

STATE ENVIRONMENTAL REGULATION

Expert Analysis

‘Environmental Justice’ Regulations Proposed for Siting of Power Plants

Last August, when Governor Andrew Cuomo signed the Power New York Act of 2011¹ into law, he highlighted² provisions of the act that, he expected, would encourage new investments in electric generating facilities across the state and create new “green” jobs.³ One portion of the act that was not extensively discussed at the time was the re-establishment of Article 10 of the Public Service Law (PSL), which had expired Jan. 1, 2003.

As a general matter, the Legislature indicated that it intended that the new Article 10 would streamline the siting process for approving major power plants in the state. The Legislature also enacted Article 10 in an effort to improve public participation in power plant siting decisions. Toward that end, the new Article 10 requires that the Department of Environmental Conservation (DEC) promulgate regulations for the analysis of “environmental justice” issues in connection with the siting of these power plants. Now, the DEC has issued “Environmental Justice Proposed Regulations” to do just that.⁴

“Environmental justice,” or “EJ,” is a somewhat amorphous term. The proposed regulations define it as “the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁵ One might reasonably wonder whether this additional requirement will adversely affect the time frame for what is supposed to be a streamlined approval process. Nevertheless, given that comments were due on the proposed regulations by the close of business on March 15, and final regulations are required by Aug. 12, the power generating industry must come to terms with incorporating EJ into their Article 10 projects.

Application

The proposed regulations would add a new part 487 to a new Subchapter H—Environmental Justice—of Chapter IV of Title 6 NYCRR. The proposed new part 487 contains 11 sections intended by the DEC to meet Article 10’s stated

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goals of reducing “disproportionate” environmental impacts in “overburdened” communities. Toward that end, the DEC says that the proposed regulations are intended to “ameliorate certain negative impacts of power plants” to be located in overburdened EJ communities through an augmented review (i) of the existing environmental or physical conditions of the community in which the proposed facility is to be located, and (ii) the expected environmental and public health impacts of the proposed facility on that community. According to the DEC, the overall purpose of an EJ review is to enable the New York State Board on Electric Generation Siting and the Environment to determine whether a proposed facility may result in or contribute to any significant and adverse disproportionate environmental impacts upon the community during its construction or operation.

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It is important to keep in mind that the proposed regulations focus only on minority and low-income communities, and require that an applicant⁶ undertake a full EJ analysis only if a proposed facility’s potentially significant adverse environmental and public health impacts will affect an EJ area. An EJ area is defined in the proposed regulations as a low-income or minority community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies. If no EJ area is present in the area in

which a proposed facility is to be located, that is, the “Impact Study Area,”⁷ an applicant is not required to use the EJ-specific procedures set forth in the proposed regulations.

When Is a Study Required?

Sections 487.4 and 487.5 of the proposed regulations set forth the threshold requirements for determining if an applicant must conduct a full EJ analysis.

First, Section 487.4 requires an applicant to define the Impact Study Area, which must encompass at least a one-half mile radius around the location of the proposed facility. If an applicant uses a radius larger than a one-half mile radius to define the Impact Study Area, it must use this same radius for other required elements of the EJ analysis.

Under Section 487.5, an applicant must determine if an EJ area is present within the Impact Study Area and therefore likely to be affected by any significant adverse impacts of the proposed facility. To make that determination, an applicant must determine if any minority or low-income community is present. If a minority or low-income community is present, then an EJ area is present in the Impact Study Area. If the demographic data are not sufficient or adequate for determining the presence of a minority or low-income community within an Impact Study Area, the applicant must work with the DEC, the municipality, and residents of the Impact Study Area to develop an accurate demographic profile of the Impact Study Area.

If no area meeting the definition of either a minority or low-income community is present within the Impact Study Area, an EJ area still is present if two conditions are met. The first condition is if a census block group or contiguous area with multiple census block groups has a minority or low-income population that is above 85 percent of the stated thresholds for defining a minority or low-income community. The second condition is if reasonably available air quality data and health outcome data reveal that the Impact Study Area may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or from the execution of federal, state, local and tribal programs and policies when compared to the county as a whole; if the Impact Study Area is in New York City, the comparison is to the city as a whole.

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If an EJ area is present in the Impact Study Area, the applicant must complete a full EJ analysis and submit a final EJ analysis with its application. If no EJ area is present, the applicant is not required to undertake the full EJ analysis.

What Is an EJ Analysis?

Section 487.6 of the proposed regulations sets forth the general requirements and procedures for completing an EJ analysis. First, an applicant must initiate its EJ analysis as early as practicable in the pre-application process. An applicant must define the Impact Study Area pursuant to Section 487.4 and determine whether an EJ area is present in the Impact Study Area pursuant to Section 487.5 during the pre-application process. If an EJ area is present within the Impact Study Area for the proposed facility, an applicant must include in its preliminary scoping statement preliminary information about its proposed EJ analysis. If an EJ area is present within an Impact Study Area of any reasonable and available alternate location identified by an applicant, the applicant also must include preliminary information about its proposed EJ analysis for the alternate location.

Section 487.7 establishes the requirements for conducting the cumulative impact analysis of air quality required as part of an applicant's final EJ analysis. This cumulative impact analysis is required only if the proposed facility is an air emission source and is likely to impact an EJ area. If an Impact Study Area does not contain an EJ area, an applicant is not required to conduct this EJ-specific cumulative impacts analysis. The cumulative impact analysis is required in addition to any other air quality impact analysis that may be required for the proposed facility under applicable regulations. Section 487.7 requires that an applicant conduct its cumulative impact analysis of air quality for a circular area extending from the proposed facility to the larger of a one-half mile, the Impact Study Area, or the distance to the furthest receptor location of maximum impact for any pollutants modeled for the proposed facility.

The cumulative impact analysis must include all criteria air pollutants that will be emitted from the proposed facility other than ozone precursor emissions⁸; emissions of mercury, if appropriate; and emissions of non-criteria pollutants that are identified by an applicant in its preliminary scoping statement and for which the projected concentrations may exceed certain quantified public health-based air criteria.

Section 487.8 establishes the "Comparison Areas" against which the Impact Study Area is to be compared and contrasted by an applicant to evaluate whether there will be any significant and adverse disproportionate environmental impacts upon the Impact Study Area as a result of construction or operation of the proposed facility. Comparison Areas are the county in which the facility is proposed to be located and the adjacent communities, defined in Section 487.3 in terms of "the geographic area contiguous to and surrounding the Impact Study Area." Under Section 487.7, for facilities proposed to be located within New York City, the Comparison Area is the entire city.

Section 487.9 describes how an applicant must prepare the comprehensive demographic, economic and physical descriptions for the Impact Study Area and Comparison Areas. An applicant's demographic, economic and physical descriptions must include reasonably available information on population, racial and ethnic characteristics, income levels, open space and public health data, including available data on asthma and cancer, compared and contrasted to the county and the adjacent communities.

This section requires that an applicant present the public health data pursuant to a protocol approved by the department and the Department of Health, similar to how applicants are currently analyzing health outcomes under the State Environmental Quality Review Act (SEQRA) and DEC Commissioner Policy 29 (CP-29).⁹ Thus, an applicant would have to include in its comprehensive description information on air quality, including National-Scale Air Toxics Assessment data; the number and concentration of industrial facilities in the area; historic and cultural resources and community

An EJ area is defined in the proposed regulations as a low-income or minority community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local and tribal programs and policies.

or neighborhood character, including existing patterns of population concentration, distribution or growth; visual and aesthetic resources; ground or surface water quality; ambient sound level; vehicular and pedestrian traffic; and any other information necessary for the applicant to provide an accurate and complete representation of the demographic, economic and physical characteristics of the Impact Study Area and Comparison Areas.

Section 487.9(d) requires that an applicant evaluate the potentially significant adverse environmental and public health impacts of the proposed facility on the Impact Study Area during both its construction and operation.

Section 487.10 describes how the comprehensive description of the Impact Study Area must be compared and contrasted with the county and adjacent communities. It requires that an applicant use generally accepted statistical methods to evaluate the physical conditions for each of the Comparison Areas and the physical conditions of the Impact Study Area that would result from the construction and operation of the proposed facility.

An applicant then must compare and contrast the physical conditions of the Impact Study Area, including the impacts from construction and operation of the proposed facility, with the "physical conditions" in each of the Comparison

Areas to evaluate whether the proposed facility may result in or contribute to any significant and adverse disproportionate environmental impacts in the Impact Study Area. Many of the "physical conditions" to be examined are the traditional types of environmental conditions that are examined under SEQRA, such as historic and cultural resources and community or neighborhood character, visual and aesthetic resources, water quality and noise. Additionally, an applicant would be required to quantify the number and concentration of certain polluting facilities to get a sense of existing physical conditions within an area.

Section 487.10 also requires that, if an applicant's evaluation indicates that the facility would result in or contribute to a significant and adverse disproportionate environmental impact, the applicant's evaluation must include a discussion of any measures that the applicant will take to avoid, offset or minimize the impact to the maximum extent practicable and the effect of those measures on any impact.

Finally, Section 487.11 requires an applicant to prepare a Statement of Environmental Justice Issues that summarizes the applicant's final EJ analysis.

Conclusion

In developing the proposed regulations, the DEC attempted to find a proven methodology for conducting an EJ analysis but could not do so, either in New York, other states, or in the federal regulatory framework. It therefore wrote on something of a blank tablet. Certainly, the way these new obligations, once finalized, actually will operate in practice remains to be seen. Yet at least one thing is clear: the EJ requirement is a new one that undoubtedly will add a layer of evaluation that will increase the time and cost to applicants seeking approval to site a power plant in New York. It may also signal DEC's intent to formally incorporate EJ principles into other approval procedures.

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1. Chapter 388 of the Laws of 2011.
2. "Governor Cuomo Signs Power NY Legislation," press release, available at <http://www.governor.ny.gov/press/08042011NYLegislation>.
3. See, Charlotte Biblow, "New Financing Law Seeks to Boost Effectiveness of 2009 Green Jobs Act," NYLJ (July 28, 2011).
4. See "Environmental Justice Proposed Regulations," available at <http://www.dec.ny.gov/regulations/79626.html>.
5. Proposed Regulations, at Section 487.3(k).
6. The Proposed Regulations apply to anyone seeking a Certificate of Environmental Compatibility and Public Need pursuant to PSL Article 10. See Proposed Regulations, Section 487.2.
7. An "Impact Study Area" is defined in Section 487.3(n) of the Proposed Regulations as the "geographic area around the location of a facility in which the population is likely to be affected by at least one potentially significant adverse environmental impact resulting from the construction and/or operation of the facility that is different in type, scope, or magnitude compared to the population located in the broader geographic area surrounding the facility."
8. These should be addressed pursuant to the provisions of 6 NYCRR Part 231.
9. CP-29 is available at <http://www.dec.ny.gov/public/36929.html>.