

Industrial Wind Power Plants

Public Participation and the Legal Requirements that Apply

Gary A. Abraham, Esq.
170 No. Second Street
Allegany, NY 14706
(716) 372-1913
gabraham44@eznet.net
www.garyabraham.com

Major sources of regulation of industrial wind power plants

1. Local law

Towns regulate land use (zoning, building, local ordinances and laws affecting land)

2. Federal environmental agencies

a. U.S. Fish and Wildlife Service

threatened or endangered species and their habitats

INTERIM GUIDANCE ON AVOIDING AND MINIMIZING
WILDLIFE IMPACTS FROM WIND TURBINES

<http://www.fws.gov/habitatconservation/wind.htm>

b. U.S. Army Corps of Engineers

permit to disturb wetlands

if applicable, project application must address purpose and need; alternatives; environmental consequences, including aesthetic and landscape/visual impacts, impacts on cultural and recreational resources

e.g., Cape Wind Energy Project

<http://www.nae.usace.army.mil/projects/ma/ccwf/windfarm.htm>

3. State environmental agencies

a. New York State Department of Environmental Conservation (DEC)

Water Quality Certifications for Projects Requiring a
Federal Permit

<http://www.dec.ny.gov/permits/6546.html>

b. New York State Historic Preservation Office (SHPO)

<http://nysparks.state.ny.us/shpo/environ/forms.htm>

c. New York State Public Service Commission (PSC)

Article VII, Certificate of Environmental Compatibility and
Public Need

<http://www.dps.state.ny.us/articlevii.htm>

Proposed Article X Reform, three versions:

Assembly A.08697, Senate S.5908, Governor S.6178

4. State Environmental Quality Review Act (SEQRA)

Comprehensive “hard look” by state or local government
body with power of approval

Strict procedural compliance, but confusing to local
governing boards

Applies to (1) local laws, zoning change or planning
decisions and (2) project proposals

DEC regulations (**SEQR**), but DEC neither administers nor
enforces compliance with the regulations

([6 NYCRR Part 617](#))

http://concernedcitizens.homestead.com/SEQRA_Primer.html

SEQR applies to “actions” taken by a state or local agency

1. “projects or physical activities, such as construction or other activities that *may* affect the environment” and require funding or approval by state or local government
2. “agency planning and policy making activities that *may* affect the environment and commit the agency to a definite course of future decisions”
3. “adoption of agency rules, regulations and procedures, including local laws, codes, ordinances, executive orders and resolutions that *may* affect the environment”

[Part 617.2\(b\)](#)

SEQR procedures

1. “Hard look” at potential impacts on the “environment,” including:
 - a. “physical conditions that will be affected by a proposed action, including land, air, water, minerals, flora, fauna, noise, resources of agricultural, archeological, historic or aesthetic significance”
 - b. “existing patterns of population concentration, distribution or growth”
 - c. “existing community or neighborhood character”
 - d. “human health”

[Part 617.2\(l\)](#)

–“As early as possible in an agency's formulation of an action it proposes to undertake . . .”

[Part 617.6\(a\)](#)

2. Initial decision: *Positive determination* of environmental significance or *negative determination*?

- a(1). complete Full Environmental Assessment Form for actions likely to require an Environmental Impact Statement (EIS), *or*
- a(2). complete Short Environmental Assessment for actions not listed as likely to require an EIS

[Type I](#), [Type II](#), and Unlisted Actions

- b. if a potential for adverse visual impacts exists, complete a Visual Assessment Form

c. if there is no reasonable expectation of *any* adverse environmental impacts, complete written Findings Statement, including a reasoned analysis of how this conclusion was reached

[SEQRA forms \(FEAF, SEAF, Findings\)](#)

d. if the decision-making body finds “at least one significant adverse environmental impact” *may* occur, ***prepare an EIS*** ([Part 617.7\(a\)\(1\)](#))

(i). if project sponsor requests local law or zoning change, project sponsor prepares EIS

(ii). project sponsor prepares project-specific EIS

(iii). EIS for local law or zoning change may be “generic” ([GEIS](#)), avoiding project specific details (e.g., zoning overlay district for all projects of same industrial type)

(iv). EIS *must be adopted by decision-making body*, it does not belong to project developer

(v). decision-making body can retain expert and legal consultants and charge all costs to project developer ([Part 617.13](#))

3. EIS procedures

a. scoping (optional)

b. complete draft EIS (DEIS) or draft Generic EIS (DGEIS)

c. invite public comments

d. review DEIS, criteria in [Part 617.7\(c\)](#) (attached here), public comments and any supporting documentation included with public comments ([Part 617.7\(b\)\(2\)](#))

e. determine whether DEIS is deficient; notify project sponsor of deficiencies ([Part 617.9\(a\)\(2\)\(i\)](#))

f. repeat (b) through (e) as many times as it takes to reach (h) or (i), below

g. maintain public control over preparation of DEIS throughout the process

h. accept or reject DEIS by adding responses to public comments = Final EIS (FEIS)

i. if an FEIS is adopted:

- (i). certify that all requirements of the SEQRA regulations have been met;¹
- (ii). certify specifically that the action “avoids or minimizes adverse environmental impacts to the maximum extent practicable.”²
- (iii). both certifications must be based on a consideration of criteria listed in the SEQR regulations.³

Judicial review

1. Standards:

- (a). Did the decision-making body take a “hard look” at the potential adverse impacts? (standard is reasonability)
- (b). Did the decision-making provide a “reasoned elaboration” of the basis for its conclusion about “significant” impacts (standard is reasonability)
- (c). Did the decision-making body follow the SEQR procedures? (standard is strict compliance)

2. Time for review:

- (a). Local law, zoning change or comprehensive planning decision: four months
- (b). local planning board or ZBA decision: 30 days
- (c). DEC wetlands permit: 30 days

3. Expenses and attorney fees:

Paid by losing party only if that party is a state agency; not available for review of local government decisions

4. What can a court do?

- (i). annul decision and send it back to decision-making body to comply with procedures
- (ii). correct an illegal or erroneous decision (rare) (END)

¹ [Part 617.11\(d\)\(4\)](#).

² [Part 617.11\(d\)\(5\)](#).

³ See [Part 617.7\(c\)](#), reproduced as an attachment to this outline.

Criteria for determining whether under SEQR environmental impacts are “significant”

Part 617.7(c)

[. . .] (c) Criteria for determining significance:

(1) To determine whether a proposed Type I or Unlisted action may have a significant adverse impact on the environment, the impacts that may be reasonably expected to result from the proposed action must be compared against the criteria in this subdivision. The following list is illustrative, not exhaustive. These criteria are considered indicators of significant adverse impacts on the environment:

- (i) a substantial adverse change in existing air quality, ground or surface water quality or quantity, traffic or noise levels; a substantial increase in solid waste production; a substantial increase in potential for erosion, flooding, leaching or drainage problems;
- (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;
- (iii) the impairment of the environmental characteristics of a Critical Environmental Area as designated pursuant to section 617.14(g) of this Part;
- (iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;
- (v) the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character;
- (vi) a major change in the use of either the quantity or type of energy;
- (vii) the creation of a hazard to human health;
- (viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses;
- (ix) the encouraging or attracting of a large number of people to a place or places for more than a few days, compared to the number of people who would come to such place absent the action;
- (x) the creation of a material demand for other actions that would result in one of the above consequences;
- (xi) changes in two or more elements of the environment, no one of which has a significant impact on the environment, but when considered together result in a substantial adverse impact on the environment; or
- (xii) two or more related actions undertaken, funded or approved by an agency, none of which has or would have a significant impact on the environment, but when considered cumulatively would meet one or more of the criteria in this subdivision.

(2) For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, the lead agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are:

- (i) included in any long-range plan of which the action under consideration is a part;
- (ii) likely to be undertaken as a result thereof; or
- (iii) dependent thereon.

(3) The significance of a likely consequence (i.e., whether it is material, substantial, large or important) should be assessed in connection with:

- (i) its setting (e.g., urban or rural);
- (ii) its probability of occurrence;
- (iii) its duration;
- (iv) its irreversibility;
- (v) its geographic scope;
- (vi) its magnitude; and
- (vii) the number of people affected.

[. . .]