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**POWER PLANT SITING LAW  
AWAITS LEGISLATIVE ACTION**

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**Patricia E. Salkin, Esq.  
Associate Dean and Director**

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# Power Plant Siting Law Awaits Legislative Action

Patricia E. Salkin



New electric generating facilities proposed to be constructed in this State with the capacity to generate at least 80 megawatts must first be approved by the New York State Board on Electric Generation Siting and the Environment. The Siting Board is created by New York Public Service Law Article X, which also sets forth the legal requirements that must be satisfied before the Siting Board can approve a project. Article X was enacted in 1992 to replace its predecessor, Article VIII, which had already expired on January 1, 1989. The Article X provisions were part of comprehensive legislation that reestablished a statutory energy planning process that had also expired.

During its first six years, the new siting law saw little action. However, as the electric energy industry was restructured, a number of prospective generating companies began submitting applications for approval of new generating facilities pursuant to Article X. In what seemed like an explosion of activity, the Siting Board approved five new facilities during 2000 and 2001 for a total of 3,490 megawatts of new electric generation capacity. Assuming that these facilities get constructed, this represents an increase of nearly 10 % in New York's generating capacity. A new facility was approved in the Town of Athens, Greene County on June 15, 2000; in the Town of Scriba, Oswego County on January 17, 2001; in Lower Manhattan on August 30, 2001; in Long Island City, Queens on September 7, 2001; and in Astoria, Queens on November 21, 2001.

However, the projects approved by the Siting Board are only a fraction of those in the pipeline. As of December 2001, applications have been filed for another eight projects in the following counties: Albany, Brooklyn, Orange, Queens (2), Rockland (2), and Suffolk. Another eleven prospective projects are in the application process, but applications have not yet been filed for them.

In contrast, Article VIII oversaw the

approval of only six projects in the sixteen years from 1972 through 1988, and only one was constructed. This new flurry of activity under Article X, however, ushered in a new public debate about the adequacy of New York's siting law. Early in 2000, several stakeholders urged the repeal of Article X, arguing that the law failed to adequately protect the environment in the new era of deregulation. Others urged a streamlining of the Article X review process, citing its failure to live up to the purpose of providing a one-stop forum for the siting of new facilities at a time when the State needed new generating capacity to ensure reliability and to keep prices in check. Other big-picture issues were encountered, such as which agency would implement federal environmental permit requirements under the federal Clean Air Act and Clean Water Act.

After Governor Pataki directed the State Department of Public Service to submit a bill to the Legislature to address some of these emerging issues, a three-way agreement between the Governor, Senate Majority Leader and Assembly Speaker was reached in August, 1999, to make the first significant amendments to Article X. The amendments clarified the authority of the Department of Environmental Conservation to issue the required federal environmental permits, and improved the pre-application process, among other things.

Nevertheless, both the Siting Board and Department of Environmental Conservation encountered new and difficult questions during their respective reviews of Article X applications such as: whether the intervenor funding process provided meaningful assistance to the recipients; whether the overall review process was too protracted or too rushed; whether the environmental analyses were sufficiently thorough, and as thorough as that which was required under the State Environmental Quality Review Act; whether the State should

require more advanced technology for cooling water intake structures and air pollution control; whether the need for the facility should be determined; whether local zoning requirements should be preempted; and whether incentives should be provided to proposed projects which result in net improvements to the environment, such as the repowering of existing facilities or the reuse of existing brownfield sites.

Most of these issues continue to be sorted out on a case-by-case basis. However, in 2001, two chapter laws went into effect which together provide a six-month expedited review for projects that achieve a 75% reduction in air emissions of nitrogen oxides, sulfur dioxide, and particulate matter, and also install air-cooled condensers or evaporative cooling systems.

All this may be short-lived, however, because Article X is set to expire as of January 1, 2003. Needless to say, the expiration of Article X would present a number of significant challenges to all stakeholders. A thoughtful public discussion of Article X is both timely and critical because absent legislative action this year, a major shift will occur in the regulatory paradigm that determines whether new electric generating facilities should be built, and where. Whether Article X should be allowed to sunset, simply extended, or continued with amendments, will be the topic of a March 1, 2002 symposium at Albany Law School (ALS). The program is being presented by the ALS's Government Law Center, Environmental Outlook, Environmental Law Society and Environmental Alumni Group, along with the Hudson River Environmental Society. For more information, call 518-445-2329.

*Patricia E. Salkin is Associate Dean and Director of the GOVERNMENT LAW CENTER OF ALBANY LAW SCHOOL. She has written and lectured extensively on the subject of smart growth.*