

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
Office of Hearings and Mediation Services
625 Broadway, First Floor
Albany, New York 12233-1550

In the Matter of
Proposed Part 251 (CO₂ Performance Standards for Major Electric Generating Facilities)
and Proposed Revisions to Part 200 (General Provisions)
and
Proposed Part 487 (Analyzing Environmental Justice Issues in Siting of Major Electric
Generating Facilities Pursuant to Public Service Law Article 10)
of Title 6 of the Official Compilation of Codes, Rules and Regulations
of the State of New York

HEARING REPORT

-by-

_____/s/_____

Daniel P. O'Connell
Administrative Law Judge

_____/s/_____

Molly T. McBride
Administrative Law Judge

_____/s/_____

Maria E. Villa
Administrative Law Judge

April 6, 2012

PROCEEDINGS

Background

The New York State Department of Environmental Conservation (“Department” or “DEC”) scheduled hearings to receive public comment on the proposed addition of Part 251 to the Department’s regulations at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”). The proposed Part 251 would establish carbon dioxide (“CO₂”) performance standards for major electric generating facilities. The Department also proposed revisions to 6 NYCRR Part 200, General Provisions. In addition, the Department proposed to add a new Part 487 to the regulations, entitled “Analyzing Environmental Justice Issues in Siting of Major Electric Generating Facilities Pursuant to Public Service Law Article 10.”

The proposed part 251 will establish carbon dioxide emission standards for new major electric generating facilities (those with at least 25 megawatt capacity) and for increases in capacity at existing generating facilities of at least 25 megawatts.

The proposed Part 487 will establish the regulatory framework for undertaking an analysis of environmental justice issues associated with the siting of a major electric generating facility, including the evaluation of significant and adverse disproportionate environmental impacts, if any, which may result from construction or operation of the facility.

The Department’s Division of Air Resources (“DAR”) requested that the Department’s Office of Hearings and Mediation Services (“OHMS”) assign administrative law judges (“ALJs”) to conduct the legislative hearing sessions and to provide a report summarizing the comments. ALJ Maria E. Villa was assigned to conduct the hearing in Albany; ALJ Daniel P. O’Connell was assigned to conduct the hearing in New York City; and ALJ Molly T. McBride was assigned to conduct the hearing in Buffalo.

Prior to the hearings, the DAR staff provided the ALJs with a copy of the Department’s notice of proposed rulemaking and proof of publication of this notice. The notice appeared in the January 18, 2012 edition of the *State Register*, the *Environmental Notice Bulletin*, and in the following newspapers: the *New York Post*, *Newsday*, *Albany Times Union*, *Buffalo News*, *Syracuse Post-Standard*, *Glens Falls Post Star*, and the *Rochester Democrat & Chronicle*.

The Department received written comments on the rulemaking until 5:00 p.m. on Thursday, March 15, 2012.

Public Hearings

Albany

Approximately 15 people attended this hearing session, held at 3:00 p.m. on Monday, March 5, 2012 at the Department’s Central Office, 625 Broadway, Public Assembly Room 129.

The hearing followed an hour long question and answer session at the same location. Prior to the receipt of public comments, Michael Jennings, of the Division of Air, and Melvin Norris, Director of the Department's Office of Environmental Justice, offered brief statements concerning the proposed regulations.

Two people offered comments on the record. Ross Gould, Air and Energy Program Director for Environmental Advocates of New York, began his remarks by recognizing the leadership of Governor Cuomo and the legislature in passing legislation aimed to protect communities of color and low-income communities from being disproportionately burdened by the impacts of new power generating facilities. Mr. Gould also commended the hard work of the New York State Department of Environmental Conservation.

Mr. Gould went on to emphasize that the regulations must allow for effective participation by those most affected by power plant siting, and minimize any cumulative impacts on air quality in the vicinity of a proposed plant. In addition, he stated that proposed power plants that would result in or contribute to disproportionate impacts should be required to avoid, offset, or mitigate those impacts within an affected community. According to Mr. Gould, the regulations as drafted currently fall short of these goals.

Mr. Gould stated that the definitions of "Impact Study Area," "low-income community," and "minority community" should be improved, and indicated that Environmental Advocates would also be providing written comments with respect to these regulations.

Mr. Gould then offered comments on Part 251, urging that the regulations take into account the effects of global warming, and stating that the regulations must be consistent with the State's goal of reducing greenhouse gases by 80 percent by the year 2050, as well as the State's renewable energy goals and energy efficiency goals, and its participation in the Regional Greenhouse Gas Initiative. Mr. Gould asserted that the proposed standard "must be lowered to the levels that industry itself tells us that its new facilities are capable of meeting, which are 800 pounds per megawatt hour for combined cycle, and 1100 pounds megawatt hour for simple cycle or internal combustion." This speaker noted that Environmental Advocates is also concerned with the standard as applied to biomass and waste to energy facilities, noting that different biomass feedstocks have different emission levels, and arguing that the regulations should block the siting of any waste to energy facilities.

The second and final speaker, Grace Nichols of Save the Pine Bush, stated that with respect to the proposed Part 487 regulations, the minimal impact area of one-half mile was too restrictive. Ms. Nichols noted that the applicant determines the minimum impact area, and the affected community would then be obliged to challenge that determination, which would in her view be problematic. Ms. Nichols also urged that there be an effort made to allow the community an equal opportunity to understand, be informed, and effectively communicate on these issues of environmental justice. Ms. Nichols went on to note that in the City of Rensselaer, the Department approved a permit for an asphalt plant in the vicinity of a power plant, and two other permits are currently in process for a construction and demolition landfill and a gravel mine. According to Ms. Nichols, both of these proposed activities are adjacent to schools and senior centers, and such concentrated impacts should be avoided in low-income communities

such as this one. Ms. Nichols went on to state her hope that the regulations would include a clause encouraging alternative energy facilities.

New York City

The March 6, 2012 hearing session commenced at 3:00 p.m. in a hearing room located on the 4th floor at the Office of the Department of Public Service located at 90 Church Street, New York. Over 60 people attended the hearing session, and 12 presented oral statements. The hearing session ended at about 4:45 p.m.

The following is a summary of the oral statements collected at the March 6, 2012 hearing session.

Melvin Norris is the Director of the Office of Environmental Justice from NYS Department of Environmental Conservation. On behalf of Department staff, Mr. Norris read prepared statements about the proposed regulations concerning environmental justice, and the proposed amendments to the air regulations.

Daniel Lim is a Policy Fellow at UPROSE. Mr. Lim said that UPROSE is a multi-cultural and multi-racial environmental justice organization based in the Sunset Park community of Brooklyn. UPROSE promotes sustainable development through government accountability and community participation. Latinos and Asian make up more than 50% and 25%, respectively, of the neighborhood population.

Sunset Park is a diverse, working-class community of over 127,000 residents located along the Brooklyn waterfront. Based on a designation by the NYC Department of City Planning, the Sunset Park waterfront is a significant maritime industrial area.

According to Mr. Lim, Sunset Park suffers from a disproportionate number of industrial facilities, among them, several electric generating facilities, and the Gowanus Expressway (I-278). As a result, Sunset Park has one of the highest asthma rates in New York City.

Mr. Lim's comments pertain to proposed 6 NYCRR Part 487. He presented five recommendations.

First, environmental justice protection should extend to all overburdened communities. UPROSE is concerned that the reliance on race and income thresholds could inappropriately "screen out" communities based on demographics where significant sources of pollution, particularly air pollution, remain. When a local community is screened out, the regulations should provide that community with the right to appeal for a full environmental justice analysis. This appeal process should allow the community to present evidence that the screening process has inappropriately excluded an area overburdened with pollution.

Second, any area that may be significantly impacted by a proposed facility should be the same area that would benefit from the environmental justice protections provided by the proposed regulations. The scope of the impact study area should not be limited to the minimum

½-mile radius or some other area chosen by the applicant. In addition, there is a concern that the impact area could be unnecessarily expanded to include non-impacted areas, that would “dilute the impact of the proposed facility.” Finally, the proposed regulations inappropriately presume that potential impact areas would be circular; under certain circumstances, the potential impact area, however, may not.

Third, if an environmental justice community has credible evidence that a significant impact would result from a proposed facility, the proposed regulations should require applicants to address these impacts. In addition, the proposed regulations should establish regulatory standards, other than relevance, for determining whether a proposed facility would contribute to adverse environmental and public health impacts.

Fourth, when undertaking air modeling, minor air emission sources and mobile emission sources should be included. Mr. Lim noted that the Sunset Park community is adjacent to the Gowanus Expressway, which is a significant source of air emissions from motor vehicles. In addition, Mr. Lim said that the term “limited set of non-criteria pollutants” is vague and poorly defined. Any pollutant that could result in a significant adverse impact should be considered.

Fifth, the proposed regulations should incorporate new methods for assessing cumulative and disproportionate impacts as they become available. The use of legitimate methodologies for assessing potential impacts should not be excluded because they are not “well established” or “generally accepted.”

Mr. Lim said that the proposed Part 487 regulations should be revised to incorporate these recommendations.

Sabrina Terry is from Brooklyn Community Board No. 7 (CB7), which represents more than 150,000 people who reside in the Sunset Park and Windsor Terrace communities. CB7 is one of the most diverse communities in New York City. In addition, numerous industrial facilities are located in CB7. They include, among others, electric generating facilities located at 23rd, 28th and 53rd Streets, a municipal solid waste transfer station with associated truck traffic, petroleum bulk storage facilities, and the Owl’s Head Waste Treatment Facility.

CB7 has partnered with UPROSE and the New York City Environmental Justice Alliance, and supports the five recommendations outlined above in Mr. Lim’s comments. Ms. Terry incorporated the five recommendations into her oral statement on behalf of CB7.

CB7 recognizes that proposed development can provide significant economic and quality-of-life improvements to the community. Ms. Terry expects that the requirements outlined in the proposed 6 NYCRR Part 487 would provide the community with a powerful tool to determine the appropriate siting of major electric generating facilities.

Joan Levine is Co-Chair of the Morningside Heights/West Harlem Sanitation Coalition. Ms. Levine said that she spoke in solidarity with the communities located along the Brooklyn waterfront, and the South Bronx, who suffer from unhealthy living conditions caused by industrial facilities.

Ms. Levine identified some of the many industrial facilities located in the Morningside Heights and West Harlem communities, which include a marine transfer station with associated truck traffic, the North River Municipal Wastewater Treatment Plant, a large natural gas pipeline that crosses the Hudson River from New Jersey, bus terminals, and traffic corridors associated with the Westside Highway, Broadway and Amsterdam Avenue. According to Ms. Levine, rates of asthma and other respiratory diseases are epidemic. As a result, siting a new power plant in the area would adversely impact public health. Ms. Levine said that the siting provisions of Article 10 should be strengthened to truly protect public health.

Norris McDonald is President of the African American Environmentalist Association (AAEA) located in Washington, DC. Founded in 1985, AAEA is a national nonprofit organization dedicated to protecting the environment, enhancing human, animal and plant ecologies, promoting the efficient use of natural resources and increasing African American participation in the environmental movement. AAEA is the outreach arm of the Center for Environment, Commerce and Energy.

With respect to proposed 6 NYCRR 487.4, AAEA recommends that the proposed ½-mile radius of the study area be extended to two miles. According to Mr. McDonald, the proposed ½-mile radius study area is too small and, thereby, limits the effectiveness of the environmental justice analysis. An expanded impact analysis area is needed to include existing facilities. Although an applicant may choose to increase the size of the impact study area, larger study areas should be required by the regulations. Mr. McDonald recommended that the 2-mile radius study area should be used when considering alternative sites.

Mr. McDonald observed that the DEC environmental justice workgroup did not agree on the following. First, the workgroup did not agree about how to conduct a disproportionate impact analysis. Second, the workgroup did not agree about how to consider existing conditions or environmental impacts that already burden a community when undertaking project-specific disproportionate adverse impact analysis.

Mr. McDonald said that AAEA is frustrated by the absence of a trigger to expressly stop a proposal when potential adverse impacts are identified by the environmental justice analysis. With reference to proposed 6 NYCRR 487.10, Mr. McDonald observed that when potential adverse environmental impacts are identified, an approval may be granted if offsets are available or potential impacts could be mitigated. According to Mr. McDonald, denying a proposal is fundamental to the idea of protecting a community that is disproportionately impacted by pollution. The point of avoiding environmental injustice is to prevent additional pollution sources from being located in the environmental justice area.

In assessing potential adverse health impacts, Mr. McDonald said that ozone is a significant pollutant because it causes respiratory illnesses and aggravates asthma. He expressed concern, however, that ozone has been excluded from the cumulative air impact analysis. Mr. McDonald argued that assessing the concentration of ozone precursor emissions would not satisfy the requirement at proposed 6 NYCRR 487.10 concerning the cumulative impact analysis.

Mr. McDonald said that environmental justice areas in the Bronx, Brooklyn and Harlem are disproportionately impacted by a large number of pollution sources. Consequently, Mr. McDonald said that these areas should be considered “off-limits” as potential sites for major electric generating facilities. Minimizing adverse impacts or offsetting them would not be sufficiently protective in these environmental justice communities.

Eddie Bautista is the Executive Director of the New York City Environmental Justice Alliance. Mr. Bautista explained that the New York City Environmental Justice Alliance includes community-based organizations such as Nos Quedamos (We Stay), the Point Community Development Corporation, Youth Ministry Peace and Justice, the Morningside Heights/West Harlem Sanitation Coalition, UPROSE, and El Puente, among others. The purpose of the alliance is to maximize and coalesce the power of community groups.

Mr. Bautista explained that pollution loads in environmental justice communities are currently too high. Consequently, new sources of pollution should not be located in these areas.

Mr. Bautista said that local offsets are necessary. Moreover, if offsets cannot be obtained within the environmental justice communities, then the permits for proposed electric generating facilities located in those communities should be denied.

Mr. Bautista cautioned that using racial and income thresholds to identify environmental justice communities may not be sufficient to identify all environmental justice communities due to changing demographics. The regulatory standard of 51.1% appears to be arbitrary. For example, according to the 2000 census, the Latino population of the Williamsburg area in Brooklyn was 65%. Based on 2010 census data, however, the Latino population in Williamsburg decreased to 40%. Therefore, under the proposed regulations, Williamsburg, which had been considered an environmental justice community, may not be considered so now, and that any proposed electric generating facility would be sited closer to centers of the remaining Latino residents. Consequently, a plurality of the population in the area is minority, and must be protected by the proposed environmental justice regulations.

Kellie Terry is a representative from the Point Community Development Corporation, which is a non-profit organization dedicated to youth development, and the cultural and economic revitalization of the Hunts Point section of the South Bronx. The mission of the Point is to encourage the arts, local enterprise, and responsible ecology and self-investment in the Hunts Point community. The Point is a member of the New York City Environmental Justice Alliance. Ms. Terry also spoke on behalf of Action Coming To Inform Our Neighborhood (ACTION).

The following detrimental effects are associated with the operation of electric generating facilities: air emissions, waste water discharges, visual impacts, and noise. Air emissions, which include sulfur dioxide, oxides of nitrogen, hydrocarbons, particulate matter, carbon monoxide, and other toxins like mercury, are the most significant potential adverse human health impacts. Members of the Hunts Point community have high rates of asthma. Mobile air emission sources are significant at the Point due to solid waste transfer facilities and food distribution centers.

According to Ms. Terry, electric generating facilities are not equally distributed, and they are not sited correctly. The regulations should be revised to account for the current, credible methods for assessing cumulative and disproportionate impacts.

Moreover, the radius of the impact study area should be greater than ½ mile. A larger impact study area would ensure that all air emission sources would be considered. Ms. Terry's organization is also concerned about the criteria for determining whether an environmental justice community exists, and that some areas may be screened out due to shifting demographics within urban centers. Ms. Terry argued that siting is a zoning issue.

Finally, when undertaking analyses, Ms. Terry said that minor emission sources and mobile air emission sources should be considered, and that any proposed offsets selected must effectively alleviate adverse impacts.

Gavin Kearney is the Director of Environmental Justice with New York Lawyers for the Public Interest. New York Lawyers for the Public Interest is a member of the New York City Environmental Justice Alliance. Mr. Kearney's comments focused on the environmental justice community screening process proposed in 6 NYCRR Part 487.

Mr. Kearney recommended that all communities be screened, rather than those which may be considered environmental justice communities. Mr. Kearney said that this approach would be consistent with PSL Article 10, that it would ensure protection for all over-burdened communities, and that it would reduce potential impacts to maximum extent.

Mr. Kearney expressed concern about using census data to determine the impact study area, and argued that it may not be reliable. According to Mr. Kearney, minorities and low income individuals are generally undercounted. Consequently some environmental justice communities may be inadvertently screened out.

Mr. Kearney recommended that that the radius of the study area should be larger than the ½-mile distance outlined in the proposed regulation. He recommended further that applicants should not have any discretion in determining the radius of the study area.

In addition, Mr. Kearney recommended that the cumulative impact analysis should include minor stationary emission sources and all mobile emission sources when determining background concentrations of the criteria pollutants. Determining the background emission levels is a critical first step in the evaluation process. Special attention should be paid to the location of air emission monitors; street level monitors are important. Finally, non-criteria pollutants should be monitored as appropriate.

Peggy Lee is the Youth Justice Coordinator from UPROSE. Four people joined Ms. Lee at the podium. Ms. Lee said that the Sunset Park community has higher than average asthma rates due to the high number of industrial facilities located in the community. Ms. Lee reiterated the five recommendations stated by Mr. Lim in his oral presentation.

Anusha Vankataroman is a representative from El Puente. El Puente is a member of the New York City Environmental Justice Alliance. Founded in 1982, El Puente is a community initiative dedicated to harnessing the energy and efforts of the diverse peoples of Brooklyn from Williamsburg, Greenpoint and Bushwick. El Puente promotes leadership in arts, culture, health and wellness, green spaces, affordable living and education.

According to Ms. Vankataroman, the communities that make up El Puente are environmental justice communities. Nevertheless, some areas of North Brooklyn may fall outside of the race and income thresholds as proposed in the regulations. Demographic changes have occurred. While there is a plurality of people of color, more non-minority people live in the area. For example, in 2000, the minority population in the south side of Williamsburg was 65% Latino. In 2010, the minority population in the south side of Williamsburg was 46% Latino, but Latinos still outnumber any demographic group in the neighborhood.

Ms. Vankataroman said that it would not be fair to place a burden on the community to demonstrate that it should be included in an impact study area. Ms. Vankataroman advocated for looking beyond the census data. Rather, other data should be used. When potential adverse impacts are identified, efforts must be made to ensure that these potential impacts are prevented. Finally, the evaluation of potential impacts should be based on the most current scientific methods available.

Dan Duratt is the Director of the New York Office of AAEEA. Mr. Duratt said that siting is important. To underscore that point Mr. Duratt explained that he was from Bedford Stuyvesant, and that his family has a long history in that community.

During his statement, Mr. Duratt referenced the following documents: (1) Toxic Waste and Race, (2) 1984 EPA's Annual Environmental Justice Report, and (3) October 1994 Environmental Justice - Breaking New Ground.

Of concern to Mr. Duratt are the roles that sound science, public policy, and public participation play in siting electric generating facilities, and in consider potential impacts to environmental justice communities.

Mr. Duratt said that the location of all school buildings (grade K through 12) should be identified and considered when determining the environmental justice study area due to the cumulative effect of exposing our youth to pollutants. Mr. Duratt noted that African-Americans and other minorities are disproportionately impacted.

The regulations should identify the timeline for when preliminary reports would be available for public review and comment, and when the final reports would be available for public review and comment.

Murad Awawdeh is from the Luther Family Health Center. In 2011, there were 757,000 visits to the Center's network of facilities, where 114,779 patients were served. Forty-three percent of the patients treated at the Luther Family Health Center are Hispanic/Latino, 14% are

African-American, and 8% are Asian. Approximately 74% of the patients are below the federal poverty line.

Chronic diseases in the area include diabetes, asthma and cardiovascular disease. Asthma rates are high, and have been increasing.

With respect to siting electric generating facilities, environmental justice protections should extend to all overburdened communities. Mr. Awawdeh reiterated the recommendations stated by representatives from UPROSE and other members of the Environmental Justice Alliance.

Jessica Clemente is the Executive Director of Nos Quedamos (We Stay), Inc., which is a coalition of residents and businesses from the Melrose Commons community in the South Bronx. According to Nos Quedamos, the urban renewal process should physically regenerate the neighborhood, and improve the socio-economic and environmental conditions of all residents. The goal is to develop an economically productive, sustainable, and healthy community. During the urban renewal process, current members of the community must be afforded the opportunity to stay in the neighborhood, and play an active and integral role in the redevelopment process.

Ms. Clemente said that the Melrose Commons community is located in one of the poorest congressional districts in the country. Ms. Clemente said that Nos Quedamos is a member of the New York City Environmental Justice Alliance, and restated the five recommendations identified above in Mr. Lim's presentation.

Buffalo

The March 8, 2012 hearing session commenced at 3:00 p.m. in a hearing room located in the Department's Region 9 office located at 270 Michigan Avenue, Buffalo, New York. Approximately 10 people were in attendance. No public comments were made. The hearing session ended at about 4:00 p.m.

Melvin Norris is the Director of the Office of Environmental Justice from the NYS Department of Environmental Conservation. On behalf of Department staff, Mr. Norris read prepared statements about the proposed regulations concerning environmental justice, and the proposed amendments to the air regulations.

At the conclusion of the Buffalo hearing, staff remained available to speak with members of the public about the proposed amendments.

Transcripts of these hearings were delivered to the Department's Division of Air.