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New York's One-Stop Power Facility Siting Process Has Arrived

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New York's "one-stop" approval process for new power generation facilities has finally arrived. Last August, Governor Cuomo signed the "Power NY Act" into law which in part created Article 10 of the New York State Public Service Law ("PSL") thereby establishing a streamlined process for the siting of electric generation facilities of at least 25 megawatts. Before the new law took effect, Article 10 required the New York State Board on Electric Generation Siting and the Environment ("Board") and the New York State Department of Environmental Conservation ("NYSDEC") to promulgate regulations implementing Article 10. Both agencies recently promulgated the requisite regulations, and developers will now be able to take advantage of Article 10's streamlined licensing process - a change from the current process of having to deal with various state and local laws to obtain required permits.

The "One-Stop" Siting Process

Article 10 establishes and vests power in the Board, consisting of five state agency officials and two ad hoc members who reside in the community in which the proposed facility is to be located. Developers must obtain a Certificate of Environmental Compatibility and Public Need ("CECPN") from the Board before any construction of a major electric generating facility can begin. The Legislature enacted Article 10 "to ensure that state and local regulatory certification regarding the construction and operation of major electric generating facilities would be determined in a unified manner."

The "one-stop" nature of the new process is strengthened by the fact that no other state agency or municipality may require any approval, consent, permit, certificate, or other condition for the construction or operation of a major electric generating facility that is subject to Article 10. The Board also has the power to exempt proposed facilities subject to Article 10 from local laws and ordinances if the Board finds that the local law or ordinance is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers.

Additional details regarding the new Article 10 statute are contained in Cullen and Dykman's September 2011 client advisory entitled New NYS Article 10 Powerplant Siting Statute.

The Board's Article 10 Regulations

On July 17, 2012, by Memorandum and Resolution, the Board promulgated new regulations to implement Article 10. The regulations establish the procedures for applications for CECPNs and other matters affecting the construction and operation of major electric generating facilities pursuant to Article 10. The Board's regulations replace Parts 1000 through 1003 of Title 16 of the New York Codes, Rules and Regulations ("NYCRR") with new Parts 1000 through 1002. The regulations became effective on August 1, 2012.

Part 1000 addresses the general procedures for complying with Article 10 and includes sections concerning public involvement (1000.4); the pre-application procedure (1000.5); application filing and service (1000.6); publication and content of notices (1000.7); water quality and coastal certifications (1000.8); the fund for municipal and local party intervenors (1000.10); evidence and proof (1000.12); and other factors related to applications and CECPNs (1000.13-1000.17).

Part 1001 details the application content and lists forty-one potential exhibits to a CECPN application (1001.2-1001.41). Applicants must submit all exhibits that are relevant to the proposed major electric generating facility technology and site.

Part 1002 sets forth the compliance filings designed to ensure that the applicant complies with the terms, conditions, limitations, or modifications of the construction and operation of the proposed facility. (1002.1-1002.3). Part 1002 also addresses reporting and inspections of major electric generating facilities (1002.4).

Summarized below are select sections of the Board's regulations that may be of more interest to developers or others participating in an Article 10 proceeding.

- *Definitions of Revisions and Modifications*. Certain changes to an application or CECPN that will likely result in a significant increase in the environmental impact of the facility or a substantial change in the location of all or a portion of such a facility as determined by the Board (not including the shifting of a wind turbine, access road or electric collector line to a new location within a 500 foot radius of the original location), could trigger substantial additional scrutiny and fees if deemed a "revision" under Section 1000.2(AK), rather than a "modification" under section 1000.2(x).
- *Public Involvement Program (PIP) Plan*. Section 1000.4(d) requires applicants to submit a PIP plan at least 150 days before submitting the preliminary scoping statement. The plan must "indicate the steps the applicant commits to take to inform, engage, and solicit input from the local community, general public, and other stakeholders, including a schedule indicating when the steps will be taken."
- *Pre-Application Procedures*. At least 90 days before the application is filed, the applicant must file a preliminary scoping statement with the Board. The preliminary scoping statement must include a description of the proposed facility, the range of potential environmental and health impacts of the construction and operation of the facility and of each pollutant that will be emitted or discharged by the facility, the application and review process, the amount of pre-application funds available for municipal and local parties, and a designated contact person from whom information will be available. (Section 1000.5)
- *Fund for Municipal and Local Parties*. Section 1000.10 provides that each pre-application preliminary scoping statement shall be accompanied by an intervenor fee in an amount equal to $350 for every 1,000 kilowatts of generating a capacity of the subject facility, but no more than $200,000. If the pre-application preliminary scoping statement is substantially modified or revised subsequent to its filing, the Board may require an additional pre-application intervenor fee in an amount not to exceed $25,000. Each application shall be accompanied by an intervenor fee in an amount: i) equal to $1,000 for each 1,000 kilowatts of capacity, but no more than $400,000, and ii) for facilities that will require storage or disposal of fuel waste byproduct, an additional intervenor fee of $500 for each 1,000 kilowatts of capacity, but no more than an

additional $50,000, shall be deposited in the intervenor account. Revisions to an application will require substantial additional scrutiny and the applicant must submit an additional intervenor fee in the amount equal to $1,000 for every 1,000 kilowatts of capacity, but no more than $75,000.

- *Evidence and Proof*. Section 1000.12 states that "all issues to be litigated must be relevant" and "all evidence submitted must be relevant and material." Issues and evidence are relevant if they assist the Board in making its required findings. Evidence is material if it has reasonable potential to affect the outcome of the Board's findings or determination. The applicant has the burden of proof to demonstrate that all findings and determinations required by Section 168 of the PSL can be made by the Board. "Whenever factual matters are involved, the party bearing the burden of proof must sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation."
- *Alternatives*. Each application must identify and describe alternate location sites for the proposed facility. For each alternative location identified, the application must include an evaluation of the comparative advantages and disadvantages of the proposed and alternative locations. (Section 1001.9)
- *Preliminary Design Drawings*. Section 1001.11 requires applications to include "preliminary design drawings" prepared by a state-licensed design professional. All drawings are to be drawn using computer graphics or computer-aided design software.
- *Disclosure of Capital Costs*. Section 1001.14 requires applicants to provide "a detailed estimate of the total capital costs of the proposed facility, including a separately stated estimate for each interconnection, broken down in a rational manner by the applicant into major cost components appropriate to the facility." Supporting work papers must also be submitted upon request. If the required information qualifies for confidential treatment, the regulations provide a process for determining trade secret status and for limiting public disclosure.
- *Safety and Security*. Sections 1001.18(a) - (c) require site security and safety response plans as part of the certification process. Section 1001.18(d) requires applicants to ask the New York State Division of Homeland Security and Emergency Services to review such plans.
- *Water Resources and Aquatic Ecology*. Section 1001.23 requires detailed groundwater analysis and stormwater plans.
- *Local Laws and Ordinances*. Section 1001.31(e) requires that applicants, before asking the Board to not apply an unreasonably burdensome local law, show either that it is technically impractical or that its costs to consumers outweigh its benefits.

NYSDEC's Article 10 Regulations

NYSDEC also recently promulgated two regulations required under Article 10 that became effective July 12, 2012. The first (6 NYCRR Part 251), establishes carbon dioxide emission limits for new major electric generating facilities with a nameplate capacity of 25 MW or more and for existing facilities that increase capacity 25 MW or more. For existing facilities, the rule would apply only to the capacity increase, and not to the entire facility.

The following emission rate limits are required by the proposed rule:

- For boilers permitted to burn greater than 70% fossil fuel; combined cycle turbines; and internal combustion engines that fire only gas: 925 lb CO_2 /MW or 120 lb CO_2 /MMBtu;
- For simple cycle combustion turbines and stationary internal combustion engines that fire liquid fuel or liquid and gaseous fuel: 1450 lb CO_2 /MW or 160 lb/MMBtu;
- For other emission sources, including waste-to-energy and biomass facilities, the owner or operator of the facility must propose and meet an NYSDEC-approved case-specific emission limit for CO_2.

The CO_2 emission rate limits are measured on a 12-month rolling average basis and can be met by a facility using either an output based limit (MW generated) or an input based limit (annual Btu input).

The second rule (6 NYCRR Part 487), establishes procedures for conducting the requisite environmental justice ("EJ") reviews for the siting of major energy projects. The regulations are intended to enhance public participation and review of environmental impacts of proposed major electric generating facilities upon EJ communities and reduce disproportionate environmental impacts in overburdened communities.

Section 487.6 sets forth the general requirements and procedures for completing an EJ analysis. The applicant must initiate its EJ analysis as early as practicable in the pre-application process. "If an EJ area is present within the impact study area for the proposed facility, the applicant must include in its preliminary scoping statement preliminary information about its proposed EJ analysis, including as much information as is reasonably available, similar in detail to the preliminary information the applicant is required to provide generally for its environmental impact assessment. If an EJ area is present within the impact study area of any reasonable and available alternate location identified by the applicant, the applicant must also include preliminary information about its proposed EJ analysis for the alternate location."

Section 487.6 also outlines the items that the applicant must include in its final EJ analysis submitted with its application. "If the applicant identifies any reasonable and available alternate locations to the proposed facility in its application, and the impact study area of any alternate location includes an EJ area, the applicant must complete a final EJ analysis for each such alternate location."

Section 487.7 establishes the requirements for conducting the cumulative impact analysis of air quality required as part of the applicant's final EJ analysis. "This cumulative impact analysis is specifically geared toward assessing EJ-specific impacts and is only required if the proposed facility is an air emission source and is likely to impact an EJ area."

"The EJ analysis must be written clearly and concisely in plain English and contain all relevant and material facts in sufficient detail to enable the Board to make explicit findings related to EJ issues."

If you have any questions or would like further information from Cullen and Dykman concerning this topic, please contact any of the following attorneys: David T. Metcalfe at 516-357-3733 or by e-mail at dmetcalfe@cullenanddykman.com; Angela N. Cascione at 516-296-9102 or by e-mail at acascione@cullenanddykman.com; Brian T. FitzGerald at 518-788-9401 or by e-mail at bfitzgerald@cullenanddykman.com; or Gregory G. Nickson at 518-788-9440 or by e-mail at gnickson@cullenanddykman.com.

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