

Article 10 – A Revised Process for Siting of Major Electric Generating Facilities in New York State

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by

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What is Article 10?

Article 10 (also known as Article X) is part of the New York State Public Service Law, §160 - §173, and it provides for the siting of major electric generating facilities. A major electric generating facility is defined as having a ***nameplate capacity*** of 25 MW (***megawatts***) or greater per year. The law also applies to existing major electric generating facilities that are proposing to increase capacity by more than 25 MW. Examples of major electric generating facilities include but are not limited to fossil-fueled power plants, hydroelectric projects, and wind energy farms.

What are the purposes of this paper?

- To summarize how the revised Article 10 siting process will operate in NYS and provide sources of information for understanding the process in more detail. A glossary of select terms, which are bold and in italics, has been included at the end of the paper.
- To respond to local concerns and identify how the changes to Article 10 apply to local governments' authority to regulate larger facilities and what the potential effects of these changes may be
- To focus on wind generation facilities, while keeping in mind that Article 10 pertains to several types of electricity generating plants
- To emphasize the importance of local comprehensive planning, especially its role in helping a municipality consider regulatory options for wind generation facilities that are subject to Article 10, as well as for smaller facilities falling below the Article 10 threshold

When was Article 10 revised and why is this important?

Article 10 (also known as the Power NY Act) was signed into law in 2011. The revision places the siting authority in the control of the ***Siting Board*** (Board on the Electric Generating Siting and the Environment), which consists of five members from state government agencies and two ad-hoc members from the locality in which a facility is being proposed. Prior to the enactment of the revised Article 10 in 2011, and following the expiration of an earlier version of Article 10 in 2003, the siting of large facilities was subject to any regulations of the local municipality, as well to the SEQR (State Environmental Quality Review) regulations. The shift of approval authority from local governments back to the state is a significant aspect of Article 10, and it has raised concern among local governments and supporters of "home rule." Also significant is that the generating capacity of a proposed facility that is subject to Article 10 has been reduced from the previous 80 MW to 25 MW.

How large is a 25 MW wind facility?

While wind speed and the size of the turbines are important variables that will influence the size of a wind farm, one can get a sense of size by considering the details of the Fenner Wind Farm in Madison County. Each turbine has a generating capacity of 1.5 MW and, from the ground to the center of the hub, is 213 feet. From the ground to the tip of the upper vertical blade, the turbines are 328 feet. With a

designed total capacity of 30 MW, 20 turbines were originally installed in an area that measures about 1.5 miles wide by 2.5 miles long.¹ A wind farm with seventeen such turbines would trigger Article 10.

By contrast, the largest turbines being manufactured currently have a rotor diameter of 413 feet and are rated at 6.15 MW each. Although it is not likely that wind farms in central New York would have such large turbines, it would require only five of these turbines for the facility to be subject to Article 10.

How does the siting process work under Article 10?

The siting process entails numerous requirements that must be met by the applicant, as well a series of standards that must be applied by the Siting Board. The process is detailed in the law and is outlined in a slide presentation posted on the State Siting Board website.²

There are five phases to the siting process: Pre-application; Application; Administrative Hearings; Siting Board Decision; and Compliance. The process includes extensive public participation and notification requirements and is designed to engage the public at the earliest stages and throughout the review process. A Public Involvement Program Plan must summarize activities to educate, inform and involve the public and be submitted by the applicant 150 days before filing the Preliminary Scoping Document. The applicant must pay a fee to fund a pre-application intervenor account. Half of these funds are to be available for municipal parties and half for local parties to hire expert witnesses, consultants, or lawyers. These intervenor efforts will contribute to a complete record.

Under the Pre-application Phase, the applicant must submit a Preliminary Scoping Statement to the Siting Board, describing:

- Proposed facility and environmental setting
- Potential significant and adverse environmental and health impacts
- Proposed studies to evaluate potential impacts, including for wind facilities, pre-and post-construction studies monitoring the potential impacts to avian and bat species
- Measures to avoid or mitigate adverse impacts
- Reasonable alternatives
- State and Federal requirements
- Other required information

Many of the areas of potential impact mentioned above must be further analyzed by the applicant under the Application Phase.

During the Siting Board Decision Phase, the Siting Board must make explicit *findings* about the nature of the environmental impacts related to construction and operation of the facility and related facilities (electric and gas lines, water supply lines, waste disposal, communications and transportation) on:

- Statewide electrical capacity
- Ecology, air, ground and surface water, wildlife, and habitat
- Public health and safety
- Cultural, historical and recreational resources; transportation, communication, utilities, etc.
- Cumulative impact of emissions on the local community according to *Environmental Justice* regulations

The Siting Board must also determine that:

- The facility is a “beneficial addition to or substitute for” generation capacity

- Construction and operation are in the public interest
- Adverse environmental effects will be minimized or avoided
- Impacts on Environmental Justice communities will be avoided, offset or minimized “using verifiable measures”
- It is in compliance with state laws and regulations and in compliance with, or override of, unreasonably restrictive local laws and regulations.

In determining the above factors, the board must also consider:

- The state of available technology
- The nature and economics of reasonable alternatives
- The environmental impacts identified
- The impact of construction and operation of related facilities
- The consistency of the construction and operation of the facility with policies and strategies of the state energy plan
- The impact on **community character** and whether the facility would affect communities that are disproportionately impacted by cumulative levels of pollutants

What effect does Article 10 have on municipal home rule?

Although NYS Municipal Home Rule Law affords local governments broad authority to regulate their own affairs, including the option to prohibit most types land uses through zoning, there are several instances where state law either partially or totally preempts this local government authority. Reasons for state preemption of local home rule authority include “matters of state concern”.³ New York State’s electricity generation goals, including those from alternative sources such as wind, may be considered a matter of state concern. New York has set a “30 x 15” goal, meaning the state seeks to have 30 percent electricity from renewable sources by 2015.⁴ The siting of large power plants in New York has been difficult at times, and success rates of facility siting with and without Article 10 in place have been compared.⁵ As noted on the State Siting Board website, Article 10 provides a siting process “in a unified proceeding instead of requiring a developer or owner of such a facility to apply for numerous state and local permits.” This has also been referred to as “one-stop shopping” and has been a goal of earlier versions of Article 10.⁶ Restrictive local zoning or uncertain outcomes resulting from other local regulations can be viewed as inconsistent with this policy.

The extent of preemption under Article 10 is broad. Under § 172, Powers of Municipalities and State Agencies, the law clearly states that “Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may, except as expressly authorized under this article by the board, require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility with respect to which an application for a certificate hereunder has been filed...” It is clear that authority to issue approvals (or authorize other permits) is retained by the Siting Board. Less precise is the role of local regulations in the siting process. Standards are applied by the Siting Board who then exercises some discretion in deciding the extent of applicability of a local law to the proposed facility.

“Unreasonably Burdensome” and Substantive vs. Procedural Requirements

Before issuing a certificate of construction or operation of a major electric generating facility the Siting Board must determine that a host of requirements are met, including [*emphasis added*] :

§168. (e) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, including, but not limited to, those relating to the interconnection to and use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way, which would be otherwise applicable if it finds that, as applied to the proposed facility, such is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

This “unreasonably burdensome” clause has generated much speculation and a good many questions. The language is clear in that the board cannot dismiss outright a local law, as some have claimed. It is also important to know that the Siting Board is to apply the local law unless it is found to be unreasonably burdensome, as defined above; however, the difference between procedural and substantive requirements of a local law is factored into the process. Examples of procedural requirements in a local law could include a time-limit for a step in the review process or a public hearing, while a setback or a height limit in a zoning law would be a substantive requirement.

In the Memorandum and Resolution Adopting Article 10 there is a Discussion and Analysis of Comments that provides replies to comments from parties who commented on the law during the review period. The commentary explains “substantive” and “procedural” in connection with the Siting Board’s review, the unreasonably burdensome standard, and home rule.

As a general matter, PSL § 172(1) supplants all local procedural requirements applicable to the construction or operation of a proposed major electric generating facility (including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under Article VII of the PSL) unless the Board expressly authorizes the exercise of the procedural requirement by the local government. The default is that the local procedural requirement is supplanted and the Siting Board does not need to take any action or adopt any findings for that to happen. PSL § 172(1) also supplants all local procedural requirements applicable to the interconnection to or use of water, electric, sewer, telecommunication, fuel and steam lines in public rights of way that the Siting Board elects not to apply, in whole or in part, pursuant to PSL §168(3)(e). The default is that the local procedural requirement is not supplanted unless the Siting Board elects to not apply it by finding that, as applied to the proposed facility, the requirement is “unreasonably burdensome” in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. Therefore, Article 10 is a general law not subject to the home rule prohibitions. Article 10 and the proposed implementing regulations are not in conflict with the New York State Constitution or the home rule powers granted to New York local governments.

PSL § 172(1), however, does not supplant any local substantive requirements applicable to the construction or operation of a proposed major electric generating facility (includes interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under Article VII of the PSL). Pursuant to PSL §168(3)(e), the Siting Board must find that the facility is designed to operate in compliance with all local substantive requirements, all of which shall be binding upon the applicant, unless the Siting Board elects to not apply them. The

default is that the local substantive requirement is not supplanted unless the Siting Board elects to not apply it by finding that, as applied to the proposed facility, the requirement is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. In other words, unless the Siting Board finds a local ordinance to be unreasonably burdensome, the Siting Board itself applies the ordinance.⁷

The question remains: what is unreasonably burdensome? The basic answer is that this is not known with any specificity because no applications have advanced far enough in the siting process under the revised Article 10. The Memorandum addresses comments focused on how the board might apply the standard. On page 78, we are reminded that the statute requires that local governments be afforded the opportunity to defend their laws. Such a defense will typically involve a showing of the rationale for the law; therefore it is difficult to know how the standard might be applied without this testimony. The memo also mentions how the local members of the Siting Board, which will vary with location, will likely further contribute to variation between individual cases. The memo goes on to make some “generic observations,” touching upon setbacks and noise and reinforcing the case-by-case nature of applying “unreasonably burdensome.”⁸

As proposals involving local regulations come before the Siting Board, the meaning of “unreasonably burdensome” will begin to take shape. And over time, application of this standard is likely to be precedent-building. Challenges and case law may further influence the nature of the clause and provide direction in its application.

While local governments should keep an eye on projects that come before the board, they would also be well served to pursue a strategy of readiness. Such a strategy invariably leads to a discussion on the importance of municipal planning, which is critical in deciding what’s best for a particular community.

What is a comprehensive plan and why is it important?

A municipal comprehensive plan (also known as a master plan) is an expression of a community’s vision and it charts a course for the future of the community in many different areas – e.g. land use, transportation, energy, economic development, historic preservation, etc. As defined in the NYS Statutes, “‘town comprehensive plan’ means the materials, written and/or graphic, including but not limited to maps, charts, studies, resolutions, reports and other descriptive material that identify the goals, objectives, principles, guidelines, policies, standards, devices and instruments for the immediate and long-range protection, enhancement, growth and development of the town...” - Town Law §272-a

Comprehensive plans often identify and express those characteristics that make a community special then outline steps to preserve that character and balance it with changes over time. A good comprehensive plan will involve the public; the more people become involved, the more the plan is likely to be a truer expression of the community. A comprehensive plan is not required by law, yet it is encouraged. A comprehensive plan should be a policy document, putting forth guidance yet not detailing the finer points that may be involved in a grant application or the adoption of a local law, both of which are tools that can help carry out the plan’s goals.

Among the benefits of a good comprehensive plan are increased chances for funding under public grant programs, especially when the subject of the funding application is an objective in the plan. A comprehensive plan also enhances predictability. For example, a public agency considering a large project, such as a highway, will consult the plan and gain a better understanding about which areas are

more sensitive, what resources – visual, aesthetic, historic – are highly valued, and where the highway may have lesser impacts. These are important points with regard to Article 10 since the siting of large facilities falls under the purview of the Siting Board but is influenced by the local community.

A comprehensive plan provides the connective tissue between the vision of the community and the means for achieving that vision. It forms the basis for land use regulations, which often help implement the plan. If a local land use law is challenged in terms of its intent, a court will examine the relationship between the law and the comprehensive plan. And this relationship will vary depending on the community. A comprehensive plan could encourage or discourage wind energy facilities, and regulations can be developed to articulate those goals.

Together, a well conceived comprehensive plan and land use regulations will not only help a community achieve its vision, but will communicate a municipality's intentions. This indicates readiness, and not just for large wind energy proposals, but across the board. For entrepreneurs hoping to open a business, for families looking to relocate, for those interested in historic preservation or recreation, for longtime residents thinking of the future – all of these parties and more may benefit from a comprehensive plan and any regulations that may be in place. And should the municipality ever need to defend its law before the Siting Board, a sound comprehensive plan can lend assurance in addressing the unreasonably burdensome standard, even though there is no guarantee that a local law will be applied, in whole or in part. A municipality's defense before the board may very well walk a fine line between a law being construed as "unreasonably burdensome" or being understood as a vital means in protecting cherished resources that are of local or regional significance.

What are the local regulatory options for wind energy facilities that fall under the threshold set in Article 10?

For electrical generating facilities falling below the 25 MW threshold, a municipality's home rule is not preempted by Article 10. That is to say, a municipality may choose to restrict or prohibit proposed facilities under zoning, review facilities under Site Plan Review (which can be adopted in a municipality with or without zoning), address noise and lighting impacts under a local law, or choose not to adopt regulations addressing such facilities. And, despite the known threshold triggering the applicability of Article 10, municipalities should not hesitate in considering regulations for the large electric generating facilities that are above the 25 MW threshold.

Before adopting or amending land use regulations, a municipality may chose to adopt a moratorium. A moratorium is a stop-gap measure putting a hold on an identified land use (or uses) while the municipality considers the development of regulations and/or the adoption or amendment of a comprehensive plan.⁹

What is the relationship between SEQRA and Article 10?

Actions requiring a certificate of environmental compatibility and public need under Article 10 of the Public Law are classified as Type II actions under SEQRA. Type II actions are, by regulation, those actions which never require further SEQR review (see NYCRR §617.5 (c) (35)). In place of SEQRA, Article 10 includes numerous environmental impact provisions, as outlined above and detailed in the text of the law.

For clarification, there was a period of time when Article 10 was not in effect, as mentioned above. During this period, the SEQRA regulations applied to the siting of large electricity generation facilities. Additionally, following the adoption of the Article 10 in 2011, there was a one-year period given to allow

the DEC and the Siting Board to adopt certain rules and regulations. During this period, SEQRA (and any applicable local or state laws) applied to the siting of large electricity generation facilities, even though a project developer could elect to become subject to the requirements of Article 10.¹⁰

Where can I find more information about municipal regulatory options for wind energy facilities?

There are many helpful resources. The NYS Department of State (DOS), Division of Local Government, has developed a training program on local wind energy regulation.¹¹ Department of State staff presentations are typically coordinated with county planning departments. Additionally, in Otsego County, the OCCA Environmental Planner can present this course material. Local governments and other interested parties can contact OCCA to learn more about training on this and other land use topics. Training programs can help members of planning boards and zoning boards of appeal obtain required hours under New York State law. A separate presentation focused on the new siting process is available through the Siting Board website and was presented in Otsego County by DOS in March 2013.

Beyond the overview provided through a training program, local governments will often need specifics on drafting a local law. The DOS, being the repository for local laws filed in New York State, can provide sample local laws.¹²

Drawing a distinction between a *sample* and a *model* local law is helpful here. A sample local law is an actual local law that has been adopted by a specific municipality and is therefore illustrative of features and approaches that another municipality *could* take in its regulation. It's important to realize that what works for one community does not automatically work for another; however, the specifics and variations found among sample local laws serve as a sort of menu of options for municipalities to consider as they draft their own local law. Elements of sample local laws often work well when they are considered along with model local laws, which typically include baseline components and do not get into the level of detail that tailors a law to a specific locality. Some model laws parenthetically expand upon the various regulatory options available to a municipality by offering guidance.

Another source for sample local laws, in electronic format, is the Pace University Land Use Law Center.¹³ The Columbia Law School, Center for Climate Change Law offers an online model law, as well as several related resources.¹⁴ The American Wind Energy Association has created a matrix for wind laws in New York. This resource contains both models and samples and highlights the major components of each law.¹⁵

The wide range of differences among all of these examples reinforces the variability in municipal preferences. In addition to basing a local wind law on the comprehensive plan, a municipal attorney should be consulted when drafting local laws.

Conclusion

Article 10 attempts to strike a balance by providing a framework for meeting the state's electric generating needs while incorporating local involvement in the siting process. While the finer details of this balance –the extent of applicability of local regulations to an actual proposal – have not yet unfolded, municipalities retain their authority to both express their visions through comprehensive planning and articulate their desired land use pattern through the adoption of zoning laws. Variation in the exercise of this authority will continue to create a mix in the regulatory landscape across the state, and it will likely contribute to initial siting considerations for prospective large facilities. Wind energy developers may look to municipalities who encourage, or at least do not prohibit, large facilities. In instances where projects are proposed in municipalities or zoning districts that prohibit the use, the

absoluteness of home rule is not guaranteed. Nevertheless, with two ad hoc members on the Siting Board and an opportunity to defend a local law during the siting process, the incorporation of local government concerns under Article 10 is an incentive for municipalities to be proactive and prepared through planning.

Glossary

Nameplate capacity Also known as the rated capacity, nominal capacity, installed capacity or maximum effect, nameplate capacity refers to the intended technical full-load sustained output of a facility such as a power plant, a chemical plant, fuel plant, metal refinery, mine, and many others. (Wikipedia)

Siting Board The Siting Board is a governmental entity of New York State organized within the New York State Department of Public Service. The Siting Board was established primarily to review applications and to issue or deny certificates authorizing the construction and operation of major electric generating facilities. When the Siting Board is reviewing an original application for a certificate, it consists of five permanent members and two ad hoc public members. The five permanent members of the Siting Board also have additional responsibilities to promulgate regulations for the implementation of Article 10, and they have jurisdiction with respect to the amendment, suspension or revocation of a certificate. (www.dps.gov)

Megawatt A watt is a unit of power that measures the rate of energy conversion or transfer; a megawatt is a measure of power equal to one million watts.

Findings are an analysis which applies law to facts, leading to conclusions. (NYSDOS)

Environmental justice The United States Environmental Protection Agency defines Environmental justice (EJ) as “the fair treatment and meaningful involvement of all people regardless of race, color, sex, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.” (Wikipedia)

Community Character The image of a community or area as defined by such things as its built environment, natural features and open space elements, type of housing, architectural style, infrastructure, and the type and quality of public facilities and services. (NYSDEC Draft Workbook for Full Environmental Assessment Form)

¹ www.madisoncountyaagriculture.com/altenergy/FennerProjectinfosheet1.pdf

² (2) www.dps.ny.gov/SitingBoard (under Public Presentations). The website also offers numerous resources for the Article 10 siting process, including links for Siting Board Members, Article 10 Law, Article 10 Regulations, Siting Board Guides, Projects Under Review, Frequently Asked Questions, Siting Board Forms, Agendas and Calendars, Siting Board Webcasts, Public Information Coordinator, Press Releases, Public Notices, Public Presentations, and Expired Article X.

³ www.nyslocalgov.org/pdf/Strengthening_Home_Rule.pdf

⁴ New York State Department of State. Wind Energy Regulation Land Use Training Program.

⁵ Garofano, Eric. 2011. Losing Power: Siting Power Plants in New York State www.albanygovernmentlawreview.org/files/6_Garofano.pdf

⁶ Ibid.

⁷ Memorandum and Resolution Adopting Article 10 Regulations. State of New York Board on Electric Generation Siting and the Environment. July 17, 2012. Page 75-76.

<http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId=%7B99668DF4-4A1B-4E59-97A8-6AF6B9614521%7D>

⁸ Ibid. Page 78.

⁹ See Land Use Moratoria. NYSDOS. www.dos.ny.gov/lg/publications/Land_Use_Moratoria.pdf

¹⁰ New York State Legislature Passes Article 10 Legislation Reestablishing Comprehensive Statewide Process for Siting Electric Generating Facilities. Klimberg, Stanley. Ruskin, Moscou, and Faltischek, P.C. <http://rmfpc.com/new-york-state-legislature-passes-article-10-legislation-reestablishing-comprehensive-statewide-process-for-siting-electric-generating-facilities>

¹¹ This presentation is posted on the Genesee/ Finger Lakes Regional Planning Council's website: <http://www.gflrpc.org/ProgramAreas/AdditionalServices/Workshops/Spring2010/Presentations/A3WindEnergy.pdf>

¹² The Department of State, Division of Local Government, can be contacted at (518) 473-3355.

¹³ From the homepage, www.law.pace.edu/landuse, sample wind laws can be viewed by choosing "Gaining Ground Database" then conducting a topic search for "Wind Energy".

¹⁴ <http://web.law.columbia.edu/climate-change/resources/model-ordinances/model-municipal-wind-siting-ordinance>

¹⁵ www.awea.org/learnabout/smallwind/upload/Wind-Ordinances-by-State-NY.pdf

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