



CONNECTICUT RIVER WATERSHED COUNCIL

The River Connects Us

deKoven House; 27 Washington Street; Middletown, CT 06457

January 5, 2011

Daniel F. Caruso, Chairman
Connecticut Siting Council
Ten Franklin Square
New Britain, CT 06051

RE: **DOCKET No. 225D** - Kleen Energy Systems, LLC Certificate of Environmental Compatibility and Public Need for the construction, maintenance and operation of a Electric Generating Facility and Switchyard on River Road, Middletown, Connecticut.

Response by the Connecticut River Watershed Council to questions posed at the December 7, 2010 hearing

Dear Chariman Caruso,

In the course of my appearance as an Intervenor at the Siting Council ("SC") hearing on December 7, 2010 to review the recommendations of the Thomas Commission, members of the Siting Council and representatives of the Kleen Energy project in Middletown, Connecticut asked a number of questions for which the Connecticut River Watershed Council ("CRWC") submits the following answers.

1. Attorney Hoffman, representing Kleen Energy; and SC (Paraphrased): What size and type of Project is the CRWC suggesting for the requiring of an Environmental Inspector? (Transcript, pages 142-143, lines 24, 1-2; and pages 154-155, lines 21-10 respectively)

CRWC: We recommend that the SC adopt the following language in its Decision & Order: "All projects for which the SC requires a Development and Management Plan ("D&M Plan") should automatically be required to have an Independent Environmental Inspector (IEI), unless the SC makes an explicit determination that, given the relatively small effort such supervision would entail, that supervision can be effectively handled by its own staff."

This is a flexible standard that enables the SC, on a case-by-case basis, to make a determination as to whether an IEI is required, a decision that hinges on the complexity of the project, the sensitivity of the resources affected and the availability of in-house staff to handle this added responsibility, in addition to overall project coordination.

The notion of an IEI, one that is paid for by the applicant but reports to the SC and its staff, is not new to the SC. It has been used on transmission projects. The basic function of such an IEI is to supplement the staff of the Council in the fieldwork needed to oversee the implementation of the D&M Plan. Although it may be possible for the SC to hire enough permanent staff to handle this oversight function, this is not always practical, since for projects large enough to call for a D&M

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Plan it is a time consuming task, requiring plenty of time out in the field, and the SC has no way of knowing one year to the next how many of these projects it will have.

Admittedly, the standard we propose above raises the question of how the SC determines whether a project requires a D&M Plan. The SC handles a wide variety of projects, ranging from relatively small modifications to existing facilities all the way to major transmission lines and generating stations sited where none existed before. Given such a variety of projects, it should not be surprising that there are no hard and fast rules as to which projects require a D&M Plan, and which do not. Sometimes the SC has required a D&M Plan for projects that did not require a certification, but were subject to certain construction conditions, conditions which are implemented by requiring a D&M Plan. In short, in making this determination, the SC has used its judgment, relying on its past experience and on the facts and input received for that particular project. At the moment, we see no reason to argue for a different approach. Indeed, the flexible nature of this standard has some advantages, since sometimes a “small project,” due to its location and its potential for affecting sensitive environmental resources, may require far more attention than a much larger one in a less sensitive area.

2. Attorney Hoffman, representing Kleen Energy: “What sort of qualifications would the environmental inspector possess?” (Transcript, Page 144, Lines 21-22)

CRWC: We would recommend that the IEI have college-level education in soils, biology, botany and water management, (preferably with an engineering or natural resources degree) or equivalent state licenses, plus at least one or two years of field supervision experience. Such individuals are readily available, either as present or past employees of reputable engineering companies that undertake construction projects, or independent contractors with past enforcement experience at the state or local level. Companies that supply this service sometimes employ a team approach. It is also important that such an individual be truly independent, which means she or he should not be part of the team constructing the project, or a past employee of either the applicant or the contractors constructing the project. The SC has the option of requiring the applicant to submit two or three choices, from which the SC, on recommendation of staff, chooses the one it prefers. As indicated earlier, for certain projects the SC may decide to rely on its own staff rather than require the applicant hire an IEI. In those instances, the Chairperson knows the capabilities of his or her own staff and will assign someone whose competence matches the nature of the supervision required.

Duties of the IEI (Underlined topics were not questions posed at the hearing, but CRWC felt they were important enough to include as sub-headings when providing answers to questions that were asked).

As noted, the principal duty of the IEI is to oversee the successful execution of the D&M Plan and other related conditions imposed on the Project. In the area of Erosion & Sedimentation Control, for example, this includes not only seeing to it that all components and practices explicitly shown on the D&M Plan are, in fact, put into place at the right time, but that the Project follows State Guidelines on the subject, and that remedial action is promptly taken when any of these measures proves to be insufficient for whatever reason. A violation takes place when the applicant does not meet the above responsibilities. Included in this responsibility is requesting changes to the original Plan when circumstances warrant, and to implement these

upon approval. But the IEI is also at fault when he or she has failed to detect the departure from the Plan, or the system fails without the IEI having required timely action from the applicant.

An experienced IEI will know what level of supervision is required to ensure the D&M plan is followed. Depending on the stage of the project, that may call for intense daily and/or nightly supervision, or much less. Since undetected failures are as much the IEI's responsibility as the applicant's, and the Council can have the IEI fired or replaced for not doing his or her job, there is no need to require a specific schedule of field presence provided that there is regular and frequent reporting. Thus, we would recommend that the IEI be required to send in a Report to the Council once a week or once every two weeks, detailing the nature and results of his or her review, and any actions that he or she has taken (often in accord with the applicant) to mitigate effects of the project and assure compliance with the D&M Plan. It is proposed that this requirement be part of the rule requiring an IEI, and that the rule also require copies be sent to other agencies with similar jurisdiction, in particular the Connecticut Department of Environmental Protection (CT DEP) and the United States Army Corps of Engineers (USACE). The usefulness of this last requirement is further explained below.

A second duty of the IEI is to help the SC staff in handling complaints by the public. The designation of where people must call or write in order to file a complaint depends on whatever protocol the SC chooses to adopt, but once a complaint is lodged according to this protocol, a prompt response is important, especially when inaction can result in serious irreparable damage to the environment or to other people's property. The IEI should be available on call to assist the SC in contacting the applicant, field inspecting the situation and immediately recommending an action to deal with the problem. Sometimes the issue can be resolved most quickly when the IEI works directly with the applicant or the contractor, but other situations may require that he or she submit his or her recommendation to SC staff and any other relevant agencies, so that they may make a prompt determination as to the nature of the violation, if any, and how to respond. The important point here is that the IEI can and ought to serve as a key communication link for ensuring that the applicant is aware of complaints and responds to them, and that feedback is provided to the complaint lodger of the actions being taken in response to such complaints, while maintaining that SC staff members are properly informed. The burden of ensuring proper enforcement and proper notification to the various agencies that might have an interest in the situation should not be on the public.

The need for good field supervision and prompt handling of complaints and violations is, of course, universal to all projects. However, as noted above, for some such projects, the SC may determine these duties are simple enough they can be carried out by its own staff. When the staff undertakes these duties, the SC should also have on record regular reports, at least timed to coincide with the SC's own regular meeting schedule. It should be noted that such reports can possibly cover more than one project.

Regular field inspection and reporting by SC staff is also appropriate for many projects for which a D&M Plan is NOT required. More often than not, for projects of the scale of a substation expansion or a small gas turbine where a certificate is required, a D&M Plan is not needed simply because the project is so compact that the applicant, at the time of filing, can present the same information in the form of a "Site Plan" or "Landscape Plan." We take the position here

that responsible supervision for these projects (as outlined by the tasks listed above) can ordinarily be handled in-house, and that when that is not the case, the SC still has the option of requiring an IEI.

However, there is no doubt that, for projects whose complexity requires a D&M Plan, regardless of whether this be a generation or transmission or some other type of facility, an IEI should be required unless the Council specifically dictates otherwise as part of its Decision & Order.

3. Attorney Hoffman, representing Kleen Energy: “Would it [an IEI] be required during construction or also during operation?” (Transcript, Page 143, Lines 5-6; brackets added for clarification)

CRWC: The SC’s jurisdiction ordinarily comes into play when a utility proposes to site a new project or modify an existing one. Once it grants permission for a project (typically by granting a certificate but occasionally by making a determination of no significant adverse effect subject to certain conditions) it takes on the duty to oversee the construction to make sure it is constructed according to the conditions of the permit. Once the project is completed to the SC’s satisfaction, whatever oversight remains is negligible and, if necessary, can be handled via regular reporting by the applicant or occasional field visits, well within the capacity of staff. Hence, we return to the same principle we spelled out earlier. The purpose of the IEI is to assist staff in field supervision of the project (including the fieldwork required to respond to complaints) and in particular, to assist staff in oversight of projects whose complexity requires a D&M Plan.

Once the construction phase is over, the IEI can provide valuable technical and review assistance by preparing for the SC a report that independently confirms that all conditions of the permit have been met, and the affected site is fully and effectively stabilized. For a typical project, once that is done, the IEI’s services will likely no longer be needed. Indeed we believe that in most cases continuing supervision over a project, to the extent needed, is best done directly by SC staff.

What is the role of the IEI in the review or approval of changes to the D&M Plan?

The SC, as one of its Conditions, can and often does require applicants who must submit a D&M Plan to propose a protocol for how changes to that Plan should be proposed, reviewed and approved. Inevitably, changes are required, and it is important that there be a mechanism that allows for the proper evaluation of such changes in a prompt and efficient manner. We submit that an IEI can be a great help to staff in carrying out this responsibility, which often entails the need to witness in the field the cause of the changed petition. Similarly, if the IEI sees a reason to request the applicant make a change with which the applicant does not agree, the SC staff members readily serve as the first line of arbitration.

Is an IEI warranted on jobs requiring a D&M Plan, or is this oversight redundant?

We argue the IEI is NOT redundant for the following reasons:

- 1) Only the SC is in the position to enforce a D&M Plan (or any equivalent “Site Plan” or “Landscape Plan”) that is approved as part of its Decision & Order. There is no other agency that has either the duty, or the power to do this.
- 2) It is true that major projects often have overlapping jurisdictions in areas commonly addressed by the D&M Plan. This is especially true for Section 401 federal Permits administered by the USACE, Clean Water Act Permits delegated to the State DEP (including stormwater runoff and point source permits) and Wetlands Permits under local jurisdiction. However, the State relies entirely on either the public or the applicant to self-report violations, and looks to heavy fines as a deterrent. This system makes sense for “operating permits,” but leaves much to be desired in overseeing construction because by the time the agency learns of the problem, a great deal of the damage has already been done.

In the case of many municipalities, the wetlands enforcement officer is available to inspect work and enforce wetlands regulations in the field. However, it should be noted that all of the upland aspects of construction encompassed by a D&M Plan, as well what happens in tidal waters is outside the authority of a local wetlands commission. Furthermore, the SC’s exclusive or overriding jurisdiction over local agencies under Sec 16-50(x) is a serious disincentive to local enforcement, since the local agency has no final say on what is permitted in a wetland, and any enforcement action by a wetland officer can be appealed to the SC.

The SC, in short, cannot rely on others to enforce the conditions of its permits. At the same time, by providing field supervision, it can help in ensuring a much faster response by other agencies, and where there is overlap, that joint response strengthens its enforcement abilities.

This would be even more so if representatives of those other agencies could form part of a joint coordinating council similar to that being proposed the Safety issues.

CRWC’s Conclusion

The CRWC is not intervening in this proceeding for the purpose of excoriating the Kleen Energy Project. Rather, we wish to point out that the framework being proposed by the Thomas Commission to address safety issues is just as applicable to environmental issues and should be adopted for that purpose for future projects. Had this framework been in place for the Kleen Energy Project in February 2008, enforcement would have been timely and would not have resulted in the circuitous method of reporting and action, relying solely on members of the public to alert officials of masses of sediment going into the CT River. Mr. Corvo has responded by saying he is a good applicant, and we are not appearing before you to dispute that. However, the reality is that with projects of this type, environmental degradation and abuse do occur even when the applicant has the best of intentions. The surest way of detecting deleterious situations before they become serious environmental incidents is through independent observation. Responsible environmental safety and commitment should not be solely dependent upon the merit of individual applicants, but rather on a structure that fosters successful project outcomes.

CRWC respectfully requests that the Siting Council includes as part of the recommendations it issues as a result of the Thomas Commission Report, the following: “all projects for which the Council requires a D&M Plan should automatically be required to have an Independent Environmental Inspector, unless the Siting Council makes an explicit determination that, given the relatively small effort such supervision would entail, that supervision can be effectively handled by its own staff.” The Independent Environmental Inspector would provide the Siting Council with weekly or bi-monthly reports, with copies ideally being sent to agencies with similar jurisdiction.

We greatly appreciate the Siting Council’s consideration of requiring Independent Environmental Inspectors for certain projects, as the Council in its wisdom deems appropriate and important.

Thank you for your consideration. If you have additional comments, I can be reached by phone at 860-704-0057 or by email at jtalbot@ctriver.org.

Sincerely,

A handwritten signature in cursive script that reads "Jacqueline Talbot". The signature is written in black ink and is positioned below the word "Sincerely,".

Jacqueline Talbot
River Steward