

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

CASE 99-F-1191 - Application of Astoria Energy LLC, for a
Certificate of Environmental Compatibility and
Public Need to Construct and Operate an
Approximately 1000 Megawatt Generating Facility
in the Astoria Section of Queens County.

NOTICE OF SCHEDULE FOR FILING EXCEPTIONS

(Issued September 26, 2001)

Attached is the Recommended Decision of Presiding
Examiner J. Michael Harrison and Associate Examiner P. Nicholas
Garlick in this proceeding. Briefs on exceptions will be due in
hand to the undersigned and all active parties by October 17,
2001. Twenty-five copies of the brief on exceptions shall be
filed with the Secretary, and a copy shall be served on each
party. Reply briefs on exceptions will not be entertained.

JANET HAND DEIXLER
Secretary

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RECOMMENDED DECISION

BY

PRESIDING EXAMINER J. MICHAEL HARRISON

AND

ASSOCIATE EXAMINER P. NICHOLAS GARLICK

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APPEARANCES: See Appendix A

J. MICHAEL HARRISON, Presiding Examiner and
P. NICHOLAS GARLICK, Associate Examiner:

I. INTRODUCTION

A. Project Description

On June 19, 2000, Astoria Energy LLC (the Applicant, or Astoria Energy) filed an application with the State Board on Electric Generation Siting and the Environment (the Siting Board) for a Certificate of Environmental Compatibility and Public Need, pursuant to Public Service Law (PSL) Article X, to build and operate a nominal 1000 megawatt (MW) gas-fired, combined cycle electric generating facility in the Astoria section of Queens County, New York. The proposed facility is a merchant facility, intending to sell electricity into New York's wholesale market.

The proposed facility is located at 17-10 Steinway Street, on an approximately 23-acre brownfield site currently utilized as an operational fuel oil storage and distribution terminal. The site is in an M3-1 Heavy Manufacturing Zone, amongst other manufacturing and heavy industrial uses, including the Steinway and Sons manufacturing factory, the Bowery Bay Water Pollution Control Plant, electric transmission facilities,

other power generating facilities, and a variety of smaller manufacturing and warehousing facilities.

The proposed facility will consist of an efficient, state-of-the-art, combined-cycle electric generating facility, using natural gas as its primary source of fuel, with low-sulfur distillate fuel oil as a backup fuel for up to 720 hours annually. The primary structural components of the facility consist of a 612 foot - 110 foot turbine building and adjacent heat recovery steam generator enclosures, four nested 269-foot stack flues, two air-cooled condensers (AC) for cooling (each with 40 cells in a 4 x 10 arrangement), two 150,000 barrel oil storage tanks, and an open air switchyard outside the turbine building.

A new 138 kV aerial electric transmission line will connect the proposed facility to the existing Astoria East Substation, which is located about one-half mile southwest of the site on Consolidated Edison Company of New York, Inc. (Con Edison) property. In addition, a new 20-inch diameter natural gas pipeline would be constructed underground along Steinway Place from the proposed facility site to the Con Edison 24-inch main located about one-third of a mile to the south at the intersection of Steinway Place and 20th Avenue.¹

The Applicant will use the existing New York City municipal water and sewer infrastructure located adjacent to the site to supply water to and receive discharged water from the proposed facility. The existing storm water management system at the site is to be upgraded as a part of redevelopment.

B. Procedural History

¹ A direct connection to a proposed Iroquois Eastchester Lateral pipeline is under consideration, but has not been presented for this record.

Prior to filing its application, Astoria followed the pre-application consultation process outlined in PSL §163. The Applicant met with various state agencies, municipal officers and local residents during the summer of 1999,² and submitted a Pre-Application Report to the Siting Board on August 31, 1999. Agency and community contacts and meetings continued thereafter, and in November 1999 the Applicant distributed proposed pre-application stipulations containing the methodology and scope of studies concerning the proposed facility. These stipulations were refined in a comment and consultation process and, following a settlement conference held April 24, 2000, various final stipulations were executed by the Department of Public Service (DPS) Staff, the Department of Environmental Conservation (DEC) Staff, and Department of Health (DOH) Staff.³

Following the filing of the application, Astoria Energy filed supplemental information in eleven separate filings between September 18, 2001, and June 21, 2001. In a letter dated March 1, 2001, as required by PSL §165(1), Siting Board Chairman Helmer informed Astoria Energy that its application generally complied with the filing requirements of PSL §164(1). This compliance determination commenced the 12-month period within which a final determination must be made on the application.⁴

A prehearing conference was conducted by the Examiners on March 26, 2001, to identify active parties, discuss scheduling and procedural matters, and initiate review of requests for intervenor funds.⁵

² Exh. 1, Vol. I, §2.3.

³ Exh. 1, Vol. II, App. 1.0-2.

⁴ The Siting Board's final decision is required by March 1, 2002 PSL §165 (4).

⁵ Pursuant to PSL §164 and 16 NYCRR §1000.9, a total of \$169,890 of the \$300,000 available funds was awarded, \$127,000 to

As provided in notices issued by the Secretary to the Siting Board and the DEC Office of Hearings and Mediation Services, and published in newspapers by the Applicant, joint legislative/public statement hearings were convened at 7:00 p.m. on April 18 & 19, 2001 at P.S. 141 in Astoria, Queens, New York. On April 18, 2001, approximately 150 people attended and 16 people made oral statements for the record. Of those who spoke, 13 spoke in favor of the project and three spoke against. On April 19, 2001, approximately 65 people attended and ten people made oral statements for the record. Of those who spoke, five spoke in favor of the project and five spoke against.

Concurrently with the filing of the Article X application, the Applicant submitted applications to DEC for a Clean Air Act (CAA) Title V permit, a CAA Title IV permit, a Prevention of Significant Deterioration (PSD) permit, and the transfer and modification of a State Pollutant Discharge Elimination System (SPDES) storm water discharge permit. DEC required filing of comments on draft air and SPDES permits by April 19, 2001.

On May 2 and 3, 2001, an issues conference was conducted jointly in the DEC and Article X proceedings. On May 24, 2001, we issued our "Article X and DEC Part 624 Issues Ruling." ALJ Garlick determined there were no substantive and significant issues with respect to the requested DEC permits, and we jointly specified a list of issues identified for Article X adjudication.⁶

Office of the President, Borough of Queens/Coalition Helping to Organize a Kleaner Environment(Queens/CHOKE), and \$42,890 to Citizens Environmental and Economic Coalition (CEEC).

⁶ Interlocutory appeals were filed with the Siting Board objecting to the exclusion of some Article X issues, but as these matters were later resolved, these appeals were withdrawn. On July 17, 2001, the DEC Commissioner upheld ALJ Garlick's issues determinations on appeal.

Astoria Energy filed a notice of impending settlement negotiations with the Siting Board on June 13, 2001. The negotiation process was successfully completed with representatives of the Applicant, DPS Staff, DEC Staff, and DOH Staff on July 18, 2001 entering into a Joint Stipulation settling all issues.⁷ A hearing was held on July 18, 2001, at which evidence was identified and received into the record. A total of 78 exhibits were received, including the Applicant's exhibits and testimony, the Joint Stipulation, testimony of DPS Staff witnesses, and a stipulation agreement among DEC Staff, DPS Staff, and the Applicant, resolving an on-site oil storage facility issue.

No other party presented testimony, and although other parties did not sign the Joint Stipulation, the proposed certificate conditions included in that agreement were not challenged, except as they might be affected by resolution of an outstanding issue involving the applicability of New York City's Air Code.

Briefs were filed by the Applicant and DPS Staff on August 31, 2001. On August 24, 2001, Astoria Energy filed a brief replying to DPS Staff, and presenting initial comments on the New York City air issues. New York City (NYC) filed its initial comments on August 24, 2001 as well. On August 30, NYC filed its reply to the Applicant, and on August 31, the Applicant filed its reply to NYC.

C. Summary of the Joint Stipulation

The Joint Stipulation consists of 11 separate topic agreements, each of which identifies the nature of probable impacts the proposed facility will have, provides a set of

⁷ Exh. 39. The Joint Stipulation includes eleven separate topic-specific settlement agreements, proposed certificate conditions, and a list of applicable acronyms.

proposed certificate conditions related to the topic, and discusses how the proposed certificate conditions will minimize adverse impacts as required by PSL §168.

The topic agreements include: (1) Air Quality; (2) Electric Transmission Facilities; (3) Gas Supply and Transmission Facilities; (4) Land Use and Local Laws; (5) Noise; (6) Public Interest; (7) Soils, Geology, Seismology and Agricultural Lands; (8) Terrestrial and Aquatic Ecology; (9) Traffic; (10) Visual and Cultural Resources and Aesthetics; and (11) Water Resources.

Each topic agreement is reviewed below. We find that the topic agreements in the Joint Stipulation collectively address all of the topic areas identified in PSL §168. We conclude that the evidentiary record compiled in this proceeding is comprehensive, supports the terms of the Joint Stipulation, and provides a factual basis sufficient for the Siting Board to determine whether the proposed facility should be certificated.

D. Required Findings of the Board

Article X allows the Siting Board either to grant or deny the application as filed, or to certify a facility "upon such terms, conditions, limitations or modifications of the construction or operation of the facility as [it] may deem appropriate."⁸ In order to grant a certificate, the Siting Board must find:

- That the facility is reasonably consistent with the policies and long-range planning objectives and strategies of the most recent state energy plan, or that "the facility was selected pursuant to an approved procurement process."⁹

⁸ PSL §168(2).

⁹ PSL §168(2)(a).

- The nature of the probable environmental impacts, specifying predictable adverse and beneficial effects on (a) the normal 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.¹⁰
- That the facility minimizes adverse environmental impacts, considering (a) the state of available technology, (b) the nature and economics of reasonable alternatives required to be considered under PSL §164(1)(b), and (c) the interest of the state respecting 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 discharge any effluent in contravention of DEC standards or, where no classification has been made of the receiving waters, that it will not discharge effluent unduly injurious to fish and wildlife, the industrial development of the state, and the public health and public enjoyment of the receiving waters.¹³
- That the facility will not emit any air pollutants in contravention of applicable air emission control requirements or air quality standards.¹⁴
- 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

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).

¹⁵ PSL §168(2)(c)(v).

- That the facility will operate in compliance with all applicable state and local laws and associated regulations, except that the Board may refuse to apply specific local laws, ordinances, regulations, or requirements it regards as unduly restrictive.¹⁷
- That the construction and operation of the facility is in the public interest, considering its environmental impact and the reasonable alternatives considered [under PSL §164(1)(b)].¹⁸

As noted above, the Siting Board's required findings include that the proposed facility "will not discharge any effluent that will be in contravention of the standards adopted by the department of environmental conservation...",¹⁹ and "will not emit any pollutants to the air that will be in contravention of applicable air emission control requirements or air quality standards."²⁰ In past Article X proceedings, the Siting Board has deferred to the judgment of the DEC Commissioner, who has been delegated responsibility to issue permits from the United States Environmental Protection Agency (EPA) pursuant to the Clean Air Act (CAA) and Clean Water Act (CWA).²¹

¹⁶ PSL §168(2)(c)(vi).

¹⁷ PSL §168(2)(d).

¹⁸ PSL §168(2)(e).

¹⁹ PSL §168(2)(c)(iii).

²⁰ PSL §168(2)(c)(iv).

²¹ Case 99-F-0558, Application of Heritage Power LLC, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued January 19, 2001), pp. 7-8; Case 99-F-1314, Application of Consolidated Edison Company of New York, Inc., Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued August 30, 2001), pp. 34-36.

II. THE REQUIRED FINDINGS

A. Air Quality

Under PSL Article X, the Siting Board must make findings specifically with regard to the impact of construction and operation of the facility on air resources.²² In this case the Applicant has applied to the DEC Commissioner for three permits: 1) a CAA Title V permit; 2) a CAA Title IV permit; and, 3) a Prevention of Significant Deterioration (PSD) permit. DEC Staff reviewed these applications, and by public notice dated February 28, 2001 determined that the applications were complete and prepared draft permits for public review. DEC Staff concluded that applicable statutory and regulatory criteria could be met through compliance with the conditions in the draft permit.

Following the required period for public review and comment, an issues conference was convened on May 2, and May 3, pursuant to DEC's administrative permit hearing regulations.²³ The Associate Examiner, in an issues ruling dated May 24, 2001, determined that none of the 41 issues relating to the air permits proposed by interveners should be advanced to adjudication. The interveners appealed to the DEC Commissioner arguing that 38 issues should be adjudicated. One appeal was subsequently withdrawn.

The DEC Commissioner dismissed all remaining appeals in her Interim Decision dated July 17, 2001, and remanded the matter back to DEC Staff to continue processing the permits.

²² Applicable here are the required findings on the nature of the probable "adverse and beneficial effects" on "...air ... quality..." (§168(2)(b)); that the facility "is compatible with public health and safety" (§168(2)(c)(ii)); and that the facility would "not emit any pollutants to the air that will be in contravention of applicable air emission control requirements or air quality standards" (§168(2)(c)(iv)).

²³ 6 NYCRR Part 624

While final permits have not yet been issued, there is no reason to believe that when released and final they will differ in any significant way from the draft permits. Accordingly, the DEC administrative process has been exhausted and the DEC Commissioner has examined all proposed issues regarding the emission of air pollution from the proposed facility. The Siting Board should conclude, as it has in the past, that the impacts covered by the DEC air permits have been minimized, and make the related findings required by PSL §168(2)(c).

The DEC Commissioner's decision to issue the air pollution control permits will be based on the evidence contained in the record of these joint proceedings. The record includes modeling of air emissions from existing and other proposed facilities in the area through 2004, which indicate that the proposed facility is expected to displace older units, reducing emissions of NO_x, SO₂, and CO₂. The record also explains that the proposed facility will use efficient combustion equipment using primarily natural gas, add-on emission controls, including selective catalytic reduction (SCR), and a carbon monoxide catalyst, to meet federal LAER and BACT standards.

B. Water Resources

Under Article X, the Siting Board must make findings specifically with regard to the impact of construction and operation of the facility on water resources and aquatic

wildlife.²⁴ Generally, these findings subsume compliance with a number of federal and state laws and regulations. Our discussion includes several sections, beginning with a brief description of the proposed facility's water needs.

The second section relates to the wastewater that would be discharged from the proposed facility, if it were constructed. Storm water discharges are regulated pursuant to the federal CWA and, as explained above, the Siting Board has relied in the past on the DEC Commissioner's decision to issue permits as evidence that impacts from storm water discharges have been minimized.

The third section briefly discusses state and federal freshwater wetlands. Since the proposed project does not directly affect wetlands, the potential impacts to wetlands that may result from the proposal are non-existent. The fourth section discusses potential impacts to groundwater.

²⁴ Applicable here are the required findings on the nature of the probable "adverse and beneficial effects" on ". . . water quality, fish, and other marine life," (PSL §168(2)(b)); and the required finding that the facility "minimizes adverse environmental impacts, considering the state of available technology . . . with respect to . . . fish and wildlife . . . and other pertinent considerations" (PSL §168(2)(c)(I)), and that the facility "will not discharge any effluent that will be in contravention of the standards adopted by [DEC], or in case no classification has been made of the receiving waters associated with the facility, will not discharge any effluent that will be unduly injurious to the propagation and protection of fish and wildlife, . . ." (PSL §168(2)(c)(iii)).

1. Project Description

All water used at the proposed project will be purchased from the New York City public water supply system and will be delivered through an existing 20-inch water supply line adjacent to the project site.²⁵ On average, the proposed facility will use 0.481 million gallons of water per day (MGD), with a peak demand of 1.6 MGD.²⁶ The major water uses are for power production and potable water.

On average, the proposed facility will discharge 0.237 MGD of treated wastewater to the Bowery Bay Water Pollution Control Plant, a publicly owned treatment works owned by NYC. The maximum wastewater discharge will be 0.267 MGD.²⁷

The proposed facility minimizes adverse water-related impacts through the use of closed-loop, air-cooled condensing system for cooling purposes. The project does not require water for cooling.

2. The Federal Clean Water Act and ECL Article 17

The purpose of the Clean Water Act (CWA)²⁸ is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁹ To accomplish this goal, the CWA authorizes the development of national water quality standards and establishes a permit program referred to as the National Pollutant Discharge Elimination System (NPDES) program. The U.S. Environmental Protection Agency (EPA) administers the

²⁵ Exh. 1, Vol. I, §4.9.2.4.

²⁶ Exh. 1, Vol. I, Table 4.9-2.

²⁷ Exh. 1, Vol. I, §4.9.3.1.

²⁸ 33 USC §§1251 to 1387, formally known as the Federal Water Pollution Control Act (FWPCA).

²⁹ 33 USC §1251(a).

NPDES permit program. This permit program regulates the daily wastewater discharges from a facility.

The CWA also provides for the delegation of the national permit program to the states.³⁰ Under the delegation, EPA suspends its issuance of permits, but retains residual enforcement authority and may oppose the decision by a state to grant a permit. Since 1975, New York has had a federally approved permit program, established pursuant to Environmental Conservation Law (ECL) Article 17, Title 8,³¹ to control wastewater and storm water discharges to the state's surface and groundwaters. DEC administers the SPDES program, consistent with the requirements of the federal Clean Water Act.³²

a. No SPDES Permit Required for
Discharges from Proposed Facility

As discussed above, all discharges from the proposed facility are being made to the Bowery Bay Water Pollution Control Plant. Therefore, because the proposed plant will not discharge wastewater to either surface or groundwater, no SPDES permit is needed. However, the Applicant does need an Industrial Sewer Discharge Permit from the NYC Department of Environmental Protection.³³ This permit is outside the DEC permitting process, and would be issued by the Siting Board under Article I, unless delegated to New York City. This permit is among those that would be delegated to NYC under the Joint Stipulation.³⁴

³⁰ 33 USC §1342(b); 40 CFR Part 123.

³¹ Water Pollution Control - State Pollutant Discharge Elimination System (SPDES).

³² The regulations that implement the SPDES program are 6 NYCRR Parts 750-758.

³³ Exh. 1, Vol. I at §4.9-24.

³⁴ See discussion of delegation of permitting to NYC, below.

b. SPDES Permit for Storm Water Management

There is currently an existing SPDES Permit No. NY-02-8002 and a Best Management Practices (BMP) plan for storm water management for the proposed site. The Applicant has applied to modify this permit to construct and maintain a permanent storm water collection and treatment system, including two new basins for collecting storm water.³⁵ These new basins will control the runoff from the first one-half inch of precipitation.

To control storm water discharges during the construction of the proposed facility, the Applicant will file a "Notice of Intent for the Project Site for Storm Water Discharges Associated with Construction Activity" under the SPDES General Permit. Prior to the start of construction, a "Storm Water Pollution Prevention and Erosion Control Plan" will be implemented. This plan details how storm water, storm surges and tidal surges will be managed. The plan minimizes contaminants and sediment loads released via storm water to the abutting surface water. Silt fences and hay bales will be used to control erosion during the construction of the electrical transmission and natural gas interconnections.³⁶

Finally, the site of the proposed facility is within a special flood hazard area designated by the Federal Emergency Management Agency (FEMA). The project will comply with all applicable requirements for construction in such an area. Specifically, the turbine building will be constructed 9 inches above the 100-year flood level and the major equipment used at

³⁵ Exh. 1, Vol. I at §4.9-50.

³⁶ Exh. 59, p. 11-14.

the facility will be constructed 2 feet above the 100-year flood level.

The draft SPDES permit for storm water management has been released, and the public review process is complete. The Siting Board can expect issuance of this permit without significant change.

3. Freshwater and Tidal Wetlands

The proposed facility will not adversely impact either freshwater or tidal wetlands. This is because the proposed facility is not located within any tidal or freshwater wetlands, nor are the electrical transmission facilities and other ancillary facilities. As noted elsewhere, the proposed facility will be located on an already disturbed brownfield site.

4. Groundwater

The proposed facility will not utilize any groundwater for consumptive purposes. Potential impacts on groundwater will be limited to the construction of the proposed facility.³⁷ During construction, groundwater will be pumped via wells into detention ponds, which will be constructed on-site. From these ponds, this groundwater will be allowed to percolate back into groundwater. The pumping of groundwater will cease after construction is complete.

5. Conclusions

With respect to storm water, freshwater wetlands, and groundwater the record demonstrates that the facility minimizes adverse environmental impacts considering the interest of the state as required by PSL §168(2)(c)(i), and that the proposed facility is compatible with the public health and safety

³⁷ Exh. 1, Vol. I at §4.9.4.2.

pursuant to PSL §168(2)(c)(ii). The record demonstrates further that the proposed facility would not contravene either any applicable water quality standards or be inconsistent with applicable regulations of the DEC, as required by PSL §168(2)(c)(iii). Finally, pursuant to PSL §168(2)(d), the proposed facility is designed to operate in compliance with applicable state and local laws and regulations related to water and wetlands resources, as well as public health and safety.

C. Other Environmental Impacts

1. Terrestrial and Aquatic Ecology

No issues regarding the impacts of the proposed facility were proposed for adjudication, nor were any of the Applicant's evaluations or conclusions challenged. The record before the Siting Board adequately demonstrates that the impacts to terrestrial and aquatic ecology have been identified, and that any adverse impacts have been minimized.

The Application characterized the existing plant communities, wetlands, aquatic habitats, and wildlife present on the site of the proposed project. The Application also examined areas adjacent to the site of the proposed facility as well as areas to be used during construction and areas along the electrical and natural gas transmission routes.³⁸ The site of the proposed project is an entirely developed fuel oil storage and distribution terminal, a so-called "brownfield". The project will not impact wetlands because there are none on the site of the proposed facility and all interconnections will be at some distance from wetlands and other waterbodies. There are no records indicating that the site or the areas adjacent thereto have been used by any state or federally listed threatened or endangered species, or species of special concern.

³⁸ Exh. 1, Vol. I, §4.4-1.

The proposed facility has minimized adverse impacts on terrestrial ecology and wildlife.

2. Soils, Geology, Seismology, and Agricultural Lands

Sections 3.0, 4.7 and 4.9 of the application materials describe the existing characteristics of soils and geology at the site, and review the potential impacts and design considerations associated with the site's characteristics. Although geologic and other earth resource characteristics do not generally trigger specific regulatory measures, the Siting Board is required to find whether the proposed facility would minimize environmental impacts with respect to viable agricultural lands.³⁹

As discussed earlier, the site of the proposed facility is an urban brownfield currently used as a tank farm. The site is located along the shore of Steinway Creek where it empties into the East River. Much of the site sits upon land that was once underwater, but was filled in the past. The subsurface soils include fill materials of sand and larger particles interbedded with construction and demolition debris, including concrete blocks, bricks, boulders and wood.⁴⁰

During construction of the proposed facility, the gas transmission lines and electrical transmission facilities excavation will occur at the site. The Applicant estimates that more than 65,000 cubic yards of existing soils will be moved at the site and as much as 20,000 cubic yards of fill may be brought to the site as backfill material.⁴¹ Adverse impacts to the environment during construction will be minimized through erosion and other controls, in accordance with the Storm water

³⁹ PSL §168(2)(c)(I).

⁴⁰ Exh. 1, §4.7-9.

⁴¹ Exh. 1, Vol. I, §4.7.4.1.

Pollution Prevention Plan. Soils found to be unsuitable for reuse at the site will be disposed of at an authorized off-site disposal facility.

There is no agricultural land at or near the site, and due to the nature of the site, no agricultural uses are foreseen.⁴² To address concerns regarding seismology, the proposed project will be constructed in accordance with applicable local building codes and seismic codes.⁴³

Consistent with PSL §168(2)(d), the record shows that the proposed facility is designed to operate in compliance with applicable state and local laws and regulations concerning the environment and public health and safety. The Siting Board should conclude, based on the record, that the proposed facility would minimize adverse environmental impacts with respect to viable agricultural lands, pursuant to PSL §168(2)(c)(i), and would be compatible with public health and safety as required by PSL § 168(2)(c)(ii).

3. Land Use, Recreational and Cultural Resources

a. Land Use

The Applicant conducted a land use inventory to identify the existing land uses in the vicinity of the site.⁴⁴ The proposed facility is located in an M3-1 district, and is consistent with the New York City Zoning Resolution.⁴⁵ In addition, the proposed facility and the associated electric and natural gas interconnections will all be located in industrial zones, in close proximity to other industrial and commercial land uses. In addition, after the proposed facility is

⁴² Exh. 55, p. 3.

⁴³ Exh. 1, Vol. I, §4.7.4.1.

⁴⁴ Exh. 1, Vol. I §4.2.

⁴⁵ Exh. 45, p. 3.

constructed, there will be a significant reduction in truck traffic from the site, compared with its existing use. Finally, the proposed project will comply with all applicable performance standards established for the M3-1 zone, including: noise; vibration; smoke, dust and other particulate matter; odorous, toxic or noxious matter; radiation, fire and explosive hazards; and humidity, heat or glare.

Before construction begins, the Applicant would provide proof of adequate financial security in the amount of \$3.15 million to fund the decommissioning if the proposed project is not completed.⁴⁶

b. Recreational Resources

The site of the proposed facility does not provide any public access to recreational resources. As discussed above, the site is an entirely developed, brownfield site that is currently used as a fuel oil storage and distribution terminal. Given the heavily industrial nature of the surrounding area, there is very little recreational or fishing activity in the vicinity of the site. There are parks and ball fields located approximately more than one-quarter of a mile from the facility, but the construction and operation of the proposed facility will not interfere with the use of existing recreational resources.⁴⁷

c. Cultural Resources

Section 4.6 of the application⁴⁸ addresses the proposed facility's potential impacts on cultural and historical resources, including those at or near the site and those along the gas and electrical interconnection routes. There are no

⁴⁶ Exh. 39, Tab A.

⁴⁷ Exh. 45, p. 3-6.

⁴⁸ Exh. 1.

known historic resources on the site of the proposed project or along the interconnection routes. Given the highly disturbed, industrial nature of the site and surrounding area, it is extremely unlikely that any meaningful archeological resource could be present.⁴⁹ However, the Applicant will implement an Unanticipated Discovery Plan in the event that significant resources are discovered during construction.⁵⁰

Historic and cultural resources were located in the one mile area around the site that was studied. However, no resources listed on the National Register of Historic Places or eligible for such listing will be adversely impacted by construction of either the proposed facility or the interconnection lines.⁵¹

d. Conclusion

With respect to land use, recreational and cultural resources, the record demonstrates that the proposed facility would minimize adverse environmental impacts considering the interest of the state as required by PSL §168(2)(c)(i), and that the proposed facility is compatible with the public health and safety pursuant to PSL §168(2)(c)(ii).

4. Visual and Aesthetic

The Applicant agreed to implement recommendations for mitigation of visual impacts made by a DPS Staff witness,⁵² eliminating any potential controversy in this area. The record contains evidence upon which the Siting Board may reasonably

⁴⁹ Exh. 1, Vol. 1, 4.6-1.

⁵⁰ Exh. 39, Tab A.

⁵¹ Exh. 1, Vol. 1, §4.6.3.

⁵² Exh. 74-78.

reach conclusions about the probable visual impacts of the proposed facilities.⁵³

The analysis presented in the application includes description and evaluation of the existing visual setting of the site and the electric and gas interconnections, as well as identification of visually sensitive resources in the surrounding area. The proposed facility's site, as mentioned earlier, is located in a heavily industrialized area characterized by industrial landscape and views.

The record describes visual impacts associated with the proposed facility, including its lighting and its stack plume frequency and characteristics, and compares the existing setting with anticipated visual characteristics with the facility in place.⁵⁴ The proposed facility, this evidence shows, would not significantly alter the viewshed from any location in the visual study area. When the buildings and structures are visible, and not screened due to proximity to other plants or factors in the area, their appearance will not be inconsistent with the heavy industrial appearance of the northern half of the visual study area.

Mitigation measures include the use of non-reflective construction materials. Walls will enclose some structures, transformers will be placed away from the front gate, and lighting impacts are to be minimized.

Adverse visual impacts are not a significant aspect of this facility's potential impacts, and the Siting Board may reasonably conclude that visual impacts have been minimized.

D. Public Health and Safety
and Public Interest Issues

⁵³ Exh. 1, Vol. I, §4.5; Exh. 49.

⁵⁴ Exh. 1, Vol. I, §4.5.3-4.5.4; Exh. 49, pp. 8-14.

1. Traffic

The record contains an analysis of the probable traffic-related impacts of the proposed facility. The Applicant's traffic impact analysis includes capacity analysis of local roadways, key intersections and driveways, analysis of field work at five nearby locations, and an analysis of Steinway Street traffic accident data.⁵⁵ Potential adverse traffic impacts during construction were projected by adding expected construction traffic to projected background traffic conditions. The modeling indicated that traffic levels would be acceptable during construction, even during the peak 2002 period of construction traffic volume.⁵⁶ The analysis also projected acceptable traffic conditions in 2004, the first full year of projected operations.⁵⁷

The record shows that traffic effects of construction of the natural gas interconnection facilities and electric transmission interconnection facilities will be reasonable, that barge traffic on the East River will not increase, and that construction impacts on traffic will not affect air traffic or ground access to LaGuardia Airport.⁵⁸ The evidence also shows that the Applicant will minimize adverse traffic impacts by busing employees who do not take public transportation to the construction site.⁵⁹ Further, the Applicant has determined that neither facility operations nor the electric and gas

⁵⁵ Exh. 1, Vol. I, §4.10; Exh. 61, pp. 4-7.

⁵⁶ Exh. 61, p.10; Exh. 1, Vol. I, §4.10; Table 4.10-7.

⁵⁷ Exh. 1, Vol. I, §4.10, Table 4.10-9.

⁵⁸ Exh. 61, pp. 10-14.

⁵⁹ Exh. 61, pp. 9-10.

transmission facilities will have adverse traffic impacts.⁶⁰ Thus, no mitigation measures are considered necessary.

The topic agreement on traffic in the Joint Stipulations indicates that the Applicant has agreed to select construction support areas near major thoroughfares to minimize congestion, to evaluate traffic conditions at key intersections near the selected support areas, and to attempt to use sites historically used for parking, or material storage, or construction support.⁶¹

On the basis of the foregoing, the Siting Board may reasonably find that the nature of probable traffic impacts has been reviewed,⁶² that the facility and its construction as proposed would minimize adverse environmental impacts associated with traffic,⁶³ and would be compatible with public health and safety.⁶⁴

2. Electric Transmission

Probable electric transmission impacts have been analyzed in this record.⁶⁵ With the exception of the Steinway Creek crossing, all electric transmission facilities interconnecting the proposal facility to the Astoria East substation will be on private property, along an approximately one-half mile route. These new 138 kW transmission circuits

⁶⁰ Project operations are expected to have a positive impact on traffic. Exh. 1, Vol. I, at §§4.10.9; Exh. 61, pp. 9-14.

⁶¹ Exh. 39, Traffic, p. 7. These agreed-upon measures are not expressly included in the proposed Certificate Conditions, but the Certificate conditions generally incorporate conditions specified in the Topic Agreements of the Joint Stipulation (Certificate Conditions, §II(A)).

⁶² PSL §168(2)(b).

⁶³ PSL §168(2)(c)(i).

⁶⁴ PSL §168(2)(c)(ii).

⁶⁵ Exh. 1, Vol. I, §4.12; Exh. 16.

will run on a common right-of-way, beginning with an overhead section and transitioning to an underground duct bank at a transition tower along the route, and situated among other existing transmission and substation facilities.⁶⁶ The record demonstrates that the electric interconnection is consistent with the industrial character of the area, and compatible with public health and safety.

The record also contains an evaluation of the impacts of the proposed facility on Con Edison's transmission system, neighboring utilities' transmission systems, and the New York State Bulk Transmission System (NYSBTS).⁶⁷ Evidence demonstrates that the addition of the proposed facility will have a de minimus effect on the voltage stability, thermal limitations and stability performance of the Con Edison transmission system, and will not adversely affect the NYBTS. The New York Transmission Planning and Advisory Subcommittee (TPAS) and the Operating Committee of the New York Independent System Operator (NYISO) have reviewed and approved the Interconnect Study for the facility.⁶⁸

Astoria Energy has agreed to a number of conditions to ensure that the design, engineering and construction of the transmission facilities will not adversely affect the operation of the NYBTS.⁶⁹ The electromagnetic field (EMF) generated by the transmission facilities will be within PSC recommended

⁶⁶ Exh. 16, §3.10.

⁶⁷ Exh. 1, Vol. I, §§4.12.3 - 4.12.4; Exh. 16.

⁶⁸ Exh. 14.

⁶⁹ Exh. 39, Electric Transmission Facilities Topic Agreement, pp. 4-7. These requirements are not included in the Proposed Certificate conditions per se, but are incorporated therein by reference (Certificate Conditions, §II(A)).

guidelines,⁷⁰ and the Applicant agrees to design, engineer and construct the electric transmission facilities to comply with the established EMF guidelines.⁷¹

The Siting Board may properly find that electric transmission impacts have been evaluated and that adverse impacts have been minimized.

3. Gas Transmission and Supply

The record contains a detailed description and review of a proposed gas transmission interconnection. The proposed facility would connect with Con Edison's 24-inch diameter high-pressure gas transmission line, in the New York Facilities System, via a 20-inch gas service main (above 125 psig) installed underground by Con Edison.⁷² The main would run between Steinway Place and the proposed facility site, north of Berrain Boulevard. To serve heating load, a 4-inch low-pressure gas main would extend to the facility site from Steinway Street, about 800 feet from an existing 4-inch main. The interconnection facilities will include all valves, regulators, metering equipment, service taps, and related pipeline facilities necessary to ensure public safety and reliable service.

The Applicant indicated there may possibly be an opportunity to connect directly to a planned extension of the Iroquois Gas Transmission System (IGTS), but the record does not contain information on or an evaluation of this option. The Applicant suggests that "[i]f the Project interconnects with IGTS, the Applicant will supplement the Application to include a

⁷⁰ PSC Statement of Interim Policy on Magnetic Fields of Major Electric Transmission Facilities (issued September 11, 1990).

⁷¹ Exh. 39, Electric Transmission Facilities Topic Agreement, pp. 4, 7; Exh. 16.

⁷² Exh. 1, Vol. I, §4.14.1, Figure 4.14-1; Vol. V., App. 4.14-1.

thorough discussion, evaluation and analysis, including studies, of the expected impacts of an interconnection with IGTS."⁷³

Should the Siting Board grant a certificate to the Applicant, it will not be permissible thereafter to modify the project through an application amendment.⁷⁴ Rather, such a change would be a project "revision"⁷⁵ and would require a petition to the permanent Siting Board for an amendment to the certificate.⁷⁶ With this understanding, the Siting Board may properly authorize the construction and operation of the proposed facility utilizing the Con Edison gas main extensions described above.

The record also addresses natural gas supply, and demonstrates that adequate gas supplies should be available to serve the facility.⁷⁷ The Applicant will arrange for the purchase and delivery of natural gas, and anticipates use of both firm and interruptible capacity provided by suppliers or marketers. The maximum annual consumption is expected to be well within supply forecasts.⁷⁸

The record also addresses potential impacts on the Con Edison distribution system.⁷⁹ The proposed facility's gas usage should not increase peak day requirements on the Con Edison system. During periods of gas supply interruption, when higher priority firm requirements limit available pipeline capacity,

⁷³ Exh. 39, Gas Supply and Facilities Topic Agreement, p. 5.

⁷⁴ 16 NYCRR §1000.12.

⁷⁵ 16 NYCRR §1000.2(r).

⁷⁶ 16 NYCRR §1000.15(b).

⁷⁷ Exh. 1, Vol. I, §4.14.2 - 4.14.4; Exh. 39, Gas Supply and Transmission Facilities Topic Agreement, p. 4.

⁷⁸ Exh. 69, pp. 5-14.

⁷⁹ Exh. 1, Vol. I, §4.14.5; Exh. 1, Vol. V, App. 4.14-1.

the facility would be permitted to operate on an alternative supply of low sulfur fuel oil for up to 720 hours annually.

Thus, the evaluation of natural gas supply and transmission issues in the record is sufficient to permit the Siting Board to conclude that the proposed facility is likely to have an adequate supply of natural gas, and that any adverse impacts associated with gas transmission interconnections have been minimized.

4. Noise

The record demonstrates that the proposed facility will comply with applicable noise standards. The record contains a comprehensive analysis of existing noise levels in the proposed facility's vicinity, and a noise impact evaluation.⁸⁰ The Applicant's study included measurement of existing ambient noise at the noise sensitive locations nearest to the facility site, using eight monitoring locations, including three residences. Construction and operation noise levels were modeled using the NOISECALC computer model developed by DPS. The Modified Composite Noise Rating (CNR) method was used to evaluate potential adverse effects, including the possibilities of hearing damage, sleep interference, indoor and outdoor speech interference, community complaint potential, and infrasound or vibration damage. The modeling indicated that noise levels would be no worse than "no reaction," to the extent noticeable at all, at the eight monitoring locations.⁸¹ Thus, none of the modeled adverse effects, such as community complaints or sleep interference, will occur during construction or operation of the proposed facility. The facility's noise levels will comply with the requirements of New York City's

⁸⁰ Exh. 1, Vol. I, §4.8; Exh. 4, Exh. 21; Exh. 23; Exh. 56.

⁸¹ Exh. 1, Vol. I, §4.8.4; Exh; Exh. 56, pp. 8-10.

zoning regulation, Noise Code, and City Environmental Quality Review (CEQR).⁸²

Additional analysis confirmed that cumulative noise of the proposed facility together with the neighboring New York Power Authority's (NYPA) proposed Poletti Station expansion would have no significantly adverse long-term impacts during either simultaneous construction or operation of both facilities.⁸³

The Applicant has agreed to implement a number of measures to mitigate facility construction noise, and to reduce operating noise through plant design. Construction activities will be limited during the hours of 6:00 p.m. to 7:00 a.m. to further reduce impacts. Design measures include installation of HRSG Stack Silencers, acoustical insulation for the turbine building, enclosures for the air and gas compressing stations, and specially designed low-noise cooling condensers.⁸⁴ an ambient noise monitoring program will be performed within 180 days following commercial startup of the facility.⁸⁵

The record adequately demonstrates that there will not be significantly adverse noise impacts during facility construction or operation. The Siting Board may properly find that noise impacts have been minimized, and that the facility's noise emissions will be consistent with public health and safety.

5. Economic Factors

⁸² Exh. 39, Noise Topic Agreement, p. 5.

⁸³ Exh. 1, Vol. I, §4.8.5, Table 4.8-7, Table 4.8-8; Exh. 56, pp. 12-13.

⁸⁴ Exh. 1, Vol. I, §4.8.7; Exh. 56, pp. 10-11.

⁸⁵ Exh. 39, Noise Topic Agreement. The conditions agreed to are not specifically included in the Applicant's proposed

The evidence in the record shows that the project will promote the public interest and will foster and promote competition in wholesale electricity markets in New York. The Applicant's Market Assessment and Portfolio Strategies (MAPS) computer modeling showed that the facility, as a result of its high efficiency and relatively low price of producing electricity, would be dispatched ahead of less efficient existing plants, and that it would be most effective in lowering wholesale electricity prices in Con Edison's service territory where it would compete directly with more expensive facilities located south of the Dunwoodie transmission constraint.⁸⁶

The record supports the conclusion that average spot energy prices will likely decrease by at least 1.5% in New York State as a whole, and by at least 4.2% in Con Edison's subzone south of the Dunwoodie transmission constraint. Both Applicant and DPS Staff witnesses testified that the facility would help meet a compelling need for a more competitive market structure in New York.⁸⁷ Thus, the evidence on competitive impact supports the conclusion that the proposed facility is in the public interest.

The proposed facility would also produce indirect economic and public interest benefits by increasing the reliability of the electric system in New York City. For example, average line loadings through the Dunwoodie and Millwood transmission constraints are projected to drop by about 450 MW with the facility in operation. The freeing up of both transmission and generation capacity would increase reliability

Certificate Conditions, but are included therein by reference (¶III(A)).

⁸⁶ Exh. 1, Vol. II, p. 8, Table 5; Exh. 72, p. 5. The displacement of output from less efficient plants would have the additional benefit of reducing air pollution in the area.

⁸⁷ Exh. 32, p. 4; Exh. 72, supra.

by reducing the chance that the New York City area might experience inadequate resources.⁸⁸

Socioeconomic benefits for the surrounding community are also expected. During construction, about 700 construction workers per day will be employed,⁸⁹ and construction of the facility is expected to generate about \$183 million in wages and salaries.⁹⁰ Total economic activity from construction, including indirect expenditures and tax revenues, is estimated at \$566 million (\$450 million within New York City).⁹¹ During operations, the project will add annual wages and benefits of about \$3.5 million for approximately 30 full-time equivalent employees, without significant impact on the community's existing services.⁹²

The Siting Board may properly find that the proposed facility will contribute to the public interest by providing substantial economic benefits for New York City and New York State.

E. Other Issues

1. Approved Procurement Process

Along with its application, Astoria Energy filed a motion for a declaratory ruling seeking a determination from the Siting Board that the proposed facility has been selected pursuant to an approved procurement process. The Applicant requests that the Siting Board now grant the motion, contending that the motion has not yet been addressed. In fact, at the prehearing conference held March 23, 2001, the Presiding

⁸⁸ Exh. 1, Vol. II, App. 10-1, pp. 5-6.

⁸⁹ Exh. 1, Vol. I, §3.11.2.

⁹⁰ Ibid., §4.11.4.1.2, Table 4.11-5.

⁹¹ Ibid., §4.11.4.1.3, Table 4.11-5.

⁹² Ibid., §4.11.4, Table 4.11-6.

Examiner formally ruled on the motion, determining that the proposed facility is selected pursuant to an approved procurement process.⁹³ However, what the Applicant effectively seeks at this point is the Siting Board's certification finding, pursuant to PSL §168(2)(a)(ii), that the proposed facility is selected pursuant to an approved procurement process.

Because PSL §164 contains alternative filing requirements for an application, based upon whether a proposed facility is selected pursuant to an approved procurement process, in practice, an initial finding is typically made as to whether an application makes a prima facie case that the facility is selected pursuant to an approved procurement process. This establishes the information that should be considered in the proceeding. A final determination is later made, at the end of the proceeding, as required by PSL §168(2)(a)(ii).⁹⁴ As the applicant observes in its brief, this approach has been followed in other Article X cases beginning with Athens Generating Company, L.P.⁹⁵

As Astoria Energy observes, the PSC has determined that competition in the electricity supply market is an approved procurement process. For example:

Competition in the electricity supply market is an approved procurement process because it is an electric

⁹³ Tr. 138.

⁹⁴ See Case 99-F-1164, Application by Mirant Bowline, L.L.C., Order Concerning Approved Procurement Findings (issued and effective June 21, 2001), pp. 3-5.

⁹⁵ See Case 98-E-0096, Athens Generating Company, L.P., Declaratory Ruling Concerning Approved Procurement Process issued April 16, 1998), p. 7; Order Concerning Interlocutory Appeals (issued January 28, 1999) p. 4; and Opinion and Order Granting Certificate of environmental Compatibility and Public Need (issued June 15, 2000), p. 120.

capacity procurement process approved as reasonably consistent with the 1998 State Energy Plan.⁹⁶

The Commission noted, however, that it is up to specific Siting Boards to make the finding in specific cases, as required by PSL §168(2)(ii), that specific facilities are selected pursuant to an approved procurement process.

As a practical matter, any private merchant plant developer, and any applicant with a facility which would be engaged in wholesale competition subject to NYISO dispatch, makes a prima facie case with those facts alone that the facility would compete in the competitive wholesale market and therefore is selected pursuant to an approved procurement process.

What the Siting Board must determine, therefore, after the record evidence has been compiled, basically amounts to a determination whether the proposed facility will actually be expected to make a material contribution in the wholesale marketplace, i.e., whether it will be competitive in its own right. As such, this determination is akin to the public interest determination discussed above. In fact, it is one of several factors to be considered in the broader public interest determination, and the balancing of environmental costs and benefits. PSL §168(2)(a)(ii), however, requires a separate determination whether a facility is selected pursuant to an approved procurement process.

As discussed above, the record demonstrates that this proposed facility is likely to displace less efficient generating plants south of the Dunwoodie constraint, and effectuate lower wholesale prices through this competitiveness. Ample basis exists, therefore, for the Siting Board to conclude

⁹⁶ Case 99-E-0089, Ramapo Energy Limited Partnership, Declaratory Ruling Concerning Approved Procurement Process (issued August 25, 1999), p. 4.

that the proposed facility is selected pursuant to an approved procurement process.

2. State and Local Laws and Regulations

The Siting Board must find that the proposed facility is designed to operate in compliance with state and local laws and regulations, except to the extent it grants a waiver of any such laws or regulations on the ground that they are unreasonably restrictive as applied to the proposed facility.⁹⁷ The agencies signing the Joint Stipulation agree with the Applicant that the project will comply with all applicable local laws, and that no waivers of any local laws are required. In addition, the Applicant requests the Board to authorize it to seek certain regulatory permits and approvals from relevant NYC agencies.⁹⁸

a. State Law Compliance

With respect to State laws, the Siting Board must find that the proposed facility complies with the New York State Coastal Management Program. The record contains an evaluation of the Coastal Management Policies and the NYC Local Waterfront Revitalization Program adopted pursuant thereto.⁹⁹

The record shows the project will promote the economic and land use aspects of New York's 44 Coastal Management Policies, while being consistent with recreational water resource and environmental aspects.

b. Major Onshore Storage Facility (MOSF) License

⁹⁷ PSL §168(2)(d).

⁹⁸ PSL §172(1).

⁹⁹ Exh. 1, Vol. I, §4.2.5; Exh. 45-46, 49-51.

New York State Navigation Law requires that any person seeking to operate a MOSF must obtain a license from DEC.¹⁰⁰ However, Article X transfers this jurisdiction for the issuance of this license from DEC to the Siting Board. In this case, the Applicant proposes to purchase an existing, licensed tank farm and to construct the proposed facility at the site. While most of the existing tanks on the site will be decommissioned, the Applicant proposes to refurbish two 150,000 barrel fuel oil storage tanks. These tanks will be used to store low sulfur distillate fuel oil, which will be used as back-up fuel for the proposed facility.

The Applicant, DEC Staff, and DPS Staff have executed a "MOSF Stipulation Agreement"¹⁰¹ which would transfer the jurisdiction back to DEC to regulate the storage, handling and transport of petroleum and to enforce the containment and remediation of petroleum discharges. According to this agreement, the Applicant will file a complete application for the MOSF license within 60 days of taking title to the site of the proposed facility.

We recommend that the Siting Board authorize DEC Staff to issue the MOSF license, regulate the facility and otherwise execute the state's regulatory authority relating to this site.¹⁰² DEC Staff is the agency best equipped to regulate this MOSF in a manner to minimize adverse environmental impacts.

c. Local Law Compliance

The record demonstrates that the proposed facility will operate in compliance with local laws. Specifically, it would comply with performance standards established for the M3-1

¹⁰⁰ Navigation Law §174.

¹⁰¹ Exh. 40.

¹⁰² PSL §172(1).

zone, including standards for noise, vibration, smoke, dust and particulate matter, odorous matter, noxious or toxic matter, radiation matter, fire and explosive hazards, and humidity, heat and glare.¹⁰³ Moreover, the facility complies with the NYC Noise Code.¹⁰⁴ Although the Applicant initially requested a waiver of the NYC Noise Code, modification of the project permitted compliance, and the Applicant withdrew its request.

d. NYC Permits

Astoria Energy indicates that it would require in the normal course of business certain permits and approvals under local regulations issued by NYC and its agencies. Such approvals include, for example, building permits, street evacuation permits, street closure permits, permits for structural welding, permits under the NYC Fire Code, and permits for the use and supply of water and for discharges to the sewer system. The Joint Stipulation contains agreement for the Siting Board to authorize the NYC Department of Buildings, NYC Department of Transportation, NYC Fire Department, NYC Department of Environmental Protection (DEP), and the NYC Department of Building Services to issue permits or approvals as listed in Exhibit 27.¹⁰⁵

The agreement specifies that the Board would delegate this authority with the provision that permits and approvals will be provided in a timely manner and without any unreasonable conditions, and that the Board will retain ultimate jurisdiction to issue any such permits upon petition by the Applicant. There is no controversy concerning this proposal, and the Siting Board may reasonably grant the requested delegations.

¹⁰³ Exh. 39, Land Use and Local Laws Topic Agreement, p. 8.

¹⁰⁴ Id.

¹⁰⁵ Exh. 39, Land Use and Local Laws Topic Agreement, p. 5.

e. The NYC Air Code

The Joint Stipulation contains agreement among the Applicant and the state agencies that the Applicant would not be required to obtain any permits under NYC air pollution laws and regulations.¹⁰⁶ The parties agreed that all such authority would remain with the Siting Board pursuant to PSL §172(1). NYC disagrees, however, and the Applicant has complied with NYC's request to provide a cumulative air impact analysis (CAIA). NYC suggests that after review of that analysis "issues pertaining to the City Air Code and the CAIA may well be moot,"¹⁰⁷ in which case, NYC says, "the City will certify compliance with the local Air Code."¹⁰⁸ No further developments have been brought to our attention, however, since briefs were filed.

NYC raise two distinct issues in connection with its City Air Code. first, NYC argues that the Siting Board must find that the proposed facility complies with the CAIA and the City Air Code.¹⁰⁹ Second, NYC requests the Siting Board to authorize it to require an air permit.¹¹⁰

In support of its position, NYC asserts that regulation by DEP, specifically the CAIA, is different from and supplementary to DEC's air permitting requirements under the CAA. The DEP CAIA, NYC continues, focuses on short-term, localized impacts at sensitive receptors near the planned emission source, in combination with existing and planned emission sources, whereas, according to NYC, DEC's monitors

¹⁰⁶ Exh. 39, Land Use and Local Laws Topic Agreement, p. 5.

¹⁰⁷ NYC's Initial Brief, p. 1.

¹⁰⁸ Ibid., p. 9.

¹⁰⁹ NYC cites PSL §§168(2)(b), 168(2)(ii), 168(2)(c)(iv), 168 (2)(d), and 169.

¹¹⁰ PSL §172(1).

detect post-dispersal, background emissions, and therefore determine potential long-term (average annual) impacts over a large area. Thus, NYC posits, "[i]f the Board authorizes DEP to require an air permit, DEP will have the power to address health-based concerns that are critical to the local community, and consider measures to mitigate those effects."¹¹¹

NYC argues that its Administrative Code §§24-105 and 24-106 authorize the DEP Commissioner to adopt rules, regulations and procedures to control air emissions, and to require an investigation or study in this connection. Thus, it argues, the DEP CAIA is required by these sections of the Administrative Code. Further, NYC continues, Administrative Code §24-125(a)(8) prohibits the issuance of an air permit for a stationary combustion facility if its "operations will prevent the attainment of applicable emission criteria."¹¹²

Inasmuch as the DEP CAIA addresses purely local concerns that are not the focus of DEC in its Title V permitting process, NYC continues, the Siting Board must find that the CAIA is complied with before it may determine, as it must, the nature of probable environmental impacts "including the cumulative effect of air emissions from existing facilities,"¹¹³ and that the facility "minimizes adverse environmental impacts . . . , is compatible with public health and safety, . . . [and] will not emit any pollutants to the air that will be in contravention of applicable air emission control requirements or air quality standards" ¹¹⁴ These additional local concerns, NYC adds, but for Article X would normally be considered in a State

¹¹¹ NYC's Initial Brief, p. 7.

¹¹² Ibid., p. 9.

¹¹³ PSL §168(2)(b).

¹¹⁴ PSL §168(2)(c).

Environmental Quality Review Act (SEQRA)/City Environmental Quality Review (CEQR) process.

If the Applicant does not complete a CAIA, or if it shows exceedences, the Siting Board should authorize DEP to enforce the City Air Code, NYC argues, unless it finds the DEP permitting process is unreasonably restrictive.¹¹⁵ Moreover, since the Siting Board cannot determine whether a DEP permit would be unreasonably restrictive until DEP develops a mitigation plan, NYC argues that DEP must be authorized to exercise its permitting authority, subject to continuing Siting Board jurisdiction and a future determination by the Siting Board whether any DEP mitigation plan is unduly restrictive.

Finally, NYC argues at some length that the Siting Board's determinations that it will not revisit issues addressed in the DEC permitting process do not compel the Siting Board to abstain from addressing NYC's independent air quality requirements or from delegating permitting authority to DEP.¹¹⁶

In its initial brief on NYC air issues, the Applicant argues, first, that the Siting Board lacks the authority to delegate air permitting authority to NYC, by virtue of the Siting Board's holding that it "must accept the specific findings of the DEC Commission relating to air emission and water discharge permits issued pursuant to federal delegation,"¹¹⁷ and that, "[a]s the DEC Commissioner alone will act on matters related to air and water permits, evidence on

¹¹⁵ In this regard, NYC proposes the Board consider the "unreasonably restrictive" criteria of PSL §168(d), the basis for waiving the application of a local regulation, as the basis for declining to delegate permitting authority to the local agency involved.

¹¹⁶ NYC's Initial Brief, pp. 14-20.

¹¹⁷ Case 99-G-1314, Consolidated Edison of New York, Inc., Order Concerning Interlocutory Appeals (issued June 22, 2001), pp. 13-14.

such topics is neither relevant nor material under Article X as it will not impact any filings we will make or any conclusions we will reach in this case."¹¹⁸

The Applicant argues, moreover, that NYC has not met its burden of demonstrating that a PSL §172(1) authorization would be proper. The statute provides, Astoria Energy observes, that a municipality "seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from enforcement thereof."¹¹⁹ In this proceeding, the Applicant continues, NYC presented no evidence and, therefore, there is no record basis for a delegation to NYC of permitting authority. Such delegation, the Applicant adds, would violate Article X's intended "one-stop siting" process.

In its response to NYC's brief, the Applicant maintains that the Siting Board does not need to find whether the proposed facility would be in compliance with the City Air Code, because PSL §188(2)(d) requires the Siting Board to find that "the facility is designed to operate in compliance with state and local laws and regulations issued thereunder, while the CAIA required by NYC is not relevant, as it relates only to whether the city will issue a permit, the authorization for which it is seeking under PSL §172(1)."

Moreover, the Applicant argues, while PSL §168(2)(d) requires compliance with local laws and regulations, there are no provisions in the NYC Administrative Code relating to the CAIA. Although those provisions authorize the DEP Commissioner to adopt rules, regulations and procedures, none have been adopted concerning the CAIA. Further, because NYC presented no

¹¹⁸ Case 99-F-1968, Ramapo Energy Limited Partnership, Order Concerning Interlocutory Appeals from Article X Issues Ruling (issued July 25, 2001), pp. 5-6.

¹¹⁹ PSL §166(1)(h).

evidence in this proceeding, the Applicant argues, it has not only failed to support the requested permitting authorization, but it has also failed to demonstrate its claim that the DEP permitting process addresses areas of concern not addressed in the DEC permitting process. At any rate, air permitting issues "are within the exclusive jurisdiction of the DEC,"¹²⁰ and the Siting Board has held that it may not exercise discretion to impose stricter standards than imposed by the DEC Commissioner.¹²¹

In its reply brief, NYC adds several responding arguments as well. NYC argues, first, that the delegation of authority it seeks would not be contrary to the purpose of Article X, which anticipates such delegation in appropriate circumstances (PSL §172(1)). The Applicant is wrong in asserting that the Siting Board lacks authority to make the requested delegation, NYC adds, because the air quality requirements of the City Air Code are distinct from those DEC uses under its federally delegated permitting authority.

To begin our discussion, we do not agree with the Applicant that air quality regulations of New York City that are independent of those administered and enforced by DEC under federal delegation would be unenforceable. If they are independently enforceable, then under Article X, the Siting Board is required to enforce them, unless they are found to be

¹²⁰ Applicants' Reply Brief on NYC Air Issues, p. 7. Even if separate air issues are posed, Astoria Energy argues, the Siting Board holding in Case 99-F-1164, Mirant Bowline, LLC, Order Concerning Interlocutory Appeals (issued June 21, 2001), p. 17, is that an air issues addressed in the federal permitting process will not be addressed by the Siting Board "in a different manner."

¹²¹ Case 99-F-1164, Mirant Bowline LLC, supra, p. 18, fn. 46.

unduly restrictive,¹²² or if the Siting Board authorizes NYC to administer and enforce such regulations.¹²³

The difficulty in this proceeding is that NYC has provided no evidence that such regulations exist for the Siting Board to enforce. There is no basis in this record for the Siting Board to find that NYC has any standards against which the operation of the proposed facility might be found wanting. There is also no evidence or other reasoning supporting delegation to NYC of the City Air Code permitting authority, save NYC's illogical assertion that the Siting Board must now do so in light of the failure of NYC to address its issues in this Article X proceeding.

As in Case 99-F-1625, KeySpan Energy,¹²⁴ NYC did not attempt to raise any air quality issues for adjudication in this proceeding. NYC DEP was not represented at the issues conference in May 2001, and at the time of the hearings in July, NYC Counsel indicated that an opinion as to whether the facility would comply with the City Air Code would not be available until at least late August.¹²⁵ NYC DEP has offered no explanation for its minimal participation in this proceeding. Regardless, its lack of participation leaves it without a record basis in support of any suggestion that all local regulations or requirements have not been complied with, or that permitting authority should be delegated to it.¹²⁶

¹²² PSL §168(2)(d).

¹²³ PSL §172(1).

¹²⁴ See generally, Case 99-F-1625, KeySpan Energy, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (issued September 7, 2001), pp. 13-20.

¹²⁵ Tr. 748.

¹²⁶ Discussion at the prehearing conference, at which Queens/CHOKÉ sought to investigate cumulative impacts in a manner similar to the CAIA (Tr. 486), also raise troublesome questions of whether the CAIA is actually normally part of a

The Siting Board in KeySpan Energy has declined to authorize NYC DEP to require that proposed facility to obtain a NYC air permit.¹²⁷ As that Siting Board explained, no emission limits or any standards or requirements exist for the requested CAIA. Moreover, the Siting Board rejected claims that KeySpan's application and DEC's review of it, as to air quality review, were deficient, claims not even advanced by NYC in this proceeding.¹²⁸ The KeySpan Energy Siting Board also found that in view of the lack of inventory information, among other things, even if NYC arguably is said to have an otherwise applicable standard requiring enforcement, requiring compliance with the City Air Code at this time would be unduly restrictive.¹²⁹

We conclude that these same considerations apply here as well. We recommend that the Siting Board decline to authorize NYC DEP to require an air permit for this Applicant, and that it find its PSL §168 findings may be made without consideration of the City Air Code.

permitting requirement review (Tr. 487), and whether it really does extend air quality and health impact review beyond matters already encompassed within DEC's review (Tr. 494, 523-526).

¹²⁷ Case 99-F-1625, KeySpan Energy, supra, p. 15.

¹²⁸ Ibid., p. 16.

¹²⁹ Ibid., p. 19.

3. Certificate Conditions

In its brief, DPS Staff notes that certificate conditions agreed upon among the Applicant and the state agencies were included in the Joint Stipulations (Tab B).¹³⁰ DPS Staff also argued at the hearings, however, and again in its brief, that additional conditions imposed on other applicants in Article X proceedings are appropriate here, and that the Siting Board should consider adding additional conditions.¹³¹ Stating that "those conditions are too voluminous to list individually here," DPS Staff notes "a few key conditions."¹³² These include: (1) retaining an independent Environmental Inspector; (2) a compliance filing indicating sites to be used by contractors for specific purposes; (3) hiring an engineer to inspect the facility for compliance with fire prevention and building code requirements; and (4) conducting a public information program prior to and during the construction of the facility.

In its reply brief, the Applicant opposes the addition of other certificate conditions. By executing the Joint Stipulations, the Applicant asserts, DPS Staff agreed that the conditions listed in Tab B are those necessary to construct and operate the proposed facility. The Applicant objects, moreover, to the lack of evidence or other explanation supporting additional certificate conditions. For example, the Applicant observes, DPS Staff did not explain why the Environmental Inspector from the facility should be independent from the certificate holder. There was no such requirement in the

¹³⁰ The proposed certificate conditions are attached hereto as Appendix B.

¹³¹ Tr. 711-12; DPS Initial Brief, p. 14.

¹³² Id.

Heritage certificate conditions, the Applicant observes,¹³³ and the Applicant argues this would be an unwarranted and unnecessary additional expense.

Further, the Applicant argues that the proposed certificate conditions already include sufficient conditions regarding selection and use of construction support areas, so that there is no justification for requiring a separate compliance filing to indicate off-site laydown areas, staging areas, parking lots, storage sites, and construction fabrication sites. The other conditions mentioned by DPS Staff, the Applicant continues, are unwarranted. In particular, the applicant has already agree to a program to keep the public informed of activities during construction.¹³⁴

We conclude that DPS Staff has not justified changes to certificate conditions it endorsed in the Joint Stipulations. DPS Staff's argument that any or all conditions placed on other applicants in other proceedings would be appropriate here must be rejected, as certificate conditions must be tailored for each proposed facility. If there are conditions that are appropriate for all facilities, these conditions, like any others, must be proposed and justified by evidence in the hearings, if the Applicant does not agree to them.

We take no position on the merits of the specific proposals DPS makes here, as there is no basis in the record for us to do so. We recommend adoption of the certificate conditions in the Joint Stipulations, although in view of DPS Staff's arguments we also suggest that the Applicant meet with state agencies to consider modifications to Tab B, which could be submitted along with exceptions to the Siting Board.

¹³³ Case 99-F-0558, Heritage Power LLC, Order Granting Certificate of Environmental Compatibility and Public Need (issued January 19, 2001), App. A, p. 5.

¹³⁴ Exh. 39, Tab B, p. 4.

We also recommend consolidation within the certificate conditions of those conditions now continued in various Topic Agreements in the Joint Stipulations (Exhibit 39), and included in Tab B at this point only be reference. A consolidated document will benefit everyone making reference to certificate conditions during construction and operation of the proposed facility. The Applicant should revise Tab B in this respect and submit an amended document to the Siting Board with its brief on exceptions.

III. CONCLUSION

On the basis of our discussion above, we conclude that the Siting Board can make all of the required findings pursuant to Article X (§168(2)) necessary to grant a Certificate of Environmental Compatibility and Public Need to the Applicant, subject to specified terms and conditions. The recommended certificate conditions are included in Appendix B, and by reference therein, to various topic agreements in the Joint Stipulation. We recommend that the application, so conditioned, be granted.

We find that local laws and regulations will be complied with and that the Siting Board need not consider whether any local laws, including the City Air Code, would be unduly restrictive. We recommend that, as agreed among the parties, authority should be delegated to local authorities to issue certain required permits, subject to appeal to the Siting Board, except that NYC DEP should not be granted authority to issue an air permit. Authority should be delegated to DEC to administer MOSF permitting and regulations.

September 26, 2001
JMH/PNG:lag

APPEARANCES

APPENDIX

APPEARANCES

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CERTIFICATE CONDITIONS

PROPOSED CERTIFICATE CONDITIONS

I. Project Authorization

A. The Certificate Holder is authorized to construct and operate the Project, as described in the Application, except as waived, modified or supplemented by this Certificate or other permits.

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, New Source Review permit, CAA Title IV (acid rain) permit, CAA Title V (major stationary source) permit, and any other approvals, land easements, and rights-of-way that may be required for this Project and which the Board is not empowered to provide. The Certificate Holder also shall be responsible for obtaining a license under Article 12 of the Navigation Law from the New York State Department of Environmental Conservation ("NYSDEC") for the major storage of petroleum in connection with the Project ("MOSF license").

C. The Project shall be designed to operate and be operated in compliance with all applicable federal and state laws and regulations. The Project shall be designed to operate and be operated in compliance with all applicable local laws and regulations, subject to the Board's ongoing jurisdiction regarding any additional waivers sought by the Certificate Holder and for which the Board grants a waiver.

D. The Certificate Holder is authorized to construct electric transmission facilities and interconnect those facilities to Con Edison's existing 138 kV Astoria East substation. The Certificate Holder is authorized to construct and shall design, engineer, and construct electric transmission facilities as provided in the System Reliability Impact Study ("SRIS") approved by the New York Independent System Operator ("NYISO") Operating Committee and in accordance with the applicable and published planning and design standards and good engineering practice of the NYISO, the New York State Reliability Council ("NYSRC") Northeast Power Coordinating Council ("NPCC"), North American Electric Reliability Council ("NERC"), and North American Electric Reliability Organization ("NAERO"), 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 in the approved SRIS and by any interconnection or facilities modification agreement negotiated with Con Edison, and any successor Transmission Owners (as such term is defined in the New York Independent System Operator ("NYISO Agreement")).

E. The Certificate Holder is authorized to connect the Project to the Con Edison 24 inch gas distribution main located on 20th Avenue.

F. The Certificate Holder is authorized to connect the Project to the New York City public water supply system through an existing 20-inch water supply line located adjacent to the Project Site. The Certificate Holder is authorized to connect the Project to the New York City public sewer system piping adjacent to the Project Site.

II. General Conditions

A. The Project and/or its Site shall be constructed, operated and maintained as set forth in the Application and other submissions, and as indicated by the Certificate Holder in stipulations and agreements during this proceeding, except as these may be waived, modified or supplemented by the Board, and except as regarding conditions contained in the SPDES permit, Title V Air Operating Permit and PSD Permits issued by the NYSDEC.

B. The Certificate Holder shall submit a schedule of all filings and other submissions to the Siting Board as required by these Certificate Conditions, and to the extent practicable, shall coordinate the schedule for submitting Compliance Filings with the relevant state agencies having jurisdiction over such Compliance Filings.

C. The Certificate Holder shall submit a Compliance Filing 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. Before the commencement of commercial operations of the Project, the Certificate Holder shall file with the New York Public Service Commission ("NYPSC") a petition as to the regulatory regime that will apply to it as an electric corporation.

E. Operation of the Project shall be in accordance with the SPDES, PSD and Title V Air Operating Permits.

F. The Certificate Holder shall file a copy of the following documents with the Siting Board and with the NYPSC: (1) the SRIS approved by the NYISO Operating Committee, which shall be filed prior to commencement of construction; (2) any requirements imposed by the NYSRC, which shall be filed prior to commencement of construction; (3) all electric facilities agreements and electric interconnection agreements, and any amendments thereto, with Con Edison and successor Transmission Owners (as defined in the NYISO Agreement), which shall be filed prior to commencement of commercial operation of the Project; (4) a Relay Coordination Study, which shall be filed not later than 18 months prior to the projected commercial operation date of the Project; (5) the detailed design of the electric interconnection facilities, and updates thereto, which shall be

filed prior to commencement of commercial operation of the Project; (6) all natural gas transportation agreements, and any amendments thereto, with Con Edison and any successor owners of the Con Edison natural gas transmission and distribution facilities, which shall be filed prior to commencement of commercial operation of the Project; and (7) water and sewer interconnection contracts, agreements, approvals and/or permits which shall be filed prior to commencement of commercial operation of the Project (copies of which also will be filed with the New York City Department of Environmental Protection [“NYCDEP”]).

G. The Certificate Holder shall operate the Project in accordance with the approved tariffs and applicable rules and protocols of the NYISO, NYSRC, NPCC, NERC, and NAERO, and successor organizations. Should aspects of network operation be affected by the Project that are under the lawful control of Con Edison, 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 Con Edison, or successor Transmission Owners (as defined in the NYISO Agreement). The Certificate Holder reserves the right to seek subsequent review of any specific operational orders at the NYISO, NYPSC, the Federal Energy Regulatory Commission, or in any other appropriate forum.

H. Subject to the Siting Board's ongoing jurisdiction, the Certificate Holder shall seek the regulatory permits and approvals specified in the Application from the relevant New York City agencies pertaining to the construction work for or operation of the Project.

III. Construction Conditions - General

A. These Certificate Conditions shall be made contract requirements for the construction contractors as applicable.

B. Appropriate construction personnel shall be trained in environmental compliance matters.

C. The Certificate Holder shall describe in a licensing package a community liaison program designed to maintain communication with the surrounding community during construction. This plan shall include the maintenance of a complaint log. The community liaison program shall continue once the Project becomes operational to keep communication lines open between the Certificate Holder and the community.

D. The Certificate Holder shall assign an Environmental Inspector to monitor the Project Site during construction.

E. Construction noise sources shall be mitigated by proper equipment maintenance.

F. The normal construction shifts for the Project will include two shifts occurring between 7:00 AM and 12:30 AM. Between the hours of 6:00 PM and 7:00 AM, Certificate Holder shall not: (1) engage in pile driving, jackhammering or demolition; (2) use

bulldozers, excavators or dump trucks for Site preparation; (3) load or off load big pipes or other materials that could make excessive noise; (4) conduct scheduled steam or air blows; or (5) exceed any regulatory noise limits. Steam blow noise will be mitigated through use of portable, high performance mufflers and scheduled steam blows will not be performed before 9:00 AM or after 5:00 PM. Deliveries related to construction activities shall take place during the hours of 7:00 AM to 6:00 PM unless; (1) delivered by barge; (2) to accommodate oversized delivery pursuant to NYCDOT permit; or (3) otherwise involving incidental deliveries of small items. All night time barge deliveries, the unloading of which could cause excessive noise, will not be unloaded unless such unloading activity has commenced before 12 p.m. (noon) and, for safety reasons, must be completed without interruption. Notwithstanding the preceding sentence, Certificate Holder will remain in compliance with the City's nighttime noise standards. The Project's construction activities, whether daytime or nighttime, will comply with the applicable regulatory requirements.

G. A temporary, portable, high performance muffler shall be used to attenuate noise from steam blows that occur before the steam system is connected to the turbine and the steam line temporarily is routed to the debris trap and muffler and high pressure steam is vented through the tubing. Steam blows shall not be performed before 9:00 AM or after 5:00 PM.

H. Trucks used for transporting soil or gravel during construction shall be covered to avoid loss of transported material and truck speed on-site shall be controlled to minimize dust. Vehicles carrying hazardous material shall be instructed to travel to and from Astoria Boulevard along Steinway Street.

I. The Certificate Holder shall not dispose of construction related waste by burning those waste materials on the site. The Certificate Holder shall be responsible for the actions of its contractors to prevent the burning of waste materials on the site. All construction wastes shall be disposed of in accordance with applicable laws and regulations.

J. Before hiring contractors for solid waste haulage, the Certificate Holder shall request evidence that such contractors are in possession of all required permits and licenses. During the period of operation, the Certificate Holder shall retain for inspection records showing that all waste hauling and disposal contractors have all required permits and licenses. Solid waste 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 of in accordance with applicable laws and regulations .

L. All disturbed areas shall be seeded and/or stabilized with erosion control materials within 15 days of final grading and when construction has been suspended. In all areas of the Project site that will not be covered by impervious surfaces, with the exception of the portion of the Site that qualifies as New York State regulated wetlands "adjacent area", the Applicant shall place one foot of clean fill. After the commencement of commercial

operations, and with the exception of emergency conditions, the Certificate Holder shall notify the NYCDEP in writing, at least 24 hours prior to engaging in any excavation which will exceed one foot in depth. In all cases the Certificate Holder shall follow its health and safety plan.

M. The Certificate Holder shall follow its Unanticipated Discovery Plan submitted as Appendix 4.6-2 to its Application to provide protection in the event that cultural resources are encountered during construction.

N. The Project shall be constructed in accordance with the NYC Seismic Code, Local law 1/95; NYC Administrative Code 27-569 and reference Standard 9-6.

IV. Construction - Energy Facility

A. The Turbine Building shall be constructed using non-reflective, metal panels in colors that maximize consistency with brick structures in the Project vicinity. The low bay portion of the building shall have a non-reflective gray metal roof. The air cooled condensers shall be sided with non-reflective, painted metal panels similar to those used on the Terminal Building. The stack flues shall be marked in accordance with FAA requirements. Both the existing brick administration building and boiler house building will remain on site.

B. Lighting shall be pole mounted and designed to reduce glare through shielding and use of low glare lighting elements. Project lighting shall be in accordance with local zoning and building codes. The Certificate Holder shall provide a detailed lighting plan as part of its Compliance Filing.

C. The Certificate Holder shall control potential emissions from construction related activities through the use of wetting agents on exposed soils, use of covered trucks for soils and other dry materials, limited storage of spoils on the construction site and final grading and landscaping of exposed areas.

V. Construction - Gas and Electrical Interconnects

A. The Certificate Holder shall design, engineer, construct (or fund the construction of) and operate the transmission interconnection in compliance with the electric and magnetic field strength standards established by the New York Public Service Commission ("NYPSC") in Opinion No. 78-13 (issued June 19, 1978) and *Statement of interim Policy on Magnetic Fields of Major Electric Transmission Facilities* (issued September 11, 1990), respectively.

B. The Certificate Holder shall complete negotiations on all necessary contractual arrangements with its electric and gas transmission interconnections as soon as practicable.

C. If the Project interconnects with Con Edison's gas system, Applicant shall comply with the applicable Con Edison natural gas tariff requirements.

VI. Operation and Maintenance

A. The Certificate Holder shall submit a Spill Prevention Control and Countermeasures plan and a Stormwater Pollution Prevention Plan as part of the Compliance Filing.

B. The Certificate Holder shall implement the following noise mitigation measures: (1) use of tuned HRSG stack Silencers; (2) the Turbine Building will include acoustical insulation on the interior and will be designed so that any openings are treated with acoustic louvers or oriented away from residential areas; (3) enclosures will be used for the air and gas compressing stations; and (4) specially designed low-noise cooling condensers will be used.

C. The Certificate Holder shall submit a post-construction report by an acoustical engineer to demonstrate that, based on noise measurements and acoustic observations, the operating plant complies with the acoustic design goals contained in the Application and also produces no prominent pure tones. This report shall be submitted within six-months of the start of commercial operation of the entire Project.

D. The Certificate Holder shall obtain and operate the Project pursuant to a CAA Title V Operating Permit, a CAA PSD permit, a CAA Title IV Acid Rain permit, a SPDES permit and an MOSF license..

E. The Certificate Holder shall comply with all applicable state and federal chemical and waste-storage use and handling regulations and will keep the local fire department apprised of chemicals and waste on site.

F. Within 6 months of startup of commercial operation of the Project, the Applicant shall submit a vegetation planting and maintenance plan for the Project site as a compliance filing.

G. The Applicant will provide funding in the amount of \$10,000 per year for three years following completion of construction, or approximately 40 trees per year at \$250.00 each, for off-site street tree plantings in the Project viewshed pursuant to the New York City Adopt-a-Tree Program or other similar tree planting program involving community input in order to minimize visibility of the Project's stacks if orange and white FAA markings are required

VII Decommissioning, Security Fund and Insurance

A. During construction, Certificate Holder shall post, or cause its construction contractor to post, insurance coverage consistent with industry standards, including builders' risk insurance, general liability insurance, auto liability insurance and workers' compensation. During operation, Certificate Holder shall secure insurance coverage typical for a power generation facility, including broad form property insurance, boiler and machinery insurance, general liability insurance, and workers' compensation.

B. Before commencement of construction of the Project, other than research, surveying, boring or related activities necessary to prepare final design plans and obtain necessary permits, the Applicant shall file with the Secretary of the NYPSC proof of adequate financial security (such as a restoration bond, escrow or other similar financial instrument) in the amount of \$3.15 million to meet the decommissioning costs in the event that either construction is not completed or the facility is decommissioned at a later date. The security, if drawn upon, shall be used for decommissioning the Project, dismantling the project by removing aboveground structures that could not reasonably be used for any industrial purpose, and restoring all disturbed areas. To the extent that the activities set forth in the immediately preceding sentence exceed the amount of the security, the Applicant shall provide funding to accomplish such activities.