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Locke Lord QuickStudy: New York Issues Final Renewable Energy Siting Regulations to Streamline Permitting

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On April 3, 2020, New York State announced the passage of the Accelerated Renewable Energy Growth and Community Benefit Act ("Act"). The Act established a new Office of Renewable Energy Siting ("ORES") within the NY Department of State with the intent of streamlining the current siting process for renewable energy projects in the state. This is the first state agency dedicated exclusively to the siting of renewable energy projects. New York's current siting process, known as Article 10, has widely been considered overly complex and burdensome, and is often cited as an obstacle to achieving the state's renewable energy goals. To alleviate those issues, the Act required ORES to establish a uniform set of standards and conditions for the siting, design, construction, and operation of each type of major renewable energy facility.

On March 3, 2021, ORES issued its final regulations. Although there are some notable changes, the final regulations are substantively similar to the draft regulations issued on September 16, 2020, and should vastly improve the siting process for qualifying large-scale renewables (25 MW and larger) in New York State.

Detailed Pre-Application Requirements

The regulations establish a clear and uniform set of standards and requirements for obtaining siting approval for a proposed facility, which includes the following pre-application requirements:

- No less than 60 days before the filing of its application, the applicant must conduct a pre-application meeting with the chief executive officer of the local municipalit(ies) within which the project will be sited, along with any local agencies identified by the chief executive officer. The applicant is required to share certain information with the municipality, including a summary of local laws applicable to the project and its plans for complying with such laws.
- A similar requirement to hold a meeting with community members that may be adversely impacted by the siting of the facility no less than 60 days before the date of an application. The applicant is required to provide copies of transcripts, presentation materials, and a summary of questions raised during the pre-application meetings.
- At the earliest possible point in the project's preliminary planning, the applicant shall conduct a wetland delineation to identify the jurisdictional boundaries of all wetlands on the project site and within 100 feet of areas to be disturbed by construction. The applicant is required to submit a draft report for review by ORES.
- The applicant must undertake a similar review to identify all federal, state, and local waters present on site and those within 100 feet of areas to be disturbed by construction, as well as those one hundred feet beyond the

limit of disturbance that may be hydrologically or ecologically influenced by site development.

- The applicant is additionally required to prepare and provide a wildlife site characterization report on species listed as threatened, endangered, or of special concern to ORES. The report is required to document species at the proposed facility, habitat suitability, and landscape on and within 5 miles of the project site, among other information. ORES will review within 30 days of submittal and provide a draft determination regarding a path forward to mitigate the impacts on threatened and endangered species, if relevant.
- Uniform setback requirements for Wind Turbine Towers and Solar Facility Components from property lines, centerlines of public roads, and residences.

The list above is not exhaustive, but it is indicative of the clear directives for project applicants in comparison to the Article 10 process, in which different state agencies would often impose conflicting requirements or standards on applicants.

Consistent Standards and Process

The ORES regulations establish consistent requirements for minimization of project impacts to a variety of resources including noise, viewsheds, wetlands and aquatic resources, protected species, cultural resources and more. One notable change from the draft regulations is the inclusion of additional, more specific requirements for evaluating impacts to threatened and endangered species. Specifically, the final regulations require applicants to identify the migratory routes of birds and bats through the project site, require an adjustment to the project's limits of disturbance or construction schedule in certain circumstances such as when an active nest is discovered, and specify how mitigation requirements will be calculated in certain situations where net conservation benefit plans are required. While imposing more stringent standards than previously existed, the regulations at least establish clear standards that developers can plan and account for.

The final regulations encourage local governments and communities to participate in the permitting process. Public review and comment, as well as adjudicatory hearings, will be required when substantive issues are identified. These procedures, along with the enhanced communication between applicants and ORES, are intended to foster a productive process for addressing project impacts and give applicants the flexibility necessary to implement effective mitigation strategies.

The Act provided ORES with the authority to function as a central hub in the siting process, increasing certainty and predictability. Importantly, ORES is required to issue a permit within one year of the date on which an application is deemed complete, or within six months if the facility is proposed to be located on a "repurposed site," defined as an existing or abandoned commercial or industrial use property, including without limitation, brownfields, landfills, dormant electric generating facility or other previously disturbed location. ORES must make its completeness determination within 60 days of receiving an application. Through the imposition of these time limits the ORES regulations seek to ensure that projects that have been planned in a manner consistent with the pre-application requirements will move through its amended process predictably and efficiently.

Applicability to Existing Projects

Qualifying projects currently in the Article 10 process may seek a transfer from the Article 10 process to the new ORES process. The final regulations provide guidance for transferring for several categories of projects: (a)

pending Article 10 facilities for which a completeness determination has been issued; (b) pending Article 10 facilities for which an application has been filed but have not yet been deemed complete, and (c) facilities between 20 MW and 25 MW that seek to opt in to the ORES process. Each facility requesting to transfer must submit notice to ORES as well as certain additional information depending on its Article 10 application status. Applicants will need to weigh the administrative burden of transferring, which should be relatively minor, against the additional certainty and efficiency expected to be provided by the ORES process, recognizing that as with any new regulatory framework, and particularly one involving a newly formed agency, there are likely to be unexpected challenges and delays.

These potential hiccups notwithstanding, the Act provides a clear signal that New York State recognized the problems that have hampered the Article 10 process, and there is reason to expect that the new ORES siting process will be smoother, faster and more predictable than its predecessor.

For further information on the requirements of the ORES regulations or assistance in navigating the Article 10/ORES transition, please contact the authors.

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