



NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

## DEC's Role in Article 10 Proceedings *versus SEQR*

### Comparison of Stages of Article 10 versus SEQR/UPA

State Environmental Quality Review Act (SEQR)	Article 10 of the Public Service Law
Identification of involved agencies and lead agency determination when there is more than one involved agency (DEC or municipal agency) (6 NYCRR 617.6)	Siting Board serves the same function as lead agency with substantial DEC involvement as a statutory party.
Parties: Lead and involved agencies and if there is a DEC Part 624 adjudicatory hearing.	DEC is a statutory party as set out above. Other statutory parties, including the host local government, are set out in section 166.



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## Stages of Article 10 versus SEQR

SEQR	Article 10
Multiple agency approvals: SEQR emphasizes coordination among involved agencies.	Local governments are preempted from requiring local approvals (PSL 172). The same applies to state agencies except DEC (see below) for Federally delegated or authorized activities and water withdrawal permits under Article 15. Substantive law of local governments applies except if over-ridden.



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## Stages of Article 10 versus SEQR

SEQR	Article 10
Determination of significance under SEQR .	No parallel under Article 10. Implicitly, all applications are considered potentially significant. ALJ determines issues for hearing. More relaxed standard than in UPA.
Completeness determination under Uniform Procedures Act for DEC permits along with adequacy determination for draft EIS	See PSL section 165. Chair of the Board has 60 days to determine completeness after filing of the application.
Scoping (6 NYCRR 617.8) is optional under SEQR though DEC has proposed to make it mandatory. Scoping under SEQR requires opportunities for public participation. No intervener funds.	Mandatory under PSL section 163. Scoping under PSL 163 requires public outreach and opportunities for public participation. Intervener funds would be available.



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## Stages of Article 10 versus SEQR

SEQR	Article 10
30 day public comment period but hearings are optional and typically legislative (6 NYCRR 617.9[a][4]); Hearings are adjudicatory if UPA permits are involved and substantive and significant issues are raised.	Legislative and adjudicatory type hearings. PSL section 167
Findings (6 NYCRR 617.11)	PSL section 168. Similar language to SEQR findings needs analysis. EJ findings. Consistency with the State Energy Plan.
Time frames under SEQR are directory. Final EIS is supposed to be accepted 45 days after close of the hearing. No overall time frame.	Over all time frame of 12 months with extension possible for another 6 months. PSL section 165.



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## Stages of Article 10 versus SEQR

SEQR	Article 10
Public participation is highly encouraged but not supported with funding; public participation occurs in SEQR is through scoping, public comment period on the DEIS and public hearings. No intervenor funds.	Initial outreach under PSL, scoping stage and through the hearing process. Availability of intervenor funds to support public participation.



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## **DEC'S FEDERAL PERMIT AUTHORITY**

- No preemption of Federal permit requirements
- In NYS, DEC is the only agency with federally recognized authority to issue environmental permits (Air, Water, RCRA) Under PSL 172, DEC's authority is not preempted but coordination through the PSL process.



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## **DEC's Federal Permit Authority continued**

- DEC shall provide such permits to the Siting Board prior to the Siting Board's determination on whether or not to issue a certificate.
- The issuance by DEC of such permits shall in no way interfere with the required review by the Siting Board of the anticipated impacts, or its authority to deny an application for certification, and, in the event of such a denial, any such permits shall be deemed null and void.



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## Power NY Act ECL Provisions

- The Power NY Act of 2011, which established PSL Article 10, also added a new ECL provision
- ECL Section 19-0312 required DEC to promulgate regulations targeting CO<sub>2</sub> emissions from certain power plants
- Pursuant to this requirement, DEC adopted 6 NYCRR Part 251, CO<sub>2</sub> Performance Standards for Major Electric Generating Facilities



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## DEC CO<sub>2</sub> Standards

- Applicable to new power plants with a capacity of at least 25 MW, and increases in capacity of at least 25 MW at existing plants
- Primary CO<sub>2</sub> emission limit for most base load fossil fuel plants of 925 lbs/MWhr
- Can be met by new natural gas combined cycle plants
- 1450 lbs/MWhr limit for simple cycle combustion turbines (typically peaking units)
- Case-specific CO<sub>2</sub> emission limit for certain non-fossil fuel plants



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## Environmental Justice Analysis

- Power NY Act requires EJ analysis (PSL section 164):
- The application requires an evaluation of significant and adverse disproportionate environmental impacts of the proposed facility, if any, resulting from its construction and operation, including any studies identifying the author and dates thereof, which were used in the evaluation. See <http://www.dec.ny.gov/public/333.html>



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## EJ Flow Chart

- See <http://www.dec.ny.gov/public/333.html>



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## Wind, Bird and Avian Studies (PSL section 164)

- For wind-powered facilities, the expected environmental impacts of the facility on avian and bat species based on pre-construction studies and a proposed plan to avoid or, where unavoidable, minimize and mitigate any such impacts during construction and operation of the facility based on existing information and results of post-construction monitoring proposed in the plan.



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## Role of DEC Associate Examiner

- The conclusions and recommendations of the associate examiner shall be incorporated in the recommended decision of the presiding examiner, unless the associate examiner prefers to submit a separate report.
- In the event that the DEC issues permits pursuant to federally delegated or approved authority the record in the proceeding and the associate examiner's conclusions shall provide the basis for the decision of the DEC on whether or not to issue such permits.



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## Recommended Reading

- Paul Agresta, *Article 10 and the Siting of Major Electric Generating Facilities in New York State*, NYSBA Government, Law and Policy Journal, Volume 15, No. 1 (Summer 2013)
- G.S. Peter Bergen, *It's Time to Repeal Article X*, 6 Albany Law Envtl Outlook 11 (Fall 2001)



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