

To: Our Clients and Friends

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New York Legislature Enacts Power Plant Siting Law

On June 22, 2011, the New York State Legislature enacted the Power NY Act of 2011. 2011 N.Y. S.B. 5844. This legislation includes measures to promote energy efficiency and renewable energy, but its most significant provisions reinstate a “one stop” approval process for new and expanded power plants under Article X of the Public Service Law. The new Article X is modeled after a prior version of the law that expired on January 1, 2003. With its expiration, new power plants have been subject to environmental review under the State Environmental Quality Review Act and a panoply of state and local permitting, siting and zoning laws and procedures. With Governor Andrew Cuomo’s expected signing of the new law later this summer, New York will once again have a streamlined power plant siting process, although the new law contains a number of provisions that will make it more difficult to certificate new power plants.

Article X governs the siting of “major electric generating facilities,” defined as power plants with generating capacities of at least 25 megawatts. The 25 MW applicability threshold under the new Article X is lower than the previous threshold of 80 MW under the old Article X. As a result, smaller electric generating facilities, including some wind-powered facilities, will now be covered by Article X. Further, because the new Article X drops the earlier exemption for power plants that “generat[e] electricity from the combustion of solid waste or from fuel derived from solid waste” (1992 N.Y. Sess. Laws 1480), those plants now would be covered by the law. Projects sponsored by the New York Power Authority, the Long Island Power Authority and certain other public authorities will be subject to the new Article X, as will those sponsored by independent power producers and utilities.

The key provisions of Article X are summarized below.

1. Composition of the Siting Board

Under the new Article X, the Siting Board, a group of seven people empowered to grant a Certificate of Compatibility and Public Need for a proposed project, will be comprised of five government officials and two ad hoc members from the local community. Under the old version of Article X, there was only one ad hoc local member on the board and that member had to be a resident in the “county” where a

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facility was proposed to be built. Under the new statute ad hoc members must reside in the affected municipality (outside the City of New York) and the affected Community Board district (within New York City).

2. Exclusive Authority of the Siting Board

Article X states that except as set forth therein, “no state agency, municipality or any agency thereof may ... require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility.” 2011 N.Y. S.B. 5844 § 172. This provision pre-empts municipal boards from denying permits for a project certificated by the Siting Board.

3. Role of the New York State Department of Environmental Conservation

The new Article X, like the previous version of the law, does not preempt NYSDEC’s permitting authority under air, water and solid waste laws. However, it folds NYSDEC into the process in that: (i) the Commissioner of NYSDEC sits as an ex officio member of the Board; (ii) a NYSDEC hearing officer is to serve as associate hearing examiner in the Article X proceeding; (iii) Article X Certificate applications must include the information necessary for the issuance of permits by NYSDEC; (iv) NYSDEC permits are to be issued based upon the record developed in the Article X process; and (v) NYSDEC permits are to be issued prior to the issuance of an Article X Certificate.

4. Pre-application Requirements

The new Article X (like the earlier version) includes mandatory pre-application requirements. Entities intending to seek an Article X Certificate must file a “preliminary scoping statement” with the Board containing descriptions of: (i) the proposed facility; (ii) potential health and environmental impacts of the facility on the surrounding community; (iii) proposed studies to evaluate potential health and environmental impacts; (iv) proposed measures to minimize those impacts; (v) if applicable, a study of the sufficiency of on-site fuel storage for petroleum-based electric facilities; (vi) reasonable alternatives to the facility; (vii) other necessary state and federal permits needed for construction of the facility; and (viii) any other required or relevant information. Submission of a pre-application preliminary scoping statement triggers a “pre-application process,” overseen by an appointed hearing examiner, designed to define the scope and methodology for the studies to be included in the Article X application. As under the previous Article X, agreements reached with respect to such matters are to be documented in stipulations, which may define with some particularity the nature and extent of the analyses required with respect to the relevant issues.

5. Pre-application Phase Intervenor Accounts

Unlike the previous Article X, the new legislation requires the funding of a “pre-application” intervenor account. This account is intended to fund pre-application expenses incurred by municipal and local

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parties (including individuals and community groups) for expert witnesses, consultants, and legal and administrative fees. The new Article X requires the applicant to pay \$350/MW of the proposed facility's generating capacity up to a maximum payment of \$200,000 for the pre-application phase fund. The intervenor fund may be used to pay legal fees, but it may not be used to pay fees incurred in litigation.

6. Application for a Certificate

The new Article X adopts many of the same application requirements contained in its earlier version. Thus, detailed information assembled in conformity with stipulations entered into during the pre-application process is required with respect to the proposed facility; its environmental, public health, safety, economic and energy-related impacts; as well as "reasonable and available alternatives" to the project. However, the new Article X includes additional application requirements for proposed facilities. The most significant new requirements concern:

- **Security:** A security plan must be prepared and submitted for the proposed plant, including "measures to be taken to ensure the safety and security of the local community" This plan is to be reviewed by the Board in consultation with the New York State Division of Homeland Security and Emergency Services and, in New York City, the City's Office of Emergency Management.
- **Environmental Justice:** A report must be submitted with respect to environmental justice concerns, including a comprehensive description of the demographic, economic and physical characteristics of the community within a half-mile of the proposed facility (including available public health data), as compared to the characteristics of the county and adjacent areas.
- **Cumulative Impact Analysis of Air Quality:** A study of the cumulative impact of the existing and proposed sources that may deleteriously affect air quality within a half-mile of the proposed facility.
- **Wind-Powered Facilities:** Article X requires an analysis of the expected environmental impacts of a proposed wind-powered facility on avian and bat species, and a plan to mitigate those impacts.

7. Application Phase Intervenor Accounts

In addition to the pre-application intervenor account described above, the new Article X requires the project sponsor to establish an application phase intervenor account to fund costs for municipal and local parties to a proceeding. Under the new Article X, an application must be accompanied by a fee of \$1,000/MW up to a maximum of \$400,000. This cap raises significantly the previous cap of \$150,000 under the earlier law.

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8. Timeline Requirements

The new Article X maintains the same twelve-month final decision deadline for Certificates that was included in the expired Article X. However, the new Article X streamlines the process further (by cutting down the decision time to 6 months) for owners who propose to modify an existing facility or build an additional plant adjacent to an existing facility, where the modification or new facility (in combination with the existing facility) would meet specified cooling water intake requirements and achieve lower air emissions and a lower heat rate.

For questions or further information concerning the New York's new power plant siting legislation, please ask your Bryan Cave contact, or

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Healy and Karmel served as outside legal counsel in the successful effort to certificate the East River Power Project under the expired version of Article X.

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