Applicant's witness for listing "financial guarantee insurance" as defined in NY Insurance Law, §6901 as a possible option. DPS Staff also presented examples of a letter of credit, a performance bond, and a standby trust agreement at the hearings, and argued that any security should be "in substantial conformance" with these examples "or otherwise acceptable to [DPS] Counsel."⁸⁰ On exceptions, DPS Staff objects that the

⁸⁰ Id. DPS Staff's Brief on Exceptions, p. 66.

recommended certificate conditions provide for a standby trust agreement "where necessary,"⁸¹ and DPS Staff objects that "there is no possible situation where a Standby Trust Agreement would not be necessary."⁸²

DPS Staff argues that the certificate conditions should resolve these issues, to "avoid the potential for a stalemate between DPS Staff and the Applicant during the compliance phases."⁸³

In its reply brief, the Applicant asserts that the Examiners did examine, and properly reject, these DPS arguments, concluding that "[a]ll of the evidence in this record and the precedents from earlier Article X cases support the Applicant's position."⁸⁴ Only the Applicant, it observes, presented testimony on the subject. DPS Staff does not attempt to distinguish any of the Article X cases it cites,⁸⁵ the Applicant continues, and the condition that a standby trust agreement should be used only "where necessary" should remain in place, because it may not be absolutely necessary that actual monies would have to flow through the State (and therefore face authorization delays) since funds could be paid directly to the contractor authorized to do the work.

While the precise nature of the Applicant's proposed security may be specified in a compliance filing, we note that a standby trust agreement will be necessary to ensure adequate PSC control of the funds, whenever the certificate holder is unable to pay contractors directly for decommissioning work and the

⁸¹ RD, App. B, Clause XIV.A, p. 38.

⁸² DPS Staff's Brief on Exceptions, p. 68.

⁸³ at 66, 68.

⁸⁴ RD, p. 126.

⁸⁵ Case 99-F-1164, Mirant Bowline, Opinion and Order Granting a Certificate of Environmental Compatibility and Public Need Subject to Conditions (issued March 26, 2002), App. 5, §VI, p. 10; Case 99-F-1625, KeySpan Energy - Ravenswood, *supra*, App. B, §VII, p. 8; Case 99-F-0558, Heritage Power LLC, Opinion and Order granting Certificate of Environmental Compatibility and Public Need (issued January 19, 2001), App. A, §VII, pp. 10-11.

financial security must be used.⁸⁶ This will be true regardless of the form of financial security selected by the Applicant. DPS Staff's exception is granted to this extent, and the certificate conditions are revised accordingly.

III. STATUTORY DETERMINATIONS

We find and determine that:

1. The proposed facility was selected pursuant to an approved procurement process [PSL §168(2)(a)(ii)].

2. On the basis of the full record in this proceeding, the nature of the probable environmental impacts of the proposed facility, including predictable adverse and beneficial impacts of the proposed facility on the environment and ecology; public health and safety; aesthetics, scenic, historic, and recreational values; forest and parks; air and water quality; and fish and other marine life and wildlife, will be as described in the record and as summarized in the examiners' recommended decisions [PSL §168(2)(b)].

3. For the reasons stated in this Opinion and the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the Certificate Conditions set forth in Appendix A and the terms of the permits issued by other agencies, it will minimize adverse environmental impacts, considering the state of available technology and the interest of the state respecting aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations [PSL §168(2)(c)(i)].

4. For the reasons stated in this Opinion and the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the Certificate Conditions set forth in Appendix A and the terms of the permits

⁸⁶ Case 99-F-1625, KeySpan Energy - Ravenswood, Order Approving Compliance Filing Regarding Financial Assurance of the Availability of Decommissioning Costs on a Permanent Basis (issued June 21, 2004), p. 4.

issued by other agencies, it will be compatible with public health and safety [PSL §168 (2)(c)(ii)].

5. For the reasons stated in this Opinion and in the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the Certificate Conditions set forth in Appendix A and the terms of the permits issued by other agencies, it will not be in contravention of water quality standards or be inconsistent with applicable DEC regulations [PSL §168(2)(c)(iii)].

6. For the reasons stated in this Opinion and in the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the certificate Conditions set forth in Appendix A and the terms of the permits issued by other agencies, it will not emit any pollutants to the air that will be in contravention of applicable air emission control requirements or air quality standards [PSL §168(2)(c)(iv)].

7. The proposed facility does not include any solid waste disposal facility, and is not expected to generate hazardous waste; however, any hazardous wastes that are generated will be disposed of properly [PSL §168(2)(c)(v) and (vi)].

8. For the reasons stated in Opinion and in the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the Certificate conditions set forth in Appendix A and the terms of the permits issued by other agencies, it will operate in compliance with all applicable state and local laws and associated regulations except local laws, ordinances, regulations or requirements specified in this Opinion that we find to be unreasonably restrictive in view of the existing technology or the needs of or costs to ratepayers located inside or outside the municipality that enacted such local laws, ordinances, regulations, or requirements [PSL §168(2)(d)].

9. For the reasons stated in this Opinion and the Examiners' recommended decisions, if the proposed facility is constructed and operated in accordance with the Certificate

Conditions set forth in Appendix A and the terms of the permits issued by other agencies, it will be in the public interest, considering the environmental impacts of the proposed facility and the alternatives examined [PSL §168(2)(e)].

We therefore grant to BesiCorp-Empire Development Company, LLC a Certificate of Environmental Compatibility and Public Need for the construction and operation of a 505 megawatt combined cycle cogeneration plant on the proposed site in the City of Rensselaer, Rensselaer County, subject to the terms, conditions, and limitations set forth in the Opinion and Order.

The New York State Board on Electric Generation Siting and the Environment for Case 00-F-2057 orders:

1. The recommended decision and supplemental recommended decision of Examiners J. Michael Harrison and P. Nicholas Garlick, to the extent consistent with this opinion and order, are adopted and, together with this opinion and order, constitute the decision of the Siting Board in this proceeding.

2. Subject to the conditions appended as Appendix A to this Opinion and Order, a Certificate of Environmental Compatibility and Public Need is granted pursuant to Article X of the Public Service Law to BesiCorp-Empire Development Company LLC (the applicant) for the construction and operation of an approximately 505 megawatt, combined cycle cogeneration plant in the city of Rensselaer, Rensselaer County, provided that the applicant files, within 30 days after the date of issuance of this Opinion and Order, a written acceptance of the Certificate pursuant to 16 NYCRR §1000.14(a).

3. Upon acceptance of the certificate granted in this Opinion and Order or at any time thereafter, the applicant shall serve copies of its compliance filing(s) in accordance with the requirements set forth in 16 NYCRR §1003.3(c) and Certificate Condition II.0. Pursuant to 16 NYCRR §1003.3(d), parties served with the compliance filing(s) may file comments within 15 days of their service.

4. This proceeding is continued.

By the New York State Board
on Electric Generation Siting
and the Environment
for Case 00-F-2057

(SIGNED)

JACLYN A. BRILLING
Secretary to the Board

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

Application by Besicorp-Empire Development Company, LLC
for a Certificate of Environmental Compatibility and Public Need
to Construct and Operate a 505 Megawatt, Combined Cycle
Cogeneration Plant in the City of Rensselaer, Rensselaer County

CASE 00-F-2057

AND

In the Matter of the Application of Besicorp-Empire Development
Company, LLC for a Part 201 Air State Facility Permit; a State
Pollutant Discharge Elimination System (SPDES) Permit; a
Title IV Acid Rain Permit; a Water Quality Certification; a
Construction Stormwater SPDES Permit; and, an
Excavation and Fill in Navigable Waters Permit

CASE No. 4-3814 -
00052/00001-00006

CERTIFICATE CONDITIONS

I. Project Authorization

- A. The Project consists of a Cogeneration Plant and a host facility, the Recycled Newsprint Manufacturing Plant RNMP. The Certificate holder is authorized to construct and operate the Project and the physical improvements necessary thereto, including associated interconnects (not subject to separate Article VII jurisdiction) as described in the Application, the May 2002 Supplement and the Joint Settlement Agreement, except as waived, modified or supplemented by this Certificate or other permits. Approval of these certificate conditions and authorization for the Cogeneration Plant is given by the Siting Board. Authorizations for the RNMP are given by the DEC Commissioner. Nothing herein is intended to affect or change the Siting Board's or the DEC Commissioner's jurisdiction or enforcement authority.

- B. The Certificate holder is responsible for obtaining all necessary permits, including State Pollutant Discharge Elimination System ("SPDES") and United States Army Corps of Engineers ("ACOE") approvals under the Clean Water Act ("CWA"), Clean Air Act ("CAA") Prevention of Significant Deterioration ("PSD") permit, CAA Title IV (acid rain) permit, CAA Title V (major stationary source) permit, and any other permits, approvals, land easements, and rights-of-way that may be required for this Project. Before the Certificate holder may proceed with any construction activities authorized by this certificate, certificates to construct and operate gas and electric transmission lines in the companion Article VII proceedings must be obtained.
- C. The Project shall be designed to operate and be operated in compliance with all applicable federal and state laws and regulations. Facility plans and specifications shall be prepared in conformance with applicable requirements of the New York State Uniform Fire Prevention and Building Code and shall be certified by a professional engineer or architect licensed and registered in the State of New York.
- D. Subject to the Board's ongoing jurisdiction, the cogeneration facility shall be designed to operate and be operated in compliance, subject to the exceptions provided in Section IX below, with all applicable local laws and regulations.

II. General Conditions

- A. The Project and/or plant site shall be constructed, operated, maintained, restored and monitored substantially as set forth in the Application and other submissions, and as indicated by the Certificate holder in the Joint Settlement Agreement reached during this proceeding, except as these may be waived, modified or supplemented by the Siting Board, and except as set forth in conditions contained in the SPDES, State Air Facility, PSD and Major Oil Storage Facility ("MOSF") permits or other permits and licenses issued by the New York State Department of Environmental Conservation ("NYSDEC").
- B. The Certificate holder shall submit a schedule of all plans, filings and other submissions to the Siting Board required in the Certificate Conditions. The Certificate holder shall coordinate the schedule for submitting

Compliance Filings with the state agencies having jurisdiction over such Compliance Filings. The Schedule shall include at a minimum, a cross-referenced table showing the applicable Certificate Condition number, an abbreviated description of the Certificate Condition, the description of the Compliance Filing submittal, the date drafts will be submitted, the formal scheduled submittal date and any updated filing dates. Any abbreviations should be set forth in a legend. The Schedule pages shall be numbered and include on each page the issuance date.

- C. The Certificate holder shall submit Compliance Filings consistent with Part 1003 of the Article X regulations. A "Licensing Package" is defined herein as a component of the Compliance Filing and includes all plans or other submissions required by these Certificate Conditions. Licensing Packages may be submitted individually or on a combined basis. All filings shall be served on all active parties that have advised the Siting Board of their desire to receive a copy of such filings.
- D. The Certificate holder shall operate the Project in accordance with the final SPDES, PSD, Title IV (acid rain) permit and Title V Air Operating Permits (which incorporates the PSD and NSR requirements), and other permits or licenses.
- E. In accordance with 6 NYCRR §375-1.2(e)(2) no person shall engage in any activity (1) that will, or that is reasonably anticipated to, prevent or significantly interfere with any proposed, ongoing or completed remedial program at the site or (2) that will, or is reasonably foreseeable to, expose the public health or the environment to a significantly increased threat of harm or damage at the site. The proponent of an activity may demonstrate to DEC that such activity will not interfere with a remedial program or create an increased exposure risk at the site by such means as DEC may find acceptable. Further, in accordance with 6 NYCRR §375-1.2(f), no person shall make a substantial change of use at the site without having given 60 days advance notice to DEC as provided in 6 NYCRR §375-1.6.
- F. The Certificate holder shall finance or obtain financing of such system upgrades or remedial measures as may be required by the New York Independent System Operator ("NYISO,") Minimum Interconnection Standard, or applicable Transmission Reliability Assessment Study, and Niagara

Mohawk Power Corporation ("NMPC") interconnection requirements. The Certificate holder is authorized to construct, or have constructed on its behalf, and agrees to design, engineer, and construct transmission facilities in support of the Project consistent with the System Reliability Impact Study ("SRIS") approved by the NYISO Transmission Planning and Advisory Subcommittee ("TPAS") and the NYISO Operating Committee and the NYISO 2002 Transmission Reliability Assessment Study ("TRAS"), and in accordance with the applicable and published planning and design standards and best engineering practices of NYISO, Niagara Mohawk Power Corporation ("NMPC"), the New York State Reliability Council ("NYSRC"), Northeast Power Coordinating Council ("NPCC"), North American Electric Reliability Council ("NERC"), and successor organizations depending upon where the facilities are to be built and which standards and practices are applicable. Specific requirements shall be those required by the NYISO Operating Committee and TPAS in the approved SRIS and by any interconnection or facilities modification agreements negotiated with NMPC, NYSRC, and any successor Transmission Owners (as such term is defined in the New York Independent System Operator Agreement-Composite Reflecting Commission Orders Through July 13, 2000, as updated ("NYISO Agreement"). This Certificate Condition does not grant the Certificate holder specific construction rights at any third party facilities. The Certificate holder shall enter into good faith negotiations with all appropriate third parties concerning interconnection activities. Should aspects of network operation be affected by the ESNP that are under the lawful control of NMPC, or successor Transmission Owners (as defined in the NYISO Agreement), rather than NYISO control, the Certificate holder shall operate the facilities according to the procedures of NMPC, or successor Transmission Owners (as defined in the NYISO Agreement).

- G. The Certificate holder shall operate the Project in accordance with the approved tariffs and applicable rules and protocols of NMPC, NYISO, NYSRC, NPCC, NERC, and successor organizations. The Certificate holder reserves the right to seek subsequent review of any specific operational orders at the NYISO, New York State Public Service Commission ("PSC"), the Federal Energy Regulatory Commission, or in any other appropriate forum. The Certificate holder shall comply with operational orders issued by NYISO, or its successor. In the event that the

NYISO encounters communication difficulties, the Certificate holder shall comply with directives issued by the NMPC system operator or its successor. The Certificate holder shall attempt to complete negotiations on all necessary contractual arrangements associated with its electric interconnection as soon as practicable, and agrees to accept the assistance of Staff of the Department of Public Service "DPS Staff" to mediate any disputes that cannot be resolved directly between the Certificate holder and NMPC and its successors, or any other parties.

- H. The Certificate holder shall assure that the transmission interconnection shall be designed, constructed and operated to assure compliance with the electromagnetic field ("EMF") standards established by the PSC in Opinion No. 78-13 (issued June 19, 1978) and the Statement of Interim Policy on Magnetic Fields of Major Electric Transmission Facilities (issued September 11, 1990).
- I. The Certificate holder agrees to comply with the applicable reliability criteria of NMPC, NYISO, NPCC, NYSRC, NERC and successors. If it fails to meet the reliability criteria at any time, it shall notify the NYISO immediately, in accordance with NYISO requirements, and shall simultaneously provide the DPS Staff with a copy of the NYISO notice.
- J. The Certificate holder shall file a copy of the following documents with the Siting Board and with the NYSPSC and, except for item (iii), NMPC:
 - (i) the SRIS approved by the NYISO Operating Committee, which shall be filed within thirty (30) days after receipt of the Certificate;
 - (ii) any requirements imposed by the NYSRC, which shall be filed not later than 30 days prior to the commencement of construction of the Project;
 - (iii) all facilities agreements, interconnection agreements, and amendments thereto, with NMPC and successor Transmission Owners (as defined in the NYISO Agreement), which shall be filed not later than 30 days prior to the commencement of commercial operation of the Project (under appropriate agency trade secret rules, as applicable);

- (iv) a Relay Coordination Study, which shall be filed no later than 18 months prior to the projected commercial operation date of the Project; and
 - (v) the detailed design of the interconnection facilities, and updates thereto, which shall be filed as they become available, but not later than 30 days prior to the commencement of commercial operation of the Project.
- K. The Certificate holder shall comply with dispatch instructions issued by NYISO, or its successor, in order to maintain the reliability of the transmission system. In the event that the NYISO encounters communication difficulties, the Certificate holder shall comply with dispatch instructions issued by NMPC, or its successor, in order to maintain the reliability of the transmission system.
- L. The Certificate holder shall collaborate with NMPC, and any successor Transmission Owner (as defined in the NYISO Agreement), to ensure that, with the addition of the Cogeneration Plant, NMPC transmission lines will have system protection and, relay protection system equipment, and appropriate communication capabilities to ensure that operation of the transmission system is adequate under NPCC "Bulk Power System Protection Criteria," and meets the protection requirements at all times of the NERC, NPCC, NYSRC, NYISO, NMPC, and successor Transmission Owners (as defined in the NYISO Agreement). The Certificate holder shall comply with applicable NPCC criteria and shall be responsible for the costs, together with associated expenses incurred, to verify that the relay protection system is in compliance with applicable NPCC, NYISO, NYSRC and NMPC criteria, to replace a breaker at NMPC's Reynolds Road Substation, or any other equipment that may be identified in connection with system upgrades or remedial measures as addressed in Condition II.F, in accordance with the SRIS that was approved by the NYISO Operating Committee. The specific equipment to be built or replaced must conform to the requirements of the NYSRC, NMPC, and successor Transmission Owners (as defined in the NYISO Agreement). The technical considerations of interconnecting the Project to the NMPC switchyards shall be documented by the Certificate holder and provided to DPS and NMPC no later than two months prior to purchasing the

equipment. Updates to the technical information shall be furnished as available.

- M. (i) The Certificate holder shall work with NMPC's engineers and safety personnel on testing and energizing equipment in the switchyards. A testing protocol shall be developed and provided to NMPC for review and acceptance.
- (ii) During the initial testing and energizing of switchyard equipment addressed in the protocol referenced in condition II.M.(i), the Certificate holder shall call DPS Staff in the Bulk Transmission Section within one hour to report any transmission-related incident that affects the operation of the Project. The Certificate holder shall submit a report on any such incident within seven days to DPS Staff in the Bulk Transmission Section and NMPC. The report shall contain, when available, copies of applicable drawings, descriptions of the equipment involved, a description of the incident and a discussion of how future occurrences will be prevented. The Certificate holder shall work cooperatively with NMPC, NYISO and the NPCC to prevent any future occurrences.
- (iii) The Certificate holder shall make a good faith effort to notify DPS Staff of meetings related to the electrical interconnection of the Project to the NMPC transmission system and provide the opportunity for DPS Staff to attend those meetings.
- N. Regarding the transportation of natural gas to the Cogeneration Plant, the Certificate holder shall comply with all the applicable rules and regulations of the PSC and with the terms and conditions of NMPC's Service Classification No. 14, Gas Transportation Service for Dual Fuel Electric Generators.
- O. The Project's electric and gas transmission lines are both subject to PSC review under PSL Article VII.
- P. Should the Article VII process conclude with a PSC order authorizing a route different than that proposed that could have an impact on the site plan of the Cogeneration Plant, the Certificate holder shall reconfigure the Cogeneration Plant layout for compatibility with the different route. Performance standards shall be applied to the revised Cogeneration Plant site plan such that regulatory standards are met, local codes are met to the extent practicable, and

adverse impacts are otherwise minimized to an extent comparable with those of the current conceptual layout.

- Q. These Certificate Conditions shall be made contract requirements for the Cogeneration Plant construction contractors as applicable.
- R. If obligations of the Certificate holder or the Sierra Club under the Certificate holder's agreement with Sierra Club ("Sierra Club Agreement")(Ex. 008) incorporated hereunder as Conditions III.H, IV.B., IV.C., and IV.D. are delayed, interrupted or prevented by an act of God, strike, lockout, act of the public enemy, war, blockade, public riot, lightning, fire, storm, flood or other act of nature, explosion, governmental action (including a change in law or regulation which affects the fundamental assumptions on which this Agreement is based), governmental delay, restraint or inaction, which is not reasonably within the control of the Certificate holder or Sierra Club, the Sierra Club Agreement shall not terminate or be forfeited and no right of damages shall exist against the Certificate holder or Sierra Club by reason thereof, provided obligations are commenced or resumed within a reasonable time after removal of such cause or causes.

III. Air Quality and Meteorology

- A. The Certificate holder shall construct and operate the Project pursuant to the applicable provisions of the final air permits issued by NYSDEC under Article 19 of the ECL (6 NYCRR Parts 201 and 231) and the PSD program (40 C.F.R. §§ 52.21 and 124).
- B. The combustion turbines ("CTs"), duct burners ("DBs"), and auxiliary boiler ("AB") will be fired primarily with natural gas. However, the Certificate holder will be permitted to fire low sulfur distillate (0.05 percent sulfur) up to the equivalent of 960 hours (40 days) per year at 100 percent load in the CTs and DBs and up to the equivalent of 360 hours (15 days) per year at 100 percent load in the AB.
- C. The Certificate holder shall design the Project with the following air emission controls:

- (i) NO_x control during natural gas firing with dry low-NO_x (DLN) combustors and selective catalytic reduction ("SCR") on the CT/HRSG trains;
 - (ii) NO_x control during distillate firing with water injection and SCR on the CT/HRSG trains;
 - (iii) NO_x control with low-NO_x burners and SCR on the AB;
 - (iv) CO control with an oxidation catalyst on the CT/HRSG trains;
 - (v) CO control with "good combustion control" in the AB and operation of the proposed low-NO_x burners in accordance with manufacturer's recommendations;
 - (vi) VOC control with an oxidation catalyst on the CT/HRSG trains;
 - (vii) VOC control with "good combustion control" in the AB and operation of the proposed low NO_x burners in accordance with manufacturer's recommendations;
 - (viii) VOC reduction and control at the wastewater treatment plant by deletion of the wastewater treatment plant cooling tower in favor of a heat exchanger, and the addition of covers to the primary clarifier and aeration basin;
 - (ix) SO₂, PM₁₀, and Pb control through the primary use of natural gas as fuel in the CT/HRSG trains and AB as well as the use of low sulfur distillate as the secondary fuel and good combustion practices; and
 - (x) Particulate matter control from the cooling towers shall be controlled with high efficiency drift eliminators (0.0005 percent).
- D. The Certificate holder shall file a final Fugitive Dust Control Plan ("Dust Plan") as a Compliance Filing and shall abide by the provisions of said plan during construction. The Dust Plan shall be based on and no less stringent than the Fugitive Dust Control Plan attached to the Joint Settlement Agreement in Appendix JS-C. Dust control measures shall also apply to construction parking and laydown areas.

- E. The Certificate holder shall provide NO_x and VOC emission reduction credits in the amount of 258 tons and 188 tons, respectively.
- F. During operation, the Certificate holder shall abide by sections 1.0, 2.2, 3.2, and 4.0 of the Best Management Practices for Control of Odor ("Odor BMP") attached to the Joint Settlement Agreement as Appendix JS-A as they relate to operation of the Cogeneration Plant.
- G. The Certificate holder shall implement the following measures to mitigate potential air impacts:
- (i) On-site construction and operation speed limit of 10 MPH; this shall include installation of speed limit signs;
 - (ii) Installation of 5 minute idling restriction signs;
 - (iii) Street sweeping or other mitigation measures for dust and blowing debris on parking lots and access roads, to be conducted during Project operations as necessary.
- H. Pursuant to the "Sierra Club Agreement" (Exhibit 008), the Certificate holder shall implement the following:
- (i) Local Clean Air Fund
 - (a) The Certificate holder shall contribute a fixed total of \$250,000 (the "Fixed Contribution") to a Local Clean Air Fund ("Fund"), the sole purpose of which shall be to improve ambient air quality in areas surrounding and near the Projects in New York State. The Fixed Contribution shall be payable in three (3) installments:

Installment Number 1: \$100,000, which shall be due no later than ninety (90) days after commencement of commercial operation (defined as the first sale of electricity to the grid) of the Cogeneration Plant (the "Initial Fixed Contribution Date"); and

Installment Number 2: \$50,000, which shall be due no later than two (2) years following the Initial Fixed Contribution Date; and

Installment Number 3: \$100,000, which shall be due no later than three (3) years following the Initial Fixed Contribution Date.

Upon payment of Installment Number 3 to the Fund, the Certificate holder shall have fully satisfied its obligations under this Agreement and to the Fund with respect to the Fixed Contribution.

(b) The Fund will be administered by a Local Committee having as its sole purpose an intention to improve ambient air quality in areas surrounding and near the Projects in New York State; provided, however, that the Local Committee shall be prohibited from using the Fund in furtherance of any changes to the Projects or for purposes which may reasonably be anticipated to adversely affect the Projects. Within ninety (90) days after the first anniversary of the Initial Fixed Contribution Date, and each year thereafter, the Local Committee shall be required to provide a written summary and accounting of its Fund expenditures for the previous twelve (12) months to the Certificate holder and DPS Staff to assure that Fund expenditures have been used for the sole specified purpose.

(c) Within ninety (90) days of issuance of a final State Facility Permit for the Cogeneration Plant, the Sierra Club will facilitate the establishment of a Local Committee composed of no less than four (4) local representatives, in addition to the Sierra Club, such as representatives of environmental, residential, local governmental, business and/or other stakeholder interests. The Certificate holder shall not have a representative on the Local Committee.

(ii) Potential Variable Contribution to the Purchase of Ultra-Low Sulfur (ULS) Distillate Oil or Potential Variable Contribution to the Fund

The basis for the price differentials referenced in this Condition shall be, as applicable, the actual price per gallon, delivered to the Cogeneration Plant, inclusive of all taxes, fees, or other charges, or the quoted delivered price per gallon, inclusive of all taxes, fees or other charges, at the time at which the transaction subject to the terms of this Agreement takes place, together with adjustments to account for the lower heat content in ULS distillate oil. The actual price per gallon for ULS distillate oil shall be adjusted on a pro-rata basis according to the following formula, the result of which shall be the Effective Price of ULS distillate oil and shall be used as the ULS price in all price differential calculations specified in this Agreement:

$$\text{Effective Price} = [\text{ULS price per gallon, cents}] / [\text{ULS energy factor*}], \text{ where}$$
$$\text{ULS energy factor} = [\text{energy content per gallon, ULS}] / [\text{energy content per gallon, low sulfur distillate}]$$

* ULS energy factor as established by the United States Department of Energy or other widely-accepted industry standard.

(a) In years 2006 - 2009, if the Certificate holder purchases oil with a nominal sulfur content of 500 parts per million ("ppm") ("LS distillate oil") instead of oil with a nominal sulfur content of 15 ppm ("ULS distillate oil") for the Cogeneration Plant, when the price differential is less than or equal to that specified in Table 1 for the corresponding year, the Certificate holder shall be required to purchase a quantity of ULS distillate oil in the first succeeding year in which LS distillate oil is fired or contribute to the Fund in accordance with Condition III.H.(ii)(c). Such purchase shall be made using a monetary sum that offsets the price differential between LS distillate oil and ULS distillate oil at the time of the relevant

purchase(s) in LS distillate oil, calculated according to the following formula and subject to the annual Contribution Cap amount specified in Table 1:

$$\begin{aligned} & \text{Quantity of LS Distillate Oil Purchased} \times \text{Price} \\ & \text{Differential (ULS and LS Distillate Oil)} \times \text{Variable Cap} \\ & \qquad \qquad \qquad \text{Percentage} \\ & \qquad \qquad \qquad \text{(gallons in calendar year)} \\ & \text{(cents per gallon)} \\ & \text{(from Table 1)} \end{aligned}$$

Table 1

Year	Price Differential	Variable Cap Percentage	Contribution Cap
	1		
2006	6.5%	10%	\$50,000
2007	6.0%	20%	\$100,000
2008	5.5%	35%	\$150,000
2009	4.0%	50%	\$250,000
2010 and beyond	4.0%	-	-

(b) In years 2006-2008, the Certificate holder shall be entitled to a rebate credit of \$500 per million gallons for any amount of LS distillate oil that is not used below the gallon limit in the State Air Facility Permit for the Cogeneration Plant, and the rebate credit would be subtracted from the Contribution Cap. In year 2009, the rebate credit shall increase to \$1,000 per million gallons for any amount of LS distillate oil that is not used below the gallon limit in the State Air Facility Permit for the Cogeneration Plant. No rebate credit shall apply in 2010.

(c) By January 31 of years 2007-2010, the Certificate holder shall provide to the Local Committee a written summary of the quantity of LS distillate oil, if any, that it purchased in

the preceding calendar year and shall simultaneously file such written summary with the PSC as a compliance filing. If the Certificate holder purchased LS distillate in any preceding year, within thirty (30) days of receipt of the written summary, the Local Committee will notify BEDCO in writing if it will require the purchase of ULS distillate oil in accordance with Condition III.H.(ii)(a), above (less any applicable rebate credit under Condition III.H.(ii)(b)), or whether, in the discretion of the Local Committee, it will direct the monetary sum that would otherwise be used to purchase ULS distillate oil to be contributed to the Fund. If the Local Committee directs the monetary sum to the Fund, the Certificate holder shall deposit the monetary sum to the Fund within ninety (90) days. If the Local Committee does not provide such written notification, the Certificate holder shall use the monetary sum to purchase ULS distillate oil as provided for in this Agreement.

- (d) In year 2010 and beyond, the Certificate holder shall be required to purchase ULS distillate oil for the Cogeneration Plant if the price differential is less than or equal to 4.0%.
- (e) The Certificate holder shall not be required to purchase ULS distillate oil in years 2006-2010 if (i) the price differential at the time of purchase is greater than specified in Table 1, or (ii) if the Certificate holder did not purchase any LS distillate oil in the preceding year (either because it burned exclusively natural gas or a combination of natural gas and ULS distillate oil), or (iii) if the Certificate holder did purchase LS distillate oil in the preceding year, but does not burn such oil in the following year (in which case, the requirement to purchase ULS distillate oil is delayed until the first succeeding year in which the LS distillate oil is burned).

(f) The Certificate holder shall have the right to make the first fill of the distillate oil storage tank with LS distillate oil, and shall not be required to include that quantity of LS distillate oil in the calculation under Condition III.H.(ii)(a) for 2006 or any subsequent year.

(iii) Best Efforts to Purchase ULS Distillate Oil

Upon commencement of commercial operation of the Cogeneration Plant, each time that it determines to purchase distillate oil, the Certificate holder shall secure a representative number of quotations from ULS distillate oil suppliers, based on delivered price to the Cogeneration Plant. Provided that BEDCO obtains a representative number of quotations for comparative purposes, the Certificate holder shall have satisfied its obligations to make best efforts to purchase ULS distillate oil. The quotations and a summary of what was purchased and from whom will be provided to the Local Committee and simultaneously filed with the NYS DPS as a compliance filing at the same time as the summary as set forth in Condition III.H.(ii)(c).

IV. Water Resources and Quality

- A. The Certificate holder shall submit a Spill Prevention Control and Countermeasures ("SPCC") plan as part of a Licensing Package.
- B. Prior to commencing operation, the Certificate holder shall prepare a Gray Water Operation and Maintenance Best Management Practices manual ("Gray Water BMP"). The Certificate holder shall operate the gray water system in accordance with operation and maintenance procedures specified in the Gray Water BMP. The Gray Water BMP manual shall follow the outline included with the Joint Settlement Agreement as Appendix JS-B.
- C. Subsequent to the issuance of a Certificate of Environmental Compatibility and Public Need, but prior to service of a formal compliance filing, the Certificate holder shall provide a draft of the Gray Water BMP to NYSDEC, NYS DPS, NYSDOH, the City of Rensselaer, and the Sierra Club, for a period of comment not to exceed 21

calendar days. The subsequent formal Gray Water BMP manual compliance filing shall include detailed responses to all comments on the Draft BMP received from the aforementioned parties. Detailed responses shall include a statement as to whether the parties' comments have been incorporated into the formal gray water BMP, and if not, an explanation of why such comments were not incorporated.

- D. The Certificate holder shall make best efforts to negotiate inclusion in the terms of its contract with ACSD the following provision requiring ACSD to notify the Certificate holder in case of an upset or pass through, as those terms are defined in state or federal law or regulations, in order to prevent the use of gray water that contains substances or quantities of substances not normally found in either the influent to or effluent from the ACSD South Plant:

"In the event that substances or quantities of substances not normally found in either the influent to the South Facility or water within the South Facility are identified, including those identified pursuant to ACSD's Best Management Practices program, and including situations involving an upset or pass through condition as those terms are defined under state or federal law or regulations, ACSD will notify the Certificate holder by telephone as soon as possible but no later than three (3) hours prior to the time said substances could enter the Interconnection."

- E. Recirculation of cooling water shall not exceed six (6) cycles of concentration for the gray water usage and the design capacity of the makeup water system shall be sized for three (3) cycles of concentration as specified in the Application.

V. **Vegetation and Wildlife**

- A. Immediately following construction, areas of temporarily disturbed uplands adjacent to wetlands shall be regraded to restore surface runoff from these areas to the wetlands. These areas shall then be stabilized and revegetated as the season allows. When seasonal conditions prevent reseeding, areas shall be immediately protected with mulch and reseeded during the following growing season.

- B. Development and enhancement of additional wetland habitat shall be implemented in accordance with a Wetland Mitigation Plan approved by the ACOE.
- C. The Certificate holder shall submit, as part of its Licensing Package, (1) the ACOE approved Wetland Mitigation Plan; and (2) a Stormwater Pollution Prevention Plan ("SWPPP"), prepared in accordance with SPDES General Permit for Stormwater Discharges from Construction Activities (GP-02-01). Consistent with the general permit, the plan must include water quality controls for post-construction in accordance with the New York State Stormwater Management manual (October 2001).
- D. All necessary precautions shall be taken to preclude contamination of any wetland or waterway by suspended solids, sediments, fuels, solvents, lubricants, epoxy coatings, paints, concrete, leachate or any other environmentally deleterious materials associated with the Project.

VI. Geology, Soils, and Seismology

- A. The Project shall be designed to comply with applicable IBC 2000 requirements, including seismic design criteria for the zone in which it is located.
- B. Soils disturbed during Project construction shall be managed in accordance with techniques described in the Stormwater Pollution Prevention Plan and the Post Remediation Construction Plan ("PRCP").
- C. If blasting is required, a certified blasting contractor, in accordance with applicable regulations, shall determine the final blasting technique and materials to be used, and a blasting plan shall be prepared based on preconstruction surveys. The blasting program shall be conducted under the supervision of a certified blasting contractor and all required notifications shall be provided.
- D. Following construction, monthly inspections of disturbed areas shall be made, and corrective measures implemented as necessary, until revegetation is 70 percent or more successful.

VII. Cultural Resources

- A. A final Unanticipated Discovery Plan shall be prepared and submitted as part of a Licensing Package prior to the start of construction. The approved plan shall be implemented in the event that cultural resources are encountered during construction of the Project.
- B. After consultation with the Office of Parks, Recreation and Historic Preservation ("OPRHP"), the Certificate holder shall present a Cultural Resources Management Plan indicating protection and mitigation measures to be employed to prevent adverse impacts to archeological and historic resources, where encountered and if feasible, to mitigate those impacts which cannot be avoided, and incorporating plans for tree protection, landscape planting, restoration, lighting, and other related site protections.
- C. A qualified archaeologist shall be on call during project construction, in the event that cultural resources are encountered or adjacent cultural sites may be impacted by Project activities. If significant archeological resources are identified, the Certificate holder shall carry out appropriate mitigation measures developed in consultation with OPRHP and DPS.
- D. Final site plans and grading plans for the Site, and final design plans for the gray water line route and other utility line routes shall be provided to OPRHP as part of the Licensing Package.
- E. To offset impacts resulting from visibility of the Cogeneration Plant to listed and other historic and cultural resources in its viewshed, the Certificate holder shall implement the following mitigation measures and provide the following offsets:
- (i) A Revolving Loan Fund ("RLF") shall be established for the restoration/enhancement of structures and facades in the amount of \$200,000 to be administered by a local municipal entity. The RLF shall be available to residents in the City's Historic Residential ("HR") zoning district;
 - (ii) At the commencement of Project construction, a donation of \$50,000 shall be made to the National

Heritage Trust for equal disbursement to the Crailo State Historic Site and the Schuyler Mansion State Historic Site; and

(iii) At the commencement of Project construction, a donation of \$10,000 shall be made to the National Heritage Trust for disbursement to Historic Cherry Hill.

VIII. Visual Resources

- A. The Certificate holder shall construct a 20°F (at 90% relative humidity) alternate hybrid plume abatement cooling tower. The cooling tower shall employ 0.0005% drift eliminators.
- B. The Certificate holder shall provide in its Licensing Package the vendor data for the plume-abatement system operating in the maximized wet mode and the maximized plume abatement mode.
- C. The Certificate holder shall install and utilize a control system to place the dry cooling section in daily operation between sunrise and sunset when a visible plume is expected to occur.
- D. The Certificate holder shall install entrance plantings/landscaping and professionally designed signs along Riverside Avenue.
- E. The Certificate holder shall prepare a Final Lighting Plan for construction and operation of the Project as a Compliance Filing. The Final Lighting Plan shall include the details of all proposed outdoor lighting, including measures to prevent off-site glare; provide for task-lighting of component areas as feasible; and demonstrate that design illumination conforms to applicable worker safety requirements for work area lighting while minimizing off-site lighting impacts. The Final Lighting Plan shall be based on the Preliminary Lighting Plan and also apply the additional design criteria set forth in Appendix JS-H of the Joint Settlement Agreement. These criteria shall include, but not necessarily be limited to, implementing task lighting where appropriate (cogeneration plant, cooling tower area, CEMS platforms, etc.) and incorporating the Federal Aviation Administration (FAA) determination

regarding requirements for aviation obstruction lighting of stack(s).

- F. The Certificate holder shall report results of its negotiations with FAA regarding the least-obtrusive aviation-warning lighting allowed by FAA for the Project's exhaust stack(s). If aviation warning lights are required, (1) the lowest intensity lights allowable shall be installed at the lowest elevations allowable, and (2) if permissible, dual lighting systems shall be utilized, which switch from white lights during the day to red lights at night. The stack lighting shall comply with the requirements of the FAA.
- G. A Tree Protection Plan shall be presented in a Licensing Package, based on a certified professional arborist's recommendations, for the Project, all access roads, and plan measures shall include provisions for tree protections, including boring, root pruning, soil compaction prevention, and restoration measures appropriate for ensuring health and vigor of the trees important for visual mitigation at key locations. The Plan shall include elements of the Certificate holder's "Existing Vegetation Protection Plan" that was included in the Landscape Design Concept (Exhibit 039). As part of this Plan:
- (i) The Certificate holder shall preserve existing on-site trees to the extent practicable during construction; and
 - (ii) Mature trees shall be preserved on the site to the extent practicable.
- H. A final Landscape Planting and Restoration Plan ("Landscape Plan") shall be filed as part of the Licensing Package for restoration planting locations to mitigate adverse visual impacts due to siting and construction of the Project through plantings and grading. The Landscape Plan shall include appropriate planting and maintenance specifications; indicate use of quality stock of native species and cultivars appropriate to the site; and include specifications for tree replacement due to planting failure. The Landscape Plan shall be based on the Certificate holder's preliminary plan (Exhibit 039). The final Landscape Plan shall also provide for replacement of trees removed as part of the BASF site remediation to the extent such replacement is consistent with remediation of

the BASF site and subject to the approval of DEC's remediation staff.

I. Visual Characteristics of the Project

- (i) Architectural design features and color schemes shall be developed to reflect the Project's waterfront setting and adjacent / nearby recreational initiatives. Details will be provided in Compliance Filings.
- (ii) The Cogeneration Plant buildings shall have a smooth, non-reflective metal cladding facade typical of modern industrial buildings. The taller structures will have a two-tone color scheme using earth tone colors. The buildings shall have a brown bottom and tan top. The smaller buildings at or below the color divide shall only be painted brown. Other structures, such as the stacks and storage tanks shall be painted with coordinating neutral colors. Details shall be specified in a Compliance Filing.

J. The Certificate holder shall implement the following additional measures to mitigate and/or offset potential cultural resource and visual impacts:

- (i) Two separate exhaust stacks for the Cogeneration Plant HRSGs, plus an attached single auxiliary boiler stack, rather than a single stack containing the HRSG and auxiliary boiler flues;
- (ii) Installation and operation of an LP economizer bypass system to reduce occurrence of visible plumes from the cogeneration exhaust stacks designed for daily operations from one half hour before sunrise to one half hour after sunset when a visible plume is expected to occur. In connection with this system, the Certificate holder shall submit, as part of a Compliance Filing, a plan for monitoring and reporting visible plumes from the exhaust stacks;
- (iii) Commitment to incorporate architectural details, including historic and contextual design features such as brick, glass block, and fenestration and variety in dominant straight-line horizontal arrangements, in facades of appropriate buildings facing public areas in accordance with a

development and evaluation process to be included in a Compliance Filing; and

- (iv) The color and features of the existing waterfront pump house building to be retained shall be changed so that it matches the scheme of new facilities.

IX. Land Use and Local Laws

- A. Prior to completion of construction of the Project, the Certificate holder shall meet with the Rensselaer County Director of Public Safety and the City of Rensselaer to plan how the Site staff will coordinate emergency response services.
- B. The Certificate holder shall actively consult with City of Rensselaer officials, emergency response personnel, and the local fire departments concerning the storage of aqueous ammonia and/or other hazardous materials on site. Local fire companies shall be given periodic training tours of the Project Site both during construction and operation.
- C. The Certificate holder shall develop a facility-specific Emergency Response Plan and submit it as a Compliance Filing; the plan shall be prepared in consultation with local emergency response providers. The Emergency Response Plan shall include a description of the organization of the Project's emergency response team, including each team member's role and responsibilities, and a description of the following emergency response measures/protocols: (1) applicable emergency response regulations, (2) plant injuries, first aid and emergency response equipment (e.g., showers, eye flush washes, defibrillators, and exhaust fans), (3) evacuation plan, (4) search and rescue, (5) fire fighting, (6) hazmat releases, (7) terrorist incidents, (8) notification procedures, and (9) emergency response reports.
- D. The Certificate holder shall implement the following additional mitigation in the Project:
 - (i) Greenway design at Riverside Avenue along facility frontage based upon cross-section details (Exhibit 027), but subject to receipt of any and all necessary consents from the City of Rensselaer or other entities with jurisdiction over affected parcels; and

- (ii) Subject to receipt of all necessary approvals, including subdivision as applicable to the Overlook Parcel defined below, the Certificate holder shall construct a suitably surfaced (e.g., asphalt or cinder) ten-foot wide, as practicable, bikeway along the north side and within the right of way of Riverside Avenue between the intersection of Riverside Avenue and the Port Access Highway and an overlook at the south end of the Rensselaer Port turning basin. The overlook shall be furnished with a sitting area and shall be designed for general consistency with the details in the 1986 City of Rensselaer Waterfront Revitalization Plan. To facilitate construction of the overlook on the required portion of the Rensselaer Port property (Overlook Parcel), the Certificate holder shall either (a) relinquish its rights to the Overlook Parcel such that it may be acquired by the City of Rensselaer, or (b) exercise its Port Property Option to Lease solely for the Overlook Parcel. Design of, plans for, and installation schedule for the bikeway shall be provided in a Compliance Filing.
- (iii) In the event that the warehouse parcel (existing Building 39) is used for the Project (e.g., temporarily for construction laydown), all general mitigative measures and plans applicable to the Site shall be applied to that parcel as well.
- E. The Certificate holder's Cogeneration Plant perimeter security fence shall be designed and constructed to comply with the City of Rensselaer Code §179-24.A in that no fence or wall of height greater than four feet shall be erected within 25 feet of the street or highway pavement, and no fence or wall of height greater than six feet shall be erected in a side or rear yard. Compliance of the perimeter fence design with §179-24 shall be demonstrated on the final site plan(s) to be prepared and filed in a compliance filing pursuant to Certificate Conditions I.C. and I.D. To the extent practicable, considering other relevant constraints, including but not limited to public safety, security of Cogeneration Plant facilities, preservation of existing screening vegetation, and avoidance of wetland impacts, compliance shall be accomplished by routing the fence along the shoulder of the Cogeneration Plant perimeter access road depicted in

Ex. 18, except in the vicinity of the switchyard, stormwater detention basins, cooling tower, and grey water treatment building. This condition shall not restrict the Certificate holder to a specific fence design except to the extent required to comply with §179-24.

X. Transportation

- A. A copy of all compliance filings regarding transportation shall be served upon the City of Rensselaer. A copy of all reports on compliance regarding transportation shall be served upon the City of Rensselaer.
- B. Control turns in and out of all driveways of the Article X Facility shall be reflected in drawings to be submitted in a compliance filing, which will depict alignment, curbing, signage, lane markings, or other features that preclude turns onto Riverside Avenue northbound when exiting any part of the site of the Article X Facility.
- C. Subject to receipt of required permits from the New York State Department of Transportation ("DOT"), the Certificate holder shall install prior to start of construction of the Project, and shall maintain in place during Project construction and operation, "trailblazer" signage guiding construction and operation traffic to and from the Project via the preferred arrival and departure routes. Subject to DOT approval, trailblazer signs shall be located at: (for access from the north) i) The Dunn Memorial Bridge off ramp to Route 9/20 south, ii) the intersection of Route 9/20 south and Broadway, iii) the Route 9/20 south exit to the Port Access Highway, iv) the intersection of the Route 9/20 south off ramp and the Port Access Highway; (for access from the south) v) Route 9/20 north at the City of Rensselaer line, vi) the Route 9/20 north exit to South Street, vii) the Route 9/20 north off ramp at South Street, viii) the intersection of Route 9J and the Port Access Highway; and, (for access to and from the site in all cases) ix) the intersection of the Port Access Highway and Riverside Avenue, and x) Riverside Avenue south exiting the site. The Certificate holder shall submit a report on compliance stating that it has completed installation of the trailblazer signs or that it has been unable to obtain, after reasonable diligence, the required permits from DOT.

- D. Subject to approval by the City of Rensselaer, appropriate warning signs shall be placed on Riverside Avenue around all Project site entrances during the period of Project construction. Subject to DOT approval, warning signs and message-boards shall also be placed on Route 9/20 northbound in advance of the South Street off/on ramp; on Route 9/20 southbound in advance of the Route 9J/South Street off and on ramps; and on Route 9J northbound in advance of the intersection with the Port Access Highway. The Certificate holder shall submit a report on compliance stating that it has completed installation of the warning signs and message-boards or that it has been unable to obtain, after reasonable diligence, the required approvals from the City. Warning signs and message-boards shall be removed once the construction of the Project is complete. Upon removal, the Certificate holder shall submit a report on compliance stating that it has completed removal of the warning signs and message-boards.
- E. Prior to the start of construction, the Certificate holder shall request that the DOT monitor and adjust as necessary the signal timing plan at the signalized intersections of Route 9/20 with Aiken Avenue, Washington Street, and Broadway to maintain acceptable Levels of Service ("LOS"). The Certificate holder shall not commence construction of the Article X Facility until it has submitted a report on compliance describing in detail the request made to DOT and the adjustments undertaken or to be undertaken, if any, by DOT in response to the request.
- F. During each week of construction of the Project where the total construction labor force exceeds or is expected to exceed 550 workers, the Certificate holder shall notify the City of Rensselaer Mayor's Office and Planning Office, the City of Rensselaer Police Department, the Rensselaer County Sheriff's Department, and the City of Rensselaer School District (when school is in session) by Friday of each week of the level of expected traffic to be generated by Project construction for the following week. The Certificate holder shall maintain a log of all such notifications in its construction records, and such log shall include the date and contents of such notifications.
- G. Within 60 days of the granting of the Certificate, the Certificate holder shall request the DOT and the City of Rensselaer to:

(i) remove obstructions to the lines-of-sight for drivers of vehicles entering Route 9/20 westbound via the on-ramp from Route 9J/South Street by removal of existing vegetation adjacent to and on the east side of the Route 9/20 bridge over Route 9J; and

(ii) remove obstructions to the lines-of-sight for drivers of vehicles entering Route 9/20 westbound via the on-ramp from Route 9J/South Street by relocation of or adjustment to heights of City of Rensselaer and DOT signs at the west end of the Route 9/20 bridge over Route 9J.

The Certificate holder shall submit a report on compliance describing in detail the requests made to the DOT and the City of Rensselaer and the actions undertaken by the DOT and the City of Rensselaer in response to these requests.

- H. Prior to the commencement of construction activities, the Certificate holder shall contribute up to \$100,000 to the City of Rensselaer toward the design and construction of a gate to be erected at the intersection of Riverside Avenue and the southerly side of Bellmore Place. The function of the gate will be to prohibit passage of automobile and truck traffic, except for emergency vehicles, on Riverside Avenue between the Fort Crailo neighborhood to the north and the industrial area to the south. The Certificate holder shall submit a report on compliance stating that it has made the required contribution. The selection of the contractor who will design and construct the gate will be made by the City through a public bidding process.
- I. The Certificate holder shall contract, at its expense, with the City of Rensselaer Police Department to provide traffic control during construction by uniformed officers with authority to control traffic at the intersection of South Street/9J with the Route 9/20 northbound on/off ramps during the afternoon (2:30 p.m. to 6:30 p.m.) peak hours, and additionally otherwise as needed for purposes of public safety during construction. At any time that a sufficient number of uniformed officers is not available from the City of Rensselaer Police Department to provide such traffic control, the Certificate holder may arrange for substitution by uniformed officers with authority to control traffic from any other local or state law enforcement agency within New York State, including but not limited to the Office of the Rensselaer County Sheriff and the New York State Police. The contract shall require that

during the afternoon (2:30 p.m. to 6:30 p.m.) peak hours, the City of Rensselaer Police Department traffic control officer(s) assigned to control traffic at the intersection of South Street/9J with the Route 9/20 northbound on/off ramps shall also monitor the intersection of South Street/Route 9J with the Port Access Highway and the Route 9/20 southbound off ramps to determine the need for additional traffic control at that intersection. If, in the opinion of the City of Rensselaer Police Department, monitoring reveals a need for a uniformed officer to control traffic to maintain safe operations at that intersection, the City of Rensselaer, at the Certificate holder's expense, shall also provide for a uniformed officer at that intersection during the afternoon (2:30 p.m. to 6:30 p.m.) peak hours, or as otherwise needed for purposes of public safety. At the discretion of the City's traffic monitor (see Condition X.J), in consultation with the agency providing traffic officer services, police officer control may be discontinued at times that it is not necessary to maintain safe operation in the intersection, as manifested by lack of conditions that might lead to queuing on to Routes 9&20 northbound. Police officer control shall be reinstated promptly at any time that the traffic monitor determines that it is necessary for safety. Any changes in police officer control effected pursuant to this condition shall be reported within twenty-four hours to the Certificate holder, the City of Rensselaer, NYSDPS, and NYSDEC. A copy of the police officer contract shall be provided as a Compliance Filing prior to the start of construction. The Certificate holder shall submit a report on compliance describing in detail the date and manner of actions taken by the Certificate holder in fulfillment of this Certificate Condition.

- J. The Certificate holder shall contract, at the Certificate holder's expense, with the City of Rensselaer to obtain the services of a qualified traffic engineer (Monitor) who shall be chosen (with the approval of the Certificate holder) and supervised by the City of Rensselaer and whose duty it shall be to monitor and report to the City of Rensselaer, in the first instance, and to the Board (or the Commission) if necessary, on the Certificate holder's compliance with all certificate conditions regarding Transportation during construction. A copy of the contract for the Monitor shall be provided as a compliance filing prior to the start of construction. Copies of all reports prepared by the City's Monitor shall

be provided simultaneously to the City, the Certificate holder, DPS Staff and NYSDEC. The Certificate holder shall submit a report on compliance describing in detail the date and manner of actions taken by the Certificate holder in fulfillment of this Certificate Condition. In carrying out responsibilities under this certificate, the monitor shall consult with DPS staff as appropriate, in view of the PSC's obligations to insure compliance with the certificate's terms and conditions. When, in the opinion of the Monitor, the Certificate holder is substantially out of compliance with one or more certificate conditions regarding Transportation, the Monitor may, on notice to the Certificate holder, request DPS Staff to take appropriate enforcement action. Upon reasonable request, the site of the Article X Facility and all construction records regarding Transportation shall be open to inspection by the Monitor as if the Monitor is a representative of the PSC Chairman designated pursuant to 16 NYCRR, Section 1003.5 (b). The Monitor shall be equipped with sufficient documentation, transportation, communication and other equipment to monitor effectively certificate holder and contractor compliance with the provisions of this Certificate, subsequent Orders in this proceeding, applicable sections of the Public Service law, and approved compliance filings.

- K. The Certificate holder shall designate a Transportation Coordinator who shall be responsible on behalf of the Certificate holder for monitoring compliance with, and ensuring the enforcement of, the Certificate holder's obligations under the Certificate regarding Transportation for (without limitation) contractors, deliveries, construction workers and operational employees.
- L. The traffic mitigation measures shall be described in greater detail by the Certificate holder in a Traffic Mitigation Compliance Plan for construction and operation of the Project, to be submitted as a compliance filing. The compliance filing shall include maps, plans, standard language to be utilized, a description of the mechanics of how each mitigation measure will be specifically implemented, and any other travel demand management strategies to be implemented and upon becoming effective shall be implemented by the Certificate holder.
- M. The Certificate holder shall prohibit all construction and delivery vehicles, construction worker vehicles and shuttle

buses from on-street or street-shoulder parking at any point on Riverside Avenue, the Port Access Highway, or any public street in the Fort Crailo neighborhood to the north of the site.

- N. During construction, the Certificate holder shall provide and maintain sufficient controlled access off-street parking areas on the site to handle the parking of 550 Project construction and delivery vehicles, construction worker vehicles and shuttle buses.
- O. (i) The Certificate holder shall provide for satellite parking and transportation from satellite lots during periods when the need for vehicle parking on the site exceeds 550 vehicles.
- (ii) The Certificate holder shall identify selected satellite parking locations as soon as possible after Certification, and shall specify such satellite parking locations in a Compliance Filing. The following criteria shall be applied in selecting satellite parking locations:
- Preference shall be given to:
- (a) Locations at a signalized intersection(s) to minimize congestion associated with site access and departure;
 - (b) Locations north/west of the City of Rensselaer, in close proximity to the site;
 - (c) Locations currently used or which have previously been used for satellite parking purposes; and
 - (d) Satellite parking locations shall be in commercial and/or industrial areas, and shall not be located in residential areas.
- (iii) Traffic conditions at key intersections and roads near proposed satellite parking locations shall be assessed to ensure that a significant decrease in level of service will not occur due to construction traffic.
- (iv) Shuttle buses or other similar transportation, provided at the Certificate holder's expense, shall be

provided to transport construction workers to and from the satellite parking location(s) and the site.

- P. If necessary to facilitate the staggered departures required by Condition X.Q, the arrival of construction worker vehicles and shuttle buses at the site shall be staggered. All arrivals shall be scheduled to occur not later than 7:30 a.m., unless it can be demonstrated that arrivals after 7:30 a.m. would facilitate the provision of staggered departure times without adversely affecting morning peak levels of service.
- Q. The departure of construction worker vehicles and shuttle buses shall be staggered and the Certificate holder shall enter into such contracts as are necessary to contractually limit the number of construction worker vehicles and shuttle buses or other similar transportation released from the on-site controlled-access parking areas as follows:
- (a) between 2:30 p.m. and 3:29 p.m. no more than 285 vehicles may be released;
 - (b) between 3:30 p.m. and 4:29 p.m. no more than 306 vehicles may be released;
 - (c) between 4:30 p.m. and 5:30 p.m. no more than 157 vehicles may be released;
 - (d) between 5:31 p.m. and 6:30 p.m. no more than 368 vehicles may be released;

The Certificate holder shall construct and operate its on-site parking lot in such manner as to facilitate and ensure compliance with these release limitations. Nothing in this condition shall affect the limitation of parking for 550 construction and delivery vehicles on site as set forth in Condition N.

- R. The Certificate holder shall distribute instructions to all construction contractors, including trucking companies delivering fill, equipment, and supplies to and from the site, and during the operational phase to all contractors and truck operators serving the Project, to utilize Route 9/20 and the Port Access Highway and to avoid use of Riverside Avenue or other local streets in the Fort Crailo neighborhood north of the project site. The Certificate holder shall also distribute instructions to trucking

companies serving the facility during the operational phase to avoid use of Route 9J to access the site to and from the south.

- S. The Certificate holder shall distribute to all construction workers and truck operators, and during the operational phase to all contractors and truck operators serving the Project, maps that show preferred arrival and departure routes. These Certificate Conditions shall where applicable (including, but not limited to, Condition X.M) be made contract requirements for construction contractors.
- T. The Certificate holder shall include in its contracts with construction suppliers a requirement to avoid scheduling deliveries during the hours of 7:30 a.m. to 8:30 a.m. and 4:30 p.m. to 5:30 p.m. The Certificate holder shall maintain a log of all deliveries in its construction records, and such log shall include the date and time such deliveries are made.
- U. Heavy hauls (e.g. turbines/generators, stack sections or other oversized/overweight equipment) during construction shall be scheduled to occur during non-peak traffic hours to the extent practicable. The Certificate holder shall provide advance notification (as early as possible) to the City of Rensselaer Mayor's Office and Planning Office, the City of Rensselaer Police Department, the Rensselaer County Sheriff's Department, and the City of Rensselaer School District (when school is in session) by phone or in writing (including confirmed fax transmittal) prior to such heavy hauls and shall coordinate heavy hauls with local officials. The Certificate holder will seek to maximize the use of barge and rail transportation, particularly for shipments of major equipment to the site. The Certificate holder shall maintain a log of all heavy hauls in its construction records, and such log shall include the date and time such heavy hauls are made and the mode of transportation.
- V. The Certificate holder shall give preference to fill supplied from locations south of the project site for procurement of fill, provided that the appropriate grade of fill for the project is i) available from those suppliers, and ii) offered at a delivered price no higher than by other suppliers. The Certificate holder shall identify which route will be used to convey fill to the Site in a compliance filing. Significant impacts on roadway

conditions or safety along this route shall be identified and appropriate mitigation described.

- W. The Certificate holder shall give preference to suppliers in the Rensselaer Port or adjoining properties south of the site for procurement of low sulfur (0.05% by weight) distillate oil, provided that the appropriate grade distillate oil for the project is i) available from those suppliers, and ii) offered at a delivered price no higher than by other suppliers.
- X. A Private Aid to Navigation shall be placed and maintained in the river as a warning to avoid the area of the Intake/Discharge structures or construction activity.
- Y. The gray water pipeline will be placed by directional drilling under the Hudson River and approval shall be obtained from the Army Corp of Engineers (ACOE) prior to construction of the gray water line.
- Z. The Certificate holder shall issue a Notice to Mariners regarding the permanent Intake/Discharge structures and In-water construction activities through the US Coast Guard and in coordination with the Hudson River Pilots Association.

XI. Noise

- A. The Certificate holder shall abide by the conditions and sound levels established in the Noise Plan attached to the Joint Settlement Agreement as Appendix JS-F. The Project alone shall meet a Noise Level Rank Curve of "d" for the Modified CNR (Composite Noise Rating) System at the nearest residences to the Project due to operational noise. This is equivalent to a Modified CNR level of "C." The octave band levels required to achieve a Noise Level Rank of "d" are shown in the table below.

Octave Band Center Frequency (Hertz)								
31.5	63	125	250	500	1000	2000	4000	8000
74 dB	66 dB	59 dB	53 dB	48 dB	44 dB	40 dB	37 dB	35 dB

- B. Construction noise sources shall be mitigated by proper equipment maintenance and the use of appropriate noise reduction measures as stated in the Application, including

the use of acoustical barriers, silencers, acoustical enclosures, and acoustical lagging.

- C. The Certificate holder shall conduct a construction noise evaluation in accordance with the Sound Level Measurement Protocol - Construction Noise (Exhibit 014) to demonstrate that the project complies with the construction noise criteria contained in the Noise Plan attached to the Joint Settlement Agreement as Appendix JS-F.
- D. The Certificate holder shall submit a post-construction report by an acoustical engineer to demonstrate that, based on noise measurements conducted in accordance with the Sound Level Measurement Protocol - Operational Noise (Exhibit 015), the operating plant complies with the acoustic design goals contained in the Noise Plan attached to the Joint Settlement Agreement as Appendix JS-F.
- E. Noise producing construction activities, including extended truck idling, shall be limited to the daytime hours, 6 a.m. to 9:00 p.m., except for snow removal, which may commence no earlier than 4 a.m., and except that significant noise producing activities identified in the Noise Plan may not commence prior to 7 a.m., and shall be limited to Monday through Saturday. Days and work hours for noise producing construction activities may be extended for limited periods providing the affected community is first notified. For nighttime construction involving noisy activities, including start-up testing and commissioning, the Certificate holder shall identify in a Compliance Filing the specific noise control measures that shall be implemented to minimize potential off-site noise impacts.
- F. During construction, steam blows (steam cleaning of boiler pipes) shall employ a muffler, and the public shall be notified to the dates of the activity. The Certificate holder's on-site environmental manager (or equivalent position) shall routinely monitor proper equipment maintenance to avoid unnecessary noise.
- G. The Certificate holder shall comply with federal noise level requirements for employees during construction and operation of the Project as established by the Occupational Safety and Health Administration of the U.S. Department of Labor (40 CFR 1910.95)

- H. Construction delivery trucks which arrive at night shall be immediately admitted to the site.
- I. If required during construction, blasting shall be done using best practice techniques to minimize noise.
- J. The Certificate holder shall implement the following additional noise mitigation measures:
 - (i) Provide advance community notice of significant noise-generating events in accordance with the Noise Plan attached to the Joint Settlement Agreement as Appendix JS-F.
 - (ii) Prohibit construction or employee traffic on Riverside Avenue north of the facility site;
 - (iii) Implement a Community Liaison Program to identify and address community noise concerns, beginning with construction;
 - (iv) Restrict night time construction activity to indoors where practicable; and
 - (v) Use Best Management Practices, such as equipment maintenance; strobe lights on Applicant-owned trucks; temporary noise screening for dewatering pumps, etc.; restricting time periods for the conduct of pile driving and use of explosives.

XII. Construction Management

- A. The Certificate holder shall submit an environmental compliance plan to ensure (1) implementation and maintenance of required environmental mitigation measures; (2) compliance with the terms of this Certificate; and (3) compliance with applicable federal, state and local statutes, ordinances, rules and regulations. The Compliance Plan shall include:
 - (i) the name(s) of the environmental inspector(s) and a statement of qualifications for each inspector demonstrating sufficient knowledge and experience in environmental matters to complete the inspections and audits;

- (ii) a certification confirming the independence of the inspector(s) from the Certificate holder and certifying the authority of the inspector(s) to "stop work" in cases of noncompliance or imminent environmental or safety hazard;
 - (iii) provision for deployment of more than one inspector in the event that two or more major field operations are undertaken simultaneously, such that at least one inspector shall be assigned to each construction area and no inspector shall be assigned to more than two active construction areas at any one time;
 - (iv) a proposed checklist of matters to inspect for compliance, including the specific items or locations to be inspected, the inspection method to be employed (e.g., visual, auditory, testing by instrument, etc.), and acceptability criteria to be applied by the inspector(s);
 - (v) a procedure setting forth how the Certificate holder shall respond to and correct problems found by the inspector(s);
 - (vi) a schedule for monthly environmental audits during construction and submission of audit checklists, together with a written explanation of problem(s) signed by the auditor(s) and an authorized representative of the Certificate holder, to NYS DPS Staff, NYS DEC Staff, and local agency and/or building inspectors; and
 - (vii) a schedule for submission of annual audits during the first two years of operation of the Facility to NYS DPS, NYS DEC, and appropriate local agencies.
- B. The Certificate holder shall follow the procedures and conditions set forth in the Post-Remediation Construction Plan ("PRCP") to address any concerns relating to public health and the environment arising from construction at a site where hazardous constituents exist. The PRCP shall be submitted as a compliance filing and shall be based on and no less stringent than the draft Post Remediation Construction Plan attached to the Joint Settlement Agreement as Appendix JS-C.

- C. The methods for cut and fill and stabilization techniques during project construction shall be as described in the PRCP.
- D. The Certificate holder shall perform a pre-construction geotechnical investigation consistent with the requirements of the PRCP.
- E. Construction activities shall be conducted in a manner to avoid the potential for hazardous constituents to be released into the environment.
- F. Any hazardous materials identified shall be removed and disposed of off-site in accordance with applicable NYSDEC requirements.
- G. Potential impacts due to pile driving on the Rensselaer Cogeneration Plant and Organichem shall be mitigated through coordination between the construction personnel and these companies so that this activity does not interfere with ongoing operations. If required, vibratory effects will be mitigated through the reduction in the weight of the hammers being used to drive the piles. In addition, prior to awarding construction contracts related or potentially related to pile driving, the Certificate holder shall assess, based on geotechnical information and other relevant considerations, the feasibility of employing alternative pile driving techniques such as vibratory driver/hammer; and the results of the assessment, including the effect of alternate techniques upon construction noise at receptors, shall be provided in a report to DPS Staff and the City of Rensselaer.
- H. A Waste Handling Plan (WHP), which will conform to NYSDEC guidelines, shall be developed that provides procedures for handling waste materials if encountered during construction. In addition, a Health and Safety Plan (HASP) shall be developed for the construction workers at the site. Both the WHP and HASP shall be Compliance Filings, and shall be developed in accordance with the objectives and criteria specified in Appendices JS-D and JS-E attached to the Joint Settlement Agreement.
- I. Trucks used for transporting soil or gravel during construction shall be covered to avoid loss of transported material.

- J. The Certificate holder shall not dispose of land clearing waste materials onsite. The Certificate holder shall be responsible for the actions of its contractors to prevent the burning of waste materials onsite. All construction wastes shall be disposed of in accordance with applicable laws and regulations.
- K. All unused excavated materials and/or construction debris shall be removed upon completion of construction and disposed in accordance with all applicable laws and regulations.

XIII. Public Interest

- A. The Certificate holder shall make good faith efforts to promptly address complaints raised by members of the public with respect to the construction and operation of the Project and shall describe in a Compliance Filing a Community Liaison Program ("CLP") to provide adequate notice and means of communication with surrounding communities and stakeholders prior to project construction. The CLP shall be administered by the Certificate holder's Community Liaison Office ("CLO"). With respect to the construction period, the CLP shall specify:
- (i) Targeted communities and stakeholders and limits of geographic areas;
 - (ii) Methods of timely notification and information dissemination to involved communities and stakeholders of the construction schedule prior to and during each phase of construction;
 - (iii) Criteria used to determine the direct mailing list;
 - (iv) All public locations where information shall be deposited for review and/or dissemination;
 - (v) A media contact plan to solicit the issuing of public service announcements for any construction-phase activities that are likely to result in significant inconvenience to the public (such as traffic disruption);
 - (vi) Materials used to reach stakeholders with construction information (e.g., Q&A, newsletters, information

brochures, visual materials, graphs, charts, site maps, etc.);

- (vii) Certificate holder's representatives and means of contact (e.g., office location, local and toll-free telephone numbers, web address, construction site sign, information board, etc.);
- (viii) A toll-free dedicated telephone line with specified hours of operation and inquiry response time;
- (ix) The maintenance of a complaint log specifying procedures for receiving and responding to any complaints concerning the construction of the certified facility. Utilization of the complaint log shall extend through the operational period;
- (x) The complaint response process to be used;
- (xi) Availability of a public presentation request program to inform the public about the construction and operation of the facility. The availability of the public presentation request program shall extend through the operational period;
- (xii) Methods to evaluate the adequacy and effectiveness of the public liaison program; and
- (xiii) Office location and hours.

- B. Prior to commencing construction, the Certificate holder shall form a citizens committee, the final composition of which is to be determined, but that will include at minimum representatives of the Certificate holder (including the CLO) and the City of Rensselaer. The committee will meet on a regularly scheduled basis to receive project status updates and to discuss any issues of concern related to the project.

XIV. Decommissioning

- A. Before commencement of construction of the Cogeneration Plant, other than research, surveying, boring or related activities necessary to prepare final design plans and obtain necessary permits, the Certificate holder shall provide adequate financial security (such as a cash bond,

an escrow, an existing or supplemental insurance policy, or a letter of credit) in the amount of \$530,000 to assure the restoration of any disturbed areas and the removal of equipment in the event that the Cogeneration Plant is not completed during the initial grading and excavation phase of construction ("Phase 1"). Prior to commencing concrete pouring ("Phase 2"), the amount of the financial security shall be increased to \$4,050,000. Prior to commencing steel erection ("Phase 3"), the amount of the financial security shall be increased to \$6,250,000. At the time commercial operation begins, the amount of the financial security shall be increased to \$7,000,000. Thereafter the fund shall be increased every two years, as necessary, to reflect inflation of labor and all other relevant decommissioning costs, and reexamination of costs by an experienced demolition expert. The Certificate holder shall engage the services of a Trustee and enter into a Standby Trust Agreement for the administration of site restoration funds and activities in the event of default. The Certificate holder shall submit its proposed Standby Trust Agreement with its compliance filing. The Certificate holder shall also submit its proposed letter of credit or comparable form of financial security with its compliance filing, and thereafter increase the amount of financial security to reflect the amounts required for each of the phases of construction specified above.

- B. Upon commencement of commercial operation of the Cogeneration Plant, the Certificate holder shall increase the amount of the financial security to \$7 million and subsequently to the amount determined biennially after submission of a compliance filing describing the re-estimation of decommissioning costs.

XV. Solid Waste

Before hiring contractors for solid waste haulage, the Certificate holder shall require evidence that they are in possession of current and valid permits and licenses required by local, state and federal regulations. During the period of construction and operation, the Certificate holder shall retain for inspection records showing that all waste hauling and disposal contractors have all required permits and licenses and that all such permits and licenses are current and valid.