

6 NYCRR Part 487  
Analyzing Environmental Justice Issues in Siting Major Electric Generating Facilities  
Pursuant to Public Service Law Article 10

REGULATORY IMPACT STATEMENT

1. Statutory Authority:

Chapter 388 of the Laws of 2011, the Power NY Act of 2011 (Act), enacted a number of provisions related to power plant siting and energy efficiency. Relevant to this rulemaking, the Act re-established Article 10 of the Public Service Law (PSL) which expired January 1, 2003. The new PSL Article 10 (Article 10) requires the Department of Environmental Conservation (Department) to promulgate rules and regulations for the analysis of environmental justice (EJ) issues (EJ regulations). PSL section 161, which sets forth the general provisions relating to the New York State Board on Electric Generation Siting and the Environment (Board), provides that the Board “shall not accept any pre-application preliminary scoping statement or application for a certificate, or exercise any powers or functions until the department of environmental conservation has promulgated rules and regulations required by paragraphs (f) and (g)” of PSL section 164(1).

Paragraphs (f), (g), and (h) of PSL section 164(1) set forth specific requirements which an applicant must include in its analysis of EJ issues (EJ analysis) submitted as part of its application for a Certificate of Environmental Compatibility and Public Need (Certificate) authorizing the construction and operation of a major electric generating facility. Paragraph (f) provides that, “[i]n accordance with rules and regulations that shall be promulgated by the [Department] for the analysis of environmental justices issues, including the requirements of paragraphs (g) and (h)”, an applicant shall file with its application “an evaluation of significant and adverse disproportionate environmental impacts of the proposed facility, if any, resulting from its construction and operation, including any studies identifying the author and dates thereof, which were used in the evaluation.” Paragraph (g) requires that an applicant file with its application “[a] cumulative impact analysis of air quality within a half-mile of the facility, or other radius as determined by standards established by

[Department] regulations... provided that such analysis and standards shall be in accordance with rules and regulations that shall be promulgated” by the Department. Paragraph (h) requires that an applicant file with its application “[a] comprehensive demographic, economic and physical description of the community within which the facility is located, within a half-mile radius of the location of the proposed facility, compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county...provided that such description and comparison shall be in accordance with rules and regulations promulgated” by the Department pursuant to paragraph (f).

PSL section 168(2) provides that the Board shall not grant a Certificate without making explicit findings, including “the cumulative impact of emissions on the local community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact, in accordance with regulations promulgated pursuant to paragraph (h)...by the [Department] regarding environmental justice issues.” PSL section 168(3)(d) provides that the Board may not grant a Certificate unless the Board determines that “if the [B]oard finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the [C]ertificate is issued to the maximum extent practicable using verifiable measures.” Section 24 of the Act provides that all rules and regulations required pursuant to the Act must be adopted within twelve months of the effective date of the Act. The Act was effective on August 4, 2011.

## 2. Legislative Objectives:

### General Overview

These proposed EJ regulations implement the EJ provisions of Article 10. As a general matter, Article 10 is intended to streamline the siting process for approving proposed energy sources having a capacity of 25

megawatts or more, and to improve public participation in power plant siting decisions. Article 10 is also intended to reduce disproportionate environmental impacts in overburdened communities. These proposed EJ regulations are intended to ameliorate certain negative impacts of power plants to be located in overburdened EJ communities through an augmented review (i) of the existing environmental or physical conditions of the community in which the proposed facility is to be located, and (ii) the expected environmental and public health impacts of the proposed facility on that community. The overall purpose of the review is to enable the Board to determine whether the proposed facility may result in or contribute to any significant and adverse disproportionate environmental impacts upon the community during its construction or operation. Article 10 requires the applicant to undertake additional studies and evaluations if the proposed facility will impact an EJ community and the Board to consider these studies and evaluations in reviewing the application. If the Board finds that the proposed facility would result in or contribute to a significant and adverse disproportionate environmental impact in an EJ community, the Board must also find that the applicant will avoid, offset, or minimize the impacts caused by the facility upon the community for the duration that the Certificate is issued to the maximum extent practicable using verifiable measures. The details of how an applicant is to undertake its EJ analysis were left to the Department to promulgate in EJ regulations.

Article 10 requires the Department to adopt EJ regulations, including the requirements that an applicant (i) analyze cumulative impacts to air quality, (ii) prepare a comprehensive demographic, economic and physical description of the community within which the facility is located, compared and contrasted with the county and with adjacent communities, and (iii) evaluate significant and adverse disproportionate environmental impacts of the proposed facility, if any. The statute directs the Department to establish in EJ regulations how an applicant is to comply with each of these requirements. The Department is applying the plain language of the statutory provisions at issue, where applicable, but is proposing additional requirements as necessary to ensure the applicant undertakes a meaningful EJ analysis, including a thorough evaluation of any significant and adverse

disproportionate environmental impacts, to enable the Board to make its findings on EJ issues.

#### Determining the Presence of an EJ Area

The Department interprets PSL section 164(1)(f), (g), and (h) to apply only to EJ areas. The memorandum in support of the Act states that it will reduce disproportionate environmental impacts in overburdened communities. It appears clear to the Department from both the statutory language associated with the EJ provisions of Article 10, as well as the memorandum in support, that the provisions are intended to focus on minority and low-income EJ communities that have historically been overburdened by the negative environmental and public health consequences of commercial and industrial facilities.

Accordingly, these proposed EJ regulations implement the EJ goals of Article 10 by requiring that the applicant undertake a full EJ analysis only if the proposed facility's potential significant adverse environmental and public health impacts will affect an EJ area. An EJ area is defined in the proposed regulations as a low-income or minority community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies. If no EJ area is present in the area in which the proposed facility is to be located, i.e., the "Impact Study Area," the applicant is not required to use the EJ-specific procedures set forth in these regulations. The Impact Study Area is the "geographic area around the location of a facility in which the population is likely to be affected by at least one potentially significant adverse environmental impact resulting from the construction and/or operation of the facility that is different in type, scope, or magnitude compared to the population located in the broader geographic area surrounding the facility." Nothing, however, precludes the applicant from undertaking a full EJ analysis in non-EJ areas as a means to assess the impacts on the community and to facilitate a discussion of reasonable measures to avoid or minimize significant and adverse impacts identified for that community.

## Discussion of the Required Analyses

The overlying purpose of the EJ analysis, as reflected in PSL section 164(1)(f), is the “evaluation of significant and adverse disproportionate environmental impacts of the proposed facility, if any, resulting from its construction and operation.” Indeed, paragraph (f) specifically references the requirements of paragraphs (g) and (h) as being part of this evaluation. The Department, moreover, interprets the term “disproportionate” to necessarily involve a comparison—for it begs the question, disproportionate to what? Looking at the overall statutory scheme, the Department has determined that the means by which the applicant is to evaluate disproportionality is by using a comparison between certain delineated communities. For example, paragraph (h) specifically requires a “comprehensive demographic, economic and physical description of the community within which the facility is located, within a half-mile radius of the location of the proposed facility, compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county” (Emphasis added). Although such comparisons are important in their own right, the Department reads paragraphs (f) and (h) together to require similar comparisons in determining whether the environmental and public health impacts of the proposed facility will result in or contribute to a significant and adverse “disproportionate” impact. Additionally, the Department interprets the terms “significant and adverse” in a similar manner as those terms are used in the context of the required analyses under the State Environmental Quality Review Act (SEQRA); those terms are thus to be applied in a similar manner in the context of undertaking the required analyses under paragraph (f).

As noted, the Department has defined the community in which the facility is to be located as the “Impact Study Area.” In accordance with the requirements under paragraph (h), the Department is requiring the applicant to undertake an analysis comparing and contrasting certain specified environmental and physical conditions within the Impact Study Area with the environmental and physical conditions of certain “Comparison Areas” (the county in which the facility is to be located and adjacent areas). On their own, such

comparisons help to determine whether the Impact Study Area contains an EJ area and, in some instances, the comparisons of existing conditions may show that the Impact Study Area is already overburdened irrespective of the impacts associated with the proposed facility. In the context of determining whether the environmental and public health impacts associated with the proposed facility may result in or contribute to a disproportionate impact in an EJ area, however, the Department is also requiring the applicant to add to the baseline conditions of the Impact Study Area those environmental and public health impacts associated with the construction and operation of the proposed facility. The question of disproportionality is then determined by comparing and contrasting the baseline plus facility impacts in the Impact Study Area to the baseline conditions of the Comparison Areas. In proposing to use the comparisons required under paragraph (h) for this dual purpose, the Department is both giving meaning to the term “disproportionate” and making the overall EJ analysis more efficient.

The Department is also proposing to utilize the cumulative impact analysis of air quality required under PSL section 164(1)(g) as part of the EJ analysis, as specifically required under paragraph (f). Section 164(1)(g) specifies that “[a] cumulative impact analysis of air quality” shall be undertaken by an applicant “within a half-mile of the facility, or other radius as determined by standards established” by the Department. The proposed Section 487.7, discussed below, would implement this requirement by (i) establishing the circumstances under which the cumulative impact analysis of air quality would have to be extended to a distance larger than one-half mile from the location of the proposed facility, and (ii) requiring consideration of projected emissions from certain proposed facilities, as specifically required under paragraph (g). The proposed Section 487.7 would also require an analysis associated with both criteria and non-criteria pollutants (such as mercury, under certain circumstances). The cumulative impact analysis of air quality required under paragraph (g) would also be used in the context of determining significant and adverse disproportionate air quality impacts; i.e., the total cumulative air impacts determined in accordance with Section 487.7 would constitute the baseline conditions of

the Impact Study Area plus air quality impacts associated with the proposed facility for purposes of evaluating if the construction and/or operation of the proposed facility would result or contribute to any significant and adverse disproportionate air quality impacts in the Impact Study Area.

As noted above, PSL section 164(1)(h) requires “[a] comprehensive demographic, economic and physical description of the community within which the facility is located, within a half-mile radius of the location of the proposed facility, compared and contrasted with the county in which the facility is proposed and with adjacent communities within such county, including reasonably available data on population, racial and ethnic characteristics, income levels, open space and public health data...” The proposed Section 487.2 implements this requirement in part by defining the “Impact Study Area” as “the geographic area of at least a one-half mile radius around the location of a proposed major electric generating facility in which the population is likely to be affected by at least one potentially significant adverse environmental impact resulting from the construction and/or operation of the facility that is different in type, scope, or magnitude compared to the population located in the broader geographic area surrounding the facility.” Proposed Section 487.8 identifies the Comparison Areas that the applicant must use to compare and contrast against the Impact Study Area as the county in which the facility is proposed to be located, and adjacent communities, as defined in Section 487.3. As more fully discussed below, for facilities proposed to be located in one of the five boroughs of New York City, the entire city must be used as a third Comparison Area to enable a complete evaluation of any significant and adverse disproportionate environmental impacts as required pursuant to PSL section 164(1)(f). Proposed Section 487.9 describes what the applicant must include in its comprehensive demographic, economic, and physical descriptions, including the specific items listed in PSL section 164(1)(h). There may be some overlap between the environmental or physical conditions examined as part of Proposed Section 487.9 and the impacts examined under PSL section 164(1)(b). Accordingly the evaluation undertaken as part of paragraph (b) may be used in undertaking the analysis required under Proposed Section 487.9.

### Details of the Individual Sections of the Proposed EJ Regulations

These proposed EJ regulations are fairly prescriptive with respect to how the applicant is to comply with the requirements of PSL section 164(1)(g) and (h) in its overall EJ analysis, but do not establish one specific methodology for evaluating any significant and adverse disproportionate environmental impacts as required by PSL section 164(1)(f). Rather, these regulations provide a framework for how the applicant must use the requirements of PSL section 164(1)(g) and (h) to comply with PSL section 164(1)(f). This approach, instead of dictating a specific comparison method that may not be appropriate in all cases, allows flexibility that will allow for consideration of site-specific factors to enable a more complete and meaningful evaluation of any significant and adverse disproportionate environmental impacts.

A discussion of the individual sections of Part 487 illustrates how these EJ regulations implement the legislative objectives of the EJ provisions of Article 10.

Section 487.1 states the purpose of the regulations is to establish a regulatory framework for analyzing EJ issues associated with the siting of a major electric generating facility in New York State pursuant to Article 10 and that the EJ regulations are intended to enhance public participation and review of environmental impacts upon EJ communities and reduce disproportionate environmental impacts in overburdened communities. Section 487.1 also states that the EJ regulations are not intended to create any right to judicial review involving the compliance or noncompliance of any person with the regulations. PSL section 170 expressly provides for judicial review of the Board's decision to deny or grant a Certificate.

Section 487.2 confirms these EJ regulations apply to persons seeking a Certificate pursuant to Article 10. These EJ regulations do not apply to any other person. Commissioner Policy 29, Environmental Justice and Permitting (CP-29) will continue to apply to persons applying for Department-issued permits, as applicable. CP-29 can be found on the Department's website at <http://www.dec.ny.gov/public/36929.html>.

Section 487.3 sets forth the definitions applicable to these EJ regulations. Many of the definitions are

based on the definitions in Article 10 or CP-29; however, these regulations define some terms that are used in Article 10 but are not defined in either Article 10 or CP-29. For example, “adjacent communities” is used in PSL section 164(1)(h) but not defined. This section defines “adjacent communities” to mean “the geographic area contiguous to and surrounding the Impact Study Area of a radius equal to the radius of the Impact Study Area, up to a maximum one mile radius.” If the Impact Study Area is a one-half mile radius, the “adjacent communities” shall be represented by the next one-half mile radius around the Impact Study Area; if the Impact Study Area is a two mile radius, the “adjacent communities” shall be represented by the next one mile radius around the Impact Study Area. “Reasonably available” is used in PSL section 164(1)(h) and throughout the EJ regulations. Section 487.2 defines this term to mean “obtainable from existing data, studies and records, without requiring collection of new data” (Emphasis added). The applicant would not be required to “create” data but would be expected to obtain data from public repositories, and from private entities to the extent the data are obtainable without undue cost. The definitions for “minority community” and “low-income community” in these proposed regulations are based on the existing definitions in CP-29. They may be revised prior to adoption of these regulations because the CP-29 definitions utilize 2000 U.S. Census data which may no longer be appropriate given that the data are ten years old. Updated demographic data, however, are not yet available for New York State and it is impossible at this time to know how this data may influence these definitions.

Sections 487.4 and 487.5 establish the threshold requirements for determining if the applicant must conduct a full EJ analysis.

Section 487.4 requires the applicant to define the Impact Study Area, which is the community likely to be affected by at least one potentially significant adverse environmental impact resulting from the construction and/or operation of the facility. Consistent with the language in paragraphs (g) and (h) of PSL section 164(1), the Impact Study Area will encompass at least a one-half mile radius around the location of the proposed facility. The radius may be increased by the applicant, however, based on site-specific factors, such as the

nature and scope of the environmental impacts and the projected range of those impacts. This flexibility is necessary because a one-half mile radius may not always capture the area that will be most affected by the significant adverse impacts of the proposed facility. If the applicant uses a radius larger than a one-half mile radius to define the Impact Study Area, it will be required to use this same radius for other required elements of the EJ analysis. For example, PSL section 164(1)(h) requires a comprehensive demographic, economic and physical description of the “community within which the facility is located, within a half-mile radius of the location of the proposed facility;” however, Section 487.9 (discussed below) requires that this description be done for the Impact Study Area, which may require a comprehensive description of the area around the facility of a radius greater than one-half mile. In other words, the Department interprets the term “disproportionate” under PSL section 164(1)(f) to require, under certain circumstances, that the applicant use a greater than one-half mile radius to define the Impact Study Area.

Section 487.5 instructs the applicant to determine if an EJ area is present within the Impact Study Area and therefore likely to be affected by any significant adverse impacts of the proposed facility. The applicant must determine if any minority or low-income community is present. If a minority or low-income community is present than an EJ area is present in the Impact Study Area. If the demographic data are not sufficient or adequate for determining the presence of a minority or low-income community within an Impact Study Area, the applicant must work with the Department, the municipality, and residents of the Impact Study Area to develop an accurate demographic profile of the Impact Study Area. The Department envisions this process to be similar in nature to the “ground truthing” process that the Department uses under SEQRA and CP-29 when demographic data conflicts with what is known or expected for the geographic area at issue. In this case, some additional review will be necessary to ascertain if a minority or low-income community is present. This review may include a review of the demographic data, application of data collected in prior studies concerning the area, or review of reasonably available reference or field data.

If no area meeting the definition of either a minority or low-income community is present within the Impact Study Area, an EJ area is still present if a census block group or contiguous area with multiple census block groups has a minority or low-income population that is above 85% of the stated thresholds for defining a minority or low-income community (e.g., for a low-income community, at least 20.05 percent or more of the population must have an annual income that is less than the poverty threshold, rather than 23.59 percent, which is required in the definition of a low-income community); and reasonably available air quality data and health outcome data reveals that the Impact Study Area may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies, when compared to the county as a whole, or if the Impact Study Area is in the City of New York, when compared to the city as a whole.

If an EJ area is present in the Impact Study Area, the applicant must complete a full EJ analysis and submit a final EJ analysis with its application. If no EJ area is present, the applicant is not required to undertake the full EJ analysis. Article 10 does not expressly require that an applicant make this threshold determination of whether or not an EJ area is likely to be affected by the proposed facility; however, such an inquiry is consistent with the intent of Article 10's EJ provisions and the Department's EJ policy CP-29, which is focused on improving the environment in EJ communities and addressing disproportionate adverse environmental impacts that may exist in those communities.

Section 487.6 sets forth the general requirements and procedures for completing an EJ analysis. The applicant must initiate its EJ analysis as early as practicable in the pre-application process to facilitate expeditious pre-application and application processes and to assure early and meaningful public involvement in the applicant's EJ analysis. The applicant must define the Impact Study Area pursuant to Section 487.4 and determine whether an EJ area is present in the Impact Study Area pursuant to Section 487.5 during the pre-application process. If an EJ area is present within the Impact Study Area for the proposed facility, the applicant

must include in its preliminary scoping statement preliminary information about its proposed EJ analysis. If an EJ area is present within the Impact Study Area of any reasonable and available alternate location identified by the applicant, the applicant must also include preliminary information about its proposed EJ analysis for the alternate location. Public input on the preliminary scoping statement and stipulations made during the pre-application process of the Article 10 proceedings will shape the content of the applicant's final EJ analysis. Section 487.6 outlines the items that the applicant must include in its final EJ analysis submitted with its application and references the specific sections in the EJ regulations where more detailed instructions are provided for each requirement. If the applicant identifies any reasonable and available alternate locations to the proposed facility in its application, and the Impact Study Area of any alternate location includes an EJ area, the applicant must complete a final EJ analysis for each such alternate location. This requirement is intended to forestall unnecessary delay which may result if an EJ analysis is not included in the review of an alternative that is ultimately chosen by the Board and will thus enable the Board to meet the aggressive schedule set forth in Article 10 for making a Certificate decision. The EJ analysis must be written clearly and concisely in plain English and contain all relevant and material facts in sufficient detail to enable the Board to make explicit findings related to EJ issues.

Section 487.7 establishes the requirements for conducting the cumulative impact analysis of air quality required as part of the applicant's final EJ analysis, pursuant to PSL section 164(1)(g). This cumulative impact analysis is specifically geared to assessing EJ-specific impacts and is only required if the proposed facility is an air emission source and is likely to impact an EJ area. If the Impact Study Area does not contain an EJ area, the applicant is not required to conduct this EJ-specific cumulative impacts analysis. The analysis is a heightened air quality review similar to the review that applies with respect to proposed sources with projected emissions at or above significant impact levels. The cumulative impact analysis is required in addition to any other air quality impact analysis that may be required for the proposed facility under applicable regulations. PSL section

164(1)(g) requires the analysis of air quality “within a half-mile of the facility, or other radius as determined by standards established by the [D]epartment” in its regulations. Section 487.7 requires that the applicant conduct its cumulative impact analysis of air quality for a circular area extending from the proposed facility to the larger of a one-half mile, the Impact Study Area, or the distance to the furthest receptor location of maximum impact for any pollutants modeled for the proposed facility.

Of note, the applicant shall conduct the analysis in accordance with an air modeling protocol, approved by the Department, which will detail how the applicant will comply with all of the requirements of Section 487.7. The air modeling protocol to be used is to be based on well-established air quality analysis and modeling methodologies that are routinely used by the Department and permit applicants to assess the potential air quality impacts from a proposed air emission source. The air emission sources that will be modeled, however, are those specifically identified in this section and include: the proposed facility; any additional proposed Article 10 facility for which an application has been submitted and determined by the Board to be in compliance with PSL section 164; any major stationary source that has not yet commenced operations and which has received a permit from the Department at least sixty days prior to the date of the applicant’s filing of an application pursuant to PSL section 164; any other permitted stationary source that emits an air pollutant in an amount at or above the significant project thresholds; and, on a site-specific basis and at the Department’s discretion, any air emission source that is located contiguous to the proposed facility and for which the necessary emissions data is reasonably available and acceptable to the Department. This list reflects the statutory intent of Article 10 and the legislative objectives of these EJ regulations.

The cumulative impact analysis must include all criteria air pollutants that will be emitted from the proposed facility, except that ozone precursor emissions will be addressed pursuant to the provisions of 6 NYCRR Part 231; emissions of mercury, if appropriate; and emissions of non-criteria pollutants that are identified by the applicant in its preliminary scoping statement and for which the projected concentrations may

exceed certain quantified public health-based air criteria. The cumulative air quality impacts from the proposed facility will be considered together with the impacts from other facilities and added together with available background air quality data. This information will be used by the applicant in evaluating any significant and adverse disproportionate environmental impacts upon the Impact Study Area and will be available to the Board for its findings pursuant to PSL section 168(2) related to “the cumulative impact of emissions on the local community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact.”

Section 487.8 establishes the “Comparison Areas” against which the Impact Study Area is to be compared and contrasted by the applicant to evaluate whether there will be any significant and adverse disproportionate environmental impacts upon the Impact Study Area as a result of construction and/or operation of the proposed facility. Consistent with PSL section 164(1)(h), the Comparison Areas are the county in which the facility is proposed to be located and the adjacent communities. PSL section 164(1)(h) does not define what is meant by “adjacent communities.” Consequently, these EJ regulations define “adjacent communities” in Section 487.3, discussed above, to achieve the intent of the statutory language and eliminate any potential for disagreement among parties about what specific communities should be compared and contrasted to the Impact Study Area.

Moreover, in order to make the analysis of “disproportionate” impact meaningful under PSL § 164(1)(f), the Department has concluded that it is best that the comparison communities represent an average of environmental conditions. In other words, the legislative intent would not be fulfilled by comparing the area in which the facility is to be located to comparison areas that are themselves overburdened by negative environmental conditions. Indeed, the Department interprets the term “county” under PSL section 164(1)(h) as eliciting an intent of the Legislature to look at “average” comparison communities as a whole. Consequently, the Department is proposing to define the term “adjacent communities” in terms of “the geographic area

contiguous to and surrounding the Impact Study Area.” This would enable a comparison of average environmental conditions in adjacent communities, thus both fulfilling the legislative intent and allowing for a more meaningful comparison for purposes of determining “disproportionate” impacts. It also has the benefit of defining the term “adjacent communities” in finite terms, thus allowing for a more efficient comparison and subjecting the process to fewer disputes.

The Department has concluded that New York City represents a unique set of circumstances and thus requires a slightly different type of construct when it comes to defining the Comparison Areas. Although PSL section 164(1)(h) does not require an applicant to compare and contrast the Impact Study Area to the city in which a facility is to be located, the Department is interpreting the term “disproportionate” under PSL section 164(1)(f) to require applicants to compare communities beyond those required under paragraph (h) if necessary to make a complete evaluation of disproportionality. New York City is unique in that it encompasses five counties, as opposed to all other cities in New York that are located entirely within one county. Additionally, in New York City, comparing an Impact Study to the county is unlikely to be sufficient to yield a meaningful assessment of potential EJ impacts. Large areas of some of the City’s five counties are already suffering significant adverse environmental impacts. For example, since 2001, the majority of New York City’s solid waste is trucked to private transfer stations located in the outer boroughs. Of the approximately 55 private transfer stations, 30 are concentrated in only four community districts in Brooklyn, the Bronx and Queens; the City consists of 59 community districts. Again, the Department believes that a comparison among only adversely impacted areas is unproductive and contrary to the legislative intent of requiring the applicant to avoid, offset, or minimize significant and adverse disproportionate environmental impacts, under PSL § 168(3)(c). Accordingly, for facilities proposed to be located within New York City, Section 487.8 also includes as a Comparison Area the entire city. Using the entire city as a Comparison Area will enable a complete and meaningful evaluation of any disproportionate environmental impacts.

Section 487.9 describes how the applicant must prepare the comprehensive demographic, economic and physical descriptions for the Impact Study Area and Comparison Areas, as required pursuant to PSL section 164(1)(h). As the plain language requires, the applicant's comprehensive demographic, economic and physical descriptions must include reasonably available information on population, racial and ethnic characteristics, income levels, open space, and public health data, including available data on asthma and cancer, compared and contrasted to the county and the adjacent communities. This section requires that the applicant present the public health data pursuant to a protocol approved by the Department and the Department of Health, similar to how applicants are currently analyzing health outcomes under SEQRA and CP-29. Consistent with the language in paragraph (h) requiring that the description be comprehensive, this section requires that the descriptions include information beyond the list of minimum requirements, particularly with respect to environmental, or physical, conditions. The Department is thus proposing to require the applicant to include in its comprehensive description information on air quality, including National-Scale Air Toxics Assessment data; the number and concentration of industrial facilities in the area; historic and cultural resources and community or neighborhood character, including existing patterns of population concentration, distribution, or growth; visual and aesthetic resources; ground or surface water quality; ambient sound level; vehicular and pedestrian traffic; and any other information necessary for the applicant to provide an accurate and complete representation of the demographic, economic and physical characteristics of the Impact Study Area and Comparison Areas.

Section 487.9 also requires, in subdivision (d), that the applicant evaluate the potential significant adverse environmental and public health impacts of the proposed facility on the Impact Study Area during both its construction and operation. This part of the evaluation will utilize the results of the analysis of cumulative impacts to air quality conducted pursuant to Section 487.7 and the information already required to be evaluated by the applicant pursuant to PSL section 164(1)(a). PSL section 164(1)(h) does not require that the comprehensive description of the Impact Study Area include an identification and evaluation of facility-related

impacts upon the Impact Study Area; however, this information is critical to evaluate whether any significant and adverse disproportionate environmental impact in the Impact Study Area would result from the operation and/or construction of the proposed facility, pursuant to PSL section 164(1)(f). As already noted, the applicant must add the potential significant adverse environmental and public health impacts of the proposed facility in the Impact Study Area to the existing physical conditions of the Impact Study Area identified in subdivision (b) of this section to obtain a comprehensive description of the physical conditions of the Impact Study Area that would result from the construction and operation of the proposed facility.

Section 487.10 describes how the applicant must comply with the requirement in PSL section 164(1)(h) that the comprehensive description of the Impact Study Area be compared and contrasted with the county and adjacent communities. It requires the applicant to use generally accepted statistical methods to evaluate the physical conditions for each of the Comparison Areas and the physical conditions of the Impact Study Area that would result from the construction and operation of the proposed facility, as identified in Section 487.9. The applicant must then compare and contrast the physical conditions of the Impact Study Area, including the impacts from construction and operation of the proposed facility, with the physical conditions in each of the Comparison Areas to evaluate whether the proposed facility may result in or contribute to any significant and adverse disproportionate environmental impacts in the Impact Study Area, as required pursuant to PSL section 164(1)(f). This evaluation will be available to the Board for its finding, pursuant to PSL section 168(2), of whether the construction and operation of the facility results in or contributes to a significant and adverse disproportionate environmental impact. This section uses the term “physical conditions,” as opposed to demographic, economic and physical conditions, to make clear that that it is the “physical conditions” that are compared in assessing whether the impacts associated with construction and operation of the proposed facility are “disproportionate.” Many of the “physical conditions” to be examined are the traditional types of environmental conditions that are examined under SEQRA, such as historic and cultural resources and

community or neighborhood character, visual and aesthetic resources, water quality, and noise. Additionally, the applicant would be required to quantify the number and concentration of certain polluting facilities to get a sense of existing physical conditions within an area.

Section 487.10 requires the applicant to use “generally accepted statistical methods.” Applicants should expect to apply methodologies and standards that have developed in the SEQRA and CP-29 context to examine the environmental conditions in each area. This section also requires that, if the applicant’s evaluation indicates that the facility would result in or contribute to a significant and adverse disproportionate environmental impact, the applicant’s evaluation must include a discussion of any measures that the applicant will take to avoid, offset or minimize the impact to the maximum extent practicable and the effect of those measures on any impact. This will enable the Board to make its finding pursuant to PSL section 168(3)(d) that the applicant will avoid, offset or minimize the impacts caused by the facility to the maximum extent practicable.

Section 487.11 requires the applicant to prepare a Statement of Environmental Justice Issues that summarizes the applicant’s final EJ analysis. While not an express requirement of Article 10, this statement is a critical component of the applicant’s EJ analysis as it summarizes for interested persons and the Board what is anticipated to be a lengthy document consisting of a great deal of statistical data and evaluation of the results of multiple studies and analyses.

A diagram at the end of this Statement illustrates the basic steps in an applicant’s EJ analysis.

In addition to the requirements in PSL section 164(1)(f), (g), and (h), Article 10 contains several other provisions that augment EJ. Article 10 entitles interested or affected persons and members of the public to participate in the Article 10 site selection review process and provides significant intervenor funding during both the pre-application process and the application stage of the Article 10 proceedings for local interested parties that may want to participate in the proceeding but lack sufficient funds to do so. The Department of Public Service (DPS) is concurrently promulgating regulations relating to the procedures to be used in

certificating major electric generating facilities under the provisions of Article 10. Those regulations will govern how intervenor funding will be disbursed to municipal and local parties to assure meaningful public involvement. The Department may need to revise these EJ regulations prior to their adoption to reflect procedural requirements contained in DPS's proposed regulations.

Finally, the Act requires the Department to adopt regulations to target reductions in carbon dioxide emissions of power plants. The Department is concurrently promulgating separate regulations in 6 NYCRR Part 251 to implement this requirement.

### 3. Needs and Benefits:

The regulations proposed in Part 487 are being adopted to fulfill a statutory obligation of the Department pursuant to the Act and Article 10 to promulgate EJ regulations. Article 10 obligates the Department to promulgate these EJ regulations; therefore, there is a need for these regulations. The Act and Article 10 make it incumbent upon the Department to adopt these EJ regulations by August 12, 2012.

“Environmental justice” or “EJ” is defined as the fair treatment and meaningful involvement of all people regardless of race, color, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. This definition is based on the definition of environmental justice used in CP-29. The definition is aspirational in nature. The U.S. Environmental Protection Agency (EPA) uses the same definition and states that the definition is a goal for all communities and persons and that it “will be achieved when everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.” (See generally EPA's website at: <http://www.epa.gov/environmentaljustice/> for factual background.) The intent of these EJ regulations is to promote the fair treatment and meaningful involvement of all people in the siting of power plants. Particular areas have historically been overburdened by the adverse environmental

and public health impacts of industrial facilities, particularly areas with a certain percentage of low-income and/or minority populations. Indeed, CP-29 is based on the finding that EJ communities have been unequally protected. CP-29 was adopted by the Department on March 19, 2003 to promote the involvement of all people in its environmental permit process. As the Department explained when adopting CP-29, a number of EJ advocates and minority and low-income community representatives from across New York State met with the Department in 1998 to express concern over EJ issues, including the lack of meaningful public participation by minority or low-income communities in the permit process, the unavailability or inaccessibility of certain information to the public early in the permit process, and the failure of the permit process to address disproportionate adverse environmental impacts on minority and low-income communities. In response to these concerns, the Department established an Office of Environmental Justice and, with the assistance of interested parties, developed CP-29 to promote the active participation of these historically overburdened communities in the Department's permitting process. Pursuant to CP-29, the Department identifies potential EJ areas, provides information on EJ to applicants with proposed projects in those areas, includes enhanced public participation requirements for those projects, and requires augmented review and procedures. CP-29 defines a "potential EJ area" the same as "EJ area" is defined in these proposed regulations. Department staff, upon receipt of an application for a permit covered by CP-29, conduct a preliminary screen to identify whether the proposed action is in or near a potential EJ area(s) and determine whether potential adverse environmental impacts related to the proposed action are likely to affect a potential EJ area(s). If the proposed action is not likely to affect a potential EJ area the permit review process is not subject to the requirements of CP-29. Section 487.5 of these EJ regulations contains a similar preliminary screen to determine if an EJ area is present within an Impact Study Area and an applicant is not required to complete a final EJ analysis if no EJ area is present.

In adopting CP-29, the Department acknowledged that communities with a certain percentage of minority or low-income inhabitants are more likely to be overburdened and would benefit from procedures that

go beyond those provided to other communities in New York. That finding remains applicable today. Indeed, it is apparent that the Legislature, through the re-establishment of Article 10, is attempting to address disproportionate impacts on these same communities. Accordingly, the proposed regulations require, in EJ areas only, a heightened analysis of environmental impacts, and additional protections against significant and adverse disproportionate environmental impacts. In this manner, the proposed regulations, – like CP-29 – provide additional protections to EJ areas with the ultimate goal of equal environmental treatment of all communities.

The approach the Department has taken in these proposed regulations is also consistent with the 2009 New York State Energy Plan (State Energy Plan). The State Energy Plan specifically addresses EJ in an Environmental Justice Issue Brief. The EJ Issue Brief considers the role of EJ in energy-related decisions and states that its EJ analysis and recommendations “will focus on improving both the human and physical environment with a particular emphasis on minority and low-income communities, and addressing any disproportionately adverse environmental impacts that may exist as a result of existing or planned facilities located in those communities.” The EJ Issue Brief recognizes that low-income communities and minority communities have historically been overburdened as a result of air pollution from energy-generating facilities, small stationary sources, and dense traffic, and provides as an example of this history the studies that have found that New York City residents in high asthma hospitalization areas were almost twice as likely to be African-American or Latino. The EJ Issue Brief states that “[t]o reduce the risk of overburdening communities of color and low income communities in the future, siting procedures should provide for thorough environmental review and effective participation of concerned stakeholders in the decision-making processes.” These EJ regulations, consistent with the policy articulated in the State Energy Plan’s EJ Issue Brief, require the applicant to undertake a final EJ analysis only if an EJ area is likely to be affected by the applicant’s proposed facility. The applicant may choose to undertake a full EJ analysis if an EJ area is not present within the Impact Study Area, but would not be compelled to do so.

Finally, these EJ regulations are consistent with recommendations of New York State’s Environmental Justice Interagency Task Force (Task Force). The Task Force was established in June 2008 to help protect low-income and minority communities from environmental hazards and to promote sustainable economic development. The Task Force was charged with developing policy recommendations and agency action plans for the fourteen participating state agencies and authorities to strive for EJ in their operations. On June 10, 2009, the Task Force issued a report of Draft Recommendations to assist agencies in addressing EJ. The first recommendation of the Task Force is to provide for increased community representation and access to decision making processes. The discussion of the background underlying this recommendation states that “[a] basic tenet of environmental justice is that low-income communities and minority communities have often been left out of government decision making as a result of a historical lack of access to government” and provides that government should make every effort to have the public participate early and often in permitting processes and decision making. Under this recommendation, the Task Forces identified that “[t]he first step for meaningful participation of citizens in government is for them to be provided with adequate public notice and access to information, including in multiple languages when needed.” Article 10, specifically PSL sections 163(2) and 164(2)(b), requires that the applicant provide notice of the preliminary scoping statement and the application and that the notice be in plain language, in English, and in any other language spoken by a significant portion of the population in the community in which the facility is proposed to be located.

The fifth recommendation of the Task Force is to develop EJ and sustainability provisions in permitting. Related to this recommendation, the Task Force report concludes: “Due to historical barriers to access and clear disproportionate negative environmental health outcomes in low-income and minority communities, permitting decisions and processes should take consideration of environmental justice” and that state agencies and authorities “should develop environmental justice policies that address future siting of polluting facilities in already overburdened communities and should implement policies that prioritize the permitting of clean and

sustainable facilities to prevent pollution.”

Pursuant to several provisions of Article 10 (implemented through Board regulations being promulgated by DPS concurrently with these regulations), the applicant is required in all cases to evaluate the expected environmental and public health impacts of the facility both during its construction and operation and the measures proposed to minimize environmental impacts, as well discuss reasonable available alternatives to the facility, even if no EJ area will be affected by the proposed facility. The applicant is also required to provide notice of its preliminary scoping statement and application in English and any other language spoken by a significant number of the population within the affected community and provide opportunities for citizen involvement early in the pre-application process and the application stage. In addition, intervenor funding is available to municipalities and local parties during the pre-application process and the application stage. These procedural and substantive requirements of Article 10 and its EJ provisions, implemented through these proposed EJ regulations, will assure the fair treatment and meaningful involvement of all persons in a facility siting decision.

Benefits of the adoption of these EJ regulations would accrue to the environment, EJ communities and the public-at-large, and applicants for a Certificate authorizing construction and operation of a major electric generating facility. These regulations will result in a broader and more detailed evaluation of environmental and public health impacts of the proposed facility that will benefit the community as a whole in addition to any affected EJ area, and will facilitate an applicant’s consultation with the public both during the pre-application process and the application stage of the Article 10 proceedings. The applicant’s evaluation of any significant and adverse disproportionate environmental impacts of the proposed facility and the applicant’s Statement of Environmental Justice Issues will inform the Board’s finding of whether the applicant has avoided, offset, or minimized any significant and adverse disproportionate environmental impacts to the maximum extent practicable. This finding of the Board is mandatory before the Board may grant a Certificate for the construction

and operation of a major electric generating facility.

#### 4. Costs:

The Department is unable to provide precise estimates of the actual costs that may be incurred by industry, the Department, and other state agencies in implementing these EJ regulations. The costs of an EJ analysis will be determined by a number of site-specific factors, including the nature of the proposed facility, the magnitude and scope of its potential negative environmental and public health impacts, and the extent of public involvement and input into the pre-application process as well as the application and public hearing required in Article 10 proceedings. The Department provides more general estimates of the costs for complying with these EJ regulations, based in part on its experience issuing permits for power plants under SEQRA and CP-29, as follows:

(a) Costs to regulated parties for the implementation of and continuing compliance with the rule. Persons seeking a Certificate for the construction of a major electric generating facility will be required to comply with the pre-application and application requirements of Article 10 as implemented through regulations promulgated by DPS and adopted by the Board. The Department estimates that costs to the industry for completing an EJ analysis in compliance with these regulations will be incremental because of the large costs already associated with complying with the Clean Air Act, Environmental Conservation Law Article 19 and other requirements of Article 10, and particularly because persons seeking permits related to the construction and operation of power plants in the absence of Article 10 would otherwise need to address EJ concerns pursuant to SEQRA and CP-29. The cost to an applicant of conducting the specific analysis of cumulative impacts on air quality as required by paragraph (g) of PSL section 164(1) and Section 487.7 of the regulations is estimated to range from \$0 to \$30,000. The lower end of this estimate reflects the fact that when a consultant bids on and obtains a consulting contract to conduct the air quality and permitting reviews for a project of this size, it often incorporates the cost

of the air quality modeling into the overall price it charges its client for completing the air permit application(s). In the infrequent case where an applicant must conduct a cumulative air analysis outside of the specific EJ requirements of Part 487 due to the projected air emissions of the proposed facility, the additional cost to conduct the EJ-specific analysis of cumulative impacts will be minimal, if any. If the analysis of cumulative impacts on air quality is done as a separate aspect of the application, and perhaps by a separate consultant, the price will be approximately \$30,000, which is primarily for the development of the emissions inventory. The cost of completing a health outcome study is estimated to be approximately \$12,500 based on information received from a project developer based on actual costs of a power plant permitted under SEQRA. The Department is unable to estimate the specific costs of any other elements of an applicant's EJ analysis. If the Impact Study Area does not contain an EJ area, the applicant's cost would be less and limited only to the costs associated with defining the Impact Study Area and identifying that no EJ area is present within the Impact Study Area. In any event, the cost of the EJ analysis would be minimal in comparison to the total cost of siting a major electric generating facility.

(b) Costs to the agency, the state and local governments for the implementation and continuation of the rule. Article 10 and DPS's implementing regulations will potentially create significant additional costs for several state agencies. The majority of costs for the Department are expected to be personal service costs; in particular, the potential need for staff to participate in the Article 10 administrative and adjudicatory proceedings in which the Department is a statutory party. There will be personal service cost associated with the Department's appointment of an Associate Examiner who is required to attend all hearings and assist the Presiding Examiner in inquiring into and calling for testimony concerning relevant and material matters. The Associate Examiner also must make conclusions and recommendations which are to be incorporated into the recommended decision of the Presiding Examiner, unless the Associate Examiner prepares a separate report of dissenting or concurring conclusions and recommendations. There will be incremental costs associated with

implementing these EJ regulations.

It is expected that any costs associated with these EJ regulations would be incurred by the Department, the Department of Public Service and the Department of Health, all statutory members of the Board. Under Article 10, SEQRA and CP-29 will not apply, but the EJ requirements of Part 487 are similar to existing requirements of SEQRA and CP-29. Department staff in the Office of General Counsel currently provides oversight to ensure compliance with CP-29 and several divisions and offices of the Department affected by CP-29, particularly the Division of Permits, the Office of Environmental Justice, and the Division of Air, provide support to fulfill the policy's EJ elements. The Department does not expect that its staff costs will be significantly increased to implement the Part 487 EJ requirements. The Department of Health may incur costs related to DOH's roles as a statutory party to the Article 10 proceedings. There should not be any significant additional costs associated with their responsibilities under Section 487.7 to approve the non-criteria pollutants to be included in the cumulative impact analysis of air quality or to review the applicant's proposed approach to presenting health outcome data under and Section 487.8 of the regulations.

These EJ regulations will not impose any costs on local governments, unless a local government itself is seeking a Certificate to construct a major electric generating facility pursuant to Article 10. In this case, costs similar to those discussed above in (a) for regulated parties will apply to the local government.

##### 5. Local Government Mandates:

These EJ regulations will not impose any program, service, duty, or responsibility upon any county, city, town, village, school district, fire district, or other special district. These regulations do not mandate the expenditure of funds by any sector of local government.

## 6. Paperwork:

Article 10 requires that the applicant, in accordance with EJ regulations adopted by the Department, include in its application an evaluation of any significant and adverse disproportionate environmental impacts, a cumulative impact analysis of air quality, and a comprehensive demographic, economic and physical description of the community in which the facility is to be located, compared and contrasted to the county and adjacent communities within the county. These EJ regulations implement these specific statutory requirements. There are no specific paperwork requirements in these regulations except as provided in Section 487.11, which requires the applicant to prepare a Statement of Environmental Justice Issues summarizing its final EJ analysis and justifying its conclusions. This Statement will assist the public and the Board because it will explain in a summary document what is expected to be a very lengthy analysis of EJ issues related to the proposed facility. The Summary Statement should also benefit the applicant because it will summarize the applicant's conclusions resulting from its EJ analysis in one concise document which should assist the Board in making its EJ findings necessary to grant a Certificate to the applicant.

## 7. Duplication:

There are no relevant rules, statutes, or other legal requirements of the State or federal government that duplicate, overlap, or conflict with these EJ regulations. The Department's implementation of SEQRA in its permitting actions, including the EJ procedures of CP-29, requires procedures similar to the ones proposed in Part 487. SEQRA, however, does not apply in Article 10 proceedings so no duplication or overlap between these regulations and SEQRA will occur. As discussed above, the procedures established in these regulations are consistent with the procedures that the Department currently follows when making permit decisions under SEQR and CP-29.

Likewise, there are no duplicative relevant federal requirements. In response to federal Executive Order

12898, “*Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*,” EPA and other federal agencies have adopted EJ policies or strategies that govern their internal actions but these policies and strategies do not apply to the states or impose any requirements on industry.

#### 8. Alternative Approaches:

As discussed in several prior sections, the Department is statutorily required to promulgate these EJ regulations; therefore, a “no action” approach is not available to the Department. Article 10 contains several specific requirements that an applicant must include in its EJ analysis, but otherwise delegates the details of how an applicant is to analyze EJ issues to the Department to promulgate in EJ regulations. The Department considered several approaches for conducting an EJ analysis. It reviewed the various tools and methodologies for conducting a disproportionate impact analysis identified in the “Final Report of the New York State Department of Environmental Conservation Disproportionate Adverse Environmental Impact Analysis Work Group” issued in August 2004 and sought and considered input received from stakeholders during the development of the draft Part 487 regulations. The Department held three outreach sessions with “EJ stakeholders” and invited a broad range of environmental justice, environmental advocacy, and academic interests. During these sessions, the Department discussed its proposed regulatory approach and solicited input. Stakeholders were encouraged to follow-up after the sessions with any additional comments. The Department also provided several opportunities to the energy industry to provide comments on implementation of the EJ provisions of Article 10 and the Department’s proposed regulatory approach. The Department met with the Independent Power Producers of New York, Inc. and the Alliance for Clean Energy New York, Inc. (ACE NY) and presented its proposed regulatory approach to the Environmental Advisory Committee of the New York Independent System Operator on October 21, 2011, at ACE NY’s Fall Conference on October 26, 2011 and at the 2011 Annual Industry-Environment Conference of the Business Council of New York State, Inc. on

October 27, 2011. In addition, the Department shared its proposed regulatory approach with the Long Island Power Authority and the Power Authority of New York.

The Department also reviewed the efforts of EPA and other states, particularly California. The Department is not aware of any particular methodology for conducting an EJ analysis which has been proven through use in power plant permitting or siting decisions or in the permitting of any other industrial facility, either in New York or another state. The Department, therefore, is proposing EJ regulations that do not prescribe a specific methodology but instead provide a framework for how an applicant is to comply with the specific EJ provisions of Article 10. In doing so, these EJ regulations follow as closely as practicable the specific statutory language in Article 10 and that include other provisions as necessary to enable a complete EJ analysis by the applicant, consistent with current practices under SEQRA and CP-29.

#### 9. Federal Standard:

There is no federal regulatory framework for analyzing EJ issues applicable to the siting of power plants; therefore, these proposed regulations do not exceed any minimum standards of the federal government.

#### 10. Compliance Schedule:

There is no period of time required to enable the industry to achieve compliance with these proposed EJ regulations. Regulated persons will need to comply with these regulations as soon as the Board begins accepting preliminary scoping statements from persons seeking a Certificate authorizing the construction and operation of a major electric generating facility; in fact, the Board may not accept any preliminary scoping statement until the Department has promulgated these regulations. The Department is required to promulgate these EJ regulations by August 4, 2012.

## STEPS in EJ ANALYSIS

