LOSING POWER: SITING POWER PLANTS IN NEW YORK STATE

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INTRODUCTION

Electricity powers our everyday lives, but many people never contemplate the source of this power. Only when there is a proposal to build a power plant do ordinary citizens seriously consider where and how electricity is produced. Many times local residents oppose the siting of an electricity generating facility in their area. People oppose "dirty" fossil fuel-burning plants as well as "clean" facilities such as hydro-electric dams and wind turbines. This opposition is one example of a phenomenon often referred to as "Not-in-My-Backyard" (NIMBY). NIMBY can lead to long, drawn-out fights over whether to build proposed projects such as residential developments or power plants. In an effort to avoid the effects of NIMBY, New York enacted a new Article X to the Public Service Law in 1992. This enactment set out to provide a statewide environmental review and permitting process which, among other things, preempted local land use laws in order to ensure that New Yorkers had an adequate supply of electricity.[1] However, Article X expired seven years ago[2] and efforts to renew the law have failed repeatedly.[3]

This article seeks to explain the effects of Article X's sun-setting by examining how power plants are (or are not) sited in the State of New York. Siting these facilities today is no easy task because of "NIMBYism," climate change, and the push for alternative power sources running up against the ever increasing demand for electricity. Part II provides a historical introduction into how the State of New York regulated the siting of power plants prior to the adoption of Article X. Next, Part III reviews the process of siting power plants under the former Article X of New York's Public Service Law. Additionally, Part IV examines

[1] Act of July 24, 1992, ch. 519, 1992 N.Y. Laws 3376 (codified at N.Y. PUB. SERV. LAW §§ 160–72 (McKinney 2000) (expired on Jan. 1, 2003)). TransGas Energy Sys. v. N.Y. State Bd. on Elec. Generation Siting & Env't, 887 N.Y.S.2d 99, 104 (App. Div. 2009) (quoting Consol. Edison Co. v. Town of Red Hook, 456 N.E.2d 487, 491 (N.Y. 1983) ("Article X is 'a general law relating to matters of substantial State concern,' through which law the Legislature intended to 'pre-empt further regulation in the field of major . . . electric generating facility siting.'").

[2] 1992 N.Y. Laws 3395 ("[T]his act shall expire and be deemed repealed on January 1, 2003.").

[3] *See*, *e.g.*, Assem. 11582, 2010 Leg., 233rd Reg. Sess. (N.Y. 2010); S. 8394, 2010 Leg., 233rd Reg. Sess. (N.Y. 2010) (Bill entitled "Relates to the siting of major electric generating facilities" referred to Energy Committee in Assembly and Rules Committee in the Senate, but no further action taken).

how the expiration of Article X has affected the siting of energy generating facilities in New York by examining the current procedure for siting power plants in addition to case law after the law's sunset. The approaches other states use to site power plants are examined in Part V in order to gain a better understanding of how other regulatory frameworks balance the needs of local populations versus the need for more electric generators. Finally, Part VI considers previous legislative efforts and current proposals to restore or modify Article X.

I. HISTORY OF ARTICLE X

The New York State Legislature first acknowledged the fact that a special permitting process was needed to streamline the siting of electric generating facilities by passing Article VIII of the Public Service Law in 1972 (hereinafter referred to as Article VIII).[4] The new law established a "one-stop" permitting process for "major steam-electric generating facilit[ies]," defined as facilities generating 50 MW or more.[5] Article VIII established the New York State Board on Electric Generation Siting and the Environment (Siting Board).[6] This law required an environmental review of proposed projects and granted the Siting Board sole jurisdiction to issue Certificates of Environmental Compatibility and Public Need (Certificate).[7] Limited public participation was allowed during the review and development process.[8] Additionally, local laws and ordinances could be overridden under Article VIII while requiring an exhaustion of all available administrative remedies before granting judicial review.[9] In perhaps a foreshadowing of things to come, Article VIII expired on January 1, 1989,[10] and it was not replaced until

[4] Act of Aug. 4, 1978, ch. 708, 1978 N.Y. Laws 1 (codified at N.Y. PUB. SERV. LAW §§ 140–49-b (expired 1984)).

[5] *Id.* A megawatt is one million watts.

[6] *Id.* at 2.

[7] *Id.*

[8] *See Id.* at 6.

[9] *Id.* at 10.

[10] *Id.* at 12 ("This act shall take effect immediately and shall continue in full force and effect only until January first, nineteen hundred eighty-four."). Article VIII may have been allowed to expire because it was unsuccessful. Only one of the six proposed plants under Article VIII was ever constructed, but during this same time, many power plants were built under the 50 MW threshold. *See* G.S. Peter Bergen, *Electric Generating Facility Siting and Licensing in New York State's Restructured Electric Utility Industry*, 10 ENVTL. L. N.Y. 97, 111 (1999).

1992 by Article X.[11]

II. ARTICLE X PROCEDURE

A. Nuts and Bolts

Article X was similarly toted as a "one-step" licensing process that subsumed all state and local permit requirements.[12] The state takeover of siting responsibilities caused considerable disagreement because it deprived municipalities of their "Home Rule," and it likely was a major reason for the sun-set provision of Article X.[13] In general, Article X increased environmental review and provided for more public involvement in the review and siting process compared to Article VIII. Applicants were required to deposit up to $300,000 into an "intervenor account."[14] This account was available for use by the public who became intervenors, but these funds could not be used to pay a party's legal fees.[15] Threshold requirements also changed under Article X: the new law applied to facilities generating 80 MW[16] (up from 50 MW); Article X was not limited to steam-electric facilities, and the deadline for completion of the hearing process shortened from twenty-four to twelve months.[17]

A 1999 amendment to Article X authorized the Department of Environmental Conservation (DEC) to issue environmental permits in conjunction with the Siting Board's issuance of a Certificate, which was needed for construction of a generating facility.[18] As the legislature noted: "In an effort to increase the electricity supply in New York State, Article X was amended yet again in 2001, when the hearing process was reduced to six

[11] Act of July 24, 1992, ch. 519, 1992 N.Y. Laws 3376 (codified at N.Y. PUB. SERV. LAW §§ 160–72 (McKinney 2000) (expired on Jan. 1, 2003)).

[12] N.Y. PUB. SERV. LAW § 160 (expired on Jan. 1, 2003); *see* Michael G. Murphy, *Environmental Review of Energy Projects in New York (Part 1 of 2)*, 19 ENVTL. L. N.Y. 53, 54 (2008).

[13] 1992 N.Y. Laws 3395 ("[T]his act shall expire and be deemed repealed on January 1, 2003."); Murphy, *supra* note 12, at 54.

[14] N.Y. PUB. SERV. LAW § 164(6) (expired on Jan. 1, 2003).

[15] *Id.*

[16] *Id.* § 160.

[17] Gail Suchman, *Power-Plant-Siting: Efforts to Amend Article X Fail*, N.Y. L.J., Aug. 8, 2007, at 4.

[18] Act of Nov. 22, 1999, ch. 636, 1999 N.Y. Laws 3372 (amending the Public Service Law and the Environmental Conservation Law). In addition, the amendments increased funding to municipalities and local community groups to participate in the hearing process. *See infra* Part II.B.

months for facilities that would replace older, less efficient and higher polluting plants."[19]

The one-stop licensing process was administered by the Siting Board.[20] The Siting Board originally had five members, each of whom headed a state agency interested in power plant siting. The Siting Board also had two ad hoc members (who represented the public from the region of the proposed plan) whose purpose was to ensure that local zoning issues were adequately addressed.[21] Where the local requirements were found to be "unreasonably restrictive in view of the existing technology or the needs of, or the costs to, ratepayers whether located inside or outside of such municipality," the Article X Siting Board had authority to preempt those requirements.[22] Additionally, Article X prohibited any state agency or municipality, except as expressly authorized by the Siting Board, from requiring "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" was filed under Article X.[23]

The Article X process allowed interested parties to participate in a hearing and submit comments on the proposed project.[24] Additionally, these parties could hire expert witnesses and consultants to review the proposed plant using intervenor funds provided by the power plant applicant.[25] An evidentiary hearing could be held to determine whether the proposed plant met all of the Article X and other environmental and land use requirements.[26] Such hearings required all parties to work together by providing and exchanging information, exploring new technologies or alternatives, and negotiating settlements to resolve issues regarding the site proposed for the new power plant.[27] The Article X process did successfully site new generating capacity, but only after a slow start.

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[19] Act of Aug. 31, 2001, ch. 222, 2001 N.Y. Laws 1498 (amending the Public Service Law); Suchman, *supra* note 17, at 4.

[20] N.Y. PUB. SERV. LAW § 168 (expired on Jan. 1, 2003).

[21] *See* Charles Pratt, *Re-Inventing New York's Power Plant Siting Law*, 6 ALB. L. ENVTL. OUTLOOK 1, 2 (2001).

[22] N.Y. PUB. SERV. LAW § 168(2)(d) (expired on Jan. 1, 2003).

[23] *Id.* § 172(1).

[24] *Id.* §§ 165–166.

[25] *Id.* § 164(6)(a).

[26] *Id.* § 167.

[27] *See* Christine A. Fazio & Judith Wallace, *Re-Enact the Former Article X of the Public Service Law*, N.Y. L.J., Mar. 5, 2008, at 4.

B. Article X in Practice

In the beginning, confusion over Article X procedure prolonged the process. The process for the 1080 MW Athens Generating facility, the first Article X application, began in September 1997, but it took three years before its Article X Certificate was finally issued.[28] In addition to the initial procedural questions, the Athens project was slowed when the United States Environmental Protection Agency informed New York that the Siting Board was not delegated the requisite authority to address issues under the Clean Air Act and Clean Water Act.[29] To solve the issue, the Siting Board decided to defer to the DEC on the environmental permit issues.[30]

Under Article X, a total of twenty-four projects were proposed, sixteen reached the formal application stage, and six are now in service—adding 2,880 MW to the New York power grid.[31] For most of these six projects, the licensing process lasted approximately two years.[32] This time frame is not much longer than a typical process under the State Environmental Quality Review Act (SEQRA), which involves scoping and the preparation of an environmental impact statement ("EIS") as well as the potential for multiple rounds of litigation.[33]

Three lawsuits were filed concerning the Article X process.[34]

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[28] For the decision rendered by the New York State Public Service Commission, see Case No. 97-F-1563, *In the Matter of Athens Generating Co., LP*, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (June 15, 2000). The case was also subject to a petition for rehearing and a court challenge. Citizens for the Hudson Valley v. N.Y. State Bd. of Elec. Generation Siting & Env't, 723 N.Y.S.2d 532 (App. Div. 2001).

[29] *Matter of Athens Generating*, at 13.

[30] *Id.*; *see* Act of Nov. 22, 1999, ch. 636, 1999 N.Y. Laws 3372 (amending Article X and authorizing the DEC to issue the environmental permits).

[31] *See* N.Y. STATE ENERGY PLANNING BD., NEW YORK STATE ENERGY PLAN 2009: SITING NEW ENERGY INFRASTRUCTURE ISSUE BRIEF 27–29 (2009), [hereinafter INFRASTRUCTURE ISSUE BRIEF]. *available at* http://www.nysenergyplan.com/final/Siting_New_Energy_Infrastructure_IB.pdf; Murphy, *supra* note 12, at 55 n.17 ("The total capacity of the six projects was 3,440 MW, [but] two of the facilities . . . were repowering projects, which resulted in a net increase of 550 MW.").

[32] The statute allowed the Siting Board to issue a certificate within twelve months of its determination that an application was complete. N.Y. PUB. SERV. LAW § 165(4) (expired on Jan. 1, 2003). However, in practice, extensions were normally "granted for the parties to prepare for the evidentiary hearings, prepare briefs after the hearings, and hold settlement conferences." Fazio & Wallace, *supra* note 27, at 4 n.5.

[33] *See infra* Part III.A.

[34] These challenges to Article X actions are only filed in the Appellate

Two of these suits were brought by citizens, and one suit was filed by a project developer. In the two citizen suits filed after the certificates were issued, the Appellate Division upheld the granting of the Article X Certificate.[35] However, the project developer was not as fortunate in *TransGas Energy Systems, L.L.C. v. New York State Board on Electric Generation Siting & Environment*.[36] In that case, the project developer, TransGas, sued the Siting Board because the board did not require New York City to give TransGas the right to place piping under the city streets.[37] Noting that this was a question of first impression, the Appellate Division upheld the Board's decision that the city retained the authority to regulate "public ways" under Article X.[38] TransGas's loss came nearly seven years after it filed its Article X application,[39] and its loss marked the last outstanding application filed under Article X.[40] With the last case settled, any benefits offered by Article X disappeared.

III. THE EFFECTS OF NO STATE PREEMPTIVE LAW FOR POWER PLANT SITING

Since the sun-setting of Article X,[41] any proposed power plant goes through a process that involves various reviews by municipal and county governments in addition to SEQRA

Division. Therefore, the overall Article X siting process for larger power plants was in fact likely faster than the SEQRA process, where litigation starts at the supreme court level.

[35] *See* N.Y. Inst. of Legal Research v. N.Y. State Bd. on Elec. Generation Siting & Env't, 744 N.Y.S.2d 441 (App. Div. 2002) (dismissing suit under failure to exhaust administrative remedies under Article X); Citizens of the Hudson Valley v. N.Y. State Bd. on Elec. Generation Siting & Env't, 723 N.Y.S.2d 532 (App. Div. 2001) (finding that the proposed facility was selected pursuant to an approved procurement process, that a private party applicant was not required to analyze alternative sites that it neither owns nor controls, and that the determination that visual impacts from the plant would be slight was supported by the voluminous record).

[36] 887 N.Y.S.2d 99, 104–05 (App. Div. 2009).

[37] *Id.*

[38] *Id.*

[39] Not all of this time was spent in litigation. TransGas offered several different proposals in negotiations with the city to gain the government's support, including building pipelines under the East River and placing the power plant underground. *Id.* at 101–03.

[40] Unless TransGas appeals. *See* INFRASTRUCTURE ISSUE BRIEF, *supra* note 31, at 28.

[41] The law likely expired due to the controversy over Home Rule. *See supra* Part I and accompanying text.

review.[42] SEQRA requires the sponsoring or approving governmental body to identify and mitigate the significant environmental impacts of the proposed generating facility.[43] Once it is complete, the selected lead agency determines the significance of an action's environmental impacts. The agency then decides whether to require (or prepare) an EIS and whether to hold a public hearing on the proposed action.[44] Since Article X's expiration, SEQRA is the only framework for reviewing the environmental effects of power plants. The increased use of SEQRA raises the question of whether SEQRA or Article X is the best way to address environmental issues and local control over land use.

A. SEQRA vs. Article X

1. Fossil Fuel Power Plants

Construction of major fuel-fired power plants has not stopped since Article X's sunsetting,[45] but the process under SEQRA and the applicable local regulations can be grueling. Take for example, the 350 MW, combined-cycle, electric generating facility at Caithness Long Island Energy Center.[46] The Long Island Power Authority (LIPA) started the SEQRA process in September 2004 when it sought lead agency status.[47] In December 2005, LIPA issued its finding statement, which concluded the formal SEQRA process in fifteen months (which is quicker than any Article X proceeding).[48] However, the Caithness project needed to obtain the approvals/permits from other state agencies and local governments that would have been included in Article X's one-stop process. These other requirements included: "[T]he Brookhaven Town Board special permit, Brookhaven Planning Board site plan approval, Suffolk County Department of Health

[42] N.Y. COMP. CODES R. & REGS. tit. 6A-3, §§ 617.1–.20 (2000) (these sections comprise the State Environmental Quality Review).

[43] *Id.* § 617.1.

[44] *Id.* §§ 617.2, 617.9.

[45] September 2010 saw the opening of a 635 MW natural gas burning facility in Rensselaer, New York. *See Project Timeline*, EMPIRE GENERATING CO. LLP (May 19, 2010), http://www.empiregen.com/images/stories/pdf/Project_Timeline_2.pdf; *see also infra* note 69 and accompanying text.

[46] Murphy, *supra* note 12, at 56.

[47] *Id.*

[48] *See* INFRASTRUCTURE ISSUE BRIEF, *supra* note 31, at 27–29 (no application was approved within 15 months).

Services approvals for sanitary systems and regulated material storage, and the issuance of a Public Service Commission Certificate of Public Convenience and Necessity pursuant to section 68 of the Public Service Law."[49] Including the fifteen month SEQRA process, it took twenty-five months to obtain all the necessary permits and approvals. Despite the completion of SEQRA, the Caithness project could not begin construction because the project faced five different lawsuits.[50]

The first case challenged the SEQRA findings as procedurally defective as well as substantively incorrect, but the trial judge dismissed the case,[51] and the Second Department affirmed the dismissal.[52]

The second case challenged the Town Board's issuance of a Special Permit and the SEQRA findings.[53] The court rejected the SEQRA claims, but found that the Town Board's SEQRA resolution did not have the "requisite explanation" about why it changed its position on the Special Permit.[54] After the opinion was handed down, the Town Board adopted the same SEQRA findings while explaining why it voted to issue the Special Permit.[55]

The third case challenged the Planning Board's approval of the Site Plan,[56] and the fourth case challenged the re-approvals required after the special permit was vacated in the second case.[57] Finally, the last case involved a challenge against the Public Service Commission's (PSC) issuance of the Certificate of Public Convenience and Necessity.[58] While the Caithness project survived these claims, it was not out of the court system and able

[49] *Id.* at 56–57.

[50] Michael G. Murphy, *Environmental Review of Energy Projects in New York (Part 2 of 2)*, 19 ENVTL. L. N.Y. 110 (2008).

[51] E. End Prop. Co. No. 1 v. Kessel, No. 06l-001410 (N.Y. Sup. Ct. Aug. 22, 2006) (interim order dismissing Article 78 proceeding), a*vailable at* http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/cozzens/2006aug/001410-06.pdf.

[52] E. End Prop. Co. No. 1 v. Kessel, 851 N.Y.S.2d 565 (App. Div. 2007).

[53] E. End Prop. Co. No. 1 v. Town Bd. of Brookhaven, No. 2006-23201, 2007 WL 1519037, at *1 (N.Y. Sup. Ct. May 22, 2007).

[54] *Id.*

[55] *Id.*

[56] E. End Prop. Co. No. 1 v. Planning Bd. of Brookhaven, No. 06-29596, 2007 WL 6096797, at *1 (N.Y. Sup. Ct. May 22, 2007).

[57] E. End Prop. Co. No. 1 v. Town Bd. of Brookhaven, No. 07-17956, 2008 N.Y. Misc. LEXIS 7622 (N.Y. Sup. Ct. Jan. 2, 2008).

[58] E. End Prop. Co. No. 1 v. Acampora, No. 07-2180 (N.Y. Sup. Ct. Oct. 4, 2007) (dismissed without a signed order).

to begin construction until forty months after LIPA sought lead agency status for the project.[59] Therefore, while the initial SEQRA process only took fifteen months, the fact that the developer had to obtain numerous other permits and approvals added more time compared to the typical two year Article X process.[60] Additionally, the lawsuits dragged out the process for four years. This creates a strong argument in favor of an Article X process, because only one lawsuit could be filed after an Article X proceeding since the permitting and approval requirements happen in one action.[61]

Two other arguments support the proposition that Article X provides a better review process for the siting of large fuel-fired power plants than SEQRA: (1) the Siting Board had authority to preempt local zoning requirements, removing the delay of meeting local planning boards and town boards requirements; and (2) lawsuits had to be filed directly with the Appellate Division, reducing costs and delays.[62] Furthermore, the SEQRA framework may be prone to litigation because there is no administrative law judge to act as "an intermediary to encourage settlements between the applicant and local parties during the environmental review process."[63]

Moreover, Article X offers two main reasons why residents should prefer it to SEQRA. First, the public was given numerous opportunities to review the Article X application and supporting material.[64] Moreover, an administrative law judge was available to ensure that sufficient time was provided to local communities, even granting extensions to hearing schedules as necessary.[65]

Second, the funding set aside in an intervenor account was distributed to municipalities and local community groups for retaining consultants and expert witnesses.[66] Moreover, the Article X process generally brought "the applicant and

[59] Murphy, *supra* note 12, at 56.

[60] *See supra* Part II.B.

[61] Murphy, *supra* note 12, at 56.

[62] *See* Fazio & Wallace, *supra* note 27, at 4 ("Article X required a comprehensive technical review of a large facility and its proposed site, by the developer, agencies, community and local municipalities.").

[63] *Id.*

[64] *Id.*; *see supra* Part II.A.

[65] N.Y. PUB. SERV. LAW § 165 (McKinney 2000) (expired Jan. 1, 2003); Fazio & Wallace, *supra* note 27, at 4.

[66] N.Y. PUB. SERV. LAW § 165 (expired Jan. 1, 2003). In contrast, SEQRA's fee requirement is meant to cover costs to the lead agency. N.Y. COMP. CODES R. & REGS. tit. 6A-3, § 617.13 (2001).

community to enter into settlement negotiations and resolve disputes, the result was a 'win-win' for both sides, minimizing litigation costs and improving the chance that a project would proceed only after incorporating some mitigation measures sought by the community."[67]

Finally, without Article X, only one fuel-fired power plant has been sited in the last seven years, which may present a problem as New York's energy demands increase and renewable sources of energy may not meet these demands in the near future.[68] Therefore, a state siting law is becoming a necessity. Gavin Donohue, President and CEO of the Independent Power Producers of New York, described the current regulatory environment as nearly impossible: "There are places where you just don't get through the process. You have no control over the process, no certainty, which developers need."[69] Jerry Kramer, the retired Assemblyman who helped draft Article X, points out another problem with not having an Article X-like proceeding that encourages large fuel-fire power plants: "[A]n inordinate number of smaller, stop-gap 'peaker' power plants also have been built in low-income, minority communities."[70] Moreover, these smaller plants were likely built without going to courts because these communities cannot afford to bring legal challenges. However, SEQRA is not necessarily to blame because proposed projects must still be approved by local legislatures or their respective boards. Furthermore, unhappy residents are likely to sue. Additionally, local government roadblocks and the concept of

[67] For an extensive list of major settlements occurred in New York City see Fazio & Wallace, *supra* note 27, at 4 n.4.

[68] Laidlaw Energy & Envtl., Inc. v. Town of Ellicottville, 873 N.Y.S.2d 814, 814–15 (App. Div. 2009) (holding that the Town of Ellicottville planning board's denial of an application for site plan approval for a cogeneration plant was not arbitrary and capricious); N.Y. STATE ENERGY PLANNING BD., 2009 STATE ENERGY PLAN 62 (2009) [hereinafter 2009 STATE ENERGY PLAN], *available at* http://www.nysenergyplan.com/final/New_York_State_Energy_Plan_VolumeI.pdf.

[69] Adam Sichko, *Paterson Promotes New Power Plant Siting Laws*, BUS. REV., Jan. 7, 2010, *available at* http://www.bizjournals.com/albany/stories/2010/01/04/daily23.html.

[70] Jerry Kramer, Editorial, *All Win if Siting Law is Renewed*, TIMES UNION (Albany), Feb. 26, 2010, at A13. "Peaker" power plants are typically fossil fuel-burn facilities that are used to meet electricity demands under "peak" usage times, such as the middle of a hot summer day. Fossil fuel is used, in part, because burning these fuels allow a generating facility to produce electricity quicker, meeting demand in a timely manner, because the facility can warm up faster thereby creating the steam necessary to spin the turbines.

NIMBYism have lead to lawsuits limiting the development of wind energy in New York, but is Article X the answer for renewable energy sources such as wind?

2. SEQRA and Wind Energy

The SEQRA process, by itself, is generally quicker than the Article X process.[71] This is especially true when obtaining an environmental assessment for a wind energy project. Such projects are likely to receive a negative declaration because they have no air emissions.[72] A project receiving a negative declaration can be completed in six months or less. This logic leads to the argument that "subjecting renewable energy to the very complex and evidentiary-intensive Article X process will discourage the entry of renewable energy projects into New York."[73] Proponents of keeping renewable sources out of a potential Article X process point out that many wind projects have been approved under SEQRA recently.[74] Supporters of this position conclude that "wind energy projects do not need a new siting law; they are doing just fine under SEQRA."[75] However, local land use regulations and NIMBYism may be inhibiting New York's goal of meeting forty-five percent of its electricity needs from energy efficiency and renewable sources by 2015 (known as "45 by 15").[76] Without a large amount of wind energy, this goal is likely unobtainable.

[71] *See, e.g.*, Murphy, *supra* note 12, at 56 (explaining that the SEQRA process for the Caithness Long Island Energy Center lasted "approximately 15 months, which compares very favorably to a typical Article X proceeding, which could last several years").

[72] If an action is determined not to have significant adverse environmental impacts, a determination of nonsignificance (known as a "Negative Declaration") is prepared. N.Y. COMP. CODES R. & REGS. tit. 9A-4a, § 586.8 (1995). *See* Fazio & Wallace, *supra* note 27, at 4 (discussing a 10 MW wind project that received a negative declaration and was approved in less than a year).

[73] Fazio & Wallace, *supra* note 27, at 4.

[74] *Id.* In fact, over 1,000 MW of wind energy has been installed in New York since the expiration of Article X. 2009 STATE ENERGY PLAN, *supra* note 68, at 63, 84.

[75] Fazio & Wallace, *supra* note 27, at 4.

[76] Governor Paterson set the "45 by 15" agenda for New York. Press Release, David Paterson, Governor of N.Y., Making New York More Energy Independent and Energy Efficient [hereinafter Paterson Press Release], *available at* http://www.governor.ny.gov/archive/paterson/press/factsheet_0107092.html (last visited May 15, 2011).

3. Wind Energy Litigation

In the past seven years, numerous cases have involved challenges to the issuances of permits and local laws regulating the siting of wind turbines. In *Trude v. Town Board*,[77] residents formed an interest group, Cohocton Wind Watch (CWW), to challenge a local law addressing wind turbines. The law codified dimension, setback, and operation requirements as well as noise requirements and an enforcement system, and also required wind developers to complete additional environmental studies before they could obtain a permit.[78] CWW claimed that the Town Board did not comply with SEQRA when it issued a decision stating that the law did not have any significant environmental impact. Moreover, the group alleged that the law did not conform to the town's comprehensive goals of preserving its "rural character" and "agricultural lands."[79] In denying plaintiffs' claims, the court reasoned that the town addressed major environmental concerns regarding wind farms, including the submission of an EIS.[80] Ultimately, the court concluded that "it cannot be said that the Board acted arbitrarily."[81]

In *Friedhaber v. Town Board*,[82] a citizen group alleged a myriad of violations in an attempt to overturn the town of Sheldon's local laws, passed in 2001. These local laws established regulations for wind energy systems, including the possible construction of the High Sheldon Wind Farm, which was a seventy-five turbine project.[83] The petition claimed the following violations: (1) the Zoning Board of Appeals (ZBA) lacked authority to grant a variance in a local law; (2) the ZBA exceeded its jurisdiction in the granting of variances and setback variances; (3) it was improper for the ZBA to allow local laws to be amended through variances instead of amendments; (4) by granting variances, the ZBA improperly performed legislative functions; and (5) the town failed to make the requisite disclosures under the Municipal Law.[84] All the claims were

[77] No. 95,747, 2007 WL 2811372, at *1 (N.Y. Sup. Ct. Sept. 24, 2007).
[78] *Id.*
[79] *Id.*
[80] *Id.* at *7.
[81] *Id.*
[82] No. 38491, 2007 WL 2727794, at *1 (N.Y. Sup. Ct. Sept. 18, 2007), *aff'd*, 872 N.Y.S.2d 361 (App. Div. 2009).
[83] *Id.* at *2–3.
[84] *Id.* at *2.

ultimately dismissed, and the case was affirmed on appeal in 2009.[85] The court challenges delayed the project by over eight years, illustrating the point that even where NIMBY-based legal challenges to wind farms fail, they still disrupt the development process. Additionally, many investors are turned off from having to endure eight years of litigation; it is easier to go to another state.

In 2008, a number of Clinton County resident associations filed suit over a wind project in *West Beekmantown Neighborhood Association v. Zoning Board of Appeals*.[86] Petitioners challenged a wind development project, asserting that the proposed wind farm did not meet the definition of a public utility.[87] The supreme court found that the Zoning Board of Appeal's interpretation of the wind farm as a public utility was "entitled to great deference" and dismissed the action.[88]

In *Hedman v. Town Board*, residents sought the removal of a member of the Town Board.[89] Petitioners wanted the member's removal because he failed to disclose his alleged conflict of interest with Everpower Global Corporation—the proposed developer of a wind energy facility—which included a wind turbine on the board member's property.[90] The Fourth Department affirmed the lower court's dismissal of the case because the petitioner failed to establish an actual conflict of interest.[91]

Wind Power Ethics Group v. Zoning Board of Appeals involved a dispute over the definition of "public utility" when the Town of Cape Vincent Planning Board approved St. Lawrence Windpower's site plan for its proposed construction of a series of wind-powered generators.[92] The petitioner argued that the board's determination that wind generators were a "public utility" was arbitrary and capricious; the Fourth Department rejected this claim.[93]

In Steuben County, developers of a proposed wind farm faced strong opposition from residents. First, the Advocates for

[85] Friedhaber v. Town Bd. of Sheldon, 872 N.Y.S.2d 361 (App. Div. 2009).
[86] 861 N.Y.S.2d 864 (App. Div. 2008).
[87] *Id.* at 865.
[88] *Id.* at 866.
[89] 867 N.Y.S.2d 634, 635 (App. Div. 2008).
[90] *Id.* at 635–36.
[91] *Id.* at 636.
[92] 875 N.Y.S.2d 359, 360–61 (App. Div. 2009).
[93] *Id.* at 361.

Prattsburg sued the Steuben County Industrial Development Agency—the lead agency under SEQRA for a proposed wind project.[94] The Fourth Department upheld the dismissal of the action, finding that the lead agency did take a "hard look" at the relevant environmental concerns.[95]

Windfarm Prattsburgh has faced two different lawsuits in response to its proposed thirty-six turbine project in Prattsburgh. In the first, *Dudley v. Town Board*, the Fourth Department upheld the board's condemnation of a portion of petitioner's property to create certain easements despite petitioner's argument, filed under section 207 of the Eminent Domain Procedure Law, that the town supervisor had a conflict of interest.[96] In the second case, petitioners brought the same conflict of interest complaint concerning the condemnation proceeding, but this time under an Article 78 proceeding.[97] The trial court denied the challenge.[98]

While most residents lost in court, property owners successfully challenged the issuance of special use permits for a 136 MW wind farm in *Brander v. Town Board*.[99] The court found that the Town Board did not comply with SEQRA because: (1) it failed to properly evaluate alternatives when it approved the wind project, and (2) it failed to properly review the potential adverse impacts when it approved the final EIS.[100] The town also improperly delegated the Office of Parks, Recreation, and Historic Preservation as the lead agency responsible for historic site preservation.[101] Additionally, the court found a violation of the Open Meetings Law because the Town Board approved the special use permit for the wind farm without a basis for beginning executive sessions.[102] The court vacated the Board's approval of the wind project because the Town Board's inability to comply with the SEQRA and the Open Meetings Law constituted arbitrary and capricious behavior.[103]

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[94] Advocates for Prattsburg v. Steuben County Indus. Dev. Agency, 851 N.Y.S.2d 759 (App. Div. 2008).

[95] *Id.* at 762.

[96] 872 N.Y.S.2d 614 (App. Div. 2009).

[97] Dudley v. Town Bd. of Prattsburgh, No. 100, 345, 2009 WL 513401, at *1 (N.Y. Sup. Ct. Feb. 26, 2009).

[98] *Id.* at *4.

[99] 847 N.Y.S.2d 450 (Sup. Ct. 2007).

[100] *Id.* at 455.

[101] *Id.* at 457.

[102] *Id.* at 458–59.

[103] *Id.* at 460.

It is worth noting that the Board's failures were likely actionable under Article X in the sense that the expired law required consideration of alternatives and the review of adverse impacts in the EIS. However, in nearly all of the other cases, the issues presented could have been resolved in the Article X process because of state preemption of local law (issues of zoning variances, compatibility with comprehensive plans, and definitions of "public utility") or they would not have arisen (it is unlikely that a conflict of interest would arise with the State Siting Board). This large amount of litigation suggests that New York needs to address the issue of siting wind energy projects at a state level. However, New York does not have to simply re-enact Article X; other states offer different approaches to siting power plants.

IV. SITING POWER PLANTS IN OTHER STATES

States have many other ways to approach balancing the need for siting new power plants. These approaches generally range from state-only control, a hybrid of state and local control, state incentives, or only local control. Five states and their different regulatory schemes are reviewed in this Part. After a summary of each state's framework, data is provided on: (1) the cost of electricity to retail customers/consumers in 2010 compared to 2009, and (2) the amount of installed wind capacity as a percentage of total installed generating capacity based on 2009 levels. This data is offered to show whether a state's approach to siting power plants has an effect on electricity costs as well as the types of power plants being built today.

The cost of electricity was selected as a data point because, during the time Article X was in effect, New York State was moving to a wholesale electric generation market in an effort to lower retail electric costs and replace older, less efficient, and more polluting generation plants.[104] The wholesale market would achieve these two goals as a result of increased competition when

[104] *See generally* Case No. 94-E-0952, *In the Matter of Competitive Opportunities Regarding Electric Service*, Opinion and Order Regarding Competitive Opportunities for Electric Service (May 20, 1996) (establishing a systems benefit charge to fund certain public benefit programs unlikely to be assumed by the energy marketplace during the transition to full electric retail competition); Case No. 00-F-0566, *In the Matter of Brookhaven Energy, LP*, Opinion and Order Granting Certificate of Environmental Compatibility and Public Need (Aug. 14, 2002), at 54.

new entities entered the wholesale market.[105] The focus on wind energy is an effort to show how other siting schemes address this particular form of power generation given New York's stated goal of meeting forty-five percent of its electricity needs from energy efficient and renewable sources.[106] Further, examining wind may indicate a way to stem the flow of lawsuits over wind energy products because these suits are potentially handicapping efforts to reach "45 by 15". However, many variables not covered in this study effect the cost of electricity and the types of facilities constructed in each state,[107] so this data is not meant to provide conclusive answers, but rather a general framework to view the impact of the different approaches to siting power plants.

A. California

The California Energy Commission (CEC) has the exclusive jurisdiction to site and certify generation facilities that meet the regulatory criteria under the California Environmental Quality Act (CEQA).[108] This means the typical permitting process is likely a one-stop process. In general, the CEC has jurisdiction over power plants with a net generating capacity of 50 MW or more.[109] However, the CEC must coordinate with relevant federal agencies in the development of any required federal permits, which are also addressed in the CEC's final decision.[110]

Projects that are under 100 MW, considered Small Power

[105] *In the Matter of Competitive Opportunities Regarding Electric Service*, *passim*.

[106] Paterson Press Release, *supra* note 76.

[107] Variables include the type of fuels available in the state and the amount of other regulations on generating facilities. For example, a coal producing state, such as West Virginia, will likely have cheaper electric prices because of the ease in obtaining coal. On the other hand, a state involved in a regional greenhouse gas initiative that places a cap on emissions will likely have higher prices because the requirements to limit emissions means companies either need to buy credits or turn to alternative energy. Presently, alternative energy tends to cost more than a cheap, but dirty, coal-burning facility. Additionally, certain areas in the United States are better suited for wind turbines based on wind patterns.

[108] CAL. PUB. RES. CODE § 25500 (West 2007) ("The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.").

[109] *Id.* § 25120.

[110] *Id.* § 25500.

Plants that will not have any significant unmitigated impacts on the environment or energy resources, may obtain an exemption from the CEC's permitting process.[111] If the exemption is granted, the project utilizes the CEC's Mitigated Negative Declaration to obtain the necessary permits from local and state agencies.[112] Once an application is complete, the certification licensing process is typically completed in twelve months.[113] An application for a Small Power Plant Exemption is not subject to informational requirements, meaning it can be finished in about six months.[114]

The siting process in California is similar to the old Article X,[115] but electricity prices in the two states do not match. Electricity in California cost an average of 15.31 cents per kilowatt hour[116] across all sectors (residential, commercial, industrial, transportation) as of August, 2010.[117] This is an increase of 11 cents from August, 2009.[118] In comparison, the average cost of electricity in New York across all sectors was 17.06 cents per kilowatt hour in August, 2010.[119] So, on average, electricity was more expensive in New York by 1.75 cents per kilowatt hour. However, both New York and California's cost of electricity exceed the national average of 10.45 cents per kilowatt hour in August, 2010.[120]

In terms of installed wind capacity, based on 2009 figures,

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[111] CAL. CODE REGS. tit. 20, § 1936 (2010).

[112] CAL. PUB. RES. CODE §§ 25500, 25541.

[113] *See Site Certification Process General Overview*, CAL. ENERGY COMM'N, *available at* http://www.energy.ca.gov/public_adviser/site_certification_process.html (last visited May. 15, 2011); CAL. ENERGY COMM'N, EXAMPLES OF ENERGY FACILITY LICENSING SCHEDULES FOR 6-MONTH AND 12-MONTH AFC PROCESSES, AND SMALL POWER PLANT EXEMPTION (SPPE) 4 (2010), *available at* http://www.energy.ca.gov/sitingcases/6-MONTH_12-MONTH_SPPE_PROCESS.PDF.

[114] CAL. ENERGY COMM'N, *supra* note 113, at 4.

[115] The Small Power Plant Exception did not exist under Article X.

[116] A kilowatt hour is typically how electricity is measured. A kilowatt (kW) is 1,000 watts, and a kilowatt hour refers to the use of a device or a set of devices that use 1,000 watts for an hour. For example, using a 100 watt light-bulb for ten hours equals one kilowatt hour, as would the use of a 10,000 watt machine for six minutes.

[117] U.S. Energy Info. Admin., *Average Retail Price of Electricity to Ultimate Consumers by End-Use Sector, by State*, ELECTRIC POWER MONTHLY (2010) [hereinafter *Average Retail Price*] (on file with author).

[118] *Id.* (listing August 2010 price at 15.31 and August 2009 price at 15.2).

[119] Which is up thirty-three cents from August 2009. *Id.* (listing August 2010 price at 17.06 and August 2009 price at 16.73).

[120] *Id.* (the national average increased by nine cents from 2009).

California had 2,650 MW from seventy-six different producers,[121] an increase of 1,109 MW since 2000.[122] This wind capacity represented four percent of California's total installed capacity.[123] In 2009, New York had a 1,274 MW wind capacity from fifteen producers, an increase of 1,259 MW.[124] While the raw data shows New York installing more wind power than California in this period, New York only had 15 MW of wind energy in 2000 whereas California already had 1,541 MW.[125]

B. New Hampshire

Generating facilities exceeding 30 MW in capacity must be approved by the New Hampshire Site Evaluation Committee (SEC).[126] If the SEC approves the facility, it grants a Certificate of Site and Facility with conditions.[127] Approval of the Certificate is contingent upon the applicant's successful demonstration that: (1) a need exists for the facility, (2) evidence that the appropriate financial management to support the proposed facility is in place, and (3) that the facility will suitably comply with all pertinent state public health, environmental, economic, and safety standards.[128]

The New Hampshire Department of Environmental Services reviews the siting, location, and potential environmental impacts of the proposed facility. The New Hampshire Public Utilities Commission reviews the safety, capacity, and reliability aspects of the proposal. Other member agencies of the SEC review the economic and land use impacts, potential public health effects, consistency with smart growth planning objectives (including effects on state transportation systems), consistency with state

[121] Installed capacity refers to the amount of power that can be generated. The figures used in this paper are based on installed summer capacity (the actual amount of power produced during summer peak usage) which is a more accurate reflection of the amount of energy available compared to relying on the nameplate capacity (the capacity the generating plant was designed to produce). *See* U.S. ENERGY INFO. ADMIN., EXISTING CAPACITY BY STATE (2010) [hereinafter EXISTING CAPACITY], *available at* http://www.eia.doe.gov/cneaf/electricity/epa/existing_capacity_state.xls.

[122] *Id.* (2,650–1,541).

[123] *Id.* (65,948 [net summer]/2,650[wind]).

[124] *Id.* (1,274–15).

[125] *Id.*

[126] N.H. REV. STAT. ANN. §§ 162-H:3–H:4 (Supp. 2010).

[127] *Id.* §§ 162-H:2, 7, 10.

[128] *Id.* § 162-H:7.

energy policy, and potential changes to fisheries or wildlife habitats, endangered species, and population dynamics.[129]

New Hampshire allows an Assistant Attorney General to serve as the Counsel for the Public to "represent the public in seeking to protect the quality of the environment and in seeking to assure an adequate supply of energy."[130] The various members of the SEC must submit their recommendations within five months, followed by adversarial hearings, and then the SEC must render its final decision within nine months of these hearings (or within ten months, if the project involves a bulk power facility).[131] Renewable energy facilities, defined as larger than 30 MW but less 120 MW, receive expedited treatment; within 240 days of the acceptance of an application, a decision on whether to grant a permit must be made.[132]

Electricity in New Hampshire cost an average of 15.12 cents per kilowatt hour in August, 2010, a 48 cent increase from August, 2009.[133] Compared to New York, power is still 4.95 cents cheaper in New Hampshire, but the price of electricity in New York rose 33 cents, a smaller price increase than in New Hampshire. Regardless, both states have kilowatt hour prices well above the national average of 10.45 cents.[134]

In terms of wind energy, New Hampshire currently has 23 MW installed out of a total installed capacity of 4,165 MW, meaning that wind represents 0.5% of New Hampshire's generating capacity.[135]

C. New Jersey

Siting of new electric power generators facilities requires approval by local authorities and the New Jersey Department of Environmental Protection. However, a generator may appeal to the Board of Public Utilities if the generator is "aggrieved by the action of a municipal agency."[136] If the board finds the proposed use is "necessary for the service, convenience or welfare of the public" and "no alternative site . . . [is] reasonably available,"

[129] *Id.* § 162-H:4.
[130] *Id.* § 162-H:9.
[131] *Id.* §§ 162-H:10, 17.
[132] *Id.* § 162-H:6-a.
[133] *Average Retail Price*, *supra* note 117.
[134] *Id.*
[135] EXISTING CAPACITY, *supra* note 121.
[136] N.J. STAT. ANN. § 40:55D-19 (West 2008).

then "the generator may proceed in accordance with" the board's decision notwithstanding any other ordinance or regulation of a municipality.[137] Any interested party can seek judicial review.[138]

Additionally, New Jersey recently revised certain aspects of siting new generation facilities including: (1) placing limits on municipalities in terms of small wind energy systems;[139] (2) creating a commission to "examine State owned property and [to] determine where solar and wind energy installations would be feasible;"[140] (3) amending the municipal law definition of "[i]nherently beneficial" to include "wind, solar or photovoltaic energy facility or structure;"[141] and (4) amending the State Right to Farm Act to specify that energy generated from solar, wind, or biomass projects is a permissible activity and giving farmers preferential tax treatment for such uses.[142]

Electricity in New Jersey cost an average of 15.76 cents per kilowatt hour in August, 2010,[143] a 33 cent increase from August 2009.[144] In terms of wind energy, New Jersey only had 8 MW from a single producer, as of 2009.[145] So, while electricity is currently cheaper in New Jersey, it remains to be seen whether these new laws will increase its renewable energy portfolio and at what cost.

D. Ohio

In 2008, Ohio passed a new law, "[n]o public agency or political subdivision of this state may require any approval, consent, permit, certificate, or other condition for the construction or

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[137] *Id.*

[138] *Id.*

[139] *Id.* § 40:55D-66.12. A small wind energy system is 100 kW or less. N.J. CLEAN ENERGY PROGRAM, TOWARD THE DEVELOPMENT OF A MODEL ORDINANCE ADDRESSING SMALL WIND ENERGY SYSTEMS FOR NEW JERSEY MUNICIPALITIES (2007), *available at* http://www.njcleanenergy.com/files/file/SmallWindModelOrdinance111907.pdf.

[140] Act of Jan. 16, 2010, ch. 239, 2010 N.J. Laws 1–2, *available at* http://www.njleg.state.nj.us/2008/Bills/PL09/239_.PDF.

[141] Act of Nov. 20, 2009, ch. 146, 2009 N.J. Laws 2 (codified at N.J. STAT. ANN. § 40:55D-4 (West Supp. 2010)), *available at* http://www.njleg.state.nj.us/2008/Bills/PL09/146_.PDF.

[142] N.J. STAT. ANN. § 4:1C-32.4 (West Supp. 2010).

[143] *Average Retail Price*, *supra* note 117.

[144] *Id.*

[145] U.S. DEP'T OF ENERGY, INSTALLED WIND CAPACITY BY STATE (2010) [hereinafter INSTALLED WIND CAPACITY], *available at* http://www.windpoweringamerica.gov/wind_installed_capacity.asp.

initial operation of a major utility facility or economically significant wind farm authorized by a certificate issued" by the Ohio Power Siting Board (OPSB).[146] A "major utility facility" is a generating plant of 50 MW or more, while an "economically significant wind farm" refers to wind facilities with a single interconnection that produces 5 MW or more.[147] The required certificate is one of Environmental Compatibility and Public Need that must be obtained from the OPSB.[148] Smaller projects can be approved within two to three months, while larger projects may take up to twelve months from the date the application is submitted.[149]

Electricity in Ohio cost an average of 9.36 cents per kilowatt hour in August, 2010, 7.7 cents cheaper than New York.[150] The price of electricity dropped 15 cents in Ohio from August 2009.[151] Yet, Ohio only has a small amount of wind energy; 7 MW installed capacity generated by a single producer represents well under 0.01 percent of Ohio's total installed capacity of 33, 539 MW.[152] Moreover, this level has not changed as of December 31, 2009,[153] a full year and half since Ohio adopted its law allowing the one-stop permitting process for 5 MW or larger wind farms. However, Ohio has certified 1,032.6 MW of wind power since 2008, but the projects have yet to be built.[154] In comparison, New York has installed roughly 440 MW of wind power since 2008.[155]

E. Pennsylvania

In Pennsylvania, local zoning laws dictate where generation facilities can be built. However, in an effort to encourage alternative energy sources without preempting local governments, Pennsylvania offers two incentives. First, it

[146] OHIO REV. CODE ANN. § 4906.13(B) (LexisNexis Supp. 2011).
[147] *Id.* § 4906.13(A).
[148] *Id.* §§ 4906.01, 4906.13(B).
[149] OHIO POWER SITING BD., SITING NEW ENERGY INFRASTRUCTURE IN OHIO (2010), *available at* http://www.puco.ohio.gov/emplibrary/files/OPSB/Presentations_Manuals/OhioSitingManual.pdf.
[150] *Average Retail Price*, *supra* note 117.
[151] *Id.*
[152] *Id.*
[153] INSTALLED WIND CAPACITY, *supra* note 145.
[154] OHIO POWER SITING BD., OHIO WIND TOTALS 1 (2011), *available at* http://www.opsb.ohio.gov/opsb/?LinkServID=895FE98C-C363-FCF9-6BFDC7DF3A3F7AA2&showMeta=0.
[155] INSTALLED WIND CAPACITY, *supra* note 145.

formulated a Renewable Portfolio Standard "with financial incentives and programs to stimulate the market for renewable energy.[156] Second, Pennsylvania created the Model Ordinance for Wind Energy Facilities to help municipalities prepare for a potential increase in wind energy development.[157] The Model Ordinance assists municipalities that may be unprepared for proposed wind development projects, resulting in poor decisions.[158] Government officials collaborated with private sector organizations to draft the Model Ordinance.[159] The Model Ordinance addresses the typical complaints that NIMBYism can raise: (1) visual appearance, (2) noise, (3) setbacks, (4) signal interference, and (5) decommissioning.[160] The ordinance provides mechanisms for fielding public complaints by including a public hearing requirement and mandating that the facility owner designate an employee as a community contact person for the duration of the project.[161] The availability of the ordinance is important for municipalities without zoning ordinances because a town can enact such an ordinance through its municipal code based on its police powers.[162]

Electricity in Pennsylvania cost an average of 10.76 cents per kilowatt hour in August 2010.[163] This is an increase of 84 cents from August 2009.[164] In terms of wind energy, the Keystone state has 696 MW of wind capacity out of its total capacity of 45,611 MW, which is 1.5% of the total.[165] But between 2005 and 2009, Pennsylvania has increased its installed wind capacity by 619 MW.[166]

These five states have taken varying approaches to siting

[156] Gregory D. Eriksen, Note, *Breaking Wind, Fixing Wind: Facilitating Wind Energy Development in New York State*, 60 SYRACUSE L. REV. 189, 203 (2009).

[157] CITIZEN'S FOR PA'S FUTURE, MODEL ORDINANCE FOR WIND ENERGY FACILITIES IN PENNSYLVANIA § 2 (2006), http://www.pennfuture.org/UserFiles/ModelWindOrdinance_Final3_21_06_.pdf [hereinafter MODEL ORDINANCE].

[158] Mark K. Daush, Comment, *Analyzing a Municipality's Authority to Enact the Model Ordinance for Wind Energy Facilities in Pennsylvania*, 45 DUQ. L. REV. 47, 47 (2006).

[159] *Id.*

[160] MODEL ORDINANCE, *supra* note 157, §§ 8(E), 9, 13, 15, 17.

[161] *Id.* §§ 7(D), 18.

[162] Daush, *supra* note 158, at 53.

[163] *Average Retail Price*, *supra* note 117.

[164] *Id.*

[165] INSTALLED WIND CAPACITY, *supra* note 145.

[166] *Id.* This is nameplate capacity, not summer peak capacity. Pennsylvania's total installed capacity as of December 31, 2009 was 748 MW. *Id.*

power plants, but it is hard to determine which approach is more successful. Not only is this a challenging question because of the numerous variables that affect electricity prices, but defining success takes on different meanings for different people. For some states, cheap electricity means success—even if the environment suffers. For others, clean electricity and environmental justice is more important.[167] Regardless of one's views on success, the five approaches examined here offer many different policy choices for New York to consider as it works towards its own unique energy goals.

V. STATUS OF THE ARTICLE X DEBATE TODAY

In New York today, siting and constructing an electric generating facility requires satisfying the local land use requirements and state agency environmental permits processes, within the wider framework of SEQRA's procedures. This process, as the 2009 State Energy Plan explains, has resulted in the siting of "1,000 MW of wind facilities and 325 MW of gas-fired generation, with another 3,000 MW of wind projects and . . . 1,100 MW of natural gas-fired generation . . . undergoing review."[168] While this does seem to suggest that the current state of affairs is acceptable,[169] New York will need more power produced in a clean, efficient, and fair manner,[170] and certain issues involving

[167] This is not to suggest that cheap electricity and a clean environment are mutually exclusive. For example, electricity in Washington State costs 6.61 cents per kWh, which is cheap compared to the national average of 12.02 cents. Nevertheless, Washington State received sixty-six percent of its electricity from hydro power in 2004. *See* WASH. STATE DEP'T OF COMMERCE, FREQUENTLY ASKED QUESTIONS: ELECTRICITY (2005), http://www.commerce.wa.gov/_CTED/documents/ID_2657_Publications.pdf. However, such abundance of hydro power is likely the result of geography rather than policy.

[168] 2009 STATE ENERGY PLAN, *supra* note 68, at 62.

[169] *See* N.Y. INDEP. SYS. OPERATOR, 2010 RELIABILITY NEEDS ASSESSMENT: FINAL REPORT i (2010), *available at* http://www.nyiso.com/public/webdocs/newsroom/press_releases/2010/2010_Reliability_Needs_Assessment_Final_09212010.pdf ("The 2010 RNA identified no Reliability Need, assuming that all modeled transmission and generation facilities, including Indian Point, remain in service during the next 10 years from 2011 through 2020.").

[170] While there may be over 4,000 MW of generation undergoing review, the history of Article X shows that many projects are proposed, but never produce any electricity. Moreover, if the plans to close the Indian Point nuclear facility are followed, New York will need to replace its 2,060 MW of power in a quick and efficient manner. N.Y. INDEP. SYS. OPERATOR, 2010 COMPREHENSIVE RELIABILITY PLAN 11 (2010), *available at* http://www.nyiso.com/public/webdocs/services/planning/reliability_assessments/CRP_2010_FINAL_REPORT_January

varying public and private interests are not addressed through the current process.

A. The Problems

First, under New York's deregulated system, new power plant proposals will likely come from merchant generators, i.e. the private sector. A primary interest of potential investors is an efficient and timely review process for siting electric generation facilities. The existing regulatory process does not establish a decision-making schedule upon which investors can rely. Furthermore, as the cases discussed illustrate, without a one-stop permitting process that would lead to only one lawsuit starting at the appellate level, many potential investors would not invest in New York for fear of NIMBYism and a long drawn-out regulatory process, followed by an arduous trek through the court system.

Another concern for the private sector is the size of projects that would fall under a revitalized Article X. In 2007, Governor Spitzer proposed a threshold of 5 MW,[171] and the New York State Assembly has offered bills with a 30 MW and over jurisdiction for a State Siting Board.[172] The industry expressed grave concern in light of these proposals for two reasons. First, the lower requirement would mean "that smaller plants with today's state-of-the-art controls that would not result in significant environmental impacts would be thrown into the two-year Article X process, making it virtually impossible for utilities and governmental officials to site peaking units or other clean emergency units when energy shortages are predicted or occur."[173] Additionally, smaller investors may be scared away from the state if low capacity projects are required to provide intervenor funding.

While developers have lobbied on behalf of their private

_11__2011.pdf. As concerns over climate change grow and the ever increasing demand for energy, a new law for the siting of major electricity generating facilities is likely a necessity for the economic and environmental health of New York. N.Y. AREA, ARTICLE X NEW YORK'S POWER PLANT SITING LAW: A PRIMER ON ITS HISTORY, STATUS, AND IMPORTANCE 5 (2008), *available at* http://www.area-alliance.org/documents/ArticleX.pdf ("Energy shortages in the state could cause billions of dollars in lost revenues and potentially pose significant public health risks if blackouts or brownouts were to occur during extreme hot or wintry times of the year.").

[171] Assem. 9001, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

[172] Assem. 8697, 2007 Leg., 230th Reg. Sess. (N.Y. 2007).

[173] Fazio & Wallace, *supra* note 27, at 4.

interests, public concerns have played an equally important role in the Article X debate. The major public concerns include public participation and the environment. Now "the SEQRA overlay ensures that State and local decisions affecting the environment will minimize any adverse impacts associated with electric generating facilities."[174] Environmentalists and others fear that an Article X-like process will shortchange the environment because the permitting process will be rushed to completion within one year. However, if nothing changes, the current framework does not provide intervenor funding, meaning poorer communities may not have their voices heard in an effective manner. Moreover, questions about the amount of money and how the funds should be used have arisen. For example, should legal fees be paid out of the intervenor fund?

In summary, the stumbling blocks are: "[1] the types and sizes of facilities to which the law would apply, [2] the amount and acceptable uses of intervenor funding, . . . [3] the obligation to consider environmental justice issues, . . . [4] the obligation to conduct an assessment of cumulative impacts,"[175] [5] whether renewable sources should be treated differently, and [6] whether to include greenhouse gas (carbon dioxide) standards.[176]

B. Proposed Solutions and Their Potential Problems

The New York State Energy Plan calls for "a single proceeding before a State body, similar to the authority provided to the Siting Board in the former Article X."[177] Yet, the plan's recommended solution does not establish a clear path for solving the issue. First, the plan notes that the issues "should be resolved among interested stakeholders."[178] But at this point, seven years since Article X has expired, it seems that the stakeholders cannot resolve their differences. Regardless, the plan calls for the following provisions:

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[174] 2009 STATE ENERGY PLAN, *supra* note 68, at 63.

[175] *Id.*

[176] Governor Eliot Spitzer released his first version of a new Article X, the "clean economic power supply" bill which for the first time in state history imposed a greenhouse gas (carbon dioxide) standard. *See* Assem. 8697. The bill also sought to address environmental justice concerns and lower the applicability threshold to 5 MW. As noted above, the extremely low threshold caused the bill to fail.

[177] 2009 STATE ENERGY PLAN, *supra* note 68, at 63.

[178] *Id.*

> A one-stop siting process that combines State and local authorizations into a single approval; a time-certain framework for rendering a decision on an application; authorization to override the application of unreasonably restrictive local laws; opportunities for extensive public input; and the availability of intervenor funding for expert witnesses and consultants.[179]

The most recent legislative attempt to reenact Article X was the bill cosponsored by Senator Parker and Assemblyman Cahill.[180] The bill contained air emission requirements, which the power industry strongly opposed.[181] The industry explained that, "Federal and State agencies have already taken significant steps to reduce the impact of power plant operations on the environment."[182] The power producers did not like the bill's proposal to raise the Intervenor Fund up to $450,000 or the lowing of the threshold to 20 MW.[183] On both of these issues, the industry expressed concern over the cost. Another concern was how "fuel-neutral" the bill was because it required a higher fee to be paid for facilities that involve storing fuel waste.[184] In addition, the industry was concerned about the bill's lack of language for a streamlined review of repowering projects.[185] Finally, the power producers expressed their dismay over having an expiration date for the bill because they did not want regulatory uncertainty in the future.[186]

Governor Andrew Cuomo outlined his vision for a new power plant generation siting law during his campaign.[187] The proposal

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[179] The recommendation was: "Develop a fuel neutral power plant siting law that provides greater market certainty to developers and investors and enhances public participation with sufficient intervenor funding made available to local communities, including improved notice provisions, and addressing environmental justice issues." *Id.*

[180] Assem. 11582, 2010 Leg., 233rd Reg. Sess. (N.Y. 2010); S. 8394, 2010 Leg., 233rd Reg. Sess. (N.Y. 2010).

[181] Press Release, Indep. Power Producers of N.Y., Memorandum in Strong Opposition of A.11582 Rule (Cahill) / S.8394 (Parker) (June 30, 2010) [hereinafter Indep. Power Producers of N.Y. Press Release], *available at* http://www.ippny.org/pdf.cfm?article=1517.

[182] *Id. See* N.Y. STATE CLIMATE CHANGE ACTION COUNCIL, POWER SUPPLY AND DELIVERY MITIGATION 21 (2010), *available at* http://www.nyclimatechange.us/ewebeditpro/items/O109F24020.pdf (noting that other laws and policy can and do address power plant emissions).

[183] Indep. Power Producers of N.Y. Press Release, *supra* note 181.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] ANDREW CUOMO, POWER NY: THE NEW NY AGENDA 85–87 (2010), *available at* http://www.andrewcuomo.com/system/storage/6/89/e/798/andrew_cuomo_powe

called for "a one-stop siting process" with "a date-certain framework for rendering a decision on an application and opportunities for extensive public input."[188] The Governor included requirements for "an analysis of health and cumulative impacts of emissions in the affected area" as well as "intervenor funding for expert witnesses and consultants," although no guidance was offered for the appropriate amount of funding.[189] Moreover, the Governor's *Power NY* plan expressed a desire for the siting law to be fuel-neutral, but the law should also "provide a fast-track review and approval process to those plant proposals that will provide the greatest amount of electrical power, use the most efficient technology, and be located on industrial brownfields or inside existing plant facilities."[190] Finally, Governor Cuomo's proposal called for "an expedited review process for renewable energy projects that rewards investors with an efficient, non-burdensome site approval and permitting process."[191]

The New York Interim Climate Change Action Plan, released in November 2010, offers the most recent proposal. The interim plan calls for accelerating the development of zero or low-carbon sources of power, reducing reliance on petroleum, and upgrading the power grid to increase the use of renewable energy.[192] One policy the plan suggests in order to reach this goal is to "re-create a more streamlined process for the siting of power plants."[193]

The policy (PSD-1) calls for having "a single fuel- and technology-neutral approval process" that has the ability to "override . . . the application of local substantive legal requirements that are unreasonably restrictive."[194] However, the plan does not specify the size of power plants in megawatts (MW) that will fall under this approval process. For example, Article X only applied to projects generating 80 MW or more. This is an issue because recent attempts to reenact Article X have stumbled over what size power plants a state siting law should regulate. Hopefully, the final Action Plan will be able to give more detail on these issues and generate the political will necessary for action to

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[188] *Id.* at 86.

[189] *Id.* (no set level of funding was specified).

[190] *Id.* at 86–87.

[191] *Id.* at 87.

[192] N.Y. STATE CLIMATE CHANGE ACTION COUNCIL, *supra* note 182, at 21.

[193] *Id.*

[194] *Id.*

actually take place—or this recommendation will go the way of Article X.

CONCLUSION

Article X helped bring thousands of megawatts to New York once its procedure was established. Yet, since the law expired on the first day of 2003, only a few large fuel-burning plants have been sited under SEQRA's framework. While wind projects have been more successful, the lawsuits that stem from NIMBYism have slowed the progress of this renewable energy source. It is likely that the current state of affairs cannot be sustained. This is likely because New York will need more than the couple hundred megawatts of wind power siting each year to meet its energy demands and its "45 by 15" goal. However, New York seems destined to continue with the status quo because after seven years of bills being introduced, nothing has happened. So perhaps another approach besides an Article X-like proceeding will work.

Pennsylvania's Model Wind Ordinance could help towns determine how best to handle wind projects. Perhaps a more informed Town Board would not face as many lawsuits if the Model Wind Ordinance is followed. Yet, a model ordinance does not seem to be enough. While Pennsylvania has steadily increased its wind power production, New York may need more power, especially if, and when, the 2,000 MW generated by Indian Point nuclear power plant is no longer available. In addition, there is no guarantee NIMBYism will be curtailed by a Model Ordinance. Similarly, New Jersey's incentives are a good idea, but would probably not be enough for New York.

This brings us back to an Article X one-step process with all its unresolved issues in New York including: the size of the facilities covered by the law, how much intervenor funding to provide, and how to be fuel-neutral while encouraging renewable energy sources. While these problems have been deeply entrenched, there is some ray of hope when looking at other states. For example, the intervenor fund issue could be addressed in a different way. Perhaps offering an Assistant Attorney General to aid intervenors (like New Hampshire) could satisfy community activists. The Assistant Attorney General could help with the legal work, thereby circumventing the issue of paying legal fees with intervenor funds. Further, intervenors in New York would

be very fortunate to have funding because other states do not require this funding, and they have been missing this source of money for seven years.

In terms of what size generating plants should be covered by a revived Article X, the experiences of other states, like California and Ohio, suggests that lowing the limit to 50 MW does not cause unnecessary hardship. Moreover, to assuage the proponents of lowering the threshold to 20 MW, a tiered system and expedited system for renewable energy could be an acceptable compromise.

A tiered system has many possible options. Ohio's 5 MW threshold for wind facilities with a single interconnection could help shield slightly larger wind farms from the NIMBYism-induced litigation that is currently raging in Western New York. Or, under Governor Cuomo's plan, New York could adopt a renewable Power Plant Exception that has an expedited review process, like California and New Hampshire. The threshold could be set lower than California's 100 MW or within a given range, for example 30 to 120 MW like New Hampshire. Regardless of the threshold, such a policy seems to fit nicely with Cuomo's *Power NY* plan.

New York has been unable to reach an agreement on how to re-enact a one-stop process for siting power plants. But looking to other states offers some potential compromises that may be able to restore power to New York's Article X.