



## OUTSIDE COUNSEL

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### *Power-Plant-Siting: Efforts to Amend Article X Fail*

Given the current focus on worldwide climate change, it's no surprise that both Governor Eliot Spitzer's "15 by 15" plan for clean energy and Mayor Michael Bloomberg's PlaNYC 2030 promote increased energy efficiency, demand-side management and green building to reduce the need for power.<sup>1</sup> Both plans, however, also recognize that new power plants will need to be built and old ones replaced with more efficient, cleaner technology ("repowering").

Although both Governor Spitzer and the mayor pledged to work for the passage of a new statewide power plant siting law, i.e., a new Article X of the Public Service Law to replace the one that expired on Jan. 1, 2003,<sup>2</sup> the most recent legislative session closed on June 22, 2007 without action.

This article examines the history of power plant legislation in New York and the competing bills that were debated in the Legislature.

#### **History of Power Plant Siting**

In 1972, even before the Legislature enacted the State Environmental Quality Review Act (SEQRA)—the environmental review process for industrial facilities and major development projects<sup>3</sup>—it determined that a special permitting process was needed for the siting of electric generating facilities. Senate Bill #S.9800-B, as enacted, added new Article VIII to the Public Service Law, establishing a "one-stop" permitting process for electric utilities building new plants.<sup>4</sup> Article VIII gave the newly formed State Board on Electric Generation Siting and the Environment (Board) sole jurisdiction to issue Certificates of Environmental Compatibility and Public Need (Certificate). Although Article VIII called for environmental review of proposed



projects and procedures for public participation, it also allowed the override of local laws and ordinances and limited judicial review by

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requiring exhaustion of administrative remedies and a short 30-day statute of limitations for challenge directly to the Appellate Division. The Article VIII regime continued until the end of 1988.<sup>5</sup>

After the sunset of Article VIII, environmental review of electric generating facilities fell under SEQRA,<sup>6</sup> which in turn gave way to Senate Bill S.4912-A establishing Article X, enacted on June 27, 1992.<sup>7</sup> Article X re-established Article VIII's one-stop siting process but expanded the environmental review and public processes. The most significant changes in Article X related to

the applicability threshold, increased from 50 to 80 megawatts, and the deadline for completion of the hearing process, shortened from 24 to 12 months.

After the U.S. Environmental Protection Agency (EPA) ruled that the Board had no authority under the Clean Air or Clean Water acts to issue permits (under federal law, the permitting authority was delegated by the EPA solely to the state Department of Environmental Conservation (DEC)), Article X was amended in 1999 to authorize the DEC to issue the environmental permits in conjunction with the Board's issuance of the Certificate.<sup>8</sup>

In 2001, in order to encourage repowering, an amendment was passed to reduce the hearing process under Article X to six months for facilities that would replace older, more-polluting units.<sup>9</sup> Two such repowering projects took advantage of the more streamlined process and were certified. Fifteen other project proponents filed applications for new facilities under Article X. In total, 12 projects were certified but only six were built.<sup>10</sup>

#### **Restructuring, Enron, Environmental Justice**

During the 10-year lifespan of Article X, several important changes in the business of producing electricity affected the debate as to whether and how new power plant siting legislation should be enacted.

First, the electric utility industry in New York was being restructured to foster a competitive market. In 1996, the Federal Energy Regulatory Commission (FERC) issued Order No. 888 to promote wholesale competition by allowing open access to transmission and distribution historically controlled by public utilities and to allow recovery of stranded costs.<sup>11</sup>

Several states followed suit with their own restructuring plans.<sup>12</sup> New York State accomplished its restructuring through orders of the Public Service Commission, first in 1996 through a generally applicable opinion allowing market-driven generation, and then in utility-specific orders, the most important

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of which concerned the state's largest utility, Consolidated Edison (ConEd), and ordered, among other things, the divestiture of ConEd's electric generation facilities.<sup>13</sup> This opened up the market to merchant power producers who from 1997-2001 proposed new plants under Article X.

Second, the Enron collapse in 2001 exacerbated the difficulties of private power producers in securing financing for merchant plants. Power producers were able to commence construction on facilities that had already received certificates under Article X only if they had assurances for long-term power purchase agreements or capacity markets. Of the six certified but unbuilt projects, three have been cancelled and three are on hold.

The emergence of an activist environmental justice movement also was a powerful influence on siting decisions, particularly in New York City. Many existing electric generating facilities are located in or near low-income communities or communities of color. Historically, such neighborhoods are adjacent to industrial areas that house a variety of industries and municipal infrastructure. Several community-based organizations in the city coalesced to form Communities United for Responsible Energy (CURE), which became a force in the decision-making process under Article X and SEQRA.

Things came to a head in 2000 during the siting process for ten 50-megawatt units pursued under SEQRA by the New York Power Authority (NYPA). When the Pataki administration decided the units were necessary to meet summer demand in the city,<sup>14</sup> CURE and other community groups commenced litigation against NYPA. The Appellate Division ruled that NYPA must address the emissions of fine particulate matter (PM 2.5) in light of recognized asthma rates in the CURE communities.<sup>15</sup> In 2001, CURE testified before the Assembly Committee on Energy, calling for the overhaul of Article X to address the issues of environmental justice and the cumulative effect of multiple pollution sources.<sup>16</sup> Joined by the New York attorney general and the New York City Bar Association, CURE also acknowledged the importance of a dedicated power plant siting law.<sup>17</sup>

From 2001 through the 2004 legislative session, the Legislature and the governor failed in several attempts to either extend or amend Article X. In January 2004, New York City's Energy Policy Task Force issued a comprehensive report entitled "New York City Energy Policy: An Electricity Resource Road Map," discussing demand and supply issues. The Task Force found that passage of a new Article X was important for encouraging repowering of old units in the city and for meeting future energy needs, and recognized local communities must have a significant role in the siting process. The city has remained

a visible party in the debate over Article X and has tried to unite stakeholders to support passage of a new siting bill.

## 2007 Competing Bills

The effort to draft a new Article X gained momentum this session due to the concern about greenhouse gases and the fact that both New York Independent Systems Operator (NYISO) and the city have predicted the next potential energy shortfall for 2011/2012.<sup>18</sup>

In late April, the governor released to stakeholders his first version of a new Article X, dubbed the "clean economic power supply" bill, which for the first time imposed a greenhouse gas (carbon dioxide) standard.<sup>19</sup> The governor's bill focused on repowering, new gas-fired facilities and wind. It excluded coal, nuclear and waste-to-energy facilities (relegating them to SEQRA and federal rules). It also attempted to address environmental justice concerns more fully and lowered the applicability threshold to 5 megawatts—a significant reduction.

On May 30, the Assembly passed its version of Article X, Bill No. A.8697, while the Senate passed Bill No. S.5908 the following day. The Senate bill was fairly close to the original Article X, though it included some concessions, e.g., a process for smaller plants from 50-80 megawatts and some language on environmental justice. The Assembly lowered the applicability threshold to 30 megawatts, placed the obligation on the DEC to address environmental justice and cumulative impacts, and included the governor's carbon dioxide standard. Generally speaking, the power producers supported the Senate bill and the environmental justice groups supported the Assembly bill, similar to what had happened during past attempts at passing Article X.

On June 19, the governor released a new draft, Program Bill #33 R, as a compromise. The new bill increased the threshold to 30 megawatts (as in the Assembly bill) and included provisions for clean coal with carbon sequestration, less stringent eligibility requirements for repowering, different carbon standards for base load and peak generation, and a "compelling need" standard to address environmental justice. Though the city and several environmental organizations supported the bill, in the end, it did not pass. Among other issues, some power producers did not want restrictions on fuel type and environmental justice advocates wanted clearer emissions offset requirements.

## Conclusion

For those who are "Article X" watchers, this session was another disappointment. Although all sides seem to agree that a dedicated process

for siting is desirable, until further notice, power plant siting will continue to be governed by SEQRA.

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1. Per Governor Spitzer's April 19, 2007 Clean Energy Strategy for New York, energy use would be reduced by 15 percent from forecasted levels by 2015. [http://www.ny.gov/governor/keydocs/0419071\\_speech.html](http://www.ny.gov/governor/keydocs/0419071_speech.html). Mayor Bloomberg's PlaNYC: A Greener, Greater New York, announced April 22, 2007 (Earth Day), establishes a goal of reducing greenhouse gas emissions by 30 percent by 2030 through transportation and energy programs. <http://www.nyc.gov/html/planyc2030/html/home/home.shtml>.

2. Public Service Law, §160 et seq.

3. Governor Hugh Carey first signed SEQRA into law in 1975. Environmental Conservation Law, Article 8, §8-0101 et seq.

4. L. 1972, c. 385, codified as Public Service Law, Article VIII, §140 et seq.

5. Article VIII was amended twice resulting in a final sunset date of Jan. 1, 1989. L. 1978, c. 708; L. 1983, c. 721.

6. Only one power plant was permitted under SEQRA during the period when there was no dedicated siting process in effect, i.e., the 1060 megawatt Sithe (now Dynegy) Independence Power Station near Oswego.

7. L. 1992, c. 519, codified as Public Service Law, Article X, §160 et seq.

8. L. 1999, c. 636. In addition, the amendments increased funding to municipalities and local community groups to participate in the hearing process.

9. L. 2001, c. 222 and c. 464.

10. <http://www.dps.state.ny.us/xtable.pdf>. Judicial challenge under Article has been scarce. See *Citizens for Hudson Valley v. New York State Bd. on Elec. Generation Siting and Environment*, 281 AD2d 89 (2001) (record found to support issuance of certificate); *New York Institute of Legal Research v. New York State Bd. on Elec. Generation Siting and Environment*, 295 A.D.2d 517 (2002) (petitioner's failure to exhaust administrative remedies properly warrants dismissal).

11. FERC Order No. 888, 61 FR 21540 (May 10, 1996).

12. E.g., Mass. G. L. c. 164 (1997).

13. Case No. 94-E-0952, Opinion No. 96-12 (May 20, 1996); Case No. 96-E-0897, Opinion No. 97-16 (Nov. 3, 1997) (the latter is the first of many opinions regarding the restructuring of Consolidated Edison).

14. New York City suffers from significant transmission constraints and NYISO has determined that 80 percent of the city's electricity must be generated in-city, i.e., approximately 9500 megawatts.

15. *UPROSE v. New York Power Authority*, 285 AD2d 603 (2001) ("In light of the undisputed potential adverse health effects that can result from PM 2.5 emissions, we conclude that NYPA failed to take the requisite '[h]ard look[]' at the area of environmental concern"). Article X was determined not to apply to NYPA because the units were each capped to operate below the 80-megawatt threshold. See Theodore L. Garrett, "Ambitious Environmental and Energy Goal Collide in New York," Washington Legal Foundation Opinion Letter, Vol. 12, No. 3 (Feb. 8, 2002).

16. CURE's Testimony Presented to Assembly Committee on Energy, June 6, 2001.

17. "Attorney General's Action Plan for a Balanced Electric Power Policy in New York State" (March 20, 2001). On May 29, 2001, the New York City Bar Association Committees on Energy, Environment, Project Finance, and Land Use and Zoning sponsored a roundtable to discuss Article X, which led to a formal letter to the governor and Legislature urging re-enactment.

18. NYISO, 2007 Power Trends, [http://www.nyiso.com/public/webdocs/newsroom/whats\\_new/nyiso\\_ptrends07\\_final.pdf](http://www.nyiso.com/public/webdocs/newsroom/whats_new/nyiso_ptrends07_final.pdf); Press Release, New York City Economic Development Corporation (June 26, 2006), <http://www.nycedc.com/Web/PressRoom/PressReleases/EnergyReport2006.htm>.

19. A later version of the bill was introduced as Assembly Bill #A.9001 on June 7.