



Comments on the Office of Renewable Energy Siting Proposed Regulations for the  
Review and Permitting of Renewable Energy Projects  
Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 — 900.14

*Submitted by:*

The Alliance for Clean Energy New York, the American Wind Energy Association,  
and the Solar Energy Industries Association.

December 7, 2020

On behalf of the Alliance for Clean Energy New York (ACE NY), the American Wind Energy Association (AWEA), and the Solar Energy Industries Association (SEIA), please accept these comments on the New York State Office of Renewable Energy Siting's (ORES) proposed draft rules for permitting new wind and solar energy projects, Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 — 900-14.

## **I. Introduction**

The Renewable Energy Industry welcomes New York's timely efforts to implement the Accelerated Renewable Energy Growth and Community Benefit Act (the "Act") through the release of this regulatory proposal. We also strongly feel that the effort to simplify and improve the process for issuing permits for the construction of wind and solar facilities is sorely needed, and will be a benefit to the public, municipalities, and renewable energy companies. By establishing the rules and operating conditions in advance, facilities can be designed to meet these standards from the earliest stages of development. A workable permitting process is imperative for the Renewable Energy Industry to achieve the goal of driving New York's economic recovery through investment and job creation. We recognize that renewable energy development will always need to be balanced with natural resource protections in New York and welcome the certainty of knowing these specific requirements up front.

ACE NY is a not-for-profit membership organization with a mission to promote the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution. ACE NY members include numerous companies that currently, or will in the future, own and operate major renewable energy facilities in New York communities. ACE NY members

have significant experience developing and building major wind and solar energy generating facilities in New York and elsewhere. We, along with our national counterparts AWEA and SEIA, welcome the opportunity to provide input on the proposed regulations and look forward to a constructive dialogue with ORES to ensure that more renewable energy facilities are built quickly and efficiently, while protecting the environment and benefitting host communities.

In these Comments, ACE NY, AWEA, and SEIA are collectively referred to as the “Renewable Energy Industry,” “we,” or “our organizations.”

## II. Summary of Priority Recommendations

The Renewable Energy Industry strongly supports the reform of wind and solar permitting, and generally supports this ORES proposal. The process laid out by these regulations strikes the right balance between the need to achieve the State’s renewable energy mandates, the need to maintain electric system adequacy and reliability, protection of the environment, and public input on decision-making. Our comments reflect the guiding principle that siting and permitting a wind or solar facility should be no harder than for comparable land uses with comparable impacts. That is, the environmental review and protection requirements should be on par with other proposed projects, especially given the important policy goal of transitioning to renewable energy. As an example, the construction of wind and solar projects involves typical construction processes. As such, it poses de minimis and non-unique risks to wells. Survey and testing of private wells should not be required for a land use that is low risk, is more than 100 feet from any wells, and doesn’t involve toxic chemicals. In another example, requiring the replacement of offsite culverts to mitigate the temporary stream impacts of construction activities is also not typically required in other permitting processes. These aspects of the regulations should be modified to be more consistent with typical state and local permitting requirements.

We also note that we have detailed suggested modifications to the sound provisions, which are addressed in a separate document and will be filed with the ORES under separate cover.

In Part III, we provide detailed comments on most sections of the proposed regulations. Here, we want to highlight four high priority recommendations:

### **A. THE PROCESS FOR POST-PERMIT COMPLIANCE FILINGS SHOULD BE STREAMLINED.**

One critical issue is post-permit compliance filings and the timeliness of construction. We are concerned that the currently proposed framework for submittal and review of the sixteen different compliance filings – although more efficient than Article 10 – still has the potential to delay construction, especially given the narrow construction windows established elsewhere in various provisions of the regulations. We strongly suggest that the regulations be modified to further reduce the time from permit issuance to construction. This can be accomplished by (1)

allowing applicants the option to include compliance filings in their application with approval of those plans included in the Permit; (2) allowing applicants the option to submit compliance filings when their Draft Permit is published; and (3) providing a 30-day timeframe for ORES to respond to compliance filings rather than 60 days. Further, we strongly urge ORES to consider allowing the onsite Environmental Monitor to approve minor changes to, or deviations from, the approved compliance plans, as long as they do not involve an adverse environmental impact, in order to efficiently address the inevitable changes that emerge during any typical construction project.

**B. THE REGULATIONS SHOULD FURTHER CLARIFY LOCAL LAW PROVISIONS.**

It is well known that the issue of waiving local law has been both a feature of Article 10 and its predecessors, and a controversial aspect of the permitting process. To further clarify and improve this new permitting process, and to avoid disputes regarding the application of local law, we recommend four changes to the proposal with respect to local laws. First, the regulations need to clarify that the local laws in effect at the time of the application are those that either apply or need to be the subject of a waiver, but that subsequently enacted local rules do not. This is an approach that will provide fairness and certainty and is appropriate considering that project changes are more limited under 94C and that uniform standards and conditions will be known prior to an application. These proposed regulations should not apply new local laws enacted after the pre-application meeting with municipal officials has been conducted (900-1.3(a)) or at the latest after an application has been filed (900-1.6.). This change is an opportunity to avoid future uncertainty and disputes.

A second issue with respect to local law is the basis by which ORES could waive a local requirement, which should be both abundantly clear and consistent with the language in the Accelerated Renewable Energy and Community Benefit Act. Section 900-2.25 requires the application to identify local laws applicable to the project that are of a substantive nature and of those, the laws that an applicant seeks ORES to override due to the unreasonable burdens they would impose based on technological limitations, factors of costs or economics, or needs of consumers. This language is identical to that found in the Article 10 regulations (6 NYCRR 1001.31). By retaining this Article 10 language, the proposed regulations are not consistent with the new Executive Law § 94-c(5)(e), which states, *“the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”* The ORES regulations need to be more consistent with the underlying 94(c) statute.

A third issue regarding local law is the interaction with the new uniform standards and conditions of Subpart § 900-6. The Accelerated Renewable Energy Growth and Community Benefit Act requires the establishment of uniform standards and conditions and the ORES is undergoing this lengthy and comprehensive process to establish these new standards, grounded in the avoid-minimize-mitigate framework. It then follows that these uniform standards are reasonable and stricter standards should be presumed to be unreasonably burdensome. The goal of promulgating uniform, default conditions regarding setbacks, noise, operational curtailment for bat protection,

and other aspects of construction and operation is to provide appropriate natural resource and community protection, and to provide certainty to project applicants, neighbors, and municipalities. If a jurisdiction applies stricter standards or additional rules, then the jurisdiction should have the obligation to prove why these new rules are necessary and reasonably burdensome. In the alternative, it should be presumed by ORES that the stricter standards are unreasonably burdensome. The ORES regulations should indicate that the uniform standards and conditions represent a reasonable approach for municipal jurisdictions for the issues they address.

Fourth, if the project is the subject of a special exception to zoning and that exception has been granted by local officials, there should not also be a requirement to obtain a local law variance from ORES. It is appropriate that one be required (i.e., the special exception or the variance from ORES) but not both. The regulations should make this clear.

C. **APPLICANTS SHOULD NOT BE REQUIRED TO CONDUCT DUPLICATIVE OR IRRELEVANT STUDIES THAT ORES WILL NOT BE USING FOR DECISION-MAKING.**

This proposal requires a great many studies in the pre-application phase, as exhibits in the application, or as compliance filings. Most of the requirements are relevant and will help inform the ORES decision-making. In some cases, the studies are superfluous. Part 900 – 2.1 mentions that exhibits that are irrelevant for the technology may be omitted but offers no particular guidance for that determination. And elsewhere, it appears that certain unnecessary studies are explicitly required. We provide the following examples of studies that should not be required:

- Electric and Magnetic Fields (Exhibit 22) and System Effects and Interconnection (Ex. 21) filings should be simplified or eliminated in recognition that they are already required by the NYISO interconnection processes;
- Exhibit 16 Part f(2) which is duplicative of the analysis the applicant would undergo with the U.S. Department of Defense and the Federal Aviation Administration and is adequately covered in Part f(1);
- Exhibit 10, which is irrelevant unless blasting will be occurring during construction;
- Field verifying agricultural activities within a five-mile radius of the project is excessive and need not be required;
- An ambient noise study when the uniform standard for sound is already established is not necessary;
- A detailed study of wastes and emissions for a wind and solar facility, including “studies, identifying the author and date thereof, used in the analysis” is not relevant;
- Exhibit 17: Consistency with Energy Planning, with the details in (a) through (g), when the only necessary information is how many megawatt-hours per year of pollution free power the proposed project will produce. As these regulations only apply to wind and solar, it

should be presumed that they comply with the state’s energy planning and renewable energy goals.

#### **D. THE PROCESS FOR AMENDING A PERMIT APPLICATION NEEDS TO BE MORE PRACTICAL**

Section 900-7.1 addresses amendments of an application. The Renewable Energy Industry respects ORES’s desire to discourage changes to applications, but still feels that this section needs to be simplified. The change we request can make the process more efficient and avoid discouraging changes that are requested by ORES or stakeholders and agreeable to the applicant. As discussed in more detail in Part III, we specifically suggest that when an applicant requests an amendment to their application, ORES shall review the request and, within fifteen days, inform the permittee whether the requested change is a minor amendment to be processed by the Office without change to the statutory timeframes; a major amendment subject to additional information requests that will suspend and extend review timeframes; or an application supplement which shall be submitted to the record of the proceeding.

### **III. Comments on Specific Provisions**

#### Subpart 900-1

**§900-1.1 Purpose and Applicability:** We do not have any comments on this section.

#### **§900-1.2 Definitions**

- Definition (ab) for “local agency” does not seem to contemplate a nexus between a local agency and the project area. Can an uninvolved town participate in another location’s project permitting, by virtue of it being a municipality? The Renewable Energy Industry suggests that definition (ab) be revised to read *“Local agency means any local agency, board, district, commission or governing body, including municipalities, and other political subdivision of the state within one (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility.”*
- Definition (ad) for major amendment does not recognize that in order for an amendment to be major, it should have an adverse impact. We suggest that this definition be revised to read *“... likely to result in any material increase in any identified adverse environmental impact...”* The same change is recommended for (ae).
- Definition (af) for a major renewable energy facility states that transmission lines less than 10 miles in length and less than 125kV are included within the definition of a major renewable energy facility. However, the definition of a Major Renewable Energy Facility contained in Section 94-c of the New York State Executive Law does not limit the interconnect lines to those under 125kV. The Renewable Energy Industry believes that

since the law did not limit the voltage of transmission lines, gen-tie lines less than 10 miles in length of any voltage should be included.

- Definition (ao) for non-participating property includes a parcel of real property owned by a person (as defined in subdivision (be) of this section) who has not executed an agreement with the applicant related to the facility. But definition (ba) for participating property specifies that the agreement is an executed lease, easement or other agreement. We recommend that these two definitions be revised to be consistent.
- Definition (bv) for study area appears to have a typographical error or missing word. Second, we believe the one mile and five-mile radii should be from the facility (i.e., turbines or solar panels) and interconnections, but not from all property boundaries or public access roads. Further, the proposed definition of study area is too large. For a solar facility the study area should be 1 mile from the facility with a 2-mile visual study area. There is no probative value of showing existing land uses for 5 miles from a low profile, non-air/water pollutant emitting solar facility. For a wind facility the study area should be 1 mile with a 5-mile visual study area. Lastly, the inclusion of “facility site” in the definition of study area (bv) is confusing, and the phrases “study area” and “facility site” are both used throughout the regulations. We recommend that “facility site” also be defined in the regulations.

### §900-1.3 Pre-application Procedures

- If the project is the subject of a special exception to zoning and that exception has been granted, there should not also have to be a local law variance obtained from ORES. It is appropriate that one be required (i.e., the special exception or the variance from ORES) but not both.
- We recommend that (a) be revised to only apply to new applications. It now says “*Consultation with Local Agencies. No less than sixty (60) days before the date on which an applicant files an application, or files a transfer application other than for a pending Article 10 facility for which the Article 10 application has been deemed complete...*” Given the PIP requirements, this will have already been completed for all Article 10 transfer applications therefore these should only apply to new applications and not to transfer applications.
- (a)(3) We suggest that this provision be revised to add decommissioning “*A summary of the substantive provisions of local laws applicable to the construction, operation, maintenance, and decommissioning of the proposed facility.*”
- (b) There is no reason to have to achieve such a narrow window for publication of the notice, especially when you consider that some local newspapers only run weekly. We recommend deleting the requirement that notice cannot be provided sooner than 21 days prior to the meeting.

- (e)(1) Preapplication requires delineations within 100 feet of limit of disturbance (LOD). Reference to a LOD suggests that design will be final during delineations, which is inherently contrary to how these projects are developed. Resource identification needs to be completed so that the design can incorporate avoidance and minimization measures. Conducting a field delineation based on the LOD, then preparing a report and conducting a site visit prior to filing an application does not work from a normal development perspective. We suggest that this provision be slightly revised to read “...*within one hundred (100) feet of areas proposed to be disturbed by construction...*”
- (e)(2) The Renewable Energy Industry supports the preparation and submission of a “draft” wetland delineation report at this stage of pre-application.
- (e)(4) We suggest that the word “provide” be deleted from the phrase “...*at the request of the Office to ~~provide~~ assist in determining which wetlands are regulated...*”
- (e)(5) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the final jurisdictional determination, but it should be clarified that federally regulated wetlands will not have a jurisdictional determination until the Army Corps of Engineers (ACOE) acts.
- (e)(5) The possible delay in the preparation of the final jurisdictional determination on wetlands due to weather can significantly delay a project resulting in the potential loss of a construction season. This is critical given the restrictive work windows in place for the protection of T&E species that appear elsewhere in the ORES proposal. Provision should be made for a tentative jurisdictional determination to be made based on remote sensing data, interpretation of existing wetland and soils mapping and current and historical aerial imagery with subsequent field verification when weather permits. This is the process that is proposed for wetland delineations for adjacent properties when access to the property has been denied by the landowner.
- (f)(1) requires an applicant to conduct a stream delineation survey to identify all federal and state waters regulated pursuant to ECL Article 15, and locally regulated surface waters present on the facility site and within one hundred (100) feet of areas to be disturbed by construction, including the interconnections, as well as federal, state, and locally regulated surface waters within one hundred (100) feet beyond the limit of disturbance (LOD) that may be hydrologically or ecologically influenced by development of the facility site. At the time these draft delineations are conducted, the LOD may not have been determined. Also, there needs to be clear criteria to assist an applicant in determining if a stream may be hydrologically or ecologically influenced by development of the facility site. We recommend that the term ‘hydrologically or ecologically influenced’ be defined in this regulation.

- (f)(4) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the DEC to review the draft stream delineation report and make a final determination on impact to streams.
- (f)(4) The possible delay in the preparation of the final jurisdictional determination on stream delineations due to weather can significantly delay a project resulting in the potential loss of a construction season. This is critical given the restrictive work windows in place for the protection of T&E species. Provision should be made for a tentative jurisdictional determination to be made based on remote sensing data, interpretation of existing wetland and soils mapping and current and historical aerial imagery with subsequent field verification when weather permits. This is the process that is proposed for delineations for adjacent properties when access to the property has been denied by the landowner.
- (g) The Renewable Energy Industry supports the inclusion of the additional guidance/detail provided on the elements of the wildlife site characterization process and the inclusion of timeframes for the review of a plan and agency response.
- There is no provision for mediation or resolution of a disagreement between the applicant and ORES or NYSDEC on the characterization. Applicants have disagreed with the NYSDEC on these issues before, and this section would appear to require that we reach agreement on an approved report before we can submit an application to ORES. Applicants need the opportunity to submit evidence controverting an assertion that an area is occupied habitat – for example, grassland bird habitat which is not of sufficient size to support the species identified. In order to improve upon the process of Article 10, it is critical that the preapplication processes do not unduly delay the application process.
- (g)(1)(vi) We agree that it is important to recognize that certain listed bird (and other) species are threatened by climate change. The National Audubon Society climate change report<sup>1</sup> identifies renewable energy as a key component of addressing the underlying causes of climate change. A great many bird species are listed in the Audubon study, and therefore a great many species could be positively affected by the operation of wind and solar energy facilities in New York and elsewhere. The Renewable Energy Industry believes renewable energy should not be seen as an additional stressor for those species, but as contributing to the provision of a potentially critical habitat for the species across its range.
- (g)(2)(iv) We understand the need for a desktop study to characterize the occurrence of bats species on a project site for a proposed solar energy facility. But, given the proposed work windows, tree clearing restrictions and setbacks for the protection of bat species (that would apply in any case), there are no circumstances where there would be a need for preconstruction bat surveys. The Renewable Energy Industry strongly believes that preconstruction bat surveys for a proposed solar energy facility are not necessary, due to

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<sup>1</sup> *Survival by Degrees: 389 Bird Species on the Brink, 2020.* <https://www.audubon.org/climate/survivalbydegrees>



the costs involved and the fact that the data generated would not inform the decision-making process when the work windows and tree cutting provisions are followed.

- (g)(2)(iv) The Renewable Energy Industry supports the provision that limits field surveys to one year. Given the large amount of existing data, any additional surveys should be able to be completed within one season/one year.
- (g)(2)(iv) Mist net surveys to sample bat populations have commonly been used in SEQR and Article 10 reviews. Mist net surveys are expensive and of questionable value considering that presence of Northern Long-Eared Bats is assumed everywhere in the state, regardless of the results of mist net surveys. They should not be a required element for all bat surveys, especially if the results will not be used for decision-making.
- (g)(5) Six (6) weeks is too short a time to prepare and submit draft reports after completion of the required surveys. The Renewable Energy Industry recommends that this be changed to eight weeks.
- (g)(5) We do not believe that there is a need or rationale for requiring that the sighting of a threatened and endangered (T&E) species be reported before the submission of the draft T&E surveys report. This will cause confusion and seems unnecessarily burdensome to require a report before the report. Unless there is a specific, compelling reason for this early report, this requirement should be deleted and all information should be reported in the same time frame, in one report.
- (g)(7) For clarity the word “written” should be inserted in this provision to read: “...the Office shall provide its *written* draft determination regarding whether occupied habitat...”
- (g)(7) Would projects that are determined to have a de minimis impact to NYS T&E grassland birds or their habitat still be required to submit a net conservation benefit plan? Presumably no, but the regulations are not clear. We recommend that the regulations clarify that projects with de minimis impacts do not require a net conservation benefit plan.
- (g)(7) The formula to determine mitigation fees for impact to NYS threatened and endangered species and for wetland impacts that cannot be avoided or mitigated is not included in the proposed regulation. While this may be appropriate, wind and solar project developers are going to need to know additional information on the mitigation bank credits in order to make informed decisions regarding the direction they will go, such as cost per credit, availability across the state, or only available in certain watersheds. The ORES regulations should specify that ORES will be the responsible entity for determining the formula(s) for mitigation fees. We also recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.

- (g)(7) This section provides that ORES' draft determination will, provide "if applicable, the amount of mitigation funding that may be necessary if impacts cannot be avoided or mitigated." However, because this determination will be appropriately based on desktop studies, it is possible that the amount of mitigation funding would exceed actual existing conditions. A provision should be added allowing an Applicant to request a revision to the mitigation funding amounts, if subsequent actual field studies demonstrate conditions different than those forming the basis of the draft determination.
- The Renewable Energy Industry believes that a de minimis (or other impact assessment) determination should be considered for all NYS T&E species. Even when a net conservation benefit plan is required, an impact assessment is necessary to establish what level of mitigation may be needed to achieve a net conservation benefit.
- (h) The terms Phase 1A, Phase 1B, & Phase II are not contained in any regulation. These terms are elements of an OPRHP guidance document "Standards for Cultural Resource Investigations and the Curation of Archaeological Collections in New York State." Paragraph (h) should be revised to eliminate the possibility that the inclusion of these terms in Part 900 establishes a new regulatory requirement.
- (h)(2) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the review of a submitted Phase IA archaeological/cultural resources report by the Office and OPRHP.

#### **§900-1.4 General Requirements for Applications**

- The Renewable Energy Industry recommends that a new provision be added to the application requirements. An applicant should be authorized to have the option to include any of the preconstruction compliance filings as part of the application. Many of the plans listed in 900-10.2 will be based on generic, formulaic plans with minimal need for project specific details to be incorporated. An applicant should be allowed to include these plans, as modified by project specific details in their application thereby eliminating the need for these plans to be submitted as compliance filings.
- (b) The prohibition on commencing construction should be limited to areas requiring a permit. Suggest the phrase "in jurisdictional areas" be inserted so the provision reads "...prior to commencing construction in jurisdictional areas, obtain a Water Quality Certification..."
- (b)(3) If a request for a Water Quality Certification is filed after the issuance of the siting permit it should always constitute a minor modification under Part 900-11.1. It is unreasonable to add a 60-day public comment period, plus a responsiveness summary plus a possible hearing when a Water Quality Certification is filed following the issuance of a

siting permit. This should either be deleted or specifically recognized as a minor modification.

#### **§900-1.5 Office of Renewable Energy Siting Review Fee**

- (a) This fee, which is to recover the costs incurred by ORES in the review of the application is a new cost for renewable energy projects. If the intent for the fee is to allow ORES to hire consultant services to assist in the conduct of the project review, ORES should account for the expenditures and return any unspent funds to the applicant. We do however, support ORES having the necessary resources to hire staff and/or consultants to complete the work necessary to efficiently implement this program.
- The Renewable Energy Industry notes that this new fee, combined with the intervenor fee; the fees for costs of holding hearings; the mitigation fees for wetlands, and for threatened and endangered species, and for historic and cultural resources mitigation; the fees for agricultural mitigation now included in NYSERDA's solicitations; the host-community benefit fees proposed by NYSDPS; and the increased contract deposits required by NYSERDA are all contributors to the ultimate cost of renewable resource development in New York State. These added expenses make it more costly to develop resources in New York State than in other jurisdictions and then it otherwise would be. While we do not oppose this particular fee per se, we implore ORES and the State of New York to consider the cumulative impact of these fees on the cost of achievement of the CLCPA goals.

#### **§900-1.6 Filing, Service and Publication of an Application**

- (a)(7) seems both broad and vague. While we are not opposed to this provision, we wonder what agencies would be covered under this provision that would not have already received a copy of the application under earlier provisions.
- (c)(3) Providing a written notice to all persons residing within one (1) mile of the proposed solar facility or within five (5) miles of the proposed wind facility will be costly. We request that the regulations specify that this can be a postcard notification and not the lengthy and technical language included in the newspaper publication, in recognition that a neighbor is more likely to read a shorter and informal postcard with links to the public website shown.

#### **Subpart 900-2 Application Exhibits**

- The Renewable Energy Industry supports the proposed reduction in the number of required exhibits from 41 to 25. This revision will reduce the redundancy in information, consolidate common material in one exhibit and result in a more efficient review process. However, we believe that certain of the exhibits are still redundant to other information supplied and reviewed in other processes, such as the NYISO/utility interconnection

process. We recommend deleting from these regulations any provisions that duplicate existing requirements in DPS and NYISO law. For example, exhibit 22 Electric and Magnetic Fields should be deleted.

### **§900-2.1 Filing Instructions**

- (a) States that “Exhibits not relevant to the particular facility’s technology or proposed location may be omitted from the application.” We support this approach but, in the regulations, it is not at all clear how and when this determination will be made. We recommend that (1) under each exhibit section, language be included regarding when it would not be required and (2) the regulations also specify that ORES can notify an applicant during the pre-application phase if a particular exhibit would not be required because it is not relevant to a particular facility’s technology or proposed location.
- (d) states, *“In collecting, compiling and reporting data required for the application, the applicant shall establish a basis for a statistical comparison with data which shall subsequently be obtained under any program of post-permit monitoring.”* This section is not clear, and we inquire about what obligation it will place on developers?

### **§900-2.2 Exhibit 1: General Requirements, §900-2.3 Exhibit 2: Overview and Public Involvement**

- We do not have any comments on this section.

### **§900-2.4 Exhibit 3: Location of Facilities and Surrounding Land Use**

- (b) The phrase “ancillary features” used in this provision should be defined.
- (f) Are the ancillary features noted in this provision just permanent features? Would this include temporary traffic modifications such as increasing a turning radius to accommodate turbine delivery?
- (l) Requiring a qualitative assessment of the compatibility of the facility, including any off-site staging and storage areas, with existing, proposed and allowed land uses, and local and regional land use plans, located within a one (1)-mile radius of the facility site is excessive. What is the basis for the one-mile radius and should it be identical for wind and solar facilities?
- (m) Requiring even a qualitative assessment of the compatibility of proposed above-ground transmission lines, collection lines, and interconnections and related facilities with existing, potential, and proposed land uses within the study area is excessive. Given that the size study area as defined in this part could extend to 5 miles this would require developers an extensive outlay of time and money to complete the assessment. The Renewable Energy Industry suggests that the radius selected for paragraphs (l) & (m) should be consistent and set at 300 feet.

- (p) & (q) These provisions appear to be duplicative. Paragraph (q) should satisfy both needs. Paragraph (r) should also be incorporated into a revised (p).
- (s) The term “social environment” needs to be defined.
- (u)(1) What is the basis for requiring the use of magnetometers for all oil & gas well surveys in NYS DEC regions 7, 8 & 9? This is a costly requirement and should only be required when available records indicate the likely presence of an oil/gas well on the proposed site.

#### **§900-2.5 Exhibit 4: Real Property**

- (a) Conducting title searches and an American Land Title Association (ALTA) survey is a major expense for a developer. Most developers do not conduct such detailed surveys until well into the process. This exhibit should be based on the information available to the applicant at the time of application with the completed real property record be included in the pre-construction compliance filing in 900-10.2(h). Further, we request clarification if a title search for every parcel along a public road is required since the town typically has that information.
- (d) The regulations should preserve the ability of a developer to file a permit application without having all 100% of land controls in hand. For example, in some cases it would be appropriate for the applicant to have control of all land necessary for the main structures and components of a solar project, but not yet have all the easements in place for the interconnection routes. Allowing some flexibility in the rules for some amount less than 100% control is important.

#### **§900-2-6 Exhibit 5: Design Drawings**

- The Renewable Energy Industry supports the use of general site plan drawings rather than construction-ready drawings in the design drawing requirements. This provision will provide flexibility to developers and not automatically require requests for amendments when siting of facilities matures through the planning process and locations are shifted but the change is not a significant one.
- (b) Table 1 -Clarify that the project gen-tie line is not considered a part of the Bulk Electric System.
- (b) Table 1 – Clarify that non-participating residential structures must have foundations and valid building permits (unless the building pre-dates building permit requirements).
- (b) Table 1 - A 1.5X setback from non-participating, non-residential structures and a 2X setback from non-participating occupied residences is excessive. A setback of 1.1 X tip

height from non-participating, non-residential structures and non-participating occupied residences is the common setback requirement in other states. Excessive setbacks place undue restrictions on the siting of a wind energy facility and can reduce the generation of power due to a reduction in turbines to meet excessive setbacks. Further, in (b) Table 1, the 1.1X setback to “property lines” – should be clarified as applying only to non-participating owners. The only setback that should apply to adjacent participating property owners should be the manufacturer’s required setback.

- (d) Table 2 - The Renewable Energy Industry supports that there is no minimum setback between participating landowners for a solar energy facility. But we also question the inclusion of a 100 ft setback from non-participating residential property boundaries. The combination of 250 ft. from a non-participating residence and 50 ft. from a non-participating property boundary is sufficient, rather than also having 100 ft. setback from a non-participating residential property line. A 100-foot setback from a non-participating residential property line would not be required for other types of land uses, like building construction for example. Further, for a setback from non-residential non-participating property lines, 20 feet is adequately protective, and 50 feet is not necessary in these circumstances.
- (e) What is the basis for limiting the height of solar facilities to 20 feet from finished grade? This could limit certain technology of solar panels in the future especially when considering tracking technology. We recommend this limitation be eliminated or revised to 30 feet.
- (f)(1) Requires the applicant to submit two copies of the general site plan drawings. Five copies of the application are already being provided to ORES. We question the rationale for the provision of two full sets of plan drawings.
- (f)(3) There is no basis for requiring a site suitability report from the equipment manufacturer at the application phase. These reports can involve an extraordinary detailed engineering analysis. Requiring them to be complete before an application can be determined complete, for every turbine under consideration, would limit the ability of developers to maintain competition among manufacturers. Most projects do not obtain site suitability reports until equipment has been purchased. The purchase of equipment happens post-application. Therefore, we request that this requirement be changed.

#### **§900-2.7 Exhibit 6: Public Health, Safety and Security**

- (a) This provision requires detailed information on waste streams that are not associated with renewable energy projects. We suggest this provision be deleted.
- (b)(4) This is already addressed in Exhibit 8 and so should be deleted here.

- (c)(7) This provision should be revised to require that the applicant must “offer” to conduct training drills with emergency responders at least once per year. An applicant cannot require emergency responders to participate.

#### §900-2.8 Exhibit 7: Noise and Vibration

- The Renewable Energy Industry supports the inclusion of design goals for sound. Setting these design goals early in the planning process will allow developers to optimize the layout of the facility. ACE NY and AWEA are submitting detailed comments to ORES on the noise and vibration provisions in a separate filing.

#### §900-2.9 Exhibit 8: Visual Impacts

- (b) Most solar projects are lower profile than many other local development projects. As with other development projects, the visual impact assessment should focus on designated federal and state resources where the view from the site is part of the designation criteria. This is the approach taken for SEQRA.
- (b)(4)(v) Recommend that the phrase “in effect on the date that the application is filed” be added to the end of this provision. Currently it is too vague and can result in pressure on local authorities to continually raise the bar as a means to delay the completion of a visual impact analysis.
- (d) What would be considered an alternative technology that would be assessed? Would it include alternative models or fuel sources or tracking vs. fixed tilt panels? This is unclear.
- (d)(7) The phrase “will not result in complaints” is simply not achievable and should be deleted. It is impossible to guarantee that all complaints will be avoided. The standard for glare should be “no visible red glare to any adjacent non-participating residence.”
- (d)(7) The phrase “impede traffic movements” is ambiguous and does not provide a metric which “not result in” can be measured.
- (d)(9)(iii)(c) Requirements for lighting should be left to the Federal Aviation Administration (FAA) and the developer should comply with those requirements. If the FAA deems that an aircraft lighting system is not necessary, then the developer should not be required to construct one.

#### §900-2.10 Exhibit 9: Cultural Resources

- (a)(4) We suggest that this provision be revised to read: (4) *If required by the Phase I study results, as determined pursuant to section 900-1.3(h) of this Part, the application shall provide a work plan for the Phase II site evaluation study to assess the boundaries, integrity*

*and significance of identified cultural resources and the schedule to implement the Phase II study.*

#### **§900-2.11 Exhibit 10: Geology, Seismology and Soils**

- This Exhibit should only be required if construction is going to use blasting.
- (a)(4) Are geotechnical boring samples required at every turbine and solar array location for the application? This was not required for Article 10 applications and can be onerous for site design purposes, as projects often finalize design based on these reports, which would require multiple geotechnical investigations if project components shift based on preliminary results. Requiring completion of a representative sample of turbine locations would be sufficient.

**§900-2.12 Exhibit 11: Terrestrial Ecology:** We do not have any comments on this section.

#### **§900-2.13 Exhibit 12: NYS Threatened or Endangered Species**

- (d) This subsection contains a presumption that adverse impacts would occur anywhere there is confirmed or presumed presence of a NYS endangered or threatened species, regardless of any avoidance and minimization measures incorporated into the facility design. In fact, for renewable energy facilities, the incorporation of fairly basic avoidance and minimization measures could remove nearly all adverse impacts.
- (d) Identification and evaluation of avoidance and minimization measures incorporated into the facility design would be more appropriately described in the context of a net conservation benefit plan, which is referenced in subsection (f) of this section. We recommend this part (d) be removed to avoid any confusion.
- (f) Suggest that the phrase “Other than for facilities that have a de minimis impact, to...” be inserted at the beginning of this provision to clarify that a Net Conservation Benefit Plan is only required when impacts are determined to exceed the de minimis threshold.

#### **§900-2.14 Exhibit 13: Water Resources and Aquatic Ecology**

- (a)(2) The requirement to send out a survey of private wells within 1,000 feet of the facility site is likely to provoke unnecessary fear and opposition to projects as it causes neighbors to needlessly worry that their wells will be impacted. The Renewable Energy Industry does not believe that well testing requirements are necessary or appropriate. In general, the industry is opposed to testing because it is unnecessary, and it is not typically required by NYSDEC for similar type land uses and there is no rationale for this requirement to applied for these types of land uses.



- (b)(5) & (6) In these two provisions, any reference to NYS water should be revised to read “NYS regulated water(s).”
- (b)(6)(i) The term 1st order streams appears in the discussion of placing solar racks or fencing. This term should be defined, or a reference should be provided where that information can be found, such as *(i) No solar panel racking or perimeter fence shall span a NYS protected waterbody unless it is a first order stream, i.e., stream that has no tributaries or branches.*
- (b)(7)(i)(a) The requirement to replace “existing substandard culvert(s)” is unprecedented as a regulatory requirement for stream mitigation in the state. Generally, the impacts described in Table 1 are temporary in nature (e.g., trenched installation of cable or installation of new culverts). To date, mitigation, has never been required for trenched installation of cables through streams. The installation of culverts designed in accordance with the requirements in 900-6.4(r)(6) and the requirements of the 2017 Nationwide Permit Regional Conditions attached to the US Army Corps of Engineers 2017 Nationwide Permits (Condition G-B.) generally result in only temporary impacts to streams, as these culverts are designed to function as bridges (embedded 20% below the existing stream bed and spanning 1.25 times the width of the stream). The design criteria for culverts themselves result in an effective deterrent for crossing large, high value streams due to the cost of the large, precast concrete culverts required to meet these criteria. Mitigation for culverts should only be required if the design criteria cannot be met and, aside from restoration of temporary impacts associated with trenching activities, no mitigation should be required for cable installation. It should be noted that boring of cables may not be practical or preferred in all instances (e.g., unsuitable soils, small intermittent streams) and horizontal directional drilling (HDD) operations can have additional impacts resulting from mobilization of boring equipment (drill rigs, excavators, water trucks, vacuum trucks, etc.) that may be minimized by use of trenching machines. In addition, the absolute requirement to replace “existing substandard culvert(s)” raises other potential concerns such as identification of “substandard” culverts on non-participating parcels and the need to get permits (from USACE or NYSDEC) for replacement of those culverts that may not be identified until after permits are issued for construction of the Project and may raise additional environmental concerns (e.g., cultural resources or threatened/endangered aquatic species). We believe that replacement of culverts is an option that an applicant can and should consider, however alternate methods should also be recognized. For instance, USACE often allows for the calculated square footage of impacts of the stream (e.g., a 100-foot impact in a 5-foot-wide stream would be 500 square feet) to be included in the overall wetland impact acreage and mitigated as such. This allowance is generally in recognition that installation of a culvert crossing does not result in actual loss of a stream and stream function, as opposed to impacts from rerouting, filling, or otherwise modifying stream channels.
- (b)(7)(ii) If this requirement for the replacement of 2 culverts for each new crossing is retained it raises several issues for implementation. If no substandard culverts are

available for replacement within the sub-basin onsite will ORES be approving culvert replacements at offsite locations? A provision for looking outside the subbasin or implementing alternative mitigation methods is necessary for this circumstance. How are these culverts going to be identified if they aren't on site? Is replacement of an existing culvert for construction of an access road sufficient mitigation (it is for the USACE). What about alternative mitigation such as other stream restoration work?

#### §900-2.15 Exhibit 14: Wetlands

- (a) Insert the word “proposed” into this provision so that it reads: *(a) A map or series of maps showing jurisdictional boundaries of all federal, state mapped, and locally regulated wetlands and adjacent areas present on the facility site and within one hundred (100) feet of areas proposed to be disturbed by construction...* This revision will clarify that at this stage of application process the precise limits of construction are not fully established.
- (d) Reference to off-site wetlands that may be “hydrologically or ecologically influenced” is way too subjective. Additional guidance or criteria needs to be provided by ORES.
- (f) For clarity insert the phrase “mapped state regulated” into this provision so that it reads: *(f) If the applicant cannot avoid impacts to mapped state regulated wetlands and adjacent areas...* Without this edit, this requirement is confusing and suggests that ORES will make determinations regarding minimization of impacts to non-regulated and federal waters as part of this decision.
- (f)(1) This provision suggests a prohibition rather than a need to demonstrate reasonable avoidance. We suggest this section be revised to state: *An analysis of the impact of the construction and operation of the facility on such NYS regulated wetlands and adjacent areas and identification and evaluation of reasonable avoidance measures;*
- (g) Adjacent area mitigation largely means removing current agricultural activities. Further, adjacent area mitigation is possibly more difficult than wetland mitigation as opportunities for doing so are limited. Adjacent area mitigation should not be required in the case of displacement of an active agricultural activity.
- (g)(1) The formula to determine mitigation fees for impact to wetlands that cannot be avoided or mitigated is not included in the proposed regulation. While it may be appropriate to not include this formula in the regulations, we note that these amounts are important both from a cost standpoint, and in their influence of avoidance and design decisions. At a minimum, the ORES regulations should specify that ORES will be the responsible entity for determining the formula(s) for mitigation fees. We also recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.

- (g)(2)(ii) Requiring mitigation in the same Hydrologic Unit Code (HUC) 8 as a rule is problematic but an improvement from Article 10 cases. HUC 8's are still relatively small. We suggest that the regulations allow for flexibility in the cases where there are no opportunities for mitigation within the same HUC 8.
- Table 1 - Mitigation ratios contained in Table 1 seem to exceed the requirements applied to other construction projects under Article 24 of the ECL and certain energy projects that have received a certificate under Article 10. Renewable energy projects should not be held to a higher standard than other construction projects and mitigation ratios that exceed those found in Article 10 projects are not consistent with the goals of the CLCPA.
- Table 1 - If an applicant wants to propose an activity in an area where, according to the table, it is not allowed (X), would they request a project specific permit condition from ORES in the application? The process to address this should be clarified in the regulations.
- Table 1 – Grading and manipulation of areas in a Class 1 wetland that have been previously disturbed by agricultural or commercial industrial development is prohibited according to the table. We suggest that the reuse of a previously disturbed wetland for renewable energy would be no more destructive and provide a greater societal benefit.
- Table 1 - Why is mitigation required for temporary impacts from the installation of transmission lines and collection lines? Generally, mitigation is only required for those if tree clearing is involved. The project developer should be able to reseed the area and not have to do mitigation because there is no permanent impact. Same with mowing of herbaceous vegetation. Generally mowing during operations is done only occasionally to keep woody vegetation out of a transmission line right-of-way. Mowing of herbaceous vegetation should not require mitigation.

#### §900-2.16 Exhibit 15: Agricultural Resources

- (a)(3) This provision is duplicative of Exhibit 3(g) and we suggest that it be deleted from Exhibit 15.
- (b) This requirement is appropriate for the facility site but not for a larger study area. We recommend this be changed to be for *“maps showing the following within the facility site”* But if this subparagraph is applied to non-participating landowners in the study area, which we oppose, it must be limited to *“if available”* because verification may not be available if landowners are unwilling to talk with the developer.
- (b)(1) If the study area is 5 miles, this would require an applicant to potentially field verify over 50,000 acres of land outside of the facility site and therefore not subject to potential disturbance. This would be extremely burdensome and costly and likely not provide

information relevant to the decision-making process. (b)(1) should be limited to the facility site and also allow landowner interviews in addition to field verification.

- (b)(2) & (3) These are not elements of the review that can be mapped even though they appear under (b) *Maps showing the following within the study area*. This information should be required under section (a).
- (e) The Renewable Energy Industry supports the co-utilization of agriculture with solar energy. A well-designed and executed co-utilization plan will preserve the land for 25-45 years (at the end of the lease the facility is removed) and can allow for agricultural uses that will support the local farm economy (seed companies, farm equipment providers, veterinary services, etc.) while potentially allowing the growth of local food markets. However, the concept of co-utilization is a relatively new topic so finding an accredited third party to develop a plan may be difficult. We suggest that the phrase “or accredited third party” be deleted from this provision.

#### **§900-2.17 Exhibit 16: Effect on Transportation**

- The Renewable Energy Industry supports that the requirements for a traffic assessment for solar energy facilities have been scaled back compared with the requirements for a wind energy facility. Equipment and materials for the construction of a solar facility are similar to other local construction projects.
- (f) Since a Department of Defense review is included in the FAA process, (f)(2) is not necessary and should be deleted.

#### **§900-2.18 Exhibit 17: Consistency with Energy Planning Objectives**

- Because all of 94c applies only to wind and solar projects, this Exhibit is not necessary and will not be used by ORES in any decision-making regarding permit conditions. All of the elements of this exhibit are requiring the developer to make an assessment of how the proposed project will meet energy planning requirements that are mandates of the CLCPA or are planning obligations of the NYISO. This required Exhibit should either be completely eliminated or changed to simply be a statement of the expected megawatt-hours of electricity generation that will result from the construction of this facility.

**§900-2.19 Exhibit 18: Socioeconomic Effects:** We do not have any comments on this section.

#### **§900-2.20 Exhibit 19: Environmental Justice**

- For clarity, this section should be divided into two analyses. The first should be whether the facility is in, adjacent to, or within a half mile of an Environmental Justice area as defined in 900-1.2(u). If it is not, then additional analyses should not be required. If it is,

then the analysis described in 900-2.20 must be undertaken. For the second analyses, a geographic cap of 2 miles should be placed on the requirement for an expanded environmental justice analysis cited in 900-2.20(a)(2).

#### **§900-2.21 Exhibit 20: Effect on Communications**

- The Renewable Energy Industry supports that the requirements for an assessment on telecommunications for solar energy facilities has been scaled back compared with the requirements for a wind energy facility.
- (a) It is unlikely that the telecommunications provider would be capable or willing to provide this information so long before a facility begins to take service.
- (e) & (f) The evaluation and assessment required by (e) & (f) are already required as part of the NYISO review and should be deleted here.

#### **§900-2.22 Exhibit 21: Electric System Effects and Interconnection**

- Section 900-2.22 should be revised to account for the NYISO Facilities Study timing. In addition to requiring that applications include an approved System Reliability Impact Study, as does Article 10, Section 900-2.22 (Exhibit 21) requires details concerning the interconnection and system upgrade facilities that are subject to change during the Class Year Facility Studies that are outside of developers' control. Developers face unavoidable challenges timing and sequencing the development processes posed by State permitting on the one hand and NYISO interconnection approvals on the other hand. These challenges are compounded by the fact that the two processes are interrelated with each requiring identified progress in one before progressing in the other. Through no fault of developers, the NYISO interconnection approval process can and frequently does lag behind the permitting process. Moreover, it is logical to expect that once the ORES rules go into effect, NYISO will need to amend its tariff to account for differences between the ORES and Article 10 rules leaving lingering uncertainty in the interrelationship in the interim.

Therefore, The Renewable Energy Industry recommends that the opening sentence of Subpart 900-2.22 be revised to read "Based on information available from the completed SRIS and subject to changes that may result from the NYISO Class Year Facilities Study, Exhibit 21 shall contain:"

#### **§900-2.23 Exhibit 22: Electric and Magnetic Fields**

- While we do not believe that provision of this material as part of the ORES application is necessary, we also not that it appears that the electric and magnetic fields exhibit should be exhibit 22 not 23.

### §900-2.24 Exhibit 23: Site Restoration and Decommissioning

- (c) The Renewable Energy Industry supports the proposed language that allows salvage value to be taken into account when estimating decommissioning and site restoration costs. This is a significant improvement over the current practice in Article 10 and will reduce costs incurred by developers while still providing adequate resources for full decommissioning. We also support the specificity provided regarding the decommissioning of all facility components removed four (4) feet below grade in agricultural land and three (3) feet below grade in non-agricultural land.
- (c) The Renewable Energy Industry proposes that the contingency be reduced to 10 percent. A 10 percent contingency should be sufficient to ensure that adequate resources will be available for full decommissioning and site restoration to be undertaken.

### §900-2.25 Exhibit 24: Local Laws and Ordinances

- (a) This provision currently does not contain a timeframe for the enactment of local laws that could apply to a project. The Renewable Energy Industry believes that any local law/ordinance that would apply to the facility under review must have been adopted prior to the date that the application is submitted to ORES. We ask that this requirement be reflected in the Exhibit 24 requirements.
- (b) We suggest this provision be amended. It should read *(b) a list of all local ordinances, laws, resolutions, regulations, standards and other requirements applicable to the placement of electric collection, water, sewer, and telecommunication lines in public rights of way that are of a substantive nature, together with a statement that the location of the facility as proposed conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply.* But limiting the waiver of unreasonably burdensome local laws in this section to only those laws that apply to the interconnection in public rights of way is unnecessarily restrictive. NY Executive Law 94-c(e) provides that “the office may elect not to apply, in whole or in part, *any* local law or ordinance which would otherwise be applicable...” (emphasis added). Collection lines invariably cross local roads and a municipality should not be in a position to block an ORES-approved renewable energy project by refusing to enter into a reasonable road use agreement or grant another local approval for placement of collection lines in a municipal road.
- (c ) This provision should be modified to conform to section 94-c(5)(e). The language currently proposed is identical to that found in the Article 10 regulations. By retaining the text found in Article 10 ,the draft regulations do not conform to the standards established in Executive Law section 94-c(5)(e). In order to meet the goal of streamlining the siting process ORES has an obligation to adopt regulations that are in harmony with the statute. We suggest that this provision be revised to read “*(c) A list of all local substantive requirements identified pursuant to subdivision (a) or (b) of this section for which the*

*applicant requests that the Office not apply to the facility. Pursuant to Executive Law Section 94-c, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.” Another option would be to add a provision 900-2.25(c)(4), “For requests grounded in the CLCPA targets, that the local law is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”*

- (c) The phrase “...reasonably be obviated by design changes to the facility” in the determination of what constitutes a burden will cause problems with interpretation and application. If it is a height restriction or setback or a zoning restriction, having an applicant cost out the deletion of one or more turbines or use of a smaller/shorter turbine, or having a smaller solar facility will always be raised. In every case, the design can be changed to make a project smaller and less profitable, but the applicant shouldn’t have to prove that every time. It should be adequate to provide a justification regarding why the burden cannot be reasonably borne by the applicant and how the requirement is different and more burdensome than what is in ORES’s uniform conditions. Compliance with the ORES uniform standards and conditions should carry significant weight and in those cases the burden of proof should be on the intervenor.

**§900-2.26 Exhibit 25: Other Permits and Approvals:** We do not have any comments on this section.

### Subpart 900-3 Transfer Applications from PSL Article 10 or Alternative Permitting Proceeding

**§900-3.1 Transfer Applications for Opt-in Renewable Energy Facilities:** We do not have any comments on this section.

### **§900-3.2 Transfer Applications for Pending Article 10 Facilities**

- (a)(1)(vi) For projects that transfer into the 94-c process from Article 10, the fee to be deposited into the local agency account should reflect the remaining balance of intervenor funds already paid under Article 10. (See 900-3.2(vi)) Additionally, if parties will be required to reapply for funding, the process should be explicit in the regulations, so that local agencies and community parties understand they have to reapply, and that any Article 10 rulings will not transfer over to the 94-c process. Further, we suggest that the following sentence be added at the end of existing provision: *“The Applicant shall be credited for any amounts incurred by intervenors and for which reimbursement is, or will be sought, prior to transferring pursuant to this section.”*

## Subpart 900-4 Processing of Applications, §900-4.1 Office of Renewable Energy Siting Action on Applications

- (c) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the review of a submitted application and the issuance of a determination of completeness.
- (d) The Renewable Energy Industry supports the requirement that a notice of incomplete application include "...a listing of all identified areas of incompleteness and a description of the specific deficiencies." But it is not clear if new issues can be identified when the application is resubmitted. There should be specific regulatory language that all incompleteness issues have to be identified in the first 60 days and there should not be multiple rounds of identifying new issues. This has been an issue in Article 10 and has also been an issue in SEQR for large projects with multiple notices of incomplete application. Title 19 of NYCRR Part 900 should prohibit multiple notices in the new regulations to set that bar right from the start.
- (e) Since the review of a resubmitted application should be more focused, it should not require 60 days to determine the completeness of a resubmitted application. ACE NY supports a 30-day limit on the review of a resubmitted application.
- (h) The Renewable Energy Industry supports the default determination of completeness should the Office fail to provide notice of completeness or incompleteness within 60 days.

## Subpart 900-5, §900-5.1 Local Agency Account

- (a) Requires that parties seeking funds from the local agency account must submit a request to the Office within 30 days after the date on which a siting permit application has been filed. (b) Requires that within 30 days following the request, the ALJ shall award local agency funds to those entities that comply with the provisions of subdivision (h). This approach seems to allow the possibility that someone who does not meet party status requirements can still get local intervenor funding. Party status should be a precondition to getting local intervenor funding. Further, in Subpart 900-8(4)(5), the window for party status appears to be running at the same time as the identification of issues for adjudication. This may not work. Parties frequently need confirmation of party status before they spend time and money reviewing the application and identifying potential issues for adjudication.

## Subpart 900-6

**§900-6.1 Facility Authorization, §900-6.2 Notifications, §900-6.3 General Requirements:** We have no comments on these sections.

## **§900-6.4 Facility Construction and Maintenance**



- (b) The Renewable Energy Industry strongly recommends that the on-site environmental/agricultural monitors be given the authority to approve minor project changes that typically arise during construction. The environmental monitor would then be required to document the change and inform ORES of the change within a specified timeframe. Empowering the Environmental Monitor to approve these minor project changes during construction without seeking prior ORES approval will limit construction delays.
- (l)(3) Requiring a qualified landscape architect, arborist, or ecologist to inspect the screen plantings for two (2) years following installation to identify any plant material that did not survive, appears unhealthy, and/or otherwise needs to be replaced is very costly. Overall, this type of post-construction monitoring is a new requirement, and we recommend the requirement be reduced to one year unless the inspection in the first year identifies the need for replacement plantings.
- (n)(1)(iii)(c) and (n)(2)(iii)(d). It is not necessary, nor is there a rationale, for well testing within 500 ft of a horizontal directional drill (HDD). The disturbance from HDD is no greater than trenching. There should be no impact from HDD to wells and testing should not be required within 500 feet. 100 feet would be more reasonable.
- Similarly, in (n)(2)(iii)(a), what is the rationale for well testing within 100 feet from construction of access roads and collection lines? Construction of roads and collection lines does not impact well water quality, nor is this required for other road construction, other types of economic development or land uses. Also, this does not take into account agreements with participating landowners. We recommend that this requirement be deleted. If retained, this provision should only apply to non-participating landowners.
- (o)(1)(ii) Net conservation benefit should not only factor in location and minimization measures. There are a number of other factors, such as level of impact and conservation/mitigation actions that could also contribute to a net benefit.
- (o)(1)(i)(iv),(v) and (vi) all include requirements for information about any mitigation measures that might be taken. We recommend that these three points be combined into one: *The identification and detailed description of the minimization and mitigation actions that will be undertaken by the permittee to achieve a net conservation benefit to the affected species, including, if applicable, payment of a required mitigation fee into the Endangered and Threatened Species Mitigation Fund established pursuant to section 99(hh) of the New York State Finance Law; and ...*
- (o)(2) It is unclear why a path to determining de minimis impacts should only be provided for NYS threatened or endangered grassland birds. A de minimis impact to other NYS threatened and endangered species may also occur, and a more efficient treatment of those species would help the overall goals of renewable energy deployment.

- (o)(3)(iii) The work windows for construction in grassland habitat are not practical. They could result in the construction of a renewable energy facility across two construction seasons resulting in dramatically increased construction costs and a delay in bringing the facility online. We recommend that these windows get modified. ORES should explore if the seasonal restrictions for grassland birds could be tailored to the specific region of the state. Experts have suggested that work windows could differ by region.
- (o)(3)(iii) In addition to modification of the work windows, the Renewable Energy Industry recommends that the types of work be defined more clearly. For example, it is not feasible to restrict staging, storage and transportation of equipment and components during the defined windows. Those activities are typical to everyday work at a renewable energy facility and such restrictions could be interpreted to effectively halt construction altogether during those timeframes.
- 900-6.4(o)(3)(ix) We note that although this provision is written to inform the applicant about mitigation options other than contributing to the Species Mitigation Bank Fund, it is not possible to determine the number of acres that would be required for a permittee implemented grassland bird habitat conservation plan without disclosure of the full formula for making that determination. For example, will a buffer be placed around the locations where grassland birds are displaying essential behaviors? How large a buffer? Will the calculation take into consideration the expected amount of time it would take, absent management, for grassland habitat in the area to transition to a condition that is predominately unsuitable for use by the target species and the number of years the project will be considered to be operational? These details of the formula are essential before one can determine if the ratios are acceptable or will they serve as a deterrent to permittee-initiated grassland bird habitat conservation plans being developed in lieu of paying the mitigation fee. We recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.
- (o)(4)(a) Increased cut-in speeds can have a significant impact on energy generation, reducing the amount of carbon emissions that are offset from other sources of generation, and increasing the REC prices needed to support a project's financing. There is no data that demonstrates a cut-in speed of 5.5 m/s minimizes impacts to bats more significantly than lower cut-in speeds. The effectiveness of minimization depends on a number of factors, such as location relative to known or unknown hibernacula or maternity colonies, bat activity in the area, equipment type, suitability of surrounding habitat. The Renewable Energy Industry strongly recommends a lower cut-in speed be adopted. The five years will present an opportunity to consider new technology, knowledge and other information to further inform more practicable approaches to minimize bat impacts, without the significant costs of a 5.5 m/s cut-in speed.

- (o)(4)(ii), & (o)(6) & (o)(8) Please clarify that the cessation of activities around an identified nest when a facility is operating does not include cessation of power generation.
- (o)(4)(v)(b) Requiring each developer to conduct and submit a review of curtailment operations every 5 years or sooner, if requested, seems unnecessary. Further, we ask if DEC really wants to receive a different report from each site operator regarding changes in technology or knowledge of impacts to bats. We suggest that this be an *option* for site operators. Also, this could be viewed as an agency responsibility to stay current on the research and to know if new mitigation or avoidance techniques become available in order to work with the project sites to implement those techniques that will decrease mortality at the same or reduced cost. In any case, it seems like it should be to achieve “the same or less mortality at the same or less cost to the operator”, or “to achieve the same mortality while producing more pollution-free power.” This would at least provide the operator the option to demonstrate that they could protect bats just as much with a new and improved (and potentially cheaper) methodology and/or contribute more to NYS’s renewable energy goals.
- (o)(6) Measures to avoid or reduce impact to eagles and other listed wildlife species taken during project site design should be given weight by the resource agencies when determining the need for additional mitigation in a Net Conservation Benefit Plan (NCBP).
- (o)(6)(i) Doubling the avoidance/disturbance distance for eagle nests without a visual buffer has no evidentiary basis and is inconsistent with USFWS requirements.
- (o)(8)(ii) Requires that if any dead or injured federal or NYS threatened or endangered bird species, or eggs or nests thereof, are discovered by the permittee’s on-site environmental monitor or other designated agent at any time during the life of the facility the permittee shall immediately (within 24 hours) contact the NYSDEC and the United States Fish and Wildlife Service (USFWS). The Renewable Energy Industry believes that the word “discovered” should be changed to “identified” so that the notification would be required within 24 hours after the species has been positively identified by an expert.
- (q)(1)(i) “Amphibian breeding areas” adds another work window (April 1 to June 15) that will further complicate planning and conduct of site construction. This provision should be deleted. It is addressed by prohibitions regarding work in wetlands. If it is retained, which we oppose, in-field deviations should be allowed if approved on-site by a regional DEC biologist.
- (q)(1)(viii) & (x) Placement of soil on geotextile when trenching is problematic. It is almost impossible to cleanly replace soil without incorporating geotextile. While this sounds good in theory, in practice it is very difficult to implement. In addition, it provides limited to no environmental value but increases cost of construction. We suggest this requirement be eliminated.

- (r)(2) Allowing work windows for in-stream work to be modified (September 15 through May 31 in cold water fisheries and March 15 through July 15 in warm water fisheries) with site-specific approval from the Office is a practical provision but in-field deviations should also be allowed if approved on-site by a regional DEC biologist or the on-site Environmental Monitor.
- (s) The Renewable Energy Industry is pleased that the proposed regulations no longer contain an agricultural mitigation fee and understands that any fee to mitigate the impact on agricultural resources will be addressed during the NYS Energy Research & Development Authority (NYSERDA) Tier 1 solicitation under the Clean Energy Standard.
- (s)(1)(i) & (s)(2)(i) The Renewable Energy Industry supports the inclusion of the phrase “to the maximum extent practicable” into the requirement to follow the “Guidelines for Solar Energy Projects-Construction Mitigation for Agricultural Lands”, dated 10/18/2019 and the “Guidelines for Agricultural Mitigation for Wind Power Projects”, revised 4/19/2018. Strict compliance to all the provisions is often not practical.

**§900-6.5 Facility Operation:** We do not have any comments on this section.

#### **§900-6.6 Decommissioning**

- (b) The Renewable Energy Industry supports the proposed language that allows salvage value to be taken into account when estimating decommissioning and site restoration costs. This is a significant improvement over the current practice in Article 10 and will reduce costs incurred by developers. However, there are additional ways that the upfront costs to developers can be reduced. ACE and its members suggest that the bond could be spread over the first 10 years of operation with 50% due prior to construction (based on the results of the initial decommissioning study), and 50% due in year 10. The second installment would be contingent on an updated decommissioning plan to ensure that salvage and removal costs are accurate. This change would also be beneficial for local government and landowners because it would give them confidence that the project bond will be adequately funded.

#### **Subpart 900-7, §900-7.1 Amendment of an Application**

- We recognize that ORES is trying to balance the imperative for a fast , efficient, and predictable process with the need for it to be workable in the real world, i.e., the need for flexibility as projects change through the development process. For the developers of wind and solar projects, this is a difficult issue: how modifications and amendments are handled and the required level of finality in the application in terms of site and project design. We have the following recommendations regarding how to strike this difficult balance.

- Provision (a) states that a major amendment to the application may only be filed with the express written permission of the ORES. While we understand that this is meant to discourage amendments and encourage applicants to have mature projects, this specific approach doesn't make sense and includes unnecessary steps (or, at least, steps in the wrong order). In (b)(1), applicants are directed to submit a written request to amend an application. But an applicant should not be required to first ask ORES if they can file a major amendment, and then subsequently ask the Office if the desired amended t is major or minor, especially because (a) apparently only applies to "major" amendments. Thus, the first step should be to file a requested amendment with the ORES, and the Office will then determine if the change constitutes a minor or major amendment.
- Further, the fact that part (a) states that there cannot be major amendments even requested without permission seems exceedingly restrictive and will act as a disincentive to applicants to make changes to address a concern raised after the application is filed, because it automatically extends the statutory timeframe for decision and requires re-noticing. The Renewable Energy Industry suggests that this provision should not apply to changes proposed by the applicant in a genuine effort to resolve issues or address concerns raised by stakeholders in response to the application.
- Second, if ORES notifies the applicant within 15 days that an amendment is minor, the regulations do not specify what happens next. Would ORES also notify the applicant at that time if the minor amendment is accepted? The regulations should clarify this question.
- Next, if ORES determines that the amendment is major, and the statutory timeframes are extended accordingly, why would ORES not grant permission for the applicant to submit that amendment? And, if a request for an amendment is denied, does the applicant start again at the application stage or the pre-application stage? In general, if the submission of a major amendment re-sets the timeframes for ORES review and action, it seems appropriate that the major amendment would be accepted. Said another way, a minor amendment should be acceptable to ORES without changing the timeframes, but a major amendment should appropriately change the timeframes and be reviewed with the rest of the application.
- Another solution to this conundrum would be to have the include a separate "application supplement" category, to be defined as "a change in the siting permit application likely to reduce any identified adverse environmental impact or made to address a substantive and significant issue raised in the proceeding." Application supplements should be permitted up and until the ALJ makes a recommended decision or determines there are no issues for adjudication in the proceeding. ORES could review application supplements within fifteen days, just as they review amendments. This would permit applicants to make project changes to address adverse environmental impacts and substantive and significant issues without creating the need for any additional process or review. Without this change, all potential changes would have to wait until a permit has been issued (assuming a major amendment would not be allowed) and that just doesn't make sense.

- Given all of the above concerns, the Renewable Energy Industry suggests that this section be revised to read:

*§900-7.1 Amendment or Supplement of an application*

*(a) Pending applications may only be amended pursuant to this section. Pending applications may be supplemented prior to the issuance of the recommended decision or within 30 days of the issues determination if there are no adjudicable issues.*

*(b) Requests regarding an application change*

*(1) An applicant wishing to amend or supplement a pending application shall submit a written request to the Office, setting forth:*

*(i) The proposed change to the application;*

*(ii) A justification as to why such changes are required; and*

*(iii) An anticipated timeframe for resubmission (if not already included with the request).*

*(2) The Office shall review the request and, within fifteen (15) days of receipt thereof, inform the permittee as to its determination as to whether such changes constitute a minor amendment to be processed by the Office without change to the statutory timeframes; a major amendment subject to subdivisions (c), (d), and (e) of this section; or an application supplement which shall be submitted to the record of the proceeding.*

## Subpart 900-8, §900-8.1 Publication of Draft Siting Permit

- (a) & (b) The Renewable Energy Industry supports the inclusion of a 60-day timeframe following the completeness date for the publication by ORES of the draft permit conditions and the combined notice. We note that the way that this is currently drafted, [*“No later than sixty (60) days following the date upon which an application has been deemed complete and following consultation with any relevant state agency or authority, ...”*] leaves open the possibility that a failure of ORES to consult with the relevant state agency could be used as a rationale to delay issuance of the Draft Permit. This 60-day time period should not be allowed to be exceeded if the required consultations with state agencies have not occurred. That is, a failure of the agencies should not be used to delay the issuance of a draft permit. The language should be modified to prohibit this.
- (b) All notices should be in one section, so this should either be consolidated or moved to 900-8.2. It is confusing whether the notice identified in (b) is the same as notice in 8.2(a).

## §900-8.2 Notice of Hearing

- (a) In conjunction with the previous comment, the use of the term “or” an adjudicatory hearing is confusing because the public comment hearing is held prior to issues determinations - this does not seem like an or – unless this section only addresses

adjudicatory hearing notices with the previous comment about (b) being the notice for public comment. There should clearly be a Combined Notice section and an Adjudicatory Hearing section, the two appear to have different timing and content requirements.

- (a) The Renewable Energy Industry supports the provision that any delay of the commencement of the hearing beyond the deadlines established in Part 900 requires the applicant's consent.
- Part (c) Optional Contents seems like it would not yet be possible if the issues determination hearing has not occurred and issues have not been submitted, unless this is only referring to the adjudicatory hearing notice and not the public comment period notice.
- (d) should specify how is this notice is different from the hearing notice, if it is. There are multiple timeframes and content all under the same section and it would be simpler to break this out or reorganize this.
- Provision (d)(1) states that the minimum public comment period on draft permit conditions will be 60 days. This should be the maximum public comment period. With the use of the standard conditions, it would be possible to have a 30-day review period. Further, as written in (d)(1) it appears that there would potentially be a comment period longer than 30 days, and a maximum comment period is not defined nor is it defined what would trigger a longer comment period. This level of uncertainty will make it difficult for planning. Therefore, we recommend a maximum public comment period of 60 days.

### **§900-8.3 Public Comment Hearing and Issues Determination**

- Based on direct experience with Article 10, wind and solar project developers have a keen interest in a fair, efficient, and timely process for the hearings and the issues determination. While these aspects of the permitting process may not seem to be the most critical to some, this is the segment of the process that is prone to contention and delays.
- Provision (a) discusses a public comment hearing. As a clarifying question, will a public comment hearing be required for all projects? Section 94-c section 4(5)(c)(ii) of the Executive Law states that a public hearing is only required when a municipality has provided a statement "...that a proposed facility is not designed to be sited, constructed, or operated in compliance with local laws and regulations and the office determines not to hold an adjudicatory hearing on the application, the department shall hold [a] non-adjudicatory public hearing..."
- Part (b)(1) refers to a "prospective party" which is not a defined term and this section should most likely refer to a "potential party" which is a defined term.

- Also, in (b)(1), the process for submission of issues is confusing. This language makes it sound like there is a separate process for issue submission, but our understanding is that parties submit their issues with their party status request. Would the submission of issues statements be made during the 60-day public comment period? It would make sense that the parties submit their issues during this time, then there is the public comment hearing, and then the ALJs issue their determination, but it is not clear that is the intended process.
- (b)(1) This provision gives broad discretion to the ALJ to reopen the issues determination process with only generalized standards and no obvious means for avoiding placing applicants in the untenable position of choosing between denial and a “voluntary” extension of the ORES deadline. We proposed the following edits to the text to limit the reason for reopening the issues determination to the availability of new information raising significant and substantive issues: *Upon a demonstration that such information raises a new significant and substantial issue that must be adjudicated, ~~the public review period for the application prior to the issues determination was insufficient to allow prospective parties to adequately prepare for the issues determination procedure,~~ the ALJ may adjourn the issues determination, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the prospective parties.*
- Lastly, (b)(1) is not specific as to what kind of showing would be required to demonstrate the public review period was insufficient. Guidance should be provided on this issue.
- Provision (b)(4) is quite confusing as written. For example, it is hard to know when the close of the public comment period occurs and when the filing of petitions for party status or the filing of a statement of compliance with local laws are due. A process for submission of issues statements and responses should be spelled out, such as: *Thirty (30) days from the Notice of Draft Permit, parties must submit their issues statement. The applicant shall have fifteen (15) days to submit their responses and the ALJ’s shall make an issues determination no later than 30 days after Public Comment Hearing.*
- Even though provision (b)(4) states “within fifteen (15) days”, because provision (b)(4)(i) says “may,” it is not at all clear when exactly ORES is required to issue the responses to requests for party status, or responses to the statement of issues of the applicant, or the responses to the statement of compliance with local laws. This section should be clear that all of these responses will happen in the mandatory 60-day comment period.
- (c)(7) Since this provision applies to post permit modifications it should be moved to 900-11.4.

#### §900-8.4 Hearing Participation

- (c)(1) The Renewable Energy Industry believes that a party should have a local nexus to the proposed facility in order to qualify for party status. We propose that existing (i) through



(v) be renumbered (ii) through (vi) and a new (i) added to read (i) *demonstrate that the proposed party is a resident of the community in which the proposed facility will be located or is a resident located within one (1) mile of a proposed solar facility or within five (5) miles of a proposed wind facility or is a non-profit organization that can demonstrate a concrete and localized interest that may be affected by the proposed facility and that such interest has a significant nexus to their mission.* This is especially appropriate given that there are procedures specified for non-parties as well.

- (d) Unlike Article 10, the proposed 94-c regulations already include uniform standards addressing potential impacts and design criteria (e.g. setbacks, sound, and shadow flicker). By adopting the uniform standards, the ORES is making a determination regarding the appropriateness of the standards in meeting the objectives of 94-c and that the standards are appropriate to protect human health and the environment. The Renewable Energy Industry requests that the regulations should be clear that a party proposing a site specific standard, even if it is a provision of a local law that is different than a uniform standard, carries the burden of showing the appropriateness of the standard in the particular context of the project. It should not be the applicant's burden to oppose more stringent local laws in each proceeding upon the adoption of the uniform standards. ORES should be explicit that the municipalities bear the burden of establishing the need for more stringent standards they seek to enforce than the regulations.
- (f)(1)(ii) This is a more permissive requirement than is currently in Article 10. The Renewable Energy Industry suggests that this provision be revised to read *"(ii) A finding that the petitioner has a sufficient local nexus to the proposed facility, and resides within (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility or represents individuals who reside within (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility;* Then, (f)(1)(iii) would be the current (ii): *"(iii) A finding that the petitioner has raised a substantive and significant issue or ..."* We acknowledge that this change would be moot if our recommendation with respect to Part 900-8.4©(1) is adopted by ORES.

### **§900-8.5 General Rules of Practice**

- Regarding provision (a) on Service, the Renewable Energy Industry believes that there should be a system in place like DMM or the court e-filing system so parties can see all papers and consent to electronic service. As written here, it could be that it would be the burden on the Applicant to get all parties to agree to electronic service and even then, per (a)(3) to send everything by mail. This section should be modified.
- Per provision (a)(3), email service should be the default method and should be encouraged. Simultaneous mailing should not be required. Mail service should be reserved only for parties without email capability.

- (c)(1) Filing and service of motion papers should be by email, not be personal delivery or first-class mail as in this proposal.
- (e) This section (Expedited Appeals) may be easier to follow if it was moved to section 900-8.7 Conduct of the Adjudicatory Hearing.

#### **§900-8.6 Disclosure**

- The reference to FOIL is confusing since private applicants are not subject to FOIL. Presumably the intention is to allow members of the public access to documents in the possession of ORES, but FOIL already affords that access. This reference should be deleted or explained more.
- In provision (b), the language should clearly specify that the discovery scope is limited to adjudicable issues and limited to material that is relevant to issues in dispute.
- (b)(3) This provision is very burdensome and impractical and typically developers would not have the access rights to accommodate this request. Therefore, Parties should only have this right upon making a showing of the need for it.
- (b)(6) Again, this provision is very burdensome. Parties should only have this right upon making a showing of the need for it.
- (c)(4) This seems unreasonable especially given the time periods for decisions and hearings and the issue raised in comment on (b)(3) above.
- (e) Is there a process for filing direct and rebuttal testimony or is pre-filed testimony the only testimony permitted? We would recommend that the ALJ be permitted to allow the filing of rebuttal testimony at his or her discretion.
- (f) This civil litigation vehicle is not a reasonable or necessary tool in a permitting procedure which benefits from the direct involvement of agency technical experts.

#### **§900-8.7 Conduct of the Adjudicatory Hearing**

- Provision (a)(5) addressed the close of the record. Our opinion is that the Hearing Record should be closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, and not include post hearing briefs. Or, a distinction should be made between the Evidentiary Record and the Hearing Record. Briefs are not appropriate for submitting factual material not in evidence.

#### **§900-8.8 Evidence, Burden of Proof and Standard of Proof**

- Provision (a)(1) What are the reasons supporting the allowance of hearsay evidence into the record? What weight is hearsay evidence and which party bears the burden of proof when hearsay evidence is contradicted by other testimony or data? We recommend that hearsay evidence not be admissible unless it falls within an exception to the hearsay rule as provided in New York Civil Practice Law (CPLR) Article 45 or other law. Any admissible hearsay must be shown to be reasonably reliable, relevant and probative. The burden of establishing an exception rests upon the proponent of the statement.

**§900-8.9 Ex Parte Rule:** We do not have any comments on this section.

**§900-8.10 Payment of Hearing Costs:** We do not have any comments on this section.

#### **§900-8.11 Record of the Hearing**

- In provision (b), the regulation should clearly distinguish between the evidentiary record (i.e., the record developed during the adjudicatory hearings with sworn testimony) and the entire record (which includes all the documents listed in 900-8.11 (b)). Factual issues should only be determined based on the evidentiary record.

**§900-8.12 Final Decision:** We do not have comments on this section.

### Subpart 900-9, §900-9.1 Final Determination on Applications

- The renewable energy industry requests that an additional provision 9.1(a)(3) be added that requires ORES to issue its final determination on a permit within 8 months of the completeness determination if no adjudicatory hearing is held and all permit conditions have been agreed to by the applicant.

### Subpart 900-10

#### **§900-10.1 Office Decisions on Compliance Filings**

- One of the flaws of the Article 10 system has been that even after a Certificate was issued, it still takes many months, even years, before construction can begin. This has largely been due to the filing and review of a great variety of compliance filings. This process needs to be dramatically improved in 94-C. Currently, Subpart 900-10 identifies sixteen plans to be filed after a siting permit is granted as compliance filings. The ORES has 60 days to notify the permittee if each of the plans are acceptable and a Notice to Proceed with Construction will not be issued until all are approved. This approach is setting the stage for potential significant delay and there is, in fact, no reason to mandate that the 16 plans only be filed after the permit is issued. The proposed regulations could be changed to authorize applicants to include any of the listed plans in its application at their option or filed with

ORES within a specified time period before permit issuance. With those plans included in the application, or subsequent thereto, the draft permit issued could include approved versions of those plans, thereby eliminating the need for those plans to be resubmitted as compliance filings. One of those filings could be detailed clearing and grading plans to allow the applicant to begin those activities shortly after permit issuance. Most of the plans will be based on generic, formulaic plans with minimal need for project-specific details to be incorporated. Applicants will be able to - and should be given the option to - include these plans, as modified with project-specific details, in their applications, especially given the greater degree of project development required by the ORES proposal for an application to be deemed complete as compared to Article 10. This change will reduce the time needed to prepare, review and approve the post-certificate compliance filings. An additional solution to this issue is to change the rules to allow applicants to submit compliance filings for ORES review once a draft permit is issued. In anticipation that a draft permit will in many respects be substantially the same as the final permit, applicants should be free to expedite construction schedules by submitting compliance filings once a draft permit is issued. ORES staff could then begin its review. Further, the rules should provide for a shorter period for review and approval of compliance filings than the 60 days proposed, such as 30 days. ORES will have sixty (60) days to review an application to determine if it is complete and another sixty (60) days to issue a draft permit. Applications will describe project plans much closer to final than in Article 10. Furthermore, the fact that there will be standard conditions applying to every project will greatly reduce the number of project-tailored conditions. Therefore, a month to review compliance filings would be adequate.

- The issue of moving from permit issuance to the commencement of construction is critical for wind and solar developers, especially given that elsewhere in the proposed regulations there are narrow construction windows related to species protection and other environmental resources. Navigating these various construction windows and restriction in a way that complies with all of these requirements is complex. To expedite the process from permit issuance to construction we make these three recommendations (1) allow the inclusion of compliance filings in the application, (2) allow compliance filings to be filed with ORES after the Draft Permit is issued, and (3) Provide ORES 30 days to approve of compliance filings. These three recommendations will help facilitate timely and safe construction, and not one of them reduces environmental review or weakens or changes any of the conditions to protect communities or the environment.
- The proposed regulations should be clarified to specify that work can begin on an approved compliance filing, which may be filed as one of many, as allowed under Article 10 currently. Allowing compliance filings to be made (and approved) in stages would allow an applicant to commence construction on the portion of the site covered by the approved compliance filing and not be delayed until the entire compliance filing package is approved, substantially expediting, and adding flexibility to the construction process. This is especially needed given the required work windows for T & E species and water resources.

## §900-10.2 Pre-Construction Compliance Filings

- We recommend that in (a), the words “and operation” be deleted. The permits and approvals required for construction are appropriate pre-construction filings, but the permits and approvals for operation should be provided for information only and should not be a compliance filing that needs to be approved by ORES before construction can begin.
- In provision (b) on Final Decommissioning, the Renewable Energy Industry supports the proposed language that, in addition to a letter of credit, other means of financial assurance will be allowed if approved by ORES. This proposal will provide site operators with additional flexibility in complying with the requirement while also providing local municipalities with the assurance that site decommission and restoration costs will be covered.
- (b)(1) Requires that the Final Decommissioning and Site Restoration Plan contain proof that the letter(s) of credit (or other financial assurance approved by the ORES) have been obtained but in (b)(2) it states that the letters of credit can be submitted after one year of facility operation. This should be clarified.
- Provision (d) Wind Turbine Certifications requires a verification that turbines were designed accordance with International Electrotechnical Commission (IEC) 61400-1. In fact, this certification can be time-consuming to obtain and is not in the project developer’s control, but rather the turbine supplier and the entity providing the certification. The Renewable Energy Industry suggests that ORES should tie this requirement to the pouring of foundations for turbines and not to the initial start of construction or have the ability to approve the construction conditioned upon the verification being submitted prior to the pouring of foundations as has been approved in some Article 10 cases.
- (e)(3) & (4) The Facilities Management Plan and the Vegetation Management Plan should be post-construction compliance filings. These plans cover facility inspections, maintenance, and vegetation management during facility operation. Approval of this plan should not delay construction.
- (e)(7)(vi) Retaining a third party mediator can be a cumbersome process, whereas the Department of Public Service already has a consumer dispute resolution process detailed in its regulations, and which can be employed in the event the complaint remains unresolved following the procedures in the Complaint Management Plan. This system has been employed in several Article 10 proceedings. At the very least, an applicant should be given the choice of including one or the other process.
- Provision (g)(1) addresses the Cultural Resources Avoidance, Minimization, and Mitigation Plan. The demonstration required by (g)(1) is redundant to application materials. This need

should be able to be satisfied by the cultural resources analysis done for the issuance of the permit, and it should not have to be done again. This compliance filing should be just the Cultural Resources Mitigation and Offset Plan required by (2) and should only be required when applicable.

**§900-10.3 Post-Construction Compliance Filings:** We do not have any additional comments on this section.

## Subpart 900-11 Modifying, Transferring or Relinquishing Permits

### §900-11.1 Permit Modifications Requested by Permittee

- This section of the regulations is quite critical to efficient project construction, and we strongly urge you to make it more efficient. Changes in the field during construction are common and normal and should not constitute a permit modification or require review/approval from ORES. The onsite Environmental Monitor should be empowered to review and approve these micro siting decisions to allow construction to proceed efficiently. The renewable energy industry urges ORES to modify the regulatory proposal to empower the Environmental Monitor to designate a modification as minor and approve of minor modifications. A major modification, according to the definition in Part 900-1.2 (ae), *“means a change to an existing permit standard or condition likely to result in any material increase in any identified environmental impact or any significant adverse environmental impact not previously addressed by uniform or site-specific standard or condition or otherwise involves a substantial change to an existing permit standard or condition.”* The Environmental Monitor should be able to apply this definition and designate a modification as minor, as well as approve of the minor modification and inform the ORES. If the Environmental Monitor decides that the modification is major, or if the permittee recognizes that it will be designated as major, the modification should be sent to ORES for their review and approval or rejection.
- The current proposal for permit modifications is not practical. For each change, even if it is minor, the permittee would have to wait 30 days for a decision from ORES whether it is major or minor, and then wait an additional unspecified time period for the process described in 900-11.1[c]. We note that per (a) of this Part, this process would apply not just to the permit but also to all approved compliance filings. Therefore, it is quite conceivable – especially based on experience with projects permitted under Article 10 – that there would be numerous changes to the compliance filings based on occurrences that happen in the normal course of construction. We strongly recommend that a simpler and more time-efficient process be allowed under these regulations for minor changes to approved compliance filings.

**§900-11.2 Transfers of Permit and Pending Applications, §900-11.3 Relinquishments, and §900-11.4 Permit Modifications by the Office.** We do not have any comments on these sections.

Subpart 900-12, §900-12.1 Enforcement; Subpart 900-13, §900-13.1 Severability; Subpart 900-14, §900-14.1 Effective Date; We do not have any comments on this section.

## **IV. Conclusion**

The Renewable Energy Industry appreciates the opportunity to comment on these proposed regulations. We recognize the considerable amount of work that ORES conducted to draft these comprehensive rules which completely re-design wind and solar energy project review and permitting. We urge ORES to consider our four high priority comments in Part II: (1) streamline post-permit compliance filings to reduce the risks of construction delays, (2) further clarify several local law provisions to avoid future disputes, (3) eliminate duplicative and irrelevant studies that will not be used by the ORES in its decision-making given the establishment of uniform standards and conditions that will be applied to all projects, and (4) improve the application amendment process to allow limited flexibility for changes to applications that are common and outside the control of developers. We also appreciate the ORES's willingness to review the entirety of the recommendations in Part III and consider this suite of small modifications to the regulations to improve their overall clarity, certainty, and consistency. We note that we have developed a complete redlined version of 900-1 through 900.14 which we will also be submitting to ORES. Finally, under separate cover we are submitting comments on the sound provisions of the ORES regulatory proposal.