

CASE 12-F-0036 - DRAFT DISCUSSION DOCUMENT, JULY 2012 SITING
BOARD MEETING, PUBLICLY RELEASED 7-9-12.

STATE OF NEW YORK
BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State
Board on Electric Generation
Siting and the Environment held in
the City of Albany on July 10,
2012, by a _____ vote of its five
members present

BOARD MEMBERS PRESENT:

CASE 12-F-0036 - In the Matter of the Rules and Regulations of
the Board on Electric Generation Siting and the
Environment, contained in 16 NYCRR, Chapter X,
Certification of Major Electric Generating
Facilities.

MEMORANDUM AND RESOLUTION ADOPTING ARTICLE 10 REGULATIONS

(Issued and Effective)

BY THE BOARD:

INTRODUCTION

In this memorandum and resolution, the New York State

Board on Electric Generation Siting and the Environment (Siting Board) promulgates new regulations to implement Article 10 of the Public Service Law, enacted in Chapter 388 of the Laws of 2011. Article 10 empowers the Siting Board to issue Certificates of Environmental Compatibility and Public Need authorizing the construction and operation of major electric generating facilities.

BACKGROUND

The Legislature enacted Article 10 of the Public Service Law (PSL) to ensure that state and local regulatory certification regarding the construction and operation of major electric generating facilities would be determined in a unified manner. The statute requires certification proceedings to be conducted expeditiously and generally imposes a 12-month deadline on such proceedings. The statute mandates a pre-application consultation process to obtain early input from the public regarding proposed facilities, provides for active public involvement, and establishes requirements for intervenor funding to promote local participation in siting cases. The statute also empowers the Siting Board to promulgate regulations to implement Article 10.

NOTICE OF PROPOSED RULE MAKING

A Notice of Proposed Rulemaking concerning the regulations under consideration here was published in the State Register on April 11, 2012 (SAPA12-F-0036SP1). The minimum period for the receipt of public comments pursuant to the State Administrative Procedure Act (SAPA) regarding that notice expired on May 29, 2012. Certain municipal parties were given an extension until June 15, 2012 to submit comments. Over 100

comments were received. All the relevant comments received are summarized below.

DISCUSSION AND ANALYSIS OF COMMENTS

Part 1000 General Comments

A few comments raise concerns about the role and powers of the Ad Hoc members of the Siting Board. "Ad Hoc" is a Latin term meaning "for this special purpose". We take this opportunity to clarify that Ad Hoc members will be appointed for the special purpose of providing a local voice in individual proceedings conducted to consider applications for certificates. Each facility application will have its own unique Ad Hoc members and therefore its own unique Siting Board. In those individual proceedings, the Ad Hoc members will contribute to there being a quorum, and will have voting rights, just like the permanent members. If a certificate is granted ultimately, pursuant to the statute, the unique Siting Board for the case will relinquish its jurisdiction and thereafter certain subsequent matters will either be in the jurisdiction of the Permanent Board (without Ad Hoc members) or in the jurisdiction of the Public Service Commission.

1000.1 Purpose and Applicability

No discussion necessary.

1000.2 Definitions

(u) Local Substantive Requirements

An engineering consultant firm asserted that the definition should not include references to wetlands, flood zones, and solid waste because these areas are regulated by federal rules or a combination of federal and state rules, which are sufficient to protect the resources. A public interest coalition asserted that local requirements related to waste handling facilities should be added to the definition because

Article 10 should not provide a mechanism for circumventing municipal regulations to ensure waste facilities are not overly concentrated in specific communities or sited in close proximity to receptors.

Discussion

Neither request will be adopted. Many local governments have adopted local substantive requirements regarding what can be built (or not built) in wetlands and flood zones, and have adopted local substantive requirements regarding solid waste handling and storage. Taking the language out of the definition would have the opposite effect of that intended by the comment. The location of waste facilities is already encompassed in the term "zoning" that is already part of the definition.

(x) Modification & (ak) Revision

Several wind developers and their trade supporters request that the definition of "modification" include, and the definition of "revision" exclude, the shifting of an access road or electric collector line to a new location within a 500 foot radius of the original location provided such change does not significantly increase impacts on sensitive resources or decrease compliance with setback and similar requirements, as is currently provided for the shifting of wind turbines in the proposed regulations. They argue that if the shifting of turbine locations is allowed, it is likely that the ancillary access roads and electric collector lines will need to be shifted as well. They argue these allowances recognize the common practice of making adjustments in wind turbine locations to accommodate concerns raised during application review. One wind developer requests that the 500 foot limitation be eliminated such that any change in location would not be a "revision". Some wind developers request that the same

allowance be made for substations, and that a change of turbine types also not be considered a "revision".

A member of the State Senate urges that the discretionary 500 feet allowed for the actual construction of the turbines should be drastically reduced because if the project is approved, it should be constructed where it was approved, and the public should be guaranteed of its location. One individual commented that a 500 foot change in turbine location should not be allowed, especially when it impacts a non-participating landowner. Another individual asserted that the section should be kept as originally written. A municipality asserted that the allowance in the definitions should be reduced to no more than a 100 foot radius because the Federal Aviation Administration (FAA) considers micro adjustment or micro siting to mean moving the wind turbine from 100 to 500 feet from its originally filed location, thus any reposition of a turbine outside of a 100 foot circle will require FAA review. A 500 foot move will likely also require reconsideration of visual and noise impacts, particularly if such a move also entails a change in elevation.

Discussion

The discretion at issue here does not include discretion to move turbines without Siting Board approval, although the Siting Board may consider granting such discretion separately in a certificate condition. The addition of access roads and electric collector lines to the allowance is a logical and practical extension of what was intended by the original allowance with respect to turbine placement, therefore those changes will be made. Changes in substation locations and turbine types may raise substantially different issues and should be considered on a case by case basis without a pre-set allowance for changes. The interplay of concurrent Siting Board

and FAA jurisdiction may present a challenge to siting, but limiting flexibility in the Siting Board arena will not necessarily make matters easier. In a large rural, agricultural or forested landscape, a 500 foot shift could likely be accommodated provided that it does not significantly increase impacts on sensitive resources or decrease compliance with setback and similar requirements. We expect that most such shifts will be motivated by decreasing adverse impacts rather than increasing them.

(ae) Private Facility Applicant

A facility trade organization requests that the definition be modified to find that an applicant is not a private facility applicant when it is working with an industrial development agency or public authority and the agency or authority is using its powers of eminent domain to condemn the proposed site location. It believes the proposed definition will delay the pre-application process and that the agency or authority that is working with the applicant may not be willing to exercise its power of eminent domain in support of the proposed facility. Even if some agencies or authorities are comfortable using this power to condemn small parcels of land in support of the project, for example property needed for a substation or transmission line, that fact alone does not indicate that the agency or authority would be willing to condemn significant amounts of property.

An individual responded that the language pertaining to eminent domain should not provide an avenue for developers to gain eminent domain privileges and the applicant should have to identify alternative locations because that is a cost of the development process regardless of eminent domain powers.

Discussion

The exclusion of private facility applicants from

having to consider alternative sites is only legitimate if they have no direct or indirect ability to obtain such sites. We are not persuaded by the comments that any change is warranted.

(ai) Public Rights of Way

A facility trade organization asserts that the definition of public rights of way should not be limited to only land that is used by motor vehicles. It notes that projects can rely on public rights of way to site interconnections in the subsurface area of the land, which can include land that is accessible only by foot or is underwater land. It further asserts that the proposed definition restricts the definition of public rights of way in a manner that is not found or supported by the statute.

An individual asserts in response that the municipalities should have to grant permission for the use of public rights of way on municipally held land because these lands are within their jurisdiction.

Discussion

The use of the word "public" implies that the public has an unrestricted right of travel over the rights of way at all times. The use of the words "rights of way" implies that the lands are primarily used for through access and are not general lands. Rights of way established for motor vehicles (streets and highways) are generally the only publically-owned rights of way that meet both parts of the definition. The definition as written recognizes rights similar in nature to those granted to public utility companies when they obtain franchises to use the rights of way of streets and highways maintained by a municipality, but no more. We believe that to be the intention of the statute. Lands reserved for future streets, footpaths and inland water bodies on public lands are generally subject to restrictions such that they often are not

open to public use, and they are not primarily used for unrestricted through access. Inland rivers in public ownership may be subject to momentary navigation rights, but not permanent occupation. Lands underwater in the Great Lakes, Lake Champlain, the Hudson River, Long Island Sound and the Atlantic Ocean (there may be others) within the jurisdiction of New York State, while subject to navigation rights, are not considered public rights of way. They are held in trust by the State or certain municipalities for the benefit of the people and may not be alienated. These lands may be occupied in a manner that does not interfere with navigation pursuant to certain revocable consents that may be granted pursuant to State statutes that cannot be waived by the Siting Board. We are not persuaded by the comments that any change is warranted.

(ar) Study Area

A wind developer and an organization that promotes wind development assert that the five-mile study area for rural projects is too broad and should be restricted to the project footprint unless extended in the stipulation process. A facility trade organization asserts that the definition needs to provide that in a highly urbanized area the study area will be one-mile for all projects, regardless of size. It also asserts that the study area for all projects should be one mile, with the applicant having the option to increase the study area based on project specifics or a stipulation executed by the parties.

A public interest coalition asserts that the study area should be broadened to include any area affected by at least one significant adverse impact from the proposed project. A municipality asserts that a two-mile radius study area should be sufficient to understand potential noise impacts, unless site specific topography suggests otherwise, but the regulations should retain the larger study area for visual, wireless

communications, avian and bat impacts. It also notes that in addition to visual impacts, evaluation of potential impacts on military and weather radar require study beyond five miles from a wind-powered facility. Impacts on other wireless communications may require a similarly wide field of investigation. In addition, Article 10 identifies potential impacts of wind-powered facilities on avian and bat resources as requiring special study. These studies ordinarily require an investigation in excess of five miles around the project area and, if the potential for such impacts exists, may call for detailed field studies over several years.

Discussion

The issues raised are similar to those already raised in the stakeholder process. The proposed regulations provide sufficient flexibility to address all the issues that were raised in an appropriate manner. Having reviewed the comments, we are satisfied that no changes are warranted.

1000.3 Adoption of Procedures by Reference

No discussion necessary.

1000.4 Public Involvement

Several wind developers, a developer representative, and two facility trade organizations, assert that the public involvement plan should be merged with the preliminary scoping statement thereby eliminating any time between the two and any requirement for public involvement activities prior to submission of the preliminary scoping statement. They claim that an applicant is not in a position to share details of the project with the public in an outreach effort until it has filed the preliminary scoping statement and that the public will want a full understanding of the project, not an incomplete sketch. They argue that the preliminary scoping statement provides sufficient opportunity for the public to provide input on the

project and allows the applicant to make any appropriate changes to the project at an early stage in the case. Some of the wind developers also argue that their public outreach already conducted on pending applications that become Article 10 cases should not be ignored. One wind developer asserts that since the proposed regulations do not require an applicant to make changes to the public involvement plan recommended by DPS in its review of the plan, the need for an applicant to respond in writing to DPS's comments should be eliminated. Another wind developer asserts that all the timeframes should be optional. Some of the comments, including one from a public utility company, request shortened timeframes for repowering projects. One wind developer also requests that applicants be allowed waivers of the 90-day timeframe between the filing of the PSS and the application, for good cause shown.

Many individuals, municipalities, and a locality advocacy group provided comments in support of the proposed regulations as written. They assert the public should become involved in planning at the earliest possible time; the public does not want to hear about a project that appears to be a "done deal"; local stakeholders should not be put in a hurry-up mode; it is imperative that public input takes place before scoping begins; and that public involvement should not be sacrificed to save time.

Several members of the State Assembly urged that the regulations provide for meaningful outreach to stakeholders in environmental justice communities potentially impacted by an Article 10 application, to maximize their ability to participate meaningfully throughout the process. They note that one basic tenet of environmental justice is that government must work actively to overcome barriers that have all too often resulted in decision-making without the active and informed participation

of minority and low-income communities. They assert that outreach and engagement of environmental justice community stakeholders is necessary so that their voices are not subordinated to those of other affected communities with more resources, and also to ensure that the analyses and recommended mitigation measures are not developed in studies that do not consider their knowledge and insights on the needs of their community.

One municipality observed that the lead time necessary for planning and other pre-application environmental and health information is at least as time-consuming as the lead time necessary to conduct public involvement activities, therefore retaining the public involvement requirements as drafted is not overly burdensome and will allow beneficial public participation at an early stage in project planning. The requirements as drafted may also allay concerns of municipalities that their participation in the siting process is being overly curtailed. The better approach is to require public involvement during a pre-application phase, as provided in the proposed regulations, to preserve the goal of completing Article 10 application reviews in a 12-month timeframe.

A public interest coalition and a county planning office request that the regulations include provisions for recourse to hold developers accountable for the failure to adequately conduct public involvement activities, including making any certificate issued vulnerable to legal challenge.

Several of the comments included requests that public hearings be held in the affected locality and at times when residents can participate.

Discussion

It is important that public involvement activities begin as early as practicable before development plans are so

far advanced that the developer feels it cannot be flexible or open to beneficial modifications. Moreover, the statute calls for early and often public involvement in the siting process.

In any event, most, if not all, major electric generation facilities are planned over a sufficient lead time that the time periods set forth in the proposed regulations should not be unnecessarily burdensome. The issues raised are similar to those already raised in the stakeholder process. Having reviewed the comments, we are satisfied that no changes are warranted.

1000.5 Pre-Application Procedures

An engineering consultant asserted that in order to gain information that will help in the review of projects, the State should become involved in the siting process earlier than required by the regulations and, therefore, applicants should be required to provide notice when they build a met tower or begin leasing lands for a future facility.

A wind developer asserts that applicants should not be required to discuss alternate locations owned by affiliates of the applicant, claiming that an applicant does not necessarily have access to the locations owned or controlled by its affiliates. A wind developer asserts that the requirement for public notice of the filing of a preliminary scoping statement to any community where an alternative site is being evaluated should be eliminated so as not to jeopardize future development of the alternate site. A facility trade organization asserts that the proposed regulations require too much information in the preliminary scoping statement regarding the environmental justice analysis and the air quality data, which will have to be changed later after interaction with stakeholders and the state agencies. A facility trade organization asserts that an applicant should not be required to identify at the preliminary

scoping statement stage if it will seek to use the power of eminent domain as the applicant may later change its project. A wind developer asserts that the timeframe between the filing of a preliminary scoping statement and the application should be reduced as the timeframe is excessive. A wind developer asserts that the Siting Board should indicate which local laws it will waive for the project prior to the submission of an application. Another wind developer requests that the regulations impose a maximum comment period of five days for public comment on proposed stipulations.

A facility trade organization requests that the analyses in the preliminary scoping statement about an applicant's ability to comply with state laws and regulations and the applicant's explanation as to why the Board should elect not to apply local laws should be only "preliminary" analyses and explanations.

A public utility company and a facility trade organization assert that the regulations should be modified to reduce the submittal and time requirements for repowering projects. A Hudson River conservation group asserts that the regulations should ease the regulatory burden of renewable resource facility applications in comparison to fossil fuel facilities.

A municipality warns that scoping has been used to overly narrow the study that may be required as applications develop, and advises that to forestall that possibility, the preliminary scoping statement should contain the level of detail as written in the proposed regulations. The application process should not go forward without fully specifying the scope of future studies. Otherwise, disputes about the scope can be expected to exceed the time allowed for expedited review, as applicants, siting board staff and intervenors will continue to

argue about the scope of such studies. Because the timeframes for subsequent stages of the application review process are expedited, the regulations should identify a sufficient level of detail in the information required to begin the process.

A locality advocacy organization asserts that the amount of time to comment on a preliminary scoping statement should be increased from 21 to 90 days since the additional time would help level the field for municipalities having resources that are not equal to those of developers. An individual commented that the 21 day comment period is not long enough for local boards that usually only meet once a month and may not be able to respond within such a short period of time. In addition, she is concerned that three weeks is not enough time to properly read and address the issues within the document. A county planning office agreed that the 21 days is not long enough to prepare adequate comments, especially for the local boards who meet only once a month. Another advocacy organization asserted that all public responses should be given a minimum of 60 days, and that developers should perform environmental studies for at least a year before the pre-application phase, with the studies continuing through the application process.

Another locality advocacy organization asserts that the applicant should provide notice to the host town and those in the surrounding 10-mile area, including notice to the town clerks, town supervisors, and chairs of planning boards, and copies should be placed in public libraries, post offices, and other public buildings.

A municipal official asserted that copies of finalized PILOT (payment in-lieu of taxes) agreements should be required as part of the preliminary scoping statement as evidence that the local taxing authorities can agree on a PILOT acceptable to

the applicant, so as not to waste valuable resources and time on
a project that will not come to pass.

Discussion

In keeping with the statutory scheme to act efficiently, the timeframes provided are already the minimum necessary to conduct a workable process and there is no room to further expedite the process and have it remain meaningful. Most of the issues raised are not new and were already raised in the stakeholder process. Having reviewed the comments, we are satisfied that in general, no changes are warranted. We do agree that the addition of the word "preliminary" in two places as requested would be an enhancement that is in keeping with other clarifications we are making, so those changes will be made.

1000.6 Filing and Service of an Application

A locality advocacy organization requests that applications be made available to the public on-line and downloadable in searchable format. An individual requests that the chief executive officer of the host municipality receives a searchable electronic copy to facilitate distribution to the members of the town board, planning board, and zoning board.

Discussion

Searchable electronic copies will be available to all on the internet.

1000.7 Publication and Content of Notices

A public interest coalition requested an amendment to paragraph (1) of subdivision (b) to specify notices provided in languages other than English be published in newspapers serving the appropriate language communities. The public interest coalition also requested an amendment to paragraph (2) of subdivision (b) to require that notice be provided to members of the state legislature in whose district any portion of the Study Area is located, and in New York City, to Borough Presidents and Community Boards in whose jurisdiction any portion of the Study

Area is located.

Discussion

With some refinements, the request regarding publishing notices provided in languages other than English in newspapers serving the appropriate language communities is an enhancement and will be included. The second request fails to recognize the interplay between Sections 1000.6 and 1000.7 and would result in some redundancy. In addition, any of these persons could file a statement with the secretary to be put on the list of persons to receive notices.

1000.8 Water Quality and Coastal Certification Procedures

A conservation group associated with the Hudson River discusses four topics in connection with the handling of Water Quality Certifications pursuant to §401 of the federal Clean Water Act (CWA). They are: The distinction between "pollutants" and "pollution", the scope of CWA §401, the waiver period applicable to Water Quality Certifications, and antidegradation.

Pollutants and Pollution

The conservation group states that the proposed regulations use the term "pollutant" in several places, including proposed §1000.5(d)(2), and asserts in the context of requests for Water Quality Certifications that the word "pollution" is more appropriate.

Discussion

The conservation group also points out, however, that DEC's regulations concerning water quality include a definition of the term "pollution" in 6 NYCRR §700.1(a)(47) as "the presence in the environment of conditions and/or contaminants in quantities of characteristics that are or may be injurious to human, plant or animal life or to property or that unreasonably interfere with the comfortable enjoyment of life and property

throughout such areas of the State as shall be affected thereby." It also notes that "pollution" is defined in the CWA.¹ Therefore, to the extent that a distinction can be drawn between the words "pollutant" and "pollution," the regulations, by requiring compliance with the substantive provisions of State water quality standards (including applicable definitions), are susceptible to that distinction.

The scope of CWA §401

The conservation group explains that the state agency that issues a Water Quality Certification must assure that the project or activity under review will comply not only with federal requirements but with all pertinent State water quality standards and any other appropriate requirement of State law. It asserts that the Siting Board should accordingly clarify that analyses under laws such as the Endangered Species Act and the Water Quality Certification are legally separate investigations.

Discussion

Because the regulations require compliance with the substantive provisions of all applicable State law, the record of each certification proceeding will necessarily include a showing by means of whatever analyses are necessary that such compliance will be achieved.²

The Waiver Period

The conservation group also contends that the regulations should not include provisions, in §1000.8(a)(5), relating to the applicable period after which a Water Quality Certification will be deemed to have been waived when applicants request permits from the U.S. Army Corps of Engineers (USACE). It asserts that federal agencies may not shorten the one-year waiver period specified in the CWA.

¹ CWA § 502(19); 33 U.S.C. § 1362(19).

² See §1000.8(a)(3).

Discussion

CWA §401(1)³ provides that if a State "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." The USACE has, and other federal lead agencies may, establish reasonable waiver periods shorter than one year. Therefore, we will clarify §1000.8(a)(5) as follows:

(5) When an applicant or certificate holder has requested both a Water Quality Certification from the Board and permits from the U.S. Army Corps of Engineers or other federal lead agency, the Board or a designee will provide information to the district engineer or other federal lead agency as to whether circumstances require a period of time longer than the period specified in applicable federal regulations for the certifying agency to act on the request for certification in order to avoid a waiver. The Board shall issue, waive or deny such Certification within such applicable period after the filing of the application or other document in which the request is made, taking into account whether any federal agency from which the applicant or certificate holder has sought a license or permit to conduct any activity that may result in any discharge into the navigable waters has:

In this connection, we will also correct a typographical error in §1000.8(a)(6), where "subdivision (f)" should be "paragraph (a)(5)."

Antidegradation

The conservation group maintains that, since the issuance of a Water Quality Certification requires a finding that an applicant satisfy requirements in place to ensure antidegradation, the Article 10 regulations should require

³ 33 USC §1341(a)(1).

applicants to submit sufficiently detailed information for the Siting Board to make findings pertinent to this topic.⁴

Discussion

The cited DEC guidance document is based on provisions of State law, including 6 NYCRR Parts 701 and 702. Because the Article 10 regulations require compliance with State law, a separate requirement on antidegradation is not required.

General Issues

A wind developer asserts that water quality certification issues will be presented in the application, so there is no need for notice of a subsequent filing of a request for a Water Quality Certification in the regulations. Another conservation group associated with the Hudson River asserted that because New York's coasts are unique and valuable scenic, recreational, and ecological resources that need to be protected, under no circumstances should Article 10 be used to override the federal Coastal Zone Management Act, New York State Coastal Management program, or local waterfront revitalization plans. It also asserted that the regulations should reserve the State's right to make a decision on water quality certification within one year as provided under the CWA.

Discussion

Not every developer will be in a position to apply for a Water Quality Certification at the time of application, so there is a need for the additional notice provision in the regulations. The Siting Board does not have the power to override requirements of federal or state law, and nothing in the regulations would preclude the State from utilizing the one year for a decision to the degree that it is provided under the CWA.

⁴ It cites DEC's TOGs #1.3.9 in this regard.

1000.9 Additional Information

No discussion necessary.

1000.10 Fund for Municipal and Local Parties

Intervenor Fees

Many of the comments contain assertions that the amount of funding provided for intervenors is too low. An engineering consulting firm asserts that in its experience with similar project reviews under SEQRA, fees often run in excess of \$100,000, and the intervenor fund provisions as written are inadequate to support that level of fees. A municipality concurred in the assertion that for similar project reviews under SEQRA, fees often run in excess of \$100,000. A locality advocacy organization asserts that there is not enough money provided to do a reasonable job with scoping, a visual impact assessment, a health analysis, a bird migration study, noise estimate, historic impact analysis, and a legal review of local laws. It requests that a minimum of at least \$100,000 be available to all intervenors, and that the amount be indexed to inflation. An individual also requested that the fee structure be indexed to inflation. Another individual noted that, but for Article 10, a municipality in exercising its home rule powers can charge developers fees to pay the full costs to the municipality of its review of the project, without any arbitrary cap on the costs. So that municipalities will have equal resources with developers, another locality advocacy organization asserts that the fee structure should be increased as follows: (a) \$50,000 plus \$700 per MW not to exceed \$400,000 for preliminary scoping statements; and (b) \$100,000 plus \$1,500 per MW not to exceed \$600,000 for project applications.

An organization that promotes wind development and two wind developers assert that the requirement in the proposed regulations that the applicant shall submit an additional

intervenor fee in the amount of \$75,000 for amendments determined to be a "revision" to the application disproportionately impacts moderately sized renewable energy projects. They note that the intervenor fee for applications is only \$1,000 per megawatt, so the \$75,000 fee for a revision for projects below 75 megawatts might be substantially higher than the original fee for the entire application. They request that applicants be required to provide additional intervenor funding for project revisions at the same rate that they are required to provide initial intervenor funds, \$1,000 per megawatt. They also note that the statute empowers the Siting Board to impose an intervenor fee for revisions of "up to" \$75,000, but does not require such payment automatically in all instances.

Discussion

The overall amount of intervenor fees that can be imposed is established by the State Legislature, not by the Siting Board. The proposed regulations are written to mirror the statutory allowances. We are persuaded that the regulations should be modified in one respect; the fee that is paid at the time of submitting a revision to an application should logically not be higher than the fee paid initially and therefore, we will adopt the recommendation to impose a floor funding amount of \$1,000 per megawatt for revisions to application. We will, however, retain the full discretion provided by the State Legislature to require up to \$75,000 for a revision regardless of facility size in appropriate circumstances.

Timing

A developer representative asserts that the 30 day time period for applying for intervenor funds is excessive and will hinder the expedience of the stipulation process. He requests that the timeframe for applying for intervenor funds be reduced to 15 days, and that the time taken to decide if funds

will be awarded should be reduced from the 45-60 day window. A wind developer asserts that intervenor fund applications and awards for the pre-application phase should be completed in 30 days.

Discussion

While every attempt will be made to act quickly, the timeframes are already minimal and need to be maintained to be realistic.

Miscellaneous

A public interest coalition requests that the notice of availability of funds must be given to the same parties for whom pre-application notice is required, that criteria be provided on what constitutes an equitable basis, and that the regulations be structured to allow for community-based parties to determine their funding needs as the application process progresses and as they obtain expert advice.

Discussion

We appreciate the comments and believe that it is in the interest of community-based parties that these matters are left to the discretion of the Presiding Examiner in the case.

1000.11 Assistance with Documents

No discussion necessary.

1000.12 Evidence and Proof

An organization that promotes wind development and a wind developer asserts that the standard for evidence should be "substantive and significant" because they believe that quasi-judicial hearings are only triggered by evidence that is "substantive and significant". A different wind developer asserts that the standard for determining which issues are to be litigated should be "relevant and material." A facility trade organization asserts that the proposed regulation requires issues to only be relevant, but that the standard should be

"relevant and material". An individual asserts that it is important to allow issues to be introduced for consideration that are "material and relevant" without increasing any burden-of-proof requirements on the community. A locality advocacy organization asserts that the section should be kept as it currently reads, such that an issue or evidence is allowed if material and relevant. A county planning office asserts that the proposed regulation is too lenient because the rules of evidence do not have to be applied strictly. Another locality advocacy organization asserts that the proposed regulations set narrow limits on evidence to the disadvantage of plaintiffs and the public, and should be broader. A member of the State Senate urged that the regulations maintain the option that a party can force a hearing by showing there is a material and relevant issue, a provision that should be neither diluted nor eliminated.

As to proof, one individual asserts that applicants must use a scientific method to support any argument presented in support of the development of their proposed project.

Discussion

The "substantive and significant" standard is a special standard applied in certain DEC proceedings where DEC staff has completed its review of an application and issued a written draft permit for final challenge by parties that can demonstrate that they have a "substantive and significant" issue with the draft permit language and conditions. The Article 10 process does not operate in that fashion for the statute states that presiding and associate examiners will inquire into and call for testimony concerning relevant and material matters. (PSL §167(1)(a)). There the statute does not support application of the "substantive and significant" standard, and such standard, in any event, is not per se required for all

quasi-judicial hearings. After having considered the comments, we are satisfied that no changes in the proposed text in this section are warranted.

1000.13 Amendment of an Application

No discussion necessary.

1000.14 Dismissal of an Application

No discussion necessary.

1000.15 Acceptance of a Certificate

Several individuals commented that both developers and municipalities should have equal rights to request a rehearing, appeal or to file a written unqualified acceptance of the Certificate.

Discussion

This section must be read in conjunction with the Rules of Procedure of the Public Service Commission adopted by reference in Section 1000.3. All parties have equal rights to rehearings and appeals. A written unqualified acceptance of the Certificate forces the applicant to indicate its acceptance of all modifications and conditions set forth in the Certificate, including those that may not have been proposed by the applicant. Such an acceptance is not applicable to any other party.

1000.16 Amendment, Revocation and Suspension of a Certificate

No discussion necessary.

1000.17 Transfer of a Certificate

An individual asserts that the Ad Hoc siting board members and the host community should have a say in a certificate transfer; the Chairperson should not have exclusive power to transfer certificates. The proposed regulations require submission of a copy of the proposed transfer agreement only if required by the Board's Chairperson. A developer representative asserts that the requirement allowing the

Chairperson to require the copy to be submitted is unnecessary since the petition for transfer must be verified by all parties to the transfer.

Discussion

The ad hoc members will have a say on transfers until their jurisdiction has ceased. After that, the Permanent Board will have jurisdiction. The host community has an opportunity to comment on any transfer application. The Chairperson only gets sole jurisdiction if no party has objected to the transfer in the comments. We do not understand the logic behind the assertion that verification of the petition makes the copy of the transfer agreement unnecessary.

1000.18 Counsel to the Board

No discussion necessary.

Part 1001 Miscellaneous Comments

Wind developers and an organization that promotes wind development opined that the regulations require too much of an applicant and do not take into consideration the regulatory burden being imposed on moderately-sized renewable energy projects. They believe that certain information required in the application is overly burdensome and its consideration will be of little assistance to the Siting Board in making statutory determinations and findings. They believe that the application requirements should be tailored in a manner that will not deter or delay wind projects.

Several individuals responded that the comments provided by lobbyist groups or pro-wind firms/individuals should be disregarded as biased and motivated by money. They believe that the public is entitled to information that involves the developer's compliance and that the proposed requirements should remain in the regulations.

Discussion

Our goal has been to balance all interests. Specific changes will be addressed on their merits.

1001.1 General Requirements

An organization that promotes wind development requests flexibility for applicants to provide studies and data in their application based upon the type of generation being proposed. An individual comments that the Siting Board should be required to perform a certain level of due diligence to ensure that project developers are providing accurate information and to give equal weight to the needs of those who live near a proposed development.

Discussion

The regulations already provide developers with flexibility to omit exhibits that are not relevant to the particular application. That flexibility is appropriately balanced with specific required details of exhibits which we hope will enable the Siting Board to make informed findings and determinations.

1001.2 Exhibit 2: Overview and Public Involvement

No discussion necessary.

1001.3 Exhibit 3: Location of Facilities

Some of the comments from developers and their representatives request that the study area be limited in scope to the area of all planned facility components, interconnections, and related facilities, with or without a "buffer area", and that the five-mile minimum radius for large facilities or wind power facilities with components spread across a rural landscape should only be considered, if at all, on a case-by-case basis through the stipulations process instead of as a set radius. They assert that a five-mile study area is impractical, excessive and unnecessarily burdensome and would be

better left determined per project as the stipulation process can determine the appropriate study area. One developer also objects to having to identify existing utilities and infrastructure in the study area unless they are to be impacted or used by a project.

Individuals and municipalities concerned about wind facilities assert that due to the far-reaching effects of wind turbines, a five-mile study area for such facilities is important for the proper consideration of visual impacts, property values, and noise issues. Several individuals went farther and request that the regulations prohibit heavy industrial uses like wind turbines in populated residential areas or mandate large setbacks from residences for reasons of safety and to avoid negative impacts.

A public interest coalition recommends that the study area be tied to the actual area of impact of the facility, and that what is meant by a "large facility" should be clarified.

Discussion

While we expect that the stipulations process will be useful in defining the study area, if there is not universal acceptance of a stipulation there needs to be a standard by which applications can be judged for compliance. For wind facilities, which based on the comments appear likely to be controversial in some locations, certainty is provided for all by the setting of a minimum five-mile study area. That is a reasonable policy that will minimize conflicts. Many of the developers' comments do not reflect that for non-wind facilities, the study area has been defined as an area generally related to the nature of the technology involved and the setting of the proposed site, and that for facilities in areas of significant resource concerns, the size of a study area shall be configured to address specific features or resource issues. It

is difficult to define the meaning of "large facility" in advance as we would not want to inadvertently omit facilities that need a large study area due to the failure now to anticipate such facilities. We are satisfied that the regulations as proposed are properly balanced.

1001.4 Exhibit 4: Land Use

A developer representative requests that the requirement for maps showing all publicly known proposed land uses should be limited to projects in which formal applications have been made. A wind developer requests that the proposed land use plans that must be shown be limited to ones that are already fully permitted as of the date of the submission of the application. Its concern is that some proposed land uses might not be consistent with existing local requirements, and therefore shouldn't be shown. Two wind developers request that the requirement to map proposed land use plans for any parcels within the study area be eliminated. A facility trade organization requests that the words "publicly known" be added to subdivision(c) to make it less vague and consistent with subdivision (f). The developer representative also requests that the qualitative assessment requirements be stricken from the regulations as duplicative. A wind developer requests that the requirement for aerial photographs be limited to what is publicly available such that applicants could never be forced to pay for photo mapping of the study area which in its view would needlessly increase the application cost. The wind developer also requests that the term "major facilities" as used in the section requiring applicants to file a map of existing overhead and underground major facilities for electric, gas or telecommunications within study area be defined. A county planning office believes that subdivisions (h) and (i) group too many items together and that the phrase "significant invasion of

privacy" in subdivision (h) needs to be clarified.

Discussion

Concerns about potentially duplicative provisions in the regulations have already been addressed on a global basis by subdivision (e) of Section 1001.1 which allows references to material already provided instead of the provision of duplicative matter. We agree that the addition of the words "publicly known" to subdivision(c) would be an improvement for the reasons given by the requestor. That change will be made. Aerial photographs are a key tool in the siting process. The request to eliminate them from the application if they are not publicly available is unworkable as it does not address what tool would be sufficient for use in their absence. Obtaining such photos is not an unnecessary expense as the photos are needed. The descriptor "major facilities" was added as a result of stakeholder input primarily from the developers and is meant to eliminate unnecessary minutia such as service lines not crossed by the proposed construction that would be irrelevant to the siting process and expensive to map. It is not clear that a more specific definition would be beneficial as not every case can be anticipated and we would not want to omit important facilities through a drafting omission. The phrase "significant invasion of privacy" in subdivision (h) is a term already in common usage in the parlance of cultural resources reviews, therefore we see little benefit to attempting to modify it.

1001.5 Exhibit 5: Electric System Effects

A wind developer asserts that the requirement to provide information regarding the electric system effects of the interconnection of the facility should be deleted. According to several wind developers, applicants should be allowed to provide the Siting Board with only studies and reports originating from the interconnection process at the NYISO. An organization that

promotes wind development and a wind developer added that deliverability studies would be included as part of the NYISO interconnection process. A developer representative suggested that the information required in subdivisions (i)through(l) should be addressed through compliance filings instead of in the application because the information requested is too specific for the application stage of the project.

The electric utility company serving the New York City area requests that a new exhibit requirement be added to the regulations that would require applicants to identify and demonstrate compliance with all reliability criteria, including that of the local interconnecting transmission utility. It believes applicants should be required to confer with appropriate representatives of the Department of Public Service, NYISO and the local transmission owners to identify applicable requirements and to demonstrate how they will comply with these reliability rules and requirements. It also requests the imposition of reliability rules for blackstart and automatic fuel switching capabilities.

New York City also asserts that the regulations should require all applicants to evaluate the implications, costs, and benefits of including black start capability in their proposed projects, and, if they decide not to add such capability, to provide their reasons for declining to do so. It believes this requirement will encourage developers to include blackstart capability in their projects and it will also allow for a proper record to be developed should the Siting Board decide to condition the approval of a project on the inclusion of blackstart capability. It believes the burdens imposed by this proposal should not be significant, and they are greatly outweighed by the potential benefits to be realized by the State by the addition of new facilities with blackstart capability.

Finally, a county planning office commented that the language of this section is not easily understandable to lay people or written at an eighth grade reading level.

Discussion

We expect that the required system reliability impact study from the NYISO will provide the basis for much of what is required by this section, but the study itself will not adequately address all the issues as we have laid them out. In addition, we believe the wind advocates are incorrect when they assert that the system reliability impact study will address deliverability in the sense that we have used that term in relation to estimating the effects of the proposed facility on emissions and the energy dispatch of existing must-run resources, such as wind, hydroelectric and nuclear facilities.

While the proposed regulations already require information regarding blackstart capabilities, we agree that it would be a beneficial enhancement to require an identification and demonstration of the degree of compliance with all relevant applicable reliability criteria including that of the local interconnecting transmission utility that may have criteria regarding blackstart and fuel switching capabilities. The regulations will be slightly modified to incorporate incremental reliability information.

As to the language, we note that the section includes many unavoidable terms of art that likely have little meaning to a lay person, but that the sentence structure is sufficiently understandable.

1001.6 Exhibit 6: Wind Power Facilities

Many individuals took the opportunity to comment on this section to give their opinions of the benefits and burdens of wind power. The opinions in favor stress clean air benefits, the creation of construction and permanent jobs, real property

tax income for local communities and school districts, and an opportunity for struggling farmers to lease land and obtain a second income. The opinions in opposition stress the high cost of wind power, the lack of capacity benefits, the visual impact on landscapes and seascapes and resultant negative impact on tourism, and adverse health effects from the noise emitted by wind turbines.

Setbacks

One wind developer asserted that the application should only include a summary of setback requirements, akin to that required in the preliminary scoping statement, and that waivers of unreasonable setbacks should occur prior to the application.

Many individuals and organizations proposed that minimum setbacks be imposed by the Siting Board in the regulations including a minimum 6-mile (31,680 feet) distance from any shoreline; a minimum 1,500 feet from every on-land wind tower to each non-participating property's line; or a minimum one mile (5,280 feet) or 2 kilometers (6,562 feet) from the property lines of private and public owners. Several asserted that a 2 kilometer setback is the minimum recommended by the World Health Organization. One individual also suggested a minimum land area of 25 acres per turbine. In favor of the proposed minimum setbacks, they cite concerns about public health and safety, ice throw, tower collapses, blade fragmentation, shadow flicker, noise, infrasound, the preservation of property values, visual domination, and the preservation of land development potential.

Discussion

We are satisfied that the regulations will elicit the appropriate amount of information needed at the application phase regarding setbacks. It is not clear how the wind

developer that does not want to provide this information would have the Siting Board resolve setback issues. We will address setbacks within individual cases when we will have the benefit of a record tailored to the particular location.

Third Party Certification of Wind Turbines

Several wind developers requested that this section be re-written to make third-party review and certification of wind turbines a post-certificate compliance matter.

Discussion

The wind developers are reading too much into the language of the proposed regulation. The requirement is for a status report, not a mandate of final third party review and certification at the time of application.

Meteorological Analyses

Several wind developers and their supporters assert that applicants should not be required to file meteorological data, which they claim is proprietary information that should be kept confidential. Many individuals and several municipalities responded that the analysis of wind meteorological data is part of proper siting, that it should be provided publicly so an informed decision can be made, and that it will assist in determining whether there are adequate wind resources at a proposed location for a wind project. One individual further argues that New York State residential ratepayers help fund Met Towers (meteorological towers used for wind speed measurement and recording equipment) by paying RPS and SBC charges, therefore the citizenry should be provided with all of the results of those Met Tower results. Another individual argues that the data should be for a minimum of two years prior to an application. A municipality argues that given the impact wind turbine towers have on the community, the data must be made public to ensure the veracity of electric production projections

before wind turbine towers are allowed to be constructed.

Discussion

The language of the proposed regulation requires submittal of an analysis of the data; it does not expressly mandate the raw data itself. If either the raw data or the analysis qualifies for trade secret status, applicants can pursue their rights in that regard to limit public disclosure.

Property Value Guarantees

Several individuals requested that wind developers be made to provide guarantees on the value of neighboring property in the form of insurance, cash payments, or buyouts if their wind projects cause a devaluation of the neighboring property.

Discussion

It is unclear how devaluation would be measured, but in any event, we are not prepared at this time to make any such requirement as part of the regulations.

1001.7 Exhibit 7: Natural Gas Power Facilities

A county planning office commented that the current regulation language is confusing as written. If natural gas is required for use by the facility, the requirements need to be specified in detail.

Discussion

The proposed Exhibit 7 requirements are brief and relatively straightforward. We do not see a need for revisions.

1001.8 Exhibit 8: Electric System Production Modeling

Several wind developers, a facility trade organization and an organization that promotes wind development assert that the estimated capacity factor for a project is one factor used in determining the economics of a project and is therefore commercially sensitive and its disclosure could negatively impact the developer. They believe that the developer should not have to divulge the proprietary information and should be

able to keep it confidential. In lieu thereof, the facility trade organization recommends that the applicant should be allowed to provide an estimated capacity factor based upon publicly available information.

The several wind developers and the organization that promotes wind development object to the idea of having to model facility production at all. They assert that the System Reliability Impact Study, required in Exhibit 5, is all the Siting Board needs to determine reliability issues.

The facility trade organization also asserts that the applicant should not be required to estimate the effects of the proposed facility on the energy dispatch of cogeneration units under contractual obligation to provide steam because an applicant is not in a position to determine contractual obligations that are not publicly available.

Several individuals provided comments supporting the text of the proposed regulations as written. They believe that wind facilities should not be exempted from providing the information required, even though developers may think that providing the information is costly and unnecessary, because the Siting Board needs to know this information and there are no reasons for wind to be exempted from these requirements. They also believe that full disclosure to the public should be mandatory. One individual asserts that the regulations should hold project developers to efficiency and production standards to ensure that the capacity produced outweighs the burden placed on the community by erecting wind turbines. Similarly, another individual supports verifiable electric generation monitoring. Another individual requests that a distinction be made between nameplate and effective capacity when determining if the facility should be approved because if the operating capacity is low, the Board should determine if it is worth the burden on the

community. This individual also recommends that higher priority for approvals be given to facilities located close to the end users because the need to build fewer transmission facilities would balance out the burden on the community of constructing the facility.

One municipality asserts that production volatility is a key input parameter for figuring emission impact and also in the prediction of the costs and benefits of new generation sources. According to this municipality, providing this data will help in the evaluation of effective capacity and the information should not be considered protected trade secrets due to the impact that the towers have on the community. Another municipality states that it strongly disagrees with the assertions of wind industry stakeholders that disclosure of facility capacity and generation, among other things, is unrealistic and burdensome information to ask for at the initial application stage. This municipality challenges the basis for any conclusion that capacity information is entitled to confidential treatment. The municipality believes strongly that information specific to the project and site regarding cost and generation capacity is necessary as early as possible in the application process to determine what project alternatives should be considered, as required by the statute, and whether a proposed project is, on balance, in the public interest, also as required by the statute. It asserts that a determination as to whether a given wind project can make a substantial contribution to the state's energy goals and the needs of ratepayers requires accurate information on project cost, electric generation capacity and alternatives. The municipality notes that wind energy projects will not happen without substantial ratepayer subsidies, and those costs should be evaluated in light of environmental benefits. It further advises that the

intermittent nature of wind results in electricity being generated only periodically and, therefore, other types of generating facilities must be operating to meet demand resulting in very low emissions reductions from the operation of wind energy projects.

Discussion

In general, we agree with the comments that the production information is necessary as an important input for the modeling used for simulation analyses used for a host of purposes in an Article 10 proceeding, including for analyses that will inform the necessary statutory findings and determinations. The mandates of the Article 10 statute require that such information be provided, including, in particular, to inform a required finding whether the proposed project would provide a beneficial addition of capacity. In addition, it should be noted that the production modeling studies required in this Section provide the information needed to determine energy deliverability issues without a separate energy deliverability study. The modeling required in the electric system production modeling will quantify and evaluate, among other things, the economic and physical impact of interconnecting the project to the electric system. This includes being able to estimate the effects of the proposed facility on emissions and the energy dispatch of existing must-run resources, such as wind, hydroelectric and nuclear facilities. With this information the Siting Board will be able to determine if granting an Article 10 certificate to a particular project could result in backing down other valuable resources. Therefore, a separate energy deliverability study was deleted from the application filing requirements.

Article 10 provides for a public procedure where public involvement is a key component of the review process. In

that context, almost all of the application information that relates to an essential Board finding or determination will have to be publicly available. If the required information truly qualifies for confidential treatment, the regulations already provide a process for determining trade secret status and for limiting public disclosure. The party required to submit the information has an opportunity to seek a determination of confidentiality under the Rules of Procedure of the Public Service Commission (contained in Subchapter A of Chapter I of 16 NYCRR), which will apply in Article 10 certification proceedings. Pursuant to these rules, the presiding examiner may, if needed, provide for sharing of such information with the parties under a protective order setting the limits on its disclosure.

In addition, we are not persuaded that the effects of the proposed facility on the energy dispatch of cogeneration units under contractual obligation to provide steam cannot be estimated without the details of contractual obligations that are not publicly available.

No changes are warranted by the comments.

1001.9 Exhibit 9: Alternatives

A wind developer requests that the word "fully" be inserted before the word "owned" in subdivision (a) to eliminate sites partially owned by the applicant because the disclosure and description of future development sites could jeopardize the ability of the developer to develop that site, especially if such analysis showed the alternate site to be less suitable for project development, and because identifying these sites may unnecessarily raise public concern or optimism. A developer representative requests that the language regarding the required evaluation in subdivision (b) should be clarified to require only a qualitative evaluation. A facility trade organization

requests that the word "available" be inserted after the word "reasonable" in subdivision (c) to make the language comparable to that in subdivision (a). A wind developer requests that the requirement to provide alternative layouts of the turbines within the proposed site should be limited to providing the layout that would provide the worst case impacts.

New York City asserts that applications for certificates for major electric generating facilities should not be assessed in isolation from other proposed projects, instead the potential environmental impacts of a particular project should be viewed in context, with consideration given to the potential cumulative impacts if numerous facilities are approved in the same relative time frame. New York City also asserts that requiring developers on an individual basis to prepare comparative analyses of their proposed projects is excessive and unnecessary, the purpose of Article 10 being to evaluate the merits and impacts of a proposed generating facility, not debate the relative merits and public policy considerations of generation versus energy efficiency. New York City also requests that the Siting Board consider adding a requirement that Article X applicants with projects in New York City evaluate the benefits, costs, and potential impacts of including automatic fuel-switching capabilities at their projects so that new generating facilities have the ability to switch fuels, if needed, to preserve the robustness of the electric system.

Another municipality asserts that the recommendations for changes proposed by wind industry stakeholders should not be adopted and that the disclosure of alternative sites where the applicant has an ownership interest is not unrealistic and burdensome. A third municipality asserts that the requirement for the evaluation of climate change should be eliminated in the case of wind farms unless it will cause atmospheric drag and

convection current changes that affect climate. On the climate change topic, a citizen coalition asserts that wind facilities studied in Texas are estimated to be causing climate change.

One individual asserted that transmission lines from wind facilities to the grid are not a public necessity and therefore wind developers should not be given any right of eminent domain, either directly, or in partnership with an industrial development agency (IDA) or public authority. To safeguard the citizenry's interest by obtaining for the citizenry the lowest available electricity rates, another individual requests that when an Article 10 power generation site is proposed, there should be a competitive bidding process for the use of that geographically defined site by the Siting Board.

Discussion

We decline to insert the word "fully" before the word "owned" in subparagraph (a) because it would tend to undermine the intent of the provision and could open the door to gaming by allowing a small fraction of ownership by another to be manufactured to defeat the provision. We also decline to eliminate quantifications from the comparisons required in subdivision (a). Some applicants may find that quantitative comparisons make for a better exhibit, and if quantifications are possible, they would make review of the exhibit all the easier. Similarly, we decline to add the word "available" to subdivision (c). The concept of "available" in this Section relates primarily to site ownership of alternate locations and the alternatives being explored in subdivision (c) are at the primary proposed location where ownership of the site should not be an issue. As to the layout of wind turbines, while a worst case layout would be instructive, the purpose of considering alternative layouts is not only to decide whether a certificate

can be granted. Another purpose is for the optimal layout to emerge. Therefore, we decline to grant the request.

We agree with New York City that cumulative impacts must be considered. We do not agree that the availability of energy efficiency alternatives could never be a basis for denial of a certificate under the statute. As to automatic fuel switching, we are not opposed to its consideration by an applicant as part of the analysis of back-up fuel required by Section 1001.37, but we want the regulations to be neutral as to whether, for example, a developer of a gas-fired power plant should consider making provision for a back-up such as fuel oil.

We have considered the other comments and do not believe they warrant any changes to the language of the regulations.

1001.10 Exhibit 10: Consistency with Energy Planning Objectives

A wind developer asserted that issues of reliability and electric transmission constraints should be postponed to the compliance phase of the proceeding and should be satisfied by an applicant with the completion of the NYISO interconnection process.

In response, an individual commented that wind facilities should not be exempted from providing the information required, even though developers may think that providing the information is costly and unnecessary. According to the individual, it is necessary for the Siting Board to know this information and there are no reasons for wind to be exempted from these requirements. Another individual asserted that the regulations must specifically address and regulate offshore wind turbines to be in compliance with the New York State Energy Plan. A third individual commented that the electric transmission constraints should be listed and explained.

Discussion

Reliability and electric transmission constraints relate directly to required findings and determinations the Siting Board must make. These matters cannot be put off as compliance matters. The NYISO process will inform the Siting Board's process pursuant to Section 1001.5 of the proposed regulations. Offshore wind turbines within the jurisdictional offshore areas of New York State are already addressed by the regulations. The required Exhibit 10 will include an explanation of any electric transmission constraints. No changes are warranted by the comments.

1001.11 Exhibit 11: Preliminary Design Drawings

Some wind developers would like to submit conceptual sketches instead of preliminary scaled drawings. Others do not want to submit any specific information until the compliance phase. They assert that the development of wind projects is fluid, with often only 30% of the design locked in at the time of application. They argue that fluidity allows them to efficiently respond to the input of agencies, transmission owners, and the public. They also claim that the Siting Board does not need this level of detail in making the determinations and findings required under the law.

Several individuals commented that the requirements of this section are not unreasonable and should be kept within the regulations. One individual further noted that the fact that wind facilities may take up a large land area does not, in and of itself, make the application requirements unreasonable or burdensome. Another individual requests that the regulations go further and require construction details and mitigation plans for adverse construction impacts as a safeguard against potential impacts to groundwater. One municipality asserted that if a developer cannot specify the make and model of the

equipment being used, then impact assessments should not be conducted until the equipment has been determined. Another municipality strongly denied that construction-level detail is not typically prepared during the permitting phase of a wind power project, and it asserted that such details are currently reviewed by the lead agency under SEQRA.

Discussion

The concerns of wind developers are overstated. We are not requiring them to conduct land surveys or to engineer every last detail for the application phase. In fact, the proposed regulations were purposefully modified in several places before they were issued to make it clear that construction level details are not required for an application. The comments received appear to overlook these specific wording changes. What is required is a preliminary design for the project drawn on a scaled drawing with sufficient details so that an intelligent evaluation of the proposal may be made. Site layout, construction operations areas, grading, landscape screening, basic architectural and other similar design details are needed to understand the proposal, its impacts, and the possible need for revisions. It is not realistic to expect that a certificate is going to be granted to construct major industrial facilities based only on a sketch. We have considered the comments and are satisfied that we have struck the appropriate balance between the burden on applicants and the need for sufficient information to support an application.

1001.12 Exhibit 12: Construction

A developer representative requests that the requirement for a quality assurance and control plan be modified to require that such plan be a "preliminary" plan.

Discussion

We agree that the request is in keeping with our

intent. The word "preliminary" will be added to the text.

1001.13 Exhibit 13: Real Property

A wind developer, citing the cost and effort required to search titles, asserts that wind developers should not be required to map out the easements, grants and related encumbrances for the proposed site and adjacent properties. It requests that the developer only be required to provide the tax identification number for each parcel and record owner. In addition, it notes that the applicant will not be able to identify easements, grants or encumbrances that are not on record. A developer representative requests that for subdivisions (b) and (c), the scope of the required property/right-of-way map of all proposed interconnection facilities should be limited to interconnections falling under the Siting Board's jurisdiction. A wind developer commented that developers should not be required to demonstrate full land control at the point of application because typical wind projects require extensive negotiations with significant numbers of landowners and these negotiations may not be concluded at the time of application.

An individual commented that the regulations should continue to require the level of information requested in this section because it is important to have an accurate view of the restrictions of the site in considering the design and protections for neighboring land uses.

Discussion

All developers, even wind developers, will need to provide some due diligence as to property rights. For example, an applicant has the burden to search for things like conservation easements over the site that would prohibit the intended construction activity before asking parties to expend resources reviewing the proposal. Obviously, unrecorded

interests will not be disclosed in a record search. The regulations presume only due diligence to discover publicly recorded encumbrances. While some interconnections may not be subject to the jurisdiction of the Siting Board, they should be shown so that the Siting Board will be able to consider the cumulative impacts. A demonstration of full land control at the point of application is not required by the regulations. We have considered the comments and are satisfied that no change to the language of the regulations is warranted.

1001.14 Exhibit 14: Cost of Facilities

Several wind developers, two facility trade organizations, a developer representative, and a public utility company provided comments opposing the requirement that information regarding the cost of facilities must be provided in the application. They assert that such cost information is one factor used in determining the economics of a project and is, therefore, data that is confidential and commercially sensitive. They also assert that requiring wind developers to provide this information would force them to divulge their business models, cost forecasting and industry-specific expertise. They fear that competitors will use the information to their economic disadvantage, and that fear of the release of proprietary information will discourage investor participation. They also claim that the Siting Board does not need the information to make its findings and determinations. Several of the comments concede that the cost information could be provided to the presiding examiner and DPS Staff, but seek a generic regulation keeping the information confidential from all others. The developer representative asserts that specific cost information should only be required on a case by case basis if it becomes material and relevant. One of the facility trade organizations concedes that the information is relevant to the consideration

of alternatives, but claims that such an analysis is not applicable to private facility applicants. Additional concerns were expressed that some turbine manufacturers prohibit wind developers from disclosing pricing information, and that some interconnection costs may not be known at the time of the application. Some also expressed fears that the safeguards provided by the Freedom of Information Law (FOIL) are not sufficient to protect this confidential commercial information.

Several individuals and municipalities provided comments supporting the text of the proposed regulations as written. They believe that wind facilities should not be exempted from providing the information because the Siting Board needs to know this information and there are no reasons for wind to be exempted from these requirements. They also believe that full disclosure to the public should be mandatory. One municipality asserts that cost information should not be considered protected trade secrets due to the impact that wind turbine towers have on the community. It further asserts that any wind developer that refuses to provide cost information should not be eligible for any consideration of the waiver of local laws. Another municipality states that it strongly disagrees with the assertions of wind industry stakeholders that disclosure of facility capacity and generation, among other things, is unrealistic and burdensome information to ask for at the initial application stage. It challenges the basis for any conclusion that cost information is entitled to confidential treatment. The municipality believes that the cost information specific to the project is necessary as early as possible in the application process to determine what project alternatives should be considered, as required by the statute, and whether a proposed project is, on balance, in the public interest, also as required by the statute. It notes that wind energy projects

will not happen without substantial ratepayer subsidies, and those costs should also be evaluated in light of environmental benefits.

Discussion

In general, we agree with the comments that the cost information is necessary as an important input in an Article 10 proceeding, including for analyses that will inform the necessary statutory findings and determinations. For example, such information may be relevant to required consideration of alternatives, the reasonableness of local laws, or whether the proposed facility is in the public interest.

Article 10 provides for a public procedure where public involvement is a key component of the review process. In that context, almost all of the application information that relates to an essential Board finding or determination will have to be publicly available. If the required information truly qualifies for confidential treatment, the regulations already provide a process for determining trade secret status and for limiting public disclosure. The party required to submit the information has an opportunity to seek a determination of confidentiality under the Rules of Procedure of the Public Service Commission (contained in Subchapter A of Chapter I of 16 NYCRR), which will apply in Article 10 certification proceedings. Pursuant to these rules, the presiding examiner may, if needed, provide for sharing of such information with the parties under a protective order setting the limits on its disclosure. If the safeguards provided by the Freedom of Information Law (FOIL) are not sufficient to protect disclosure of the information, one has to question whether it truly qualifies as information that the government should keep from public view.

We note that the regulations offer considerable

flexibility as to presentation of the information related to costs, including flexibility enough to address wind developer concern regarding divulging the cost of turbines. However, we note that an agreement between a wind developer and a manufacturer to keep prices secret from the market is not a per se barrier to discovery of this information by DPS Staff and other parties.

No changes are warranted by the comments.

1001.15 Exhibit 15: Public Health and Safety

A facility trade organization asserts that in subdivision (b), applicants should be required to provide the anticipated volume of waste for the proposed facility based upon the "typical" operating condition, not "any" operating condition because it would be costly and of little value to the Siting Board to provide data on waste to be emitted for any operating condition. In response, a county planning office recommends that the regulations require that the volumes of waste should be specified on a daily, weekly, and monthly basis and that there should also be a requirement for a local consent to emergency plans.

An individual asserts that if there are any adverse impacts on the environment, public health, or safety from a wind project, then the project should be denied because wind power is not an essential commodity. Another individual asserts that public health and safety issues need to be addressed prior to construction with strict guidelines, not afterwards, and there should be avenues of enforcement and penalties for developers who exceed noise limits.

Additional individuals assert that wind turbines should be subject to specific restrictions in a State building code so as to increase accountability and allow for mitigation of factors such as ice throw and shadow flicker. They assert

maps should be prepared to show zones in which wind turbine shadow flicker is likely to occur and how much of a property is rendered unusable thereby so that turbines can be sited to minimize the amount of flicker impact.

One individual asserts that a citizens advisory panel should be made a component of Article 10 because it would establish an equitable balance of interests through citizen participation to offset a bias in favor of developers due to fast-tracking under Article 10. The individual also requests that the regulations do more to protect the health and safety of citizens by requiring conformance with manufacturers' safety standards.

A public interest coalition recommends that the regulations require the applicant to identify how measures to minimize and/or offset impacts will be measured and monitored.

An individual and a municipality assert that low frequency sound causes long term, serious health effects on those near wind turbines and this section should address low frequency sound. The individual requests that C-weighted sound be measured and that the regulations include frequency limits of 35 dBA at non-participating property lines and 5 dBA above ambient levels in the winter night.

Discussion

Many of the issues raised in the comments will have to be addressed on a case by case basis in Article 10 proceedings after the development of an adequate record. Similarly, we will leave it to the stipulations process to further refine what is meant by "any" operating condition regarding estimates of the volume or components of waste. Low frequency sound is addressed in Section 1001.6. PSL Section 168(5) specifies that the Department of Public Service or the Public Service Commission shall monitor, enforce and administer compliance with the terms

and conditions of the Siting Board's order. We have considered the comments and are satisfied that no change to the language of the regulations in this section is warranted.

We do not adopt the recommendation to create a citizens advisory panel as part of the Article 10 process, because the statute and these proposed regulations already provide for extensive citizen input, through such measures as the ad hoc members of the Siting Board, the public involvement plan, and the provision of intervenor funding to aid the participation of local resident parties.

1001.16 Exhibit 16: Pollution Control Facilities

A county planning office requests that there be public input on renewal applications.

Discussion

Pursuant to subdivision (b), renewal applications for certain permits will be handled by DEC, and as such is not a matter we need address.

1001.17 Exhibit 17: Air Emissions

A wind developer requests that the words "if applicable" be added at the beginning of the section. A developer representative requests that the word "demonstrating" in subdivision (c) be changed to "indicating".

An individual requests that the regulations specify that the emissions measurements are taken from various locations around the project (downwind, smokestacks, etc.) and also that they are performed when the facilities are using regular, not clean, fuel in order to get an accurate read on the impact that the facilities will have on the environment.

Discussion

The addition of the words "if applicable" may be redundant, but is in keeping with our intention, so the words will be added. We also agree with the substitution of the word

"indicating" for the word "demonstrating" because the substitution would be a beneficial technical and grammatical correction, so the substitution will be made.

While we appreciate the comment about where air emissions should be measured, DEC has protocols for air emissions modeling and we do not want to specify anything that might conflict with DEC's practices in that regard.

1001.18 Exhibit 18: Safety and Security

A developer representative requests that the regulations be revised to reduce the level of specification and to call for final plans to be submitted as compliance filings. A wind developer also asserts that the site security plans for construction and operation should be postponed to the compliance phase of the proceeding. A facility trade organization requests that the site plans filed with the security plan for the proposed facility for both construction and operation be noted as "preliminary" site plans. The wind developer also requests that wind developers be exempted from the requirement to consult with the New York State Division of Homeland Security and Emergency Services.

A county planning office requests that the requirements of the plans be reviewed by local first responders. A municipality comments that it opposes the proposal of wind developers to postpone review of security features. It believes these aspects of a proposed facility should be reviewed by the Siting Board, as they are currently reviewed by the lead agency under SEQRA.

Discussion

Security features are too important to not be considered in the application, but we do agree that the plans called for should be "preliminary" plans. The word "preliminary" will be inserted in subdivisions (a), (b) and (c).

We do not see a compelling reason to exempt wind developers from the requirement that applicants consult with the New York State Division of Homeland Security and Emergency Services.

In considering the comment of the county planning office, we note that the safety response plan by its terms is to ensure the safety and security of the local community. Therefore, it makes sense to add a local consultation requirement. A new subdivision will be added to enhance what was already to be required.

1001.19 Exhibit 19: Noise and Vibration

Low-frequency Noise and Infrasonic

This issue generated the highest volume of comments related to noise. A significant number of individuals, municipalities and other organizations request that C-weighted noise measurements be required in Article 10 applications. An engineering consultant firm asserted the opposite, and recommended that no discussion of low-frequency noise should be required at all within the application. A few individuals commented that wind turbine noise is no louder than other noises in the landscape like truck traffic and air conditioners, so it should be allowed. The advocates for C-weighted noise measurements cite concerns about health and safety, low frequency sound vibrations harmful to the human body, the long term effects of wind farms causing tinnitus and sleep deprivation, and their belief that most complainants at operating wind farms ultimately identify low frequency noise as the source of the problem. An acoustical engineer commented that the characteristics of wind turbine sound emissions are similar to those of problematic HVAC (heating, ventilation and air conditioning) systems where the irritations experienced were not diminished until low frequency sounds were reduced by the

HVAC industry applying limits developed by its technical society ASHRAE. The advocates for C-weighted noise measurements further argue that such measurements will allow for a scientific approach to resolving noise issues.

Discussion

Despite the number of comments, no significantly different information than that presented in the stakeholder process has been offered. The proposed regulations would require applicants to provide an analysis of whether the facility will produce significant levels of low frequency noise or infrasound, without specifically requiring the measurement and estimation of C-weighted/dBC sound levels, but do not preclude a case-by-case determination requiring the measurement and estimation of C-weighted/dBC sound levels in a proceeding in an appropriate circumstance. Until we have more experience with these issues, we will leave the regulations as originally proposed.

Caps on Noise Levels

An engineering consultant firm asserted that a 50 dBA sound level limit is consistent with limiting sound level increases in a high quality rural sound environment that is very quiet to an increase of no more than 6 dBA. In response, a municipality challenges that assertion by pointing out that if the preexisting sound level in a community at night, when wind farms operate, is 30 dBA, a 50 dBA sound level limit will obviously drive some people out of the area and/or discourage others from moving in. Several individuals arguing for caps on noise levels support a cap of 35 dBA measured at non-participating property lines, and incremental increases up to the cap of no more than 6 dBA.

Discussion

The disagreement described above lends support to the

case by case approach in the proposed regulations. We have reviewed the comments and do not believe that any change is warranted.

Other Proposed Adjustments

A number of specific adjustments to this section of the proposed regulations were proposed that represent the diversity of the comments received.

Discussion

Most of the proposals go against the grain of the regulatory scheme we intend, or were not supported by sufficient analysis to warrant a greater consideration. Two of the proposals warrant adoption.

Subdivision (c) will be modified to eliminate an evaluation of pure tone and amplitude modulation for the construction period. We expect that construction noise instead will be more practically managed by case by case limits on construction hours.

Subdivision (f) will be modified to provide for average sound condition cases in addition to the already required ambient and worst case scenarios. Addition of the average case while not eliminating the other cases will provide the Siting Board with a fuller spectrum of information.

1001.20 Exhibit 20: Cultural Resources

No discussion necessary.

1001.21 Exhibit 21: Geology, Seismology and Soils

A facility trade organization requests that the engineering assessment pursuant to paragraph (1) of subdivision (r) be noted as "preliminary". A wind developer requested that the requirement for a site plan, showing existing and proposed contours, a preliminary calculation of fill, gravel, asphalt and surface material requirements, and a calculation of the cut material or spoil to be removed be postponed until the

compliance phase of the proceeding.

Discussion

We agree that the engineering assessment called for should be a "preliminary" assessment. That change will be made. We do not agree that the requirement for a preliminary site plan can be postponed until the compliance phase. The required preliminary design is not to be engineered to the level of a construction drawing.

1001.22 Exhibit 22: Terrestrial Ecology and Wetlands

A wind developer requested that the need for an applicant to describe plant communities present on adjacent properties be eliminated because applicants do not have access to adjacent properties that are privately owned and may not be able to gain such access via negotiation with the private landowner. A facility trade organization and a wind developer asserted that applicants should be required to delineate only those wetlands occurring in the area within 100 feet of the surface areas proposed to be disturbed during construction or operation of the proposed facility and interconnections because they believe such a limitation would still account for potential changes in project configuration.

Several individuals assert that any bird and bat studies that are required must be multi-year studies (one full year to three years) that take into account seasonal variations, and must include an economic impact analysis of the expected kills. One individual asserted that applicants should have to disclose the prevailing wind direction to the DEC so that the DEC may predict the impact of the facilities on the avian wildlife because the prevailing winds of turbines are often in the same direction as the migratory pattern of birds, which could potentially adversely affect the local ecology.

A municipality opposes the recommendation to limit

wetlands delineation to areas within 100 feet of those ground areas proposed to be physically disturbed during construction or operation of the facility and the interconnections. The municipality asserts that wetlands well outside the 100 foot range attract birds and bats to the area, thus putting them at risk of mortality due to collisions with wind turbines. The municipality notes that birds and bats fly long distances from roosting or nesting sites to feeding and breeding areas and these transit routes can take them directly into a wind farm. It further asserts that limiting study to areas of direct disturbance will result in insufficient information for a Siting Board to evaluate potential impacts to such natural resources. The municipality asserts that the habitat of birds, and bats in particular, within several miles of a project area needs to be studied and both DEC and U.S. Fish and Wildlife Service guidelines require a landscape-scale investigation, using publicly available information, at the initial planning stage.

Discussion

We are not convinced that plant community characterization for adjacent properties cannot be adequately identified using aerial photographs, soils maps and other means, and adequately described for preparation of an application, short of having access to the properties. The timing of bird and bat studies is a detail best left to potential resolution in the first instance in the stipulations process.

As to the area of necessary wetlands delineation, delineation techniques necessary for federal permitting require on-site sampling; therefore the rules will distinguish between delineation of wetlands on facility site properties within 500 feet of areas to be disturbed by construction, and identification of mapped or predicted wetlands on adjacent properties based on analysis of mapped and remotely-sensed data

where access is not available.

1001.23 Exhibit 23: Water Resources and Aquatic Ecology

A number of wind developers commented that the Stormwater Pollution Prevention Plan information should not be required as part of the application phase. Some wind developers also request that they be relieved of the requirements to map some or all of the aquifers and groundwater recharge areas. A facility trade organization opposes having to provide the cost information for the proposed cooling water system.

A municipality responded that the Stormwater Pollution Prevention Plan should be reviewed by the Siting Board, as it is currently reviewed by the lead agency under SEQRA. An individual commented that there should be compensation for any loss to a water system.

Discussion

The concerns of wind developers about the Stormwater Pollution Prevention Plan are overstated. Most wind facilities will likely be subject to the SPDES general permit issued by DEC and their initial Stormwater Pollution Prevention Plan will be rather generic. As to the mapping of aquifers and groundwater recharge areas, it is not clear that wind turbines, which may require excavation for deep foundations, and extensive clearing and grading for roads, power lines and substations, are any less likely to impact aquifers and groundwater recharge areas than any other type of generation facility. Compensation for the loss of water resources is a matter best left for specific cases. We have considered the comments and are satisfied that no change to the language of the regulations in this section is warranted.

1001.24 Exhibit 24: Visual Impacts

A developer representative asserts that the above-ground interconnections made a part of the visual impact

assessment should be limited to those interconnections falling under the Siting Board's jurisdiction. A wind developer asserts that the description of the resources that would be affected by the proposed facility should be limited to significant visual resources. Another wind developer requests that the visibility of roadways to be constructed within the study area not be considered in the visual impact assessment because it believes that the viewshed analysis will not provide a meaningful evaluation of the visibility of roadways. The wind developer also requests that the requirement for line of sight profile be clarified so that wind developers can provide the profile to the nearest potentially visible turbine as determined by the viewshed analysis. The wind developer also requests that the regulation be modified to allow the applicant to provide a list of building/structure data for potentially eligible properties to OPRHP and DPS, and if the agencies wish to add a building/structure as a viewpoint, the agencies would have to notify the applicant of such within 30 days.

Some individuals and an environmental advocacy organization observed that the beauty of Upstate New York should be preserved and steps should be taken to do that, such as building generation facilities with air pollution controls close to New York City where the power is needed, and prohibiting facilities with any significant visual effect or viewable from a Scenic Area of Statewide Significance. Two individuals assert that the visual impact assessment should include a nighttime visibility study, and one individual asserts that views across water bodies are equally important for communities located on water.

Discussion

While some interconnections may not be subject to the jurisdiction of the Siting Board, they should be included in the

analysis so that the Siting Board will be able to consider the cumulative impacts. If roadways are to be constructed in a manner that they will become a visible element in the landscape, they must be included in the visual impact assessment. The assessment should be conducted in a way that determines whether roadways will be visible. The nearest turbine may not be the most visually obtrusive. In determining when line of sight profiles are appropriate, we note that the language describes representative viewpoints, is to be applied with a measure of reasonableness, and that the stipulations process and the consultations described in the regulations are the best vehicle for making specific determinations about what profiles to provide. In that same vein, the proposal about giving agencies 30 days to add viewpoints does not foster the kind of communication we are trying to foster within the consultation process. Wind developers should embrace the opportunity to work with agency staff to reach agreement on technical issues. We clarify here that nighttime visibility and views across water bodies are already included within the parameters of the required visual impact assessment.

1001.25 Exhibit 25: Effect on Transportation

An individual asserted that wind developers should pay for prompt updates to nautical and aviation maps to show turbine locations, and "no swimming" zones around electrical grounding areas and lake floor/sea floor electrical cables. The individual also requested that the regulations address and plan for a downed passenger aircraft on water rescue within a large offshore wind generation complex.

A public interest coalition recommends that the words "reasonable mitigation measures" in paragraph (d)(4) be modified to "practicable mitigation measures". It asserts that the change would be consistent with statutory requirements.

A facility trade organization asserts that for the requirements of paragraph (d)(5), the applicant should be required to file only those agreements it has entered into to date. It requests that the words "if any" be added after the word "agreements" so that the regulation does not result in applicants being held hostage to the parties that control the agreements. A developer representative asserts that the same information should be addressed through a compliance filing and be coordinated with local officials responsible for safety and infrastructure issues.

DPS Staff advises that it has consulted with the Department of Defense regarding the adequacy of the language regarding an analysis and evaluation of the impacts of the facility on "airports" as it relates to military airports (and heliports). DPS Staff learned that any such airport analysis and evaluation would have to begin with a consultation with the operator of the airport, and that the Department of Defense has established a single nationwide point of contact for informal consultations. The Department of Defense also provided Staff with advice regarding the likely zone around runways where structural obstructions would require specific reviews. Staff has recommended enhanced language in that regard for the regulations. DPS Staff also recommends additional language that would include impacts on Military Use Airspace and Special use Airspace as defined by the military.

Discussion

A requirement to update nautical and aviation maps goes beyond the scope of application requirements we intend to cover by the regulations. We will leave it to the parties in the stipulations process to determine in the first instance whether the downed passenger aircraft scenario is sufficiently likely that it should be addressed in an application.

We have no objection to modifying the word "reasonable" to the word "practicable" in paragraph (d)(4) as requested. We also agree that the addition of the words "if any" to paragraph (d)(5) is in keeping with the intended regulatory scheme. Those changes will be incorporated.

DPS Staff's recommended enhanced language for the regulations in substance merely requires applicants to consult with airport operators in conducting their analysis and evaluation of the impacts of the facility on airports (and heliports) in the pre-application and application preparation phases. It is important that tall structures do not obstruct air traffic or unnecessarily interfere with radar and other communications used in flying. In addition, military facilities in the State are important to our economy and security. It also makes sense for applicants to participate in the informal consultation process established by the Department of Defense to eliminate unnecessary conflicts between energy facilities and military facilities and operations. Staff's language will be incorporated here and in Section 1000.4.

1001.26 Exhibit 26: Effect on Communications

A developer representative asserts that the geographic scope of inquiry in relation to existing broadcast communications sources, underground cable, and fiber optic telecommunication lines should be addressed on a case-by-case basis during the stipulation negotiation phase. An individual stressed the importance of considering interference with telecommunications and TV/radio within at least a 2-mile radius, including a request that the analysis be done by a qualified engineer on a case-by-case basis. Another individual expressed concerns about offshore wind turbines severely affecting radar returns because they are all very tall above the relatively flat surface of the water.

DPS Staff advises that based on its consultations with the Department of Defense, the proposed two-mile study area is technically insufficient for certain technologies, particularly radar, and that the scope of inquiry for those technologies should include all "affected sources". In addition, Staff advises that the words "radar systems used for air traffic control" should be clarified to be "radar or instrument systems used for air traffic control, guidance, weather, or military operations including training."

Discussion

The changes recommended by Staff are desirable from a technical basis and flesh out the obvious intent of the proposed regulations that the effect on communications be fully analyzed. Those changes will be made. The new language will require greater reliance on the stipulations process as suggested by the developer representative.

1001.27 Exhibit 27: Socioeconomic Effects

As they did for issues regarding wind facilities, many individuals took the opportunity to comment on this section to give their opinions of the social and economic benefits and burdens of wind power. The opinions in favor stress clean air benefits, the creation of construction and permanent jobs, real property tax income for local communities and school districts, and an opportunity for struggling farmers to lease land and obtain a second income. The opinions in opposition stress the high cost of wind power, the lack of capacity benefits, the visual impact on landscapes and seascapes and resultant negative impact on tourism, and adverse health effects from the noise emitted by wind turbines. Many of the stories provided offer heartfelt descriptions of the struggles in people's lives, on both sides of the issues, and illustrate the challenges communities face as they consider the plusses and minuses of

hosting wind facilities. All of the comments demonstrate that individuals are thoughtfully weighing difficult choices about benefits and burdens.

Discussion

The comments are more in the nature of advice to the Siting Board on how it should exercise its judgment than they are directions related to the specific language of the regulations. We have considered the numerous comments and are satisfied that the regulations as written will elicit the appropriate information we intended regarding socioeconomic effects.

1001.28 Exhibit 28: Environmental Justice

Opinions were expressed by individuals about wind power ranging from it being clean energy and not posing a danger to the environment, to it being a primary cause of environmental injustice requiring large amounts of rare earth metals and raw materials, and destroying the environment by disrupting land and obstructing views. One individual requests that the language that reads "maximum extent practical" should be removed, and instead, where the facilities cannot meet certain requirements, the certificate should be denied.

A public interest coalition recommends that the words "or minimized" be removed from the language "if such impacts cannot be avoided or minimized". It is concerned the provision could lead to misinterpretation of the offset requirements. The public interest coalition also requests that paragraph (b)(3) be clarified to state that the offset projects must benefit, and be evaluated by the extent to which they benefit, the specific local communities that are disproportionately impacted. It believes the clarification to be necessary also to avoid misinterpretation of the offset requirements.

Discussion

The statute allows certificate denial if impacts cannot be avoided, but does not mandate it. Instead, the statute allows for offsets in a proper case. The public interest coalition is correct that the words "or minimized" in paragraph (b)(3) could lead to confusion. If impacts are "minimized", by definition they are not fully avoided and there are residual impacts for which it may be appropriate to require an offset. The suggested change will be made. We do not disagree with the sentiment that the offset projects should ideally benefit, and be evaluated by the extent to which they benefit, the specific local communities that are disproportionately impacted, but the requested change seeks to restate the standard set forth in the statute and we believe that the statute is better served by us leaving it as stated by the Legislature.

1001.29 Exhibit 29: Site Restoration and Decommissioning

Many comments about site restoration and decommissioning were received from individuals, municipalities and other organizations. They were almost universally directed towards ensuring that wind turbines are dismantled and removed from the landscape at the end of their useful lives at the expense of the wind developers, and not the taxpayers. The recommendations made in the many comments include that there should be a uniform decommissioning plan to protect property owners and the host community from the abandonment of non-functional wind turbines; the plan should include defined criteria for when decommissioning would be initiated; the plan should include regular reviews of the decommissioning process; a decommissioning trust fund and replenishment obligation should be required for all large power generating facilities, not just nuclear facilities; simply having a plan in place for

decommissioning and site restoration is not enough without funding; the fund should be structured so that the money can be used to remove turbines that aren't active; the fund should be available for decommissioning with or without the permission of the developer/owner of the turbines; the size of the fund should correlate to the size and potential environmental impacts of the facility; an applicant should be required to provide proof of its financial commitment that a plan can be fully implemented; fiduciary solvency standards and bonding should be required; the funds should be held in financial institutions licensed in New York; funds should be collected prior to the commencement of construction or operation and held in escrow to cover the cost of the decommissioning; the decommissioning fund should be set at 125% of the full cost of decommissioning and restoration to account for variations; scrap metal credits should not be included in the cost because scrap metal values are volatile and inappropriate for long term calculations; wind developers should not be able to avoid decommissioning by dissolving their limited liability corporations; the plans should explain how ownership will pass; and there should be severe and clear penalties for non-compliance.

Some municipalities and individuals commented that the funds should be held by the town where the development is located and that the host community should have control over the decommissioning funds. A county planning office and an individual recommended that use of Facility Construction and Reclamation Guidelines developed by the U.S. Department of Agriculture and Markets in the decommissioning of sites located on agricultural land. Wind developers did not provide comments on site restoration and decommissioning.

Discussion

This section of the proposed regulations, as written,

is adequate to address the site restoration and decommissioning issues raised on a case by case basis in Article 10 proceedings. We are not prepared to establish a uniform plan as part of these regulations at this time. The comments do not discuss that State agencies are not statutorily well-enabled to receive escrow funds because any funds received by a State agency must be deposited in the General Fund of the State where such funds, even escrow funds, cannot be spent unless appropriated by the State Legislature. While it is possible to set up third-party standby trusts to receive and spend the funds, that process is cumbersome and not conducive to rapid spending on decommissioning projects. It also remains to be seen whether a state/local partnership with a town acting as the escrow agent will be a workable scenario. We are genuinely appreciative of the many comments and we expect that the ideas put forth will be of great value in addressing site restoration and decommissioning issues in individual cases.

1001.30 Exhibit 30: Nuclear Facilities

A facility trade organization asserts that since the Siting Board does not have the authority to override the jurisdiction of the Nuclear Regulatory Commission, it would be a useless exercise and expensive for the applicant to litigate issues outside the Siting Board purview. It requests that the proposed regulation state explicitly that the impacts on public health, public safety and environment information required to be provided for nuclear facilities will not be used by the Siting Board to make statutory findings and determinations.

Discussion

The proposed regulation already provides that the provision of this information shall not result in litigation in the Article 10 proceeding of any issue solely within the jurisdiction of the Nuclear Regulatory Commission. Whether any

of the information to be provided would inform the Siting Board in making its statutory findings and determinations within its jurisdiction could only be determined on a case by case basis by examining the information so provided.

1001.31 Exhibit 31: Local Laws and Ordinances

A significant number of individuals and municipalities used the comments to express their opposition to the Siting Board having the power to override local laws. They note that Article 10 removes the decision making power for land use decisions from local governments. They assert that the "home rule" concept for land use decisions has been important in New York for a long time, and that Article 10 violates that concept. Some argue that Article 10 violates the home rule provisions of the New York State Constitution. More specifically, they assert local governments should be able to make decisions about projects that directly affect them; local government is closest to the people and reflects their needs and concerns; the majority in the community should decide what is best for the people; while the State could standardize construction and siting for energy installations, the decision to have or not have an energy installation in a particular locality should be left for that locality to control; local board members are better able to preserve the local needs than the state; standards of each community have been set by that community with the best interest of the citizens in mind and they should be upheld for those reasons; local laws have been established to protect the beauty and character of the area and should not be overruled just for the sake of industry; the Siting Board does not answer to the citizens and thus their decisions are not reflective of the will of the people; appointees on the Siting Board would be making decisions for the people of the entire state without proper representation; the fact that the local

members of the Siting Board would serve only on an ad hoc committee will result in local rules being disregarded; State action is unwanted; the 12-month time frame encourages speed over thoughtful consideration; and wind projects are not sustainable without government subsidies, so there is no reason to assert that these projects are essential to the State, and thus the State should not be able to overrule the local governments;

Several individuals welcome Siting Board control. They assert that due to the level of disagreement within communities and the controversy involved regarding wind projects, the State should be responsible for these decisions, not the local governments.

A number of wind developers and wind power supporters also provided extensive comments regarding local laws. An organization that promotes wind development asserts that the regulations should not limit the basis upon which the Siting Board can rely when determining whether to waive local laws. Specifically, it asserts that the proposed regulations establish three tests for determining override, none of which are in the statute (Section 1001.31(e)(1)-(3)). It further asserts that the standard for demonstrating the override of local laws should be low and once the applicant has met the statutory standard for the findings and determinations for a certificate, the burden to maintain local laws should shift to the municipality. Other wind power supporters assert that applicants should not be required to justify a project's non-compliance with local standards. The Siting Board should rely upon wind-friendly local laws adopted by various municipalities in the State as the standard for determining whether to waive local laws. The regulations should allow an applicant to meet the "unduly burdensome" standard for waiver of local laws if it can

demonstrate that the project is consistent with standards employed by wind projects already in operation. Advocates of the local law standard would then have the burden of defending continued application of the standard to the project. They also assert that applicants should not have to demonstrate that they could not comply with local law via design changes or that any departures from the local law are the minimum necessary.

Some assert that the Siting Board should evaluate a project and its compliance with only the local laws in effect at the time the application is submitted. They believe that local governments should not be able to impact the review of an Article 10 application by passing laws addressed towards and potentially with the desired goal of stopping the specific proposed project.

Several wind developers assert that the regulations should provide for an early determination of the waiver of local laws because early decision will allow developers to perform the studies and design work for the facility to satisfy the applicable local laws and make appropriate project revisions resulting in a more efficient and cost effective regulatory process, which is a particular benefit to developers of moderately-sized renewable energy projects.

A developer representative asserts that the Siting Board should retain authority to review and approve building plans, inspect construction work and certify compliance with the N.Y.S. Uniform Fire Prevention and Building Code and other similar codes.

One wind developer asked the Siting Board to provide guidance on how it would apply the "unreasonably burdensome" standard to local laws requiring (1) property value guarantees; (2) U.S.-made components; (3) constantly changing local standards; (4) setback requirements; and (5) sound limits.

Many comments follow the theme that local laws should be earnestly addressed by the Siting Board and should be upheld to the greatest extent possible so as not to deprive the municipality of its ability to protect landowner rights and the health and safety of the community. A member of the State Senate urged that the Siting Board take the needs and desires of the community into consideration when determining if a local law is unduly burdensome. More specific assertions made include local laws should be applied as a default - unless shown to be otherwise, local laws should be presumed to be reasonable, necessary and reflective of community standards; all local public comments should be taken carefully into account; in determining unreasonable and burdensome local laws, the test in the proposed regulations must be maintained; the burden of proof must rest with the applicant; the State should not override local laws when wind projects intermingle with nonparticipating landowner rights; comparing the local costs of non-compliance with the benefits to ratepayers of electricity in the State is not a reasonable comparison; localities have put a lot of time and effort into making these laws and they are tailored specifically to the needs of the town; the language about "unreasonably burdensome" laws, is too vague and should be tightened to protect the local citizens; "unduly burdensome" should be interpreted in a manner that respects local laws and protects adversely impacted homeowners because town laws regarding wind development, land use and road use containing reasonable guidelines regarding setbacks and noise levels reflect the will of the people and ensure that the rural life-style the community enjoys will not be compromised; the facilities should have to be within substantial compliance of local laws, even if the state laws are allowed to supersede local laws; local setbacks should be respected with regard to

siting of the projects; and the views of local residents and elected officials should have more weight than those of the appointed Siting Board with regard to reviewing the applications for facilities.

A locality advocacy organization asserted that local ordinances should be sustained with regard to the following essential provisions, regardless of the cost benefit balance test: (1) where turbines may be located in a town; (2) setbacks; (3) wetland and aquifer protection; (4) historic site protection; (5) sensitive environmental areas; (6) consistency with the town's comprehensive plan; (7) maximum total number of turbines allowed within town; and (8) PILOT (payments in-lieu of taxes) programs.

A municipality asserts that despite Article 10, municipalities remain free to limit the use of land by prohibiting certain types of power plants, or restricting the area in which they may be sited, because Article 10 falls short of preempting a local restriction on land uses that neither requires any local approvals nor addresses facility construction or operations. It bases its assertion on a Court of Appeals holding that state laws that establish a process for obtaining a permit do not preempt a municipality's local law banning such facilities. Analogous with the law of extractive mining in New York (Article 23, Title 27 - Environmental Conservation Law: Mined Land Reclamation), it asserts that Article 10 does not supersede local laws restricting land uses generally, and does not authorize a Siting Board to disregard local laws that do not address power plant operations. It states that this conclusion does not apply to power plants with the power of eminent domain, but notes that wind-powered facilities would not exercise eminent domain.

Some individuals and municipalities oppose any cutoff

for the consideration of new local laws. They believe that the local law situation in municipalities hosting wind development is continuously evolving and is not stagnant, local laws are crucial to safeguarding the health, safety, and economy of the localities and the Siting Board should consider the impact on any local laws adopted regardless of the date. They assert that deadlines should not render crucial laws ineffective, which would give a bad name to wind energy and the Siting Board.

Some individuals and municipalities also oppose the idea of looking at the standards of a project in a different community as governing whether local laws are reasonable. They believe all local laws should be considered on a case by case basis. Some also question the behavior of developers and some elected officials in those other communities and do not believe their actions are legitimate or entitled to precedential value.

In response to the request by the developer representative that the Siting Board should retain authority over building codes, an individual commented that the local governments should retain the right to determine if the project is in compliance with local codes (construction, fire, etc.).

Discussion

Some comments challenge the constitutionality of Article 10 and the proposed regulations under the "home rule" provisions of the New York State Constitution. The concept of "home rule" involves the power of a local government to adopt and implement its own laws without state government action or interference. Home rule shifts much of the responsibility for local government from the state legislature to the local community. Without home rule authority, municipalities depend for their governing authority on specific acts of the State Legislature. With home rule authority, municipalities have the right to enact laws within the bounds of the state and federal

constitutions that are municipal in nature and that do not frustrate or run counter to a state law or prohibition. The extent of home rule powers, however, is subject to limitations prescribed by state constitutions and statutes.

New York is considered to be a "home rule state". While municipalities in New York generally owe their origin to and derive their powers and rights from the State Legislature, the New York State Constitution⁵ grants fairly broad home rule powers to local governments to adopt local laws. The Municipal Home Rule Law implements the home rule provisions of the Constitution. A New York municipality has authority to act by local law (i) with respect to its "property, affairs, or government" so long as such local laws are "not inconsistent with the provisions of the constitution ... or any general law"; and (ii) with respect to other powers granted in the Municipal Home Rule Law, "whether or not they relate to its property, affairs, or government," so long as such local laws are "not inconsistent with the provisions of the constitution" or "any general law" "except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government." The power of cities, towns and villages to "perform comprehensive or other planning work relating to the jurisdiction", and to "adopt, amend and repeal zoning regulations", are among the home rule powers granted.⁶

A "general law" is a law enacted by the State Legislature which in terms and effect applies alike to all counties,⁷ all cities, all towns, or all villages.⁸ It is

⁵ N.Y. Const. art. IX, § 2.

⁶ See N.Y. Mun. Home Rule Law § 10(1)(a)(14)(McKinney 2012) in conjunction with N.Y. Stat. Local Gov'ts §10(6)&(7).

⁷ Means counties outside of New York City.

⁸ N.Y. Const. art. IX, § 3.

contrasted with a "special law" which is a law enacted by the State Legislature which in terms or effect applies to one or more, but not all, counties, cities, towns, or villages.⁹

If Article 10 had been drafted to apply only to generation facilities in a particular municipality or group of municipalities, but not to all such municipalities, then it would have been a special law, and because of the home rule prohibitions it could not have been enacted without a home rule message requesting enactment from the affected local governments.

But there is no limit on the State Legislature's authority to act by general laws to supersede such home rule powers. Article 10, by its terms, applies alike in every municipality in the State.¹⁰ Therefore, Article 10 is a general law not subject to the home rule prohibitions. Article 10 and the proposed implementing regulations are not in conflict with the New York State Constitution or the home rule powers granted to New York local governments.

As a general matter, PSL § 172(1) supplants all local procedural requirements applicable to the construction or operation of a proposed major electric generating facility (including interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under Article VII of the PSL) unless the Board expressly authorizes the exercise of the procedural requirement by the local government. The default is that the local procedural requirement is supplanted and the Siting Board does not need to take any action or adopt any findings for that to happen. PSL § 172(1) also supplants all local procedural requirements applicable to the interconnection to or use of water, electric,

⁹ Id.

¹⁰ N.Y. Pub. Serv. Law § 162(1)(McKinney 2012).

sewer, telecommunication, fuel and steam lines in public rights of way that the Siting Board elects not to apply, in whole or in part, pursuant to PSL §168(3)(e). The default is that the local procedural requirement is not supplanted unless the Siting Board elects to not apply it by finding that, as applied to the proposed facility, the requirement is "unreasonably burdensome" in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality.

PSL § 172(1), however, does not supplant any local substantive requirements applicable to the construction or operation of a proposed major electric generating facility (includes interconnection electric transmission lines and fuel gas transmission lines that are not subject to review under Article VII of the PSL). Pursuant to PSL §168(3)(e), the Siting Board must find that the facility is designed to operate in compliance with all local substantive requirements, all of which shall be binding upon the applicant, unless the Siting Board elects to not apply them. The default is that the local substantive requirement is not supplanted unless the Siting Board elects to not apply it by finding that, as applied to the proposed facility, the requirement is unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality. In other words, unless the Siting Board finds a local ordinance to be unreasonably burdensome, the Siting Board itself applies the ordinance.

We do not agree that the information required to be included in the application by paragraphs (1) through (3) of subdivision (e) alters or diminishes the statutory findings as set forth in the statute. The statute speaks for itself. The regulations also do not preclude an applicant from presenting

whatever additional relevant and material information it desires to present in the application or at the hearings to support an applicant's request. Similarly, parties on the other side of such issues are also not precluded from providing additional information.

As to the consideration of local laws adopted after the submission of an application, we will have to consider that matter on a case by case basis. We understand that there is precedent in New York in the zoning context that vested rights to construct something without regard to newly enacted local laws do not accrue unless the construction has substantially commenced pursuant to a valid permit. We are not sure whether that precedent applies, or how it would be applied in a case having a statutory deadline for completion. We also note that the process has some built in deadlines that, without imposing a special change in procedure, will act as a practical hindrance on the consideration of new local laws including the application deadline, the deadlines for testimony, and the date upon which hearings are closed. Presumably, a similar conundrum would be presented by a change in state laws adopted after the submission of an application. Therefore, this issue will need to be addressed on a case-by-case basis.

In regard to the request for an early determination of the waiver of local laws, Article 10 and the proposed regulations do not prohibit the Siting Board's consideration of applicant requests to override local laws at a point early on in the Article 10 process. That being said, however, applicants should consider that often the facts necessary for the Siting Board to determine whether to waive a local law will require the development of a record. Specifically, Article 10 expressly recognizes the ability of municipalities to defend their local laws; therefore, it will be likely that some level of evidence

and litigation regarding the issue will be necessary prior to the Board rendering a determination.

With regard to the Siting Board retaining authority to review and approve building plans, inspect construction work and certify compliance with the N.Y.S. Uniform Fire Prevention and Building Code and other similar codes, we note, as indicated in the regulations, that the function must be performed by a city, town, village, county, or State agency qualified by the Secretary of State to review and approve the building plans, inspect the construction work, and certify compliance with the New York State Uniform Fire Prevention and Building Code, the Energy Conservation Construction Code of New York State, and the substantive provisions of any applicable local electrical, plumbing or building code. The Siting Board is not so qualified.

It is difficult to provide guidance as to how the Siting Board in individual cases will apply the "unreasonably burdensome" standard to local laws because the Ad Hoc members for each Siting Board will be different and no Ad Hoc members are on the Permanent Board promulgating the regulations. Also, the statute requires that local governments be given an opportunity to defend their specific laws before the matter can be considered. However, without deciding anything, we will make some generic observations.

While property value guarantees could be offered voluntarily by an applicant, such a requirement being imposed by local law would appear to be a tax and it is not clear that there is municipal authority to impose such a tax or to transfer applicant money to the affected property owner, or that there is Siting Board jurisdiction over tax issues. Requirements that facility components be made in the United States probably violate the interstate commerce clause of the U.S. Constitution

and one or more international trade treaties that are the law of the land. Setbacks requirements would have to be considered on a case by case basis by looking at the purpose for their establishment and the circumstances of a specific site or case. A setback might be unreasonable for the purposes of preventing construction encroachments but reasonable to protect migratory flight-paths. A setback might be unreasonable for preventing noise impacts but reasonable if applied as an "overlay zone", a term of art in zoning parlance that creates special zoning districts over ordinary zoning districts further governing which uses are permitted. The reasonableness of sound limits would clearly require a case-by-case analysis. Worst case considerations should be considered as part of any noise analysis, but they are not necessarily determinative.

Finally, as to the assertion that despite Article 10, municipalities remain free to limit the use of land by prohibiting certain types of power plants, or restricting the area in which they may be sited, without deciding anything we note that the analysis provided is not complete. The extractive mining law cited does not have a local override provision like Article 10. In addition, some uses such as the provision of a fair share of multifamily housing cannot be outright prohibited by a municipality regardless of whether the entity doing the building has eminent domain powers. There is judicial precedent in New York that necessary public utility uses cannot be prohibited, and additional judicial precedent that what constitutes a utility use is rather broad. Having considered all of the comments, we are satisfied that the proposed regulations in this section are reasonable and that no changes are warranted.

1001.32 Exhibit 32: State Laws and Regulations

No discussion necessary.

1001.33 Exhibit 33: Other Applications and Filings

No discussion necessary.

1001.34 Exhibit 34: Electric Interconnection

A wind developer and a developer representative assert that the information required in this section should be able to be provided through a compliance filing after discretionary approvals have been obtained. They claim that the information requested is too detailed for that stage of development and that it is unnecessary to support any Siting Board determination or finding.

An individual commented that due to the socioeconomic impact of transmission lines on the community, the Siting Board should be well informed of the transmission line requirements when making their determinations. Another individual requested that the State not place new transmission lines across land used for dairy farming because dairy farming is important to the local economy and taking farmland for new transmission lines may interfere with dairy farming.

Discussion

Pursuant to the Article 10 statute, the electric interconnection is part of the facility that is sited when a certificate is granted. Therefore, the information on the electric interconnection is a crucial component of the application for a certificate. In addition, the information is needed to adequately consider the cumulative impacts of the facility and its interconnections, as suggested by the individual mentioned. Any particular location of transmission lines, such as on the lands of a dairy farm, is properly made only in a case by case determination.

1001.35 Exhibit 35: Electric and Magnetic Fields

A wind developer requests that the regulation be revised to reflect that the NYISO interconnection process will

determine the specifics of the interconnection of the facility. The wind developer also requests that the Siting Board define what is meant by "unique EMF characteristics."

Discussion

We do not anticipate that the NYISO will be determining electric and magnetic field levels at adjoining properties. Field levels may have an impact on siting considerations and must be considered in the application phase. EMF characteristics are different depending on structure types, average heights, rights-of-way widths, and co-location of other transmission facilities in the right-of-way. Each segment of right-of-way for an electric transmission line having a different mix of these features can be said to be "unique".

1001.36 Exhibit 36: Gas Interconnection

A developer representative requests that the preliminary design information required in subsection (b) be addressed through a compliance filing because this level of information is not available during the early stages of development and there is no reason that the Board would need such in depth information. A facility trade organization objects to being asked to identify in the application who shall construct, own and operate the gas pipeline interconnection facilities because an applicant may not know, at the time of application, who will be involved with the pipeline facilities. The facility trade organization also objects to the proposed regulation that would require a discussion of the impact of the facility use of gas on wholesale supplies and prices in the affected region. It asserts that pricing information was excluded from the statute as part of legislative negotiations.

An individual commented that it is important for the Siting Board to consider the effect gas pricing impacts may have on ratepayers.

Discussion

The preliminary design information, particularly the information about pipeline class, valve locations, and the need for cathodic protection, is information necessary to determine pipeline siting issues and must be presented on at least a preliminary basis in the application. We also do not think it is unreasonable for an applicant to address who will own and operate the gas pipeline interconnection facilities for which the applicant is seeking siting approval. As to pricing, the regulation as proposed does not ask an applicant to reveal its gas fuel price, it only asks for an analysis of the impact of the facility use of gas on the supplies and prices of others, which is consistent with the PSL §164(1)(k). New gas-fired generation facilities are large users of gas and have the potential to significantly affect gas markets.

1001.37 Exhibit 37: Back-Up Fuel

A developer representative and a facility trade organization object to the proposed regulation that would require a discussion of the impact of the facility use of fuel oil on wholesale supplies and prices in the affected region. They assert that the information is irrelevant to the Siting Board, difficult to analyze, and pricing information was excluded from the statute as part of legislative negotiations.

An individual commented that it is important for the Siting Board to consider the effect oil pricing impacts may have on oil customers.

Discussion

Consideration of the impacts of back-up fuel is mandated by the statute (PSL §164(1)(k)). The proposed regulation does not ask an applicant to reveal its fuel price, it only asks for an analysis of the impact of facility use of fuel oil on the supplies and prices of others. This issue is of

particular concern on Long Island and other areas of the State highly dependent on fuel oil for space heating purposes where a major withdrawal of fuel oil from the market might have significant consequences on homeowners and businesses relying upon fuel oil.

1001.38 Exhibit 38: Water Interconnection

A developer representative requested that the requirement for water consumption should be changed from daily to overall peak and average levels, asserting that the level of information would be sufficient to understand the impacts of a project on water usage.

Discussion

Some water systems operate on very low capacity margins for additional usage. The requested change would make it impossible to create a demand curve for the year that would more precisely define the usage, and therefore will not be made.

1001.39 Exhibit 39: Wastewater Interconnection

A facility trade organization requests that the description of how the wastewater interconnection and any necessary system upgrades will be installed, owned, maintained and funded be allowed to be a "preliminary" description.

Discussion

We agree that a preliminary description would be in keeping with the scheme of the proposed regulations and the suggested change will be made.

1001.40 Exhibit 40: Telecommunications Interconnection

No discussion necessary.

1001.41 Exhibit 41: Applications to Modify or Build Adjacent

An individual commented that the regulations operate on the assumption that the emissions will decrease, but since there is also a chance they will increase, there should be a required table to document increases in emissions as well as

decreases.

Discussion

The purpose of this exhibit is to demonstrate compliance with Section 165(4)(b) of the Public Service Law which mandates emissions decreases if an application is to qualify for special treatment. The exhibit is therefore appropriately focused on decreases. Increases are separately covered in Exhibit 17 regarding Air Emissions.

1002.1 Purpose.

No discussion necessary.

1002.2 General Procedures.

A developer representative asserts that the timeframe to comment on compliance filings should be reduced from 21 days to 15 days because he believes 15 days should be sufficient to review a filing. A county planning office requests that minor changes be made available for timely public comment.

Discussion

Given the technical nature and large scope of most compliance filings, it is not realistic to expect parties to review the filings and comment on them in only 15 days. The 21 day timeframe provided is already ambitious, but has been set in the interests of processing compliance filings as quickly as possible. Minor changes are very limited in scope and should not entail contested issues requiring comment. Allowing for a comment period would defeat the purpose of having a minor change process to quickly process inconsequential changes.

1002.3 General Requirements.

No discussion necessary.

1002.4 Reporting and Inspections.

A county planning office requests that reports be available to the public and retained in hard copies in an accessible location. An individual and a locality advocacy

organization request that this section include an explanation of enforcement procedures. A public interest coalition requests that, where disproportionate impacts on an environmental justice community have been found, for the duration of the certificate there be ongoing monitoring of existing offset projects and consideration of potential new offset projects, by the filing of periodic reports and an opportunity for parties to periodically propose additional offset projects for consideration.

Discussion

A hard copy and an electronic copy of all filings will be available for public inspection at the office of the Secretary during ordinary business hours, and will be available electronically on the internet. PSL Section 168(5) specifies that the Department of Public Service or the Public Service Commission shall monitor, enforce and administer compliance with the terms and conditions of the Board's order. If a Certificate Holder were found not to be in compliance with a provision of a Board Order, the Commission would issue an order requiring compliance within a specified period of time, then enforce its Order pursuant to PSL Section 26 or seek a penalty pursuant to PSL Sections 24 and 25. The concept of monitoring offsets and making adjustments for the duration of a certificate is novel and we are not comfortable prejudging that process at this juncture. The proposal made by the public interest coalition may be a good starting point for the creation of such a process in an appropriate case when the issue can be considered with parties in interest in a less abstract fashion.

CONCLUSION

The views of all the stakeholders have been taken into account in developing the attached regulations that will appropriately implement PSL Article 10. The accompanying resolution and the resulting regulations, as set forth in the accompanying resolution, are adopted.

By the New York State Board on
Electric Generation Siting and
the Environment

(SIGNED)

JACLYN A. BRILLING
Secretary

STATE OF NEW YORK
BOARD ON
ELECTRIC GENERATION SITING AND THE ENVIRONMENT

At a session of the New York State Board on Electric Generation Siting and the Environment held in the City of _____ on _____, _____, by a _____ vote of its five members present

BOARD MEMBERS PRESENT:

CASE 12-F-0036 - In the Matter of the Rules and Regulations of the Board on Electric Generation Siting and the Environment, contained in 16 NYCRR, Chapter X, Certification of Major Electric Generating Facilities.

RESOLUTION BY THE BOARD

(Issued and Effective _____)

Statutory Authority
Public Service Law §§ 160(8), 161(1) and (3), 163(1)(h), (2) and (4)(b), 164(1), (2), (3), (4) and (6)(b), 165(2), (4)(b) and (5), and 167(1)(b) and (4)

RESOLVED:

1. That the provisions of §202(1) of the State Administrative Procedure Act and §101-a(2) of the Executive Law have been complied with.

2. The official Compilation of Codes, Rules and

Regulations of the State of New York, Title 16, Public Service, is amended, effective upon publication of a Notice of Adoption in the State Register, by the repeal of Subchapter A of Chapter X and the addition of a new Subchapter A to read as set forth in the Appendix attached hereto.

2. That the Secretary to the Board is directed to file a copy of this resolution with the Secretary of State.

By the New York State Board on
Electric Generation Siting and
the Environment

(SIGNED)

JACLYN A. BRILLING
Secretary

CASE 12-F-0036 - DRAFT DISCUSSION DOCUMENT, JULY 2012 SITING
BOARD MEETING, PUBLICLY RELEASED 7-9-12.

APPENDIX

**CHAPTER X CERTIFICATION OF MAJOR ELECTRIC GENERATING FACILITIES SUBCHAPTER A
REGULATIONS IMPLEMENTING ARTICLE 10 OF THE PUBLIC SERVICE LAW AS ENACTED BY
CHAPTER 388, Section 12, OF THE LAWS OF 2011**