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New York issues draft regulations to accelerate the development of renewable energy projects

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The newly created Office of Renewable Energy Siting (ORES) has issued draft regulations, now available for public comment, setting forth procedures and standards for the permitting of major renewable energy facilities in New York State. The draft regulations were issued pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act (commonly referred to as the “Siting Law”), which was enacted into law in April 2020.

New permitting program for renewable energy facilities

ORES, which is effectively a new agency established within the New York State Department of Economic Development, is tasked with issuing siting permits authorizing the construction of large-scale renewable energy projects in the state.

Currently (and continuing until ORES begins accepting applications), major renewable energy projects (facilities that will have a nameplate generating capacity of 25 megawatts or more) are reviewed and permitted under Article 10 of the Public Service Law. The Article 10 process was designed to apply to the construction and expansion of all major electrical generation facilities, including fossil fuel-fired facilities. In contrast, the new regulations are tailored to large-scale renewable energy facilities, and are aimed at streamlining and shortening the permitting process.

ORES used the Article 10 rules as a baseline for the new regulations. However, there are several key distinctions from the Article 10 process, including:

- New pre-application procedures;
- New timelines for the issuance of siting permits; and
- Uniform standards and conditions relating to noise, visual impacts, and threatened and endangered species.

The draft regulations apply to renewable energy projects over 25 megawatts. However, renewable energy projects with nameplate capacities of 20 to 25 MW, and projects for which Article 10 permit applications have already been submitted will be able to opt-in to the new process as well.

New pre-application procedures

Before submitting an application to ORES, developers would need to comply with a detailed pre-application process under the draft regulations. The extensive pre-application procedures are designed to avoid and minimize major siting issues, such as wetlands, habitat, and archaeological resources.

Specifically, developers would have to perform detailed studies and surveys before submitting the application, including a wetland and stream delineation, an archaeological resources survey, and an endangered species and habitat assessment. Developers would then consult with the New York State Department of Environmental Conservation regarding potential wetland, water, and wildlife impacts, and consult with the New York State Historic Preservation Office regarding potential impacts to archaeological resources.

Additional surveys, studies, and plans are required to be submitted along with the application in order for the application to be deemed complete, which will take time for applicants to prepare. In all, the application will require 25 exhibits, including (but not limited to):

- Detailed design drawings
- Noise impact study
- Visual impact assessment
- Geotechnical report
- Stormwater plan
- Agricultural impact assessment
- Environmental justice evaluation
- Decommissioning and site restoration plan

The draft regulations also require developers to engage with local governments and nearby residents early on in the pre-application process. Developers must meet with affected municipalities and hold at least one meeting for community members at least 60 days in advance of filing the application. At least three days before filing an application, the developer must publish a newspaper notice of the application. After submitting the application, the applicant must serve electronic and paper copies of the filed application on local governments and libraries within the affected communities, and provide written notices to residents located within one mile of a proposed solar facility and within five miles of a proposed wind facility.

New timelines for the issuance of siting permit

Following the preparation and submission of the extensive application materials, the draft regulations establish aggressive timelines for the issuance of siting permits. ORES will have sixty days to determine whether an application is complete. In the event that ORES finds that the application is incomplete, the applicant will have three months to supplement the application materials to cure the deficiencies, or the application will be considered withdrawn. Once the application is determined to be complete, ORES will have sixty days to publish a draft permit for public comment. Following a sixty-day comment period and public hearing (if determined to be necessary), ORES must grant or deny the permit promptly thereafter, and in any event, no more than one year from the date of a complete application. For projects sited on certain existing or abandoned commercial properties (including brownfields, landfills, former commercial or

industrial sites), the decision must be made even faster—within six months. Siting permits will be automatically deemed approved if the permit is not issued within the established timelines.

Uniform standards and conditions

In an effort to streamline and expedite the process of determining appropriate mitigation measures for impacts to endangered species, visual impacts, and noise impacts, ORES established standard mitigation measures applicable to different categories of projects (i.e., separate standards for wind and solar). The uniform standards are designed to minimize and mitigate potential adverse environmental impacts that could result from the construction and operation of major renewable energy facilities.

The proposed uniform standards and conditions include:

- Setback requirements for wind turbines and solar arrays.
- Noise limits of between 45 and 55 decibels for wind and solar projects, and standardized protocols for taking noise measurements.
- Visual impact mitigation measures for wind and solar facilities.
- Time-of-year restrictions on any tree clearing activities to minimize impacts to threatened and endangered species of bats.
- For wind projects, curtailment during certain times of the year and at certain temperatures to minimize impacts to threatened and endangered species of bats.
- For facilities where impacts to threatened and endangered species cannot be avoided, the implementation of a net conservation benefit plan and the payment of a fee commensurate with the anticipated impacts to threatened and endangered species, which will be used to conserve habitat or otherwise achieve a net conservation benefit to the impacted species.

ORES will only approve site-specific standards and conditions where the nature of the project is such that its impacts cannot otherwise be addressed by the uniform standards and conditions.

Overall, the uniform standards and conditions are similar to those that have been imposed on renewable energy projects under Article 10, usually after a great deal of negotiation with agencies and intervenors in the approval process. While not everyone will be happy with the standard conditions, the uniformity will provide certainty for developers, municipalities, and other interested parties and stakeholders.

Outlook

The draft regulations are designed to streamline the review of renewable energy projects, and could significantly accelerate the permitting process, particularly for those projects sited on brownfields, landfills, and former commercial or industrial sites. The uniform standards and conditions will provide developers and stakeholders with certainty and are designed to limit disputes and litigation regarding permit conditions.

Public comments are now being accepted. In addition, ORES has scheduled at least seven public statement hearings to solicit additional input. We expect to see a flurry of activity during this critical time, as developers, municipalities, and environmental advocates alike parse through the substantial regulations, and lobby for changes, before the final regulations go into effect.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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