



# STATE OF CONNECTICUT

## CONNECTICUT SITING COUNCIL

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DATE: October 1, 2021

TO: Council Members

FROM: Melanie A. Bachman *NAB*  
Executive Director/Staff Attorney

RE: **PETITION NO. 1406A** – Doosan Fuel Cell America, Inc. petition for a declaratory ruling, pursuant to Connecticut General Statutes §4-176 and §16-50k, for the proposed construction, maintenance and operation of a grid-side 9.66-megawatt fuel cell facility and associated equipment to be located at 600 Iranistan Avenue, Bridgeport, Connecticut, and associated electrical interconnection to the United Illuminating Company's existing Congress Street Substation. **NuPower Bridgeport FC, LLC Reopening of this petition based on changed conditions pursuant to Connecticut General Statutes §4-181a(b).**  
***Allco Renewable Energy Limited Motion to Change the Procedural Schedule to Allow for Additional Discovery and Motion to Stay Proceedings Until an Environmental Impact Evaluation is Prepared – DRAFT Staff Report.***

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On September 21, 2021, Allco Renewable Energy Limited (Allco), a Connecticut Environmental Protection Act (CEPA) Intervenor to the above-referenced reopened proceeding, submitted a Motion to Change the Procedural Schedule to Allow for Additional Discovery (Discovery Motion).

On September 23, 2021, Allco submitted a Motion to Stay Proceedings Until an Environmental Impact Evaluation is Prepared (Stay Motion) with regard to the above-referenced reopened proceeding.

Also, on September 23, 2021, during a regular meeting, the Connecticut Siting Council (Council) denied Allco's September 7, 2021 Motion to Compel Interrogatory Responses from NuPower Bridgeport FC, LLC and Doosan Fuel Cell America, Inc. and Motion to Strike (Strike Motion).

On September 30, 2021, NuPower Bridgeport FC, LLC (NuPower) objected to Allco's Discovery Motion on the basis that all relevant information has been disclosed. NuPower also objected to Allco's Stay Motion on the basis that fuel cell facilities are Class I renewable energy sources that do not disadvantage long-term environmental goals<sup>1</sup> and that construction of the proposed fuel cell facility is an activity neither undertaken by a state agency nor funded in whole or in part by the state.

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<sup>1</sup> NuPower specifically refers to Public Act 21-62, "An Act Concerning the Solicitation of New Fuel Cell Electricity Generation Projects."

## **I. Procedural History**

On May 11, 2020, Doosan Fuel Cell America, Inc. (Doosan), as an agent for and on behalf of NuPower submitted a petition for a declaratory ruling pursuant to Connecticut General Statutes (CGS) §4-176 and §16-50k, for the installation of a 9.66 megawatt (MW) grid-side combined heat and power fuel cell facility within a 3.5- story steel and concrete structure at 600 Iranistan Avenue in Bridgeport, Connecticut (Petition 1406).

On May 12, 2020, pursuant to Regulations of Connecticut State Agencies (RCSA) §16-50j-40, the Council notified all state agencies listed therein, requesting comments regarding the proposed facility be submitted to the Council by June 10, 2020. Also on May 12, 2020, the Council developed a schedule for Petition 1406. The Council issued interrogatories to Doosan on June 18, July 24, and September 15, 2020. Doosan provided responses to the Council's interrogatories on July 9, July 27, and September 18, 2020.

On September 24, 2020, pursuant to CGS §4-176(e) of the Uniform Administrative Procedure Act (UAPA), the Council voted to set the date by which to render a decision on the petition as no later than February 5, 2021, which was the statutorily-mandated 180-day decision deadline under CGS §4-176(i) with the 90-day extension per Governor Lamont's Executive Order No. 7M. On September 29, 2020, NuPower requested party status. On October 8, 2020, the Council granted NuPower party status. NuPower submitted information regarding the proposed facility on November 10, 2020 and December 4, 2020.

On December 18, 2020, the Council denied Petition 1406 without prejudice. The Council identified the following deficiencies:

1. Project plans provided lack site detail;
2. The petition does not address natural gas safety issues;
3. The petition does not address the safety implications of the proposed facility's location in relation to other existing infrastructure (ex. railroad, highway, electric transmission line);
4. The petition does not address potential vapor plume hazards to the adjacent highway or any potential mitigation measures; and
5. The petition does not address the potential to incorporate noise mitigation measures prior to the commencement of facility operation.

On April 7, 2021, pursuant to CGS §4-181a(b), NuPower submitted a Motion to Reopen and Modify Petition 1406 (Reopen Motion) with supporting documentation based on changed conditions related to the deficiencies identified by the Council in its December 18, 2020 denial without prejudice of Petition 1406. Also on April 7, 2021, the Council issued a memo to the Petition 1406 service list seeking comments on the Reopen Motion. No comments were received.

On May 7, 2021, the Council granted NuPower's Reopen Motion and issued a schedule for the reopened proceeding (Petition 1406A) that included the 90-day extension for administrative agency deadlines per Governor Lamont's Executive Order No. 7M that remained in effect when NuPower's Reopen Motion was submitted to the Council. Also on May 7, 2021, the Council granted Mr. Joe Provey's (Provey) March 5, 2021 Request for Intervenor and CEPA Intervenor status.<sup>2</sup>

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<sup>2</sup> On March 5, 2021, the Council acknowledged receipt of Provey's Request for Intervenor and CEPA Intervenor Status in Petition 1406 stating, "The Council has not received a motion to reopen this petition for a declaratory ruling for a fuel cell facility. However, if a motion to reopen Petition No. 1406 is submitted, the Council will vote on whether to reopen the

The Council's schedule for Petition 1406A included a deadline for the exchange of interrogatories between parties and intervenors on May 20, 2021. The Council issued interrogatories Provey and NuPower on May 13 and May 14, 2021, respectively. Provey issued interrogatories to NuPower on May 19, 2021 and NuPower issued interrogatories to Provey on May 20, 2021. Provey responded to the Council's interrogatories between May 25 and May 28, 2021. NuPower responded to the Council's interrogatories and Provey's interrogatories on June 10, 2021. Provey responded to NuPower's interrogatories between June 9 and June 10, 2021.

On June 21, 2021, Allco requested CEPA Intervenor Status in Petition 1406A. On July 16, 2021, the Council granted Allco's Request for CEPA Intervenor Status and issued a revised schedule for the *final* exchange of interrogatories between parties and intervenors with a deadline of July 28, 2021. Allco issued interrogatories to NuPower and Provey on July 26, 2021. The Council issued a second set of interrogatories to NuPower on July 29, 2021. NuPower responded to Allco's interrogatories and the Council's interrogatories on August 18, 2021. Provey also responded to Allco's interrogatories on August 18, 2021.

On September 16, 2021, the Council issued notice of its regular meeting agenda scheduled for September 23, 2021. It listed Petition 1406A as item number 7 with two separate matters to be addressed: 1) Allco's September 7, 2021 Strike Motion; and 2) CGS §4-176(e) Deadline for Action – Set Date for Decision.

On September 21, 2021, five days after the Council issued notice of its September 23, 2021 regular meeting agenda, Allco submitted its Discovery Motion. On the morning of the Council's September 23, 2021 regular meeting, Allco submitted its Motion for Stay.

During the regular meeting held on September 23, 2021, the Council denied Allco's September 7, 2021 Strike Motion on the bases that:

1. CEPA is an intervention statute that limits participation to consideration of unreasonable pollution, impairment or destruction of the public trust in the in the air, water or other natural resources of the state;
2. Fuel cells are defined by statute as a Class I Renewable Energy source in the state;
3. the scope of the Council's review is defined under the Public Utility Environmental Standards Act (PUESA); and
4. the entire record of Petition 1406, including, but not limited to, the Council's final decision, is part of the record in reopened Petition 1406A.

Also, during the regular meeting held on September 23, 2021, pursuant to CGS §4-176(e) of the UAPA, the Council voted to set the date by which to render a decision on Petition 1406A as no later than January 31, 2022, which is the statutorily-mandated 180-day decision deadline under CGS §4-176(i) with the 90-day extension per Governor Lamont's Executive Order No. 7M.

## II. Allco's September 21, 2021 Discovery Motion

Allco's Discovery Motion was submitted 138 days after the Council granted NuPower's April 7, 2021 Reopen Motion and 2 days before the Council denied Allco's September 7, 2021 Strike Motion. In its Discovery Motion, Allco argues for, "at a minimum, serving additional interrogatories and receiving complete and thorough answers to those interrogatories." Allco does not provide any proposed timeframe for additional discovery nor does Allco provide any supporting documentation for its claim that "it is impossible for the Council to conclude that the Project does not have a substantial adverse effect" because NuPower failed to correct the deficiencies identified by the Council in its December 18, 2020 final decision on Petition 1406.

Under RCSA §16-50j-22a, "The purpose of discovery is to provide the Council, parties and intervenors access to all relevant information in an efficient and timely manner to ensure that a complete and accurate record is compiled. Parties and intervenors may serve written information requests *only during the time specified by the Council.*" (Emphasis added).

The Council granted NuPower's Reopen Motion on May 7, 2021. The Council granted Allco CEPA Intervenor status on July 16, 2021 and issued a revised schedule for the *final* exchange of interrogatories between parties and intervenors. Allco issued 73 interrogatories with multiple subparts to NuPower on July 26, 2021. NuPower responded to Allco's interrogatories on August 18, 2021. Allco submitted its Strike Motion on September 7, 2021. Allco submitted its Discovery Motion on September 21, 2021. During its regular meeting held on September 23, 2021, the Council denied Allco's Strike Motion.

Administrative agencies are permitted to organize proceeding schedules so as to balance interests in reasonable, orderly and nonrepetitive proceedings against the erroneous deprivation of a private interest."<sup>3</sup> It is not unconstitutional for the Council, in good faith, to balance its statutory time constraints under the UAPA against the desire of a party, intervenor or CEPA Intervenor for more time to present their objections to a proposal.<sup>4</sup>

CEPA Intervenor participation is limited to consideration of unreasonable pollution, impairment or destruction of the public trust in the air, water or other natural resources of the state. Allco is a CEPA Intervenor in Petition 1406A. Allco issued 75 interrogatories in Petition 1406A.<sup>5</sup> Balancing the Council's statutory time constraints under the UAPA against Allco's desire for more time to present its objections to Petition 1406A, Allco's September 21, 2021 Discovery Motion should be denied.

## III. Allco's September 23, 2021 Stay Motion

Allco's Stay Motion was submitted 140 days after the Council granted NuPower's April 7, 2021 Reopen Motion and on the same day as the Council denied Allco's September 7, 2021 Compel Motion. In its Stay Motion, Allco argues the Council must prepare an Environmental Impact Evaluation (EIE) under the Connecticut Environmental *Policy* Act (CEPoA) (Emphasis added).<sup>6</sup> CEPoA (CGS §22a-1a to §22a-1h) is *separate and distinct* from CEPA (CGS §22a-14 to §22a-20).<sup>7</sup>

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<sup>3</sup> *Concerned Citizens of Sterling v. Conn. Siting Council*, 215 Conn. 474, 485-486 (1990).

<sup>4</sup> *Id.*

<sup>5</sup> Allco also issued 2 interrogatories to Provey on July 26, 2021.

<sup>6</sup> Conn. Gen. Stat. §22a-1a, *et seq.* (2021).

<sup>7</sup> *Manchester Environmental Coalition v. Stockton*, 184 Conn. 51, 63-64 (1981). (CEPoA is supplemental to CEPA).

First, Allco claims that the Council is required to complete an EIE under CGS §22a-1b(c) because construction, maintenance and operation of the proposed fuel cell facility is an action which may significantly affect the environment. CGS §22a-1b(c) states, in part, “Each state department, institution or agency responsible for the primary recommendation or initiation of actions which may significantly affect the environment shall in the case of each such proposed action make a detailed written evaluation of its environmental impact before deciding whether to undertake or approve such action.”

Second, Allco claims that the construction, maintenance and operation of the proposed fuel cell facility would “be funded in whole or in part by the state” under CGS §22a-1c because the state is a utility ratepayer that would be assessed a direct charge for the cost of the fuel cell facility. CGS §22a-1c states, “actions which may significantly affect the environment” means individual activities or a sequence of planned ***activities proposed to be undertaken by state departments, institutions or agencies, or funded in whole or in part by the state***, which could have a major impact on the state's land, water, air, historic structures and landmarks as defined in section 10-410, existing housing, or other environmental resources, or could serve short term to the disadvantage of long term environmental goals. Such actions shall include but not be limited to new projects and programs of state agencies and new projects supported by state contracts and grants.” (Emphasis added).<sup>8</sup>

In 1972, Governor Meskill vetoed the first version of CEPoA on the ground that “it would overlap existing federal and state requirements, be too costly, and be onerous to administer.”<sup>9</sup> Under PUESA, the Council’s purpose is to provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state.<sup>10</sup> The Council must find and determine “the nature of the probable environmental impact of the facility alone and cumulatively with other existing facilities, including a specification of every significant adverse effect, including, but not limited to, (i) ...impact on, and conflict with the policies of the state concerning the natural environment, (ii) ecological balance, (iii) public health and safety, (iv) scenic, historic and recreational values, (v) agriculture, (vi) forests and parks, (vii) air and water purity, and (viii) fish, aquaculture and wildlife;...”<sup>11</sup>

CEPoA and CEPA overlap PUESA. When there is an environmental legislative and regulatory scheme in place that specifically governs the conduct claimed to constitute unreasonable pollution, whether the conduct is unreasonable will depend on whether it complies with that scheme.<sup>12</sup> In an appeal of a Council decision to approve an electric generating facility, the Court stated, “The legislative act creating the Connecticut Siting Council is the Public Utility Environmental Standards Act. One of the fundamental functions of the Council under this Act is to protect the environment to the extent possible while satisfying the public need for adequate electrical power.”<sup>13</sup> PUESA is an environmental legislative and regulatory scheme that specifically governs the conduct Allco claims constitutes unreasonable pollution.

Connecticut courts have specifically addressed how CEPoA interacts with PUESA.<sup>14</sup> While the Council has discretion to consider CEPoA, it is not required to do so.<sup>15</sup> Further, the Council is not required to consider CEPA

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<sup>8</sup> Examples of actions proposed to be undertaken by state departments, institutions or agencies, or that are funded in whole or in part by the state are construction of highway bridges by DOT and construction of dormitories by state universities.

<sup>9</sup> Office of Legislative Research, Legislative History of the Connecticut Environmental Policy Act, 2008-R-0079, January 30, 2008, available at <https://www.cga.ct.gov/2008/rpt/2008-R-0079.htm>

<sup>10</sup> Conn. Gen. Stat. §16-50g, *et seq.* (2021).

<sup>11</sup> Conn. Gen. Stat. §16-50p (2021).

<sup>12</sup> *Burton v. Dominion Nuclear Conn., Inc.*, 300 Conn. 542, 557-559 (2011) (Under CEPA, intervenor appealed approval of increase in facility electric generating capacity (uprate) claiming uprate will increase temperature of facility’s thermal plume and cause unreasonable pollution).

<sup>13</sup> *City of Torrington v. Conn. Siting Council*, 1991 Conn. Super. LEXIS 2084 at \*35-36 (Conn. Super. Sept. 10, 1991).

<sup>14</sup> *Id.*; *City of New Haven v. Conn. Siting Council*, 2002 Conn. Super. LEXIS 2753 at \*43-56 (Conn. Super. Aug. 21, 2002).

or to deny petitions that are in conflict with CEPA.<sup>16</sup> It is authorized to give “such consideration to other state laws ... as it shall deem appropriate” pursuant to CGS § 16–50x(a) but has no obligation to apply any particular requirements outside of PUESA.<sup>17</sup>

Activities proposed by state actors but that are ultimately performed by private entities do not constitute “actions which may significantly affect the environment.”<sup>18</sup> In an appeal of a Council decision to approve a submarine electric transmission cable, the City of New Haven argued that the requirement of an EIE either applies directly to the Council or indirectly through CEPA.<sup>19</sup> The Court held that the EIE requirement does not govern private entities, such as Cross Sound Cable Company, LLC.<sup>20</sup> Furthermore, the Court held that the EIE requirement does not apply when there is neither government funding nor government control.<sup>21</sup> In an appeal of the Department of Energy and Environmental Protection (DEEP) and Public Utilities Regulatory Authority (PURA) issuance of a Comprehensive Energy Strategy (CES) approving the expansion of natural gas use in the state, the Connecticut Energy Marketers Association argued that the requirement of an EIE applies to the CES.<sup>22</sup> The Court held that the EIE requirement does not govern activities proposed by state actors that are ultimately performed by private entities, such as the electric distribution companies.<sup>23</sup> Furthermore, the Court held that the EIE requirement does not apply when DEEP and PURA act pursuant to the legislative directive requiring issuance of a CES.<sup>24</sup>

Like Cross Sound Cable Company, LLC in the *City of New Haven* case and the electric distribution companies in the *Connecticut Energy Marketers Association* case, NuPower is a private entity. Allco’s first Stay Motion claim that the Council is required to complete an EIE under CGS §22a-1b(c) fails because NuPower is a private entity.

Like DEEP and PURA in the *Connecticut Energy Marketers Association* case, the Council has not proposed to undertake or fund the activities that Allco alleges will constitute unreasonable pollution. Allco’s second Stay Motion claim that fuel cell facility would “be funded in whole or in part by the state” under CGS §22a-1c fails because the payment of utility bills is not a state agency action which may significantly affect the environment.

Therefore, Allco’s Stay Motion should be denied.

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<sup>15</sup> *Id.*

<sup>16</sup> *FairwindCT, Inc. v. Conn. Siting Council*, 313 Conn. 669, 697-702 (2014); Conn. Gen. Stat. §16-50x (2021).

<sup>17</sup> *Id.*

<sup>18</sup> *Conn. Energy Marketers Assoc. v. Dept. of Energy and Env'tl. Protection*, 324 Conn. 362, 374 (2016).

<sup>19</sup> *City of New Haven*, *supra* note 13 at \*50-53.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Conn. Energy Marketers Assoc. supra* note 17 at 365.

<sup>23</sup> *Id.* at 373-374.

<sup>24</sup> *Id.* at 370.