

In the Matter of : March 29, 2021
Allco Renewable Energy Limited and Windham Solar :
LLC Petition for Declaratory Ruling :

DECISION DECLINING TO ISSUE A DECLARATORY RULING

Pursuant to Conn. Gen. Stat. § 4-176(e) and R.C.S.A. § 22a-3a-4(c)(3), I am issuing this decision in response to a Petition for Declaratory Ruling submitted by Allco Renewable Energy Limited and Windham Solar LLC (Allco) related to NRG Middletown Repowering LLC (NRG), Application Nos.: 201904165, 201904166, Middletown, CT.

A. BACKGROUND

On March 15, 2019, NRG submitted to the Department of Energy and Environmental Protection (Department or DEEP) two New Source Review applications pursuant to R.C.S.A. § 22a-174-3a as part of a repowering project of the station¹ at 1866 River Road in Middletown, Connecticut. A New Source Review (NSR) permit is required to construct and operate a source of air pollution with potential uncontrolled emissions of any air pollutant equal to or greater than 15 tons per year.

NRG submitted one application to construct and operate Unit 5, an approximately 375 MW peaking electric combustion turbine generator powered by existing natural gas supply with ultra-low sulfur distillate (“ULSD”) as the backup fuel, and another application to construct and operate a 555 kW diesel emergency engine for back-up power to the turbine generator. Together with Unit 5 and the emergency generator, the project includes an emergency fire pump engine and a natural gas heater. Unit 5 will operate as a peaking unit, which is designed to operate only on critical energy demand days for electric grid contingencies, such as transmission line outages or temporary loss of power from other generating sources. Unit 5 is intended to replace Units 2 and 3 that are fired by natural gas and number 6 fuel oil.² DEEP staff reviewed both applications and provided comments on the project as a whole to NRG on April 16, 2019. On May 1, 2019, NRG’s consultant submitted revised Attachments F, H, I, and J in response to the comments of DEEP staff.

NSR Permits

Under the Clean Air Act (Act) states work with the federal government, the Environmental Protection Agency (EPA), to regulate air quality standards.³ The EPA establishes and periodically revises national ambient air quality standards (NAAQS), which sets maximum allowable ambient air concentrations for certain pollutants that endanger human health and welfare. Ozone, is another pollutant regulated under the Act, which forms when pollutants known as precursors -specifically, oxides of nitrogen (NO_x) and volatile organic compounds (VOCs) - react in the presence of sunlight.

¹ An affiliate of NRG, Middletown Power LLC, owns the existing 762 MW generating station located at 1866 River Road, Middletown, CT.

² NRG Application No. 201904165 p. 1.

³ 42 U.S.C. §§ 7409(b)(1), 7407.

Middlesex County in Connecticut is classified as a severe nonattainment area under the Act. Many states have problems attaining and maintaining the ozone NAAQS. Achieving attainment is challenging for a variety of reasons, including the state's regulated stationary sources and activities related to manufacturing processes, power production sectors, waste and aviation industries to name a few, but also in large part to transport of ozone pollution. Connecticut is one of the states that has some of the most stringent NOx and VOC control programs in the country, aggressively regulating power plants, factories, and motor vehicles.

The Department notes that during the course of its evaluation of the NRG permit applications, DEEP made several requests for additional information to the Applicant, including information concerning the proposed simple cycle turbine as opposed to a combined cycle unit for the purposes of assessing Best Available Control Technology (BACT) and evidence supporting other assertions made in the Applications.⁴ NRG submitted responses to all of the Department's requests.

B. PROCEDURAL HISTORY

On November 19, 2020, DEEP issued a Notice of Tentative Determination to issue the permits applied for by NRG. In accordance with Conn. Gen. Stat. § 22a-6h and R.C.S.A. § 22a-174-2a(b)(3), DEEP's Notice triggered a thirty-day period for comments and an opportunity for interested persons to request an adjudicatory or informational hearing on the permit application.⁵

On January 19, 2021, in response to receiving a request for an informational hearing from the public, DEEP posted on its website a Notice of Public Informational Hearing, which it set for March 3, 2021.

On January 26, 2021, Allco submitted a Petition for Declaratory Ruling regarding NRG's NSR Permit Applications. DEEP acknowledged receipt of the Petition and posted the acknowledgement on its website.

On January 29, 2021, NRG filed a request for party status in response to Allco's Petition pursuant to R.C.S.A. § 22a-3a-4(c)(1), which is part of DEEP's Rules of Practice. No other requests for party or intervenor status were received.

An informational hearing was held via ZOOM on March 3, 2021. The informational hearing consisted of presentations by DEEP staff and the parties, and provided for the collection of public comments on the record.⁶ At the informational hearing, DEEP announced that public comments would be received through March 26, 2021.⁷

On March 10, 2021, NRG filed comments in response to Allco's Petition for Declaratory Ruling.

No hearing in this matter is required and none was held.

⁴ DEEP tentative Determination p. 2 issued November 19, 2020.

⁵ R.C.S.A. § 22a-174-2a(c)(1) allows in the issuance of a Title V permit that any interested persons may request for a public informational hearing, an adjudicatory hearing, or both.

⁶ DEEP records indicate that Attorney Thomas Melone, on behalf of Allco, registered for and was in attendance at the Informational hearing.

⁷ DEEP received more than 20 written comments and several oral comments during the public comment period. Allco submitted its written comments on March 24, 2021.

C. THE PETITION

On January 26, 2021, Allco Renewable Energy Limited and Windham Solar LLC submitted pursuant to Conn. Gen. Stat. § 4-176(a), of the Uniform Administrative Procedure Act (UAPA) and R.C.S.A. § 22a-174-4, a petition for a declaratory ruling regarding the applicability of R.C.S.A. § 22a-174-3a(l)(2). This regulation states in pertinent part:

(2) Analysis of alternatives.

(A) An owner or operator of the subject source or modification shall include an analysis of alternative sites for the proposed activity, alternative sizes for the subject source or modification, alternative production processes, and all environmental control techniques and technologies which are available for such major stationary source or major modification;

(B) Such analysis shall demonstrate whether the benefits of the subject source or modification would significantly outweigh its adverse environmental impacts, including secondary impacts and cumulative impacts, and social costs imposed as a result of the location, construction or modification;

(C) The owner or operator of the subject source or modification shall submit such analysis prior to the issuance of any tentative determination on a permit application under this section.

In its Petition, Allco claims that NRG's Applications for NSR permits fail to comply with R.C.S.A. § 22a-174-3a(l)(2), which describes permit requirements for nonattainment areas. Allco's Petition states that while NRG did provide an analysis addressing the requirements of R.C.S.A. § 22a-174-3a(l)(2) in its Attachment 215-B Analysis of Alternatives of the permit application, that NRG's response is wholly inadequate and fails to meet the mandate in the regulation that the analysis must demonstrate that the benefits of a project "would significantly outweigh its adverse environmental impacts, including secondary impacts and cumulative impacts, and social costs imposed." (Petition, p. 3.) Allco's underlying concern with the project is that, "The proposed project will cause unreasonable pollution, impairment or destruction of the air, water and other natural resources of the state of Connecticut, and is prohibited by Conn. Gen. Stat. §22a-16." (Petition, p. 7.)

Allco's Petition raises a legal question: did DEEP correctly interpret R.C.S.A. § 22a-174-3a(l)(2). Allco did not request a hearing, solely a ruling concerning the legal question.

D. DISCUSSION

In accordance with Conn. Gen. Stat. § 4-176(e), the Commissioner has sixty days from receipt of a petition for declaratory ruling to act. She may:

(1) Issue a ruling declaring the validity of a regulation or the applicability of the provision of the general statutes, the regulation, or the final decision in question to the specified circumstances, (2) order the matter set for specified proceedings, (3) agree to issue a declaratory ruling by a specified date, (4) decide not to issue a declaratory ruling and initiate regulation-making proceedings, under section 4-168, on the subject, or (5) decide not to issue a declaratory ruling, stating the reasons for its action.

The principle issue presented by this Petition is a party's obligation to exhaust its administrative remedies in the context of a pending administrative proceeding. There is guidance regarding the exhaustion doctrine in the context of a declaratory ruling in *Metropolitan District v. Commission on Human Rights and Opportunities*, 180 Conn. App. 478 (Conn. App. Ct. 2018). In this decision, the Appellate Court held that MDC was precluded from resorting to the avenues of declaratory relief afforded under Conn. Gen. Stat. §§ 4-175 and 4-176, and was required to exhaust its administrative remedies in the pending administrative proceedings. In its discussion of the proper application of the exhaustion doctrine, the Court considered what, if any, administrative proceedings had commenced with respect to the conduct at issue, and then determined that sufficient remedy existed in the agency proceedings.

In this case, Allco has requested a declaratory ruling in the midst of an on-going permitting proceeding. Part of DEEP's technical review and request for additional information from NRG concerned the same issues that Allco is raising here, specifically, evidence supporting NRG's claim that there was need for the project and that NRG had evaluated alternative technologies pursuant to R.C.S.A. § 22a-174-3a(l)(2).⁸ For Allco to now bring a new action to test the very issues which DEEP is reviewing through the NSR permit review and in which the public process was designed to capture, not only ignores that process, but by beginning a new and different process, it also disrupts the integrity of the permitting process and the ability of DEEP to administer its statutory responsibilities.

DEEP's November 19, 2020 Notice of Tentative Determination triggered a thirty-day window in which the public could request either an informational hearing or a formal adjudicative hearing concerning the permit application.⁹ Pursuant to R.C.S.A. § 22a-174-2a(c)(6), an informational hearing is considered a non-adjudicatory hearing. DEEP did not receive any request for a formal adjudicative hearing in response to the Notice; only a request for an informational hearing was received from a member of the public. At the informational hearing held on March 3, 2021, DEEP also made the public aware that comments would be extended and received up until March 26, 2021. DEEP's review standards include public comment as an integral means to ensure that there are meaningful opportunities for public involvement by any person who may be impacted by the application for permitting an activity that is a major source. After the receipt of comments, DEEP will prepare a response to comments received, and issue decision about whether to approve NRG's applications.¹⁰

The Petitioner has failed to exhaust its administrative remedies in the context of a pending administrative proceeding. The Petition is unnecessary and redundant given that the DEEP Office of Adjudications conducted a public hearing on the Application on March 3, 2021. Allco's comments are more appropriately raised and considered in that public forum. To allow otherwise ignores the mandate of the *MDC* case that Allco exhaust the administrative remedies available to it.

⁸ DEEP February 14, 2020 Request for Additional Information.

⁹ R.C.S.A. § 22a-174-2a(c)(1) allows any interested persons in a Title V permit issuance to request a public informational hearing, an adjudicatory hearing, or both.

¹⁰ R.S.C.A. § 22a-174-2a(c)(9) requires the commissioner to consider all written comments submitted within the public comment period in the Notice, including all comments received at the public hearing, prior to making a final decision on the application.

E. CONCLUSION

It is both necessary and appropriate to allow the pending permit process to be fully considered and finalized by the Department. For the foregoing reasons and as provided for in Conn. Gen. Stat. § 4-176(e)(5), I am declining to issue a declaratory ruling in response to the Petition.



Date: March 29, 2021

Katherine S. Dykes
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Commissioner of Energy and Environmental Protection