

NEW YORK STATE BOARD ON ELECTRIC
GENERATION SITING AND THE ENVIRONMENT

At a session of the New York
State Board on Electric
Generation Siting and the
Environment held in
the City of Albany on , 2020

BOARD MEMBERS PRESENT:

John B. Rhodes, Chair

New York State Public Service Commission

Vincent Ravaschiere, Alternate for

Eric Gertler, Acting Commissioner, New York State
Department of Economic Development and President and
Chief Executive Officer Designate, Empire State Development

Louis Alexander, Alternate for

Basil Seggos, Commissioner
New York State Department of Environmental Conservation

John Williams, Alternate for

Richard L. Kauffman, Chair
New York State Energy Research and Development Authority

Elizabeth Lewis-Michl, Alternate for

Howard A. Zucker, M.D., J.D., Commissioner
New York State Department of Health

CASE 20-F-0067 - In the Matter of the Rules and Regulations of
the Board on Electric Generation Siting and the
Environment, Contained in 16 NYCRR, Chapter X,
Certification of Major Electric Generating
Facilities, Proposed Amendments to Parts 1000
and 1001.

MEMORANDUM AND RESOLUTION ADOPTING AMENDMENTS TO ARTICLE 10
REGULATIONS ON AN EMERGENCY BASIS AND DIRECTING ISSUANCE OF A
NOTICE OF PROPOSED RULEMAKING

(Issued and Effective)

BY THE BOARD:

INTRODUCTION AND BACKGROUND

In this memorandum and resolution, the New York State Board on Electric Generation Siting and the Environment (Siting Board) adopts, as an emergency rule pursuant to State Administrative Procedure Act (SAPA) § 202(6), minor but important changes to Parts 1000 and 1001 of Title 16 of the Official Compilation of Codes, Rules and Regulations of the State of New York. The Siting Board also directs that a Notice of Proposed Rulemaking seeking comments on the regulatory changes be issued for publication in the New York State Register concurrent with a Notice of Emergency Adoption in accordance with the rulemaking procedures prescribed by SAPA Article 2.

The regulatory changes made in the rulemaking documents provided in conjunction with this memorandum relate to ensuring that Public Service Law (PSL) Article 10 is implemented to protect the public health and environment in a manner that does not delay or jeopardize the siting of renewable energy facilities in New York. Under PSL Article 10, when an amendment is filed with respect to an application for a certificate of environmental compatibility and public need, and such amendment is deemed "likely to result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility," the Siting Board is required to conduct a hearing in the same manner as on the initial application.¹ Under the regulations implementing this provision, an amendment deemed a "revision" is subject to such a hearing.² The existing definition of "revision" incorporates a bright-line test related to "the shifting of a wind turbine, access road or electric collector line to a new

¹ PSL § 165(5).

² 16 NYCRR § 1000.16(c).

location within a 500 foot radius of the original location.”³ Accordingly, under the existing definition, any proposed or certificated relocation of a wind turbine, access road or electric collection line by greater than 500 feet would be subject to a full hearing, and potential briefing, that would take many months to complete.

As explained in more detail in the rulemaking documents provided in conjunction with the memorandum, the 500-foot bright line test incorporated into the definition of “revision” is creating unintended negative consequences, including (1) subjecting parties to costly administrative litigation, and (2) incurring regulatory delays that may render renewable energy projects uneconomic, even where - as is often the case - the facility changes are environmentally beneficial. The need to shift project elements often arises during construction planning. For example, access roads and turbines may need to be relocated to mitigate environmental impacts, collector lines may be rerouted, and the interconnecting utility may decide to relocate its point of interconnection. These types of post-certification changes trigger the hearing requirement if any component is to be relocated by more than 500 feet, regardless of any resulting environmental benefits.

Construction delays caused by this additional administrative process have already jeopardized completion of one renewable energy project and can potentially discourage many more. Such delays potentially render projects uneconomic by jeopardizing: (1) their eligibility for a federal tax credit that expires at the end of 2020; (2) time-sensitive financing commitments; and (3) achievement of construction milestones needed to preserve grid interconnection rights. In sum, the

³ 16 NYCRR § 1000.2(ak).

current regulations can cause projects to miss critical deadlines and, in turn, result in them never being built.

Explanation of Changes

The regulatory changes adopted herein will facilitate project changes that benefit the environment. The new definition of "revision" ensures that outcome by requiring further process only for project amendments that would result in more significant environmental impacts than those associated with the project as certificated or proposed. This change, moreover, more closely aligns the regulations with the statute's focus on minimizing adverse environmental impacts.

The rulemaking at issue makes four related regulatory changes as follows:

- Paragraph (x) of 16 NYCRR Part 1000.2 is amended to define "modification" as a certificate amendment that is not a revision. Language related to the 500-foot bright-line test is deleted from the definition.
- Paragraph (ak) of Part 1000.2 is amended to eliminate the 500-foot bright-line from the definition of "revision," and to re-focus the definition on whether an amendment is likely to result in a significant adverse environmental impact.
- Paragraph (a) of 16 NYCRR Part 1000.16 is amended to remove ambiguity regarding the definition of "revision" and provide a timeframe by which a determination must be made concerning whether an amendment constitutes a "modification" or a "revision."
- Paragraph (i) of 16 NYCRR Part 1001.22 is amended to reduce the required area for wetlands mapping from within 500 feet of disturbed areas to 100 feet. The change to 100 feet is consistent with existing wetlands regulations implemented by the Department of Environmental Conservation.

These changes are being adopted on an emergency basis because a substantial number of environmentally beneficial renewable projects are currently undergoing Article 10 review,

and the existing definition of "revision" may jeopardize their completion. Absent this emergency rulemaking, then, the State's goals for deployment of renewable energy resources and reduction of greenhouse gases would be impeded. Because these goals are vital to the protection of public health and welfare, the public interest warrants that these regulatory changes should be implemented immediately.

State Environmental Quality Review

The emergency adoption of the regulatory changes described herein is a Type II action in accordance with 6 NYCRR §§ 617.2(ak) and 617.5(c)(42) and, therefore, is not subject to the requirements of the State Environmental Quality Review Act (SEQRA), Environmental Conservation Law Article 8. The subsequent permanent adoption of this rule, however, will constitute an unlisted action within the meaning of 6 NYCRR § 617.2(al). Accordingly, the Siting Board will conduct the review required pursuant to SEQRA in the context of adopting a final rule.

CONCLUSION

The accompanying resolution and attached changes to 16 NYCRR Parts 1000 and 1001 are adopted and will become effective upon filing with the New York State Secretary of State. The Secretary to the Board is directed to file a Notice of Emergency Adoption and Proposed Rulemaking with the Secretary of State.

By the New York State Board on
Electric Generation Siting and the
Environment

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

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RESOLUTION BY THE BOARD

(Issued and Effective)

Statutory Authority
Public Service Law §§ 161 and 165(5)

RESOLVED:

1. That this action is being undertaken in compliance with the provisions of § 202(6) of the State Administrative Procedure Act.

2. That the official Compilation of Codes, Rules and Regulations of the State of New York, Title 16, Public Service, is amended, effective upon filing with the New York State Secretary of State, by revisions to Parts 1000 and 1001 to read as set forth in the Appendix attached hereto.

3. That the Secretary to the Board is directed to transmit a Notice of Emergency Adoption and Proposed Rulemaking to the New York State Secretary of State for publication in the New York State Register.

4. That the Secretary to the Board is directed to file a copy of this resolution with the Secretary of State.

By the New York State Board on
Electric Generation Siting and the
Environment

(SIGNED)

MICHELLE L. PHILLIPS
Secretary

APPENDIX

Paragraphs (x) and (ak) of Section 1000.2 are hereby amended as follows:

(x) Modification: An amendment of an application or Certificate that is not a revision [; including the shifting of a wind turbine, access road or electric collector line to a new location within a 500 foot radius of the original location provided such change does not significantly increase impacts on sensitive resources or decrease compliance with setback and similar requirements].

(ak) Revision: An amendment of an application or Certificate proposing [or authorizing] a change in the major electric generating facility likely to result in (i) any significant [increase in any] adverse environmental impacts of such facility [or a substantial change in the location of all or a portion of such facility as determined by the board; not including the shifting of a wind turbine, access road or electric collector line to a new location within a 500 foot radius of the original location provided such change does not significantly increase impacts on sensitive resources or decrease compliance with setback and similar requirements], determined according to 6 NYCRR § 617.7(c), in comparison to such impacts of the facility as proposed or approved, or (ii) the identification of an adverse environmental impact not included in the application.

Paragraph (a) of Section 1000.16 is amended to read as follows:

(a) [To determine whether a proposed amendment is a revision: (1) the criteria for determining significance set forth in 6 NYCRR section 617.7(c) will apply; and (2) as appropriate, the staffs of the DPS, the DEC and the DOH shall be consulted] The Secretary shall, within 14 days of the filing submitted pursuant to paragraph (b) of this section, determine whether a proposed amendment is a revision following consultation with the staffs of DPS and, as appropriate, the staffs of the DEC and the DOH.

Paragraph (i) of Section 1001.22 is amended to read as follows:

(i) A map showing delineated boundaries based on on-site identification of all Federal, State and locally regulated wetlands present on the facility site and within [500] 100 feet of areas to be disturbed by construction, including the interconnections; and predicted presence and extent of wetlands on the remainder of site properties and adjacent properties within [500] 100 feet of areas to be disturbed by construction. For adjacent properties without accessibility, initial surveys may be based on remote-sensing data, interpretation of published wetlands and soils mapping and aerial photography.

- Matter that is underlined is new; matter in [brackets] is old regulatory language to be omitted.