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ENVIRONMENTAL LAW

Expert Analysis

New York's Revived Power Plant Siting Law Preempts Local Control

Taking most observers by surprise, the New York State Legislature on June 22, 2011, overwhelmingly passed The Power NY Act of 2011.¹ Governor Andrew Cuomo signed it on Aug. 4. The new law² revives Article X of the Public Service Law after a nearly nine-year hibernation. As before, the law creates a one-stop, state-led program for permitting electric generating facilities while preempting local requirements. But the new Article X differs from its predecessor in several important ways: It covers facilities as small as 25 megawatts (down from the prior 80 megawatts threshold), it has even more generous provisions for funding intervenors, and it requires important new rules on environmental justice and carbon dioxide emissions.³

Some have linked the law's long-delayed passage to Governor Cuomo's insistence on closing the Indian Point nuclear power plant in Westchester County, and the need to replace its generating capacity. The new law will also ease the siting of wind farms, some of which have been inhibited by upstate towns that do not want them.

Background and History

Article X was in force from July 24, 1992 through Dec. 31, 2002. (An older version was in effect from 1972 through 1989.) It provided a time-limited process that circumvented local opposition to facilities by preempting local approval processes; the local communities were given a voice and allowed to participate in the process, but they were deprived of the usual veto power over land use decisions. Article X also entailed an extensive environmental review process that substituted for the State Environmental Quality Review Act (SEQRA). This author represented applicants in several Article X proceedings, and found that this was an effective mechanism for securing a decision on whether a project could be built.

In all, six projects were certified, built, and put into service under the old Article X, adding 2,880 megawatts of generating capacity; four were approved but not built; five were withdrawn or cancelled; and one was denied.⁴ The sole denial

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concerned a proposed plant in Brooklyn that was strongly opposed by the City of New York.⁵

Starting in 2003, new generating facilities no longer had Article X available to them. Instead they were subject to local zoning controls and to SEQRA. Several facilities were built under this process, but there were no firm time limits. Some applications went swiftly, and others languished, depending largely on the attitudes of the local municipalities and on whether there were well-funded opponents. Project opponents also had multiple opportunities to seek judicial review.⁶ The new Article X will likely slow down small projects in friendly places and speed up all projects in unfriendly places.

The new Article X creates a one-stop, state-led program for permitting electric generating facilities while preempting local requirements.

The new process will not be effective until the State Department of Environmental Conservation (DEC) has issued regulations concerning environmental justice, cumulative air impacts, and carbon dioxide emissions, and the Siting Board (described below) has issued its regulations under the new Article X. The statute gives DEC and the Siting Board one year to do that. Until then, applicants may still proceed under SEQRA.

New Version of Article X

Like the expired Article X, the new version centralizes and streamlines control over the siting of electric generating facilities. By lowering the applicability threshold to 25 megawatts from 80 megawatts, the revised Article X will capture a larger number of projects. (Under the prior law, many projects came in at 79.9 megawatts to squeeze under this threshold.)

Excluded from the Article's coverage are major electric generating facilities over which the federal government has siting jurisdiction (such as hydroelectric facilities, which are covered by the Federal Power Act, and nuclear facilities, which are under the purview of the Nuclear Regulatory Commission), normal repairs that do not result in an increase in capacity of more than 25 megawatts, on-site generating facilities used solely for industrial purposes up to 200 megawatts, and facilities that had already applied for a license prior to the effective date of the new law (Aug. 4, 2011). The new law drops the prior exemption for any power plant that "generates electricity from the combustion of solid waste or from fuel derived from solid waste," so those plants are now covered. Applicants for certain projects excluded from the new Article X may choose to opt in.

Siting Board. Article X vests authority in the New York State Board on Electric Generation Siting and the Environment. The board has a permanent membership of five state officials (the environmental, economic development, health, and agriculture commissioners, and the chair of the Energy Research and Development Authority). In considering particular applications, it is supplemented by two ad hoc members who reside in the municipality (in New York City, in the community district) in which the proposed facility is to be located.

The board's permanent members adopt rules and regulations concerning its procedures. The full board decides whether to issue the key approval document—a Certificate of Environmental Compatibility and Public Need Authorizing the Construction of a Major Electric Generating Facility. The board chair may issue declaratory rulings regarding the Article's applicability. Facilities are meant to operate in compliance with the substantive requirements of applicable state and local laws, but the board may override local laws or ordinances that it deems to be "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers." State agencies and municipalities may not require any further permits or approvals outside of the Article X process for any facility that applies for a certificate.

Pre-Application and Application Processes. Applicants must first file a preliminary scoping statement with the board. It must include, among other things: (1) a description of the proposed facility and its environmental setting; (2) the potential environmental and health impacts; (3)

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proposed studies evaluating these impacts; (4) proposed measures to minimize these impacts; (5) reasonable alternatives to the facility; and (6) identification of all other state and federal permits, certifications, or other authorizations needed for construction, operation or maintenance of the facility. Article X displaces the separate SEQRA process for covered facilities and instead requires that applicants perform numerous environmental and community impact analyses.

Significantly, the new Article X requires applicants to create a fund amounting to \$350 for each thousand kilowatts of generating capacity, which is to be used by municipalities and community and environmental groups to hire consultants, experts and lawyers to participate in the scoping phase.

There follows a public scoping process involving consultations with DEC, the local governments, and other concerned parties. It aims to reach agreement on the scope and methodology of studies and other matters and to narrow the disputed issues. This pre-application process is overseen by an administrative law judge of the Department of Public Service. (At the hearing, that judge is joined by one from DEC.) The parties can then enter into a stipulation setting forth their agreement.

After the scoping process, an applicant must file an application which contains the following: (1) a description of the site and facility to be built; (2) an evaluation of the expected environmental, health, and safety implications; (3) the facility's pollution control systems; (4) a safety plan during the construction and operation of the facility; (5) an evaluation of the significant and adverse disproportionate environmental impacts of the facility; (6) an analysis of air quality within a half-mile of the proposed facility; and (7) a comprehensive demographic, economic, and physical description of the community in which the facility is to be located.

Applications for wind-powered facilities must also describe and evaluate reasonable alternative locations for the facility as well as its impact on avian and bat species. The applicant must also demonstrate that the facility is reasonably consistent with the most recent State Energy Plan and analyze its potential impact on the wholesale generation markets. The application must be published and circulated.

Hearing and Decision Processes. Within 60 days of the application's filing, the board is required to determine whether the application is complete and, if so, fix a date for a public hearing. Once the board determines that the application is complete, DEC must initiate its review pursuant to federally delegated or approved environmental permitting authority. This applies primarily to the State Pollutant Discharge Elimination System for water pollution discharges, and the Clean Air Act Title V program for air emissions; since both those programs are implemented under federal delegation of authority to DEC, Article X cannot eliminate the DEC permitting process. (This was a major issue under the prior version of Article X.)

Once the hearing date is set, the hearing examiner is required to hold a prehearing conference to specify the issues and to obtain stipulations as to matters not in dispute. The examiner then issues an order identifying the issues to be addressed by the parties and sets a time period to respond

to any interlocutory motions or appeals, not to exceed 45 days.

Importantly, proceedings must be completed within 12 months from the date that the board chair determines that the application is complete and in compliance with the Article unless the parties agree to waive the deadlines. In extraordinary circumstances, the board can extend this period for an additional six months. Thus, once the application is deemed complete and the clock starts, there are clear time limits; but it can take as long to get to the starting line as it does from there to the finish.

Proceedings with respect to modifying an existing electric generating facility or to site a new facility adjacent or contiguous to an existing facility can achieve an expedited six-month review if those projects reduce total annual emissions on-site. To qualify for the expedited review, an application must demonstrate all of the following: (1) a decrease in the rate of emissions of relevant air contaminants; (2) a reduction in the total annual emissions of each of the relevant siting air contaminants emitted by the existing facility; (3) that the facility would introduce a new cooling water intake structure; and (4) that it would achieve a lower heat rate than the heat rate of the existing facility.

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A second intervenor fund (in addition to the one for the scoping stage) is provided for the hearing stage of the process. Each application must be accompanied by a fee in an amount equal to \$1,000 for each thousand kilowatts of capacity, up to \$400,000. For facilities that will require storage or disposal of fuel waste byproduct, an additional fee of \$500 for each thousand kilowatts of capacity is required, up to \$50,000.

The money is to be deposited in an intervenor account and distributed at the board's direction to defray expenses incurred by municipal and local parties. The money can be used for expert witness, consultant, administrative and legal fees (but not for judicial review or litigation). The availability of the funds for legal fees is an important deviation from the original version of Article X. It will be less than shocking if some attorneys and experts encourage towns and others to jump into the Article X process and take advantage of this intervenor funding.

The board is required to make a final decision on an application based upon the record of the hearing examiners, and must make explicit findings regarding the nature of the probable environmental impacts. Additionally, the board may not grant a certificate unless it determines, among other things: (a) the facility will beneficially add or substitute capacity in the state; (b) the facility serves

the public interest; (c) any adverse environmental impacts will be minimized or avoided to the extent practicable; and (d) the facility complies with all state and local regulations, except for those it has overridden. Judicial review of the board's final decision is available in the Appellate Division.

The law also directs the DEC Commissioner to promulgate rules and regulations targeting reductions in emissions of carbon dioxide that would apply to major electric generating facilities that commence construction after the effective date of the regulations. This provision appears to be the first legislative enactment in New York specifically addressing greenhouse gas emissions.

Environmental Justice. The new law requires applications to include an extensive discussion of environmental justice issues, and a cumulative impact analysis of air quality within a half-mile of the facility, looking at a broad range of air pollutants. Moreover, "if the Board finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community."

The new provisions on cumulative impact analysis, offsets, and enhanced intervenor funding were concessions to the environmental justice community, which has felt that power plants have been disproportionately sited in low-income and minority areas.

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1. The Assembly passed the bill by a vote of 120-14. The Senate passed the bill by a vote of 59-3.

2. Chapter 388 of the Laws of 2011.

3. Other provisions of the new law, not discussed here, provide a mechanism to allow owners of residential and non-residential buildings to borrow money for energy efficiency projects, and pay it back over a period of years through their electric and gas bills; and require a study with respect to increasing solar photovoltaic generation in the state.

4. Department of Public Service, "Article X Cases," March 13, 2007, <http://www.dps.state.ny.us/xtable.pdf>. Extensive information about all of these applications is available at <http://www3.dps.state.ny.us/W/PSCWeb.nsf/All/64C8A03C408086EB85257687006F3ABE?OpenDocument>.

5. See *Transgas Energy Systems, LLC v. New York State Board on Electric Generation Siting and Environment*, 65 AD3d 1247 (2d Dept. 2009), app. den. 2010 NY Slip Op. 60611 (2010).

6. For the saga of the drawn-out process for the siting of the Caithness Long Island Energy Center under SEQRA, see Michael G. Murphy, "Environmental Review of Energy Projects in New York," *Environmental Law in New York*, April 2008 (Part I) and May 2008 (Part II).