



November 6, 2020

VIA ELECTRONIC MAIL

The Honorable Andrew M. Cuomo
Governor of New York State
NYS State Capitol Building
Albany, NY 12224

Basil Seggos, Commissioner
NYS DEC - Division of Environmental Permits
625 Broadway, 4th Floor
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Email: basil.seggos@dec.ny.gov

RE: State Environmental Quality Review Act Final Scoping Document
Astoria Replacement Project
Astoria Gas Turbine Power LLC
Accepted: September 18, 2020
NYS Department of Environmental Conservation

Dear Governor Cuomo and Commissioner Seggos:

The PEAK Coalition,¹ Chhaya CDC, the Sierra Club, and Earthjustice respectfully write concerning very serious procedural and substantive deficiencies in the Final Scoping Document prepared for Astoria Gas Turbine Power LLC by its consultant AECOM, and approved by the Department of Environmental Conservation (Department or DEC) on September 18, 2020.

Under your leadership, New York has advanced some of the most aggressive climate legislation in the nation – the Climate Leadership and Community Protection Act (CLCPA) – which calls for a zero emissions electric sector within 20 years. At the same time, you have overseen the development of critical reforms to power plant siting through Article 10 that are intended to elevate the voices and concerns of local affected communities. The current Astoria gas plant proposal flouts both developments, attempting to evade review under Article 10 nearly

¹ The PEAK Coalition consists of UPROSE, THE POINT CDC, New York City Environmental Justice Alliance (NYC-EJA), New York Lawyers for the Public Interest (NYLPI), and Clean Energy Group (CEG).

a decade after that law went into effect, and to gain approval despite having no committed plan for compliance with the CLCPA's zero emission mandate. For other similar proposed facilities, your agencies are demanding detailed information about CLCPA compliance over their full economic life. And no other facility is claiming exemption from Article 10 at this date based on prior review of a wholly different project. As lead agency, DEC cannot approve a project that is inconsistent with the CLCPA without detailed justification, including full examination of alternatives. The Final Scoping Document proposes little more than a superficial update to a decade-old environmental review of a distinct project, and will not allow DEC to meet its CLCPA Section 7 obligations.

The proposed Astoria Replacement Project has garnered attention from community, environmental, and environmental justice groups, as well as elected officials, resulting in numerous comments raising concerns with the Draft Scoping Document and the impacts the project may have on the community. Media outlets also covered the Astoria Replacement Project, including political and community opposition to it, including but not limited to:

- HuffPost, August 8, 2020: [New York City's Hottest New Energy Fight](#),
- Queens Eagle, Sept. 4, 2020: [Stringer outlines opposition to Astoria power plant project in letter to State](#),
- Gothamist, Aug 23, 2020, [Proposal To Upgrade Peaker Plant In Astoria's "Asthma Alley" More Of A "Half Measure," Says State Senator](#)
- QNS, Oct. 29, 2020, [Queens Climate Project hosts bike ride, rally in opposition NRG's Astoria plant upgrade](#),
- Queens Chronicle, Sept. 17, 2020, [Power plant draws protest in Astoria: Marchers oppose plan to refit site; company says it aids green goals](#),
- Politico, Sept. 30, 2020, [Downstate New York gas plants make a hydrogen pitch in bid to stay afloat](#),

Failure to Substantively Address Public Comments

Despite a large volume of substantive public input, the Final Scoping Document did not change *in any material way* from the Draft Scoping Document. The Final Scoping Document attaches 91 pages of comments and letters from the community and concerned citizens at Appendix C (pp. 54-145), but nowhere addresses or takes into account the substance of those comments or the community's concerns. A mere one page of the Final Scoping Document (p. 41, Section 6.0) *describes*, but does not *respond to*, the comments that raised relevant and significant concerns about public process as well as about deficiencies in the scope's proposed study of public health and environmental impacts from the project.² It is unacceptable for the State of New York to permit Astoria Gas Turbine Power LLC and NRG to evade entirely the concerns raised by so many and to move forward with a Supplemental Environmental Impact Statement (SEIS) that will not address critical aspects of the project that require review.

² Two paragraphs at the end of Section 7 also address comments, but only to state that they will not be assessed in the DSEIS, or to state the obvious assertion that local laws, resolutions and policies will be assessed.

Specifically, the following concerns were not addressed and apparently will not be addressed in the company's Draft Supplemental Environmental Impact Statement, among others:

- The current proposed project is fundamentally at odds with and fails to integrate the requirements established under the CLCPA.
- The current proposed project improperly relies on a grandfathering determination for a different, now-abandoned, project in order to evade Article 10 review, as discussed further below.
- The company is refusing to consider important and better-suited alternatives, as discussed in more detail below.
- The company has not explained how it will comply with the new Department of Environmental Conservation NOx Rules in its "No Action" Alternative scenario.
- The scope of the proposed local Air Quality, Environmental Justice, Health Outcomes, and Flooding analyses are too narrow to fully consider potential disparate harm to the surrounding community. The current proposed project is fundamentally at odds with the State's Community Risk and Resiliency Act.
- The scoping document fails to address how City Local Law 97 and the City Climate Mobilization Act affect the need for the project.
- The current proposed project does not consider the impacts of COVID-19 on load, demand and generation needs, and whether the company's Certificate of Public Convenience and Necessity must be updated to accommodate those changes.
- There was insufficient time provided for the community members to weigh in on the scoping for the current proposed project.

Failure to Include Appropriate Alternatives in the Final Scope

The deficient scope of the project alternatives to be considered in the Supplemental Environmental Impact Statement -- an issue identified by commenters and ignored by the Department -- is deeply concerning. The Department must amend the Final Scoping Document by requiring evaluation of a more robust evaluation of alternatives not only to establish compliance with the State Environmental Quality Review Act, but also to comply with the CLCPA. Section 7(2) of the CLCPA requires the DEC evaluate whether the Astoria project is "inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits" established in the statute. To the extent an inconsistency or interference is found to occur, DEC must "provide a detailed statement of justification as to why such limits/criteria may not be met, and identify *alternatives* or greenhouse gas mitigation measures to be required where such project is located."³

The alternatives analysis in the Final Scoping Document suffers from myriad deficiencies, evidencing a rushed and inadequate process. First, mistakes in the characterization

³ CLCPA § 7(2) (emphasis added).

of the “No Action” alternative in the Draft Scoping Document flagged by commenters⁴ remained uncorrected in the Final Scoping Document. For example, the Final Scoping Document retains an erroneous reference to the *2008 project design*⁵ (which utilized combined cycle combustion turbines rather than the currently proposed simple cycle combustion turbine). Consideration of the use of combined cycle combustion turbines was abandoned years ago and the continued references to this technology, particularly in light of comments identifying the error, bespeaks a failure by the Department to meaningfully review the Draft Scoping Document. Second and even more concerning, the Final Scoping Document failed to specifically include multiple project alternatives that are far more consistent with the State’s CLCPA requirements for the electric sector than the proposed project. In particular, despite urging by commenters,⁶ the Final Scoping Document fails to require NRG to evaluate a number of highly promising options including: (a) energy storage, specifically battery storage systems that have been shown to be viable, cost-effective alternatives to peaker plants; (b) pairing of energy storage with on-site solar; (c) solutions targeted to addressing local reliability needs such as demand management or a smaller peaking facility; (d) full retirement of the facility; and (e) use of the site for transmission interconnection to bring clean, renewable power from offshore wind and upstate New York. In addition, the Final Scoping Document fails to clarify important details of the alternatives it *did* include such as the fact that an onsite Energy Storage Alternative must be sufficiently sized to address localized peaking needs and that the Renewable Generation Alternative must at minimum consider on-site solar generation.

Failure to Undergo Article 10 Review

As commenters identified and discussed, it is wholly inappropriate for a fossil fuel generating station newly proposed in 2020 to evade compliance with the robust Article 10 siting procedures that have been in effect for nearly 10 years.⁷ The currently proposed peaking project bears no resemblance to the combined cycle project for which a SEQR process was conducted between 2008 and 2010. In declining to revisit the applicability of Article 10, the Department impermissibly relied on a grandfathering determination for a still-different third proposal for the site from 2017.⁸ But the current proposal is markedly different from even the 2017 proposal, involving different technology, a different number of turbines, and the potential use of a different fuel (hydrogen). In light of the subsequent passage of the CLCPA and particularly in light of NRG’s plans to potentially refuel the facility with hydrogen—a fuel the transportation, storage, and combustion of which presents a host of novel environmental, public safety, and public health concerns—review of the project under Article 10 is critical. Similar projects - the Danskammer plant and the proposed Gowanus Repowering Project - are currently in various phases of Article 10 review. A less comprehensive and less stringent review of the Astoria Replacement project is inconsistent and would undermine efforts to rationally plan for environmentally compatible, CLCPA-compliant electricity generation across the state.

⁴ Sierra Club July 31, 2020 Scoping Comments at 6.

⁵ See Final Scoping Document at 5-3.

⁶ See Sierra Club July 31, 2020 Scoping Comments at 7.

⁷ Sierra Club July 31, 2020 Scoping Comments at 2-3.

⁸ Email from Christopher Hogan, Project Manager, NYS DEC to interested stakeholders (Sept. 25, 2020) (“At this time, the Replacement Project appears consistent with the June 12, 2019 declaratory ruling.”).

Changes in both the proposed project and the law -- namely, the CLCPA going into effect in 2020 -- demand that the company must return to the Siting Board to seek permission for *this project* to move forward without applying for a Certificate of Environmental Compatibility and Public Need under Article 10. If the project does move forward only with SEQRA review, the Final Scoping Document is far too narrow. The SEIS must be fully updated from 2010, address the need for the level of electricity generation proposed, and adhere to a stringent environmental review including CLCPA considerations in order to avoid inconsistency in review and approval of comparable projects across the state.

Failure to Include a Study of Disproportionate Impacts Under the CLCPA

As the company recognizes, the area surrounding the project includes DEC-designated potential environmental justice areas that call for in-depth scrutiny of the possibility of disproportionate adverse impacts on the local community. In addition to an environmental justice and health outcomes analysis under SEQRA, the Department must also meet its obligation pursuant to CLCPA Section 7(3) to “not disproportionately burden disadvantaged communities” when “considering and issuing permits, licenses, and other administrative approvals and decisions.” The environmental justice analysis must be significantly updated from the 2010 EIS in order to allow DEC to meet its broad obligations under the new law. A superficial SEIS that simply plugs in current demographic and facility data to the prior environmental justice analysis is not sufficient.

In this instance, the Department should be especially concerned that a new fossil fuel facility located in an urban, coastal potential environmental justice area may be receiving less scrutiny than the Danskammer plant, a similar repowering project that is applying for a Certificate under Article 10 and is located in a more rural setting that is not squarely within an urban, densely populated potential environmental justice area. The CLCPA calls broadly for the state to prioritize greenhouse gas and co-pollutant reductions in “disadvantaged communities.” The statute requires consideration of disproportionate impacts not simply from examining one particular facility, as under a SEQRA analysis, but also from the state’s actions as a whole in implementing the CLCPA and approving permits across agency portfolios.

Failure to Require Environmental Analysis Covering the Full Project Economic Lifespan, Including Potential Fuel Switch to Hydrogen

In order to evaluate consistency with the CLCPA, analysis of all project alternatives “must address the full lifespan of the project and the fact that any resource will be required to comply with the CLCPA’s 100 percent zero carbon electricity requirement by 2040.”⁹ In the Draft Scoping Document, Astoria asserted that “[i]n the longer term, the proposed Project will be able to be converted to use GHG-free hydrogen as fuel if available.”¹⁰ But the company declined to make any concrete representations about whether it intended to pursue this or another

⁹ Sierra Club July 31, 2020 Scoping Comments at 8.

¹⁰ Draft Scoping Document at 5-6.

compliance strategy, and the Final Scope declines to demand further clarity.¹¹ Additionally, the conversion of a power plant to use GHG-free hydrogen, known as “green hydrogen,” is an entirely unproven transition strategy facing many substantial barriers, including: the expensive upgrade of gas delivery infrastructure to accommodate hydrogen, lack of hydrogen storage infrastructure, green hydrogen is currently very costly to produce and very few production facilities exist, and the unclear health impacts of large-scale hydrogen combustion in dense urban communities. A failure to consider long-term consistency with the CLCPA would impede achievement of the State and New York City’s clean energy goals, thwart the informed planning purposes of the State Environmental Quality Review Act (SEQR), and cannot be squared with the approach recently undertaken for the proposed Danskammer gas plant.

As an initial matter, New York needs to know whether Astoria plans to convert the project to hydrogen or another fuel in 2040 or shut the facility down because this determination will affect long-term resource planning in the City. If there is no CLCPA-compatible plan for Astoria other than to shutter the facility, it is critical to determine that *now* so that a truly CLCPA-compliant resource can be developed on a time frame that ensures seamless compliance with the CLCPA’s 100 percent zero carbon electricity by 2040 mandate. Particularly given that New York City is transmission constrained, it makes little sense to be developing resources today that are not capable of contributing to the City’s clean energy needs in and beyond 2040, well within the economic lifespan of any new generation facility.

In addition, the need for planning over a facility’s full economic lifetime follows from the goals of SEQR. SEQR seeks to “systematically consider environmental factors early in the planning stages”¹² of a project. As commenters pointed out, the potential use of hydrogen presents a host of distinct environmental, climate, and public health issues that must be evaluated under SEQR in the project planning process.¹³ The SEIS must include an evaluation of how the proposed shift to hydrogen would impact the community that includes details about where hydrogen would be stored, how it would be transported, what new transmission and infrastructure would have to be constructed, and other operational details.

Finally, the Department’s approach in the Final Scoping Document to evaluating Astoria’s long-term consistency with the CLCPA is inconsistent with that taken by the Siting Board only days earlier on the proposed Danskammer combined cycle gas plant in Newburgh, New York. For Danskammer, based on parallel assertions that the facility *could* be converted to

¹¹ The Final Scoping Document for Astoria simply indicates that: “By 2040, it is expected the Project will be able to continue generating electricity consistent with the CLCPA using hydrogen fuel should sufficient sources become commercially available by that time.” Final Scoping Document at 2-1. It drops a footnote adding that “In 2040, the Project will comply with the CLCPA by either transitioning to operations using hydrogen fuel or another GHG-free fuel source or it will cease operating.” *Id.* at 2-1, n.1.

¹² New York State Dept. of Env. Conservation, The SEQR Handbook, 4th Ed. (2020), at 3, available at https://www.dec.ny.gov/docs/permits_ej_operations_pdf/seqrhandbook.pdf.

¹³ Sierra Club July 31, 2020 Scoping Comments at 8 (“Industrial hydrogen today is largely produced via steam methane reforming using natural gas, a process that results in significant GHG emissions. Electrolysis is an alternative means to produce hydrogen but is highly energy-intensive and only climate neutral if the electricity used to split water is itself zero carbon. Simply stating an intention to burn hydrogen at the facility, absent a detailed account of how that hydrogen would be produced, does not demonstrate consistency with the mandates of the CLCPA.”).

operate using renewable natural gas (RNG) or hydrogen for CLCPA compliance in future, both DEC and the Siting Board—in furtherance of their obligations under CLCPA Section 7(2)—demanded detailed information about the feasibility and greenhouse gas impacts of using these alternative fuels,¹⁴ including whether the applicant “intends to commit to the use of” either of these fuels.¹⁵ Given DEC’s own CLCPA Section 7(2) obligations here, it must demand the same level of information disclosure in the SEQR process, including what additional infrastructure would be needed to support the transition to hydrogen and what upgrades would be needed to the existing gas distribution system to accommodate hydrogen.

In light of the CLCPA’s requirements and the serious deficiencies in the process to date, we respectfully request that DEC revoke its approval of the Final Scoping Statement and require the company to petition the Siting Board to determine whether the project as currently configured needs Article 10 approval. In the alternative, given deficiencies in the substance of the Final Scoping Statement, we respectfully request that DEC revise the Final Scoping Statement to provide for a meaningful environmental review of the Astoria Replacement Project.

Thank you for your consideration.

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¹⁴ Ltr. from Michael Higgins, Project Manager, Bureau of Energy Project Management, NY DEC, to counsel for Danskammer Energy LLC (Sept. 8, 2020).

¹⁵ Ltr. from John B. Rhodes, Chair, Siting Board, to Brenda D. Colella, Barclay Damon LLP and Michelle Hook, Vice President of Public Affairs, Danskammer Energy, LLC (Sept. 8, 2020).

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