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New York proposes legislation to accelerate the development of renewable energy projects

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On February 20, 2020, Governor Andrew Cuomo submitted a 30-day budget amendment proposing the Accelerated Renewable Energy Growth and Community Benefit Act. If adopted, the act would:

- Create a new, separate environmental review and permitting regime for renewable energy projects
- Amend the Public Service Law Article VII process for siting major utility transmission facilities
- Amend the process for obtaining payment in lieu of tax (PILOT) agreements for renewable energy projects

New permitting program for renewable energy facilities

The act proposes entirely new procedures for the permitting of major renewable energy facilities in New York. The act would create a new Office of Renewable Energy Permitting within the Department of Economic Development, which would issue siting permits authorizing the construction of renewable energy projects[1] in the state. Decisions by the office would take into account the renewable energy targets of New York's new Climate Leadership and Community Protection Act (CLCPA) and the environmental benefits of the proposed facility.

The act would largely apply to renewable energy projects over 25 megawatts. The act exempts those projects from the existing Article 10 permitting process, and instead subjects them to the newly established siting process. Renewable energy projects with nameplate capacities of 10 to 25 MW, and projects for which Article 10 permit applications have already been submitted, would be able to opt-in to the new process as well.

The act establishes aggressive timelines for the issuance of siting permits. The proposed Renewable Energy Permitting Office would have sixty days to determine whether an application is complete and sixty days from the completeness determination to publish a draft permit for public comment.

[1] Renewable energy technologies eligible to participate in this process are solar thermal, solar PV, on-land and offshore wind, hydro, geothermal, tidal/wave, and certain fuel cell projects.

Following a sixty day comment period and public hearing (if determined to be necessary), the office must grant or deny the permit promptly thereafter, and in any event, no more than one year from the date of a complete application. For projects sited on certain existing or abandoned commercial properties (including brownfields, landfills, former commercial or industrial sites), the decision must be made even faster—within six months. Siting permits would be automatically deemed approved if the permit is not issued within the established timelines.

Public comments will only be adjudicated under the act if they raise "substantive and significant" issues. The act expressly states that general expressions of disagreement with or general opposition to facilities made during the public comment period are not to be considered substantive and significant for purposes of determining whether a hearing is necessary. In the event that public comments meet the "substantive and significant" standard, the new office would be required to promptly schedule a hearing.

The office will also have greater authority to waive compliance with local laws and regulations than under Article 10. The office may elect not to apply any local zoning regulations that it determines would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the project. In contrast, under Article 10, the Siting Board can only waive a local law if it is unreasonably burdensome in view of existing technology or the needs of, or costs to, ratepayers.

In an effort to streamline the process of determining appropriate mitigation measures for impacts to endangered species, the office would be required to establish standard mitigation measures applicable to different categories of projects (separate standards for wind, solar, etc.). In addition, the office must establish a mitigation "bank," allowing developers to make contributions to the bank to fund efforts to achieve net conservation benefits to endangered or threatened species, in lieu of implementing physical mitigation measures themselves. The bank would be managed by the New York Department of Environmental Conservation (NYSDEC).

The application fee for projects under the act would be $1,000/MW, which would be distributed to local agencies to fund their participation in the permitting process. Unlike Article 10, intervenor funds will not be made available to non-municipal parties.

Siting of major utility transmission facilities

In addition to the changes to the Article 10 process, the act would also amend the Public Service Law Article VII process and the Public Service Commission's (PSC) considerations for the siting of major utility transmission facilities. Currently, under Article VII, the PSC has no timing constraints for approving electric transmission projects. Under the act, the PSC would be required to make a final decision on a siting application for a major utility transmission facility within twelve months from the submission of a complete application. The time period for a decision could be extended by six months under certain circumstances and tolled during settlement negotiations. The PSC would also promulgate regulations for an expedited process for siting of major utility transmission facilities that would be located within existing right-of-ways, would not result in significant adverse environmental impacts, or would necessitate expanding an existing right-of-way only for the purpose of complying with rules regarding electromagnetic fields.

The act would further amend the required considerations in approving a transmission facility. The PSC would need to determine whether the project minimizes significant adverse environmental impacts and impacts on farming only to the extent practicable.

Unlike the proposed changes to Article 10, the proposed changes to Article VII take effect immediately upon the adoption of the act. There is no opt-in provision related to the Article VII amendments. The proposed amendments also appear to apply to Article VII applications that were submitted prior to the adoption of the act.

Taxation and assessment

Under Real Property Tax Law (RPTL) § 487, local taxing jurisdictions that have not opted out of the exemption for solar energy systems may require a PILOT. The act would amend RPTL § 487 to require the taxing jurisdictions to consult with NYSERDA in determining the annual payments under the PILOT.

The act would also amend portions of the General Municipal Law (GML) related to PILOT agreements issued by industrial development agencies (IDAs). IDAs would be required to consider the contribution of the project to the state's renewable energy goals and emission reduction targets as part of their cost-benefit analysis under GML § 859-a. IDAs would also be required to consult with and seek advice and assistance from NYSERDA prior to granting any financial assistance and PILOT agreements to a renewable energy project.

Outlook

If approved, the Accelerated Renewable Energy Growth and Community Benefit Act could significantly accelerate the permitting process for renewable energy projects, particularly projects sited on brownfields, landfills, and former commercial or industrial sites. Although the act lays out a framework for these changes, it also calls for the creation of rules and regulations to implement the siting permit program established in the act (likely to be completed by late summer 2020) and requires the establishment of an entirely new office within the Department of Economic Development. The true impact of the act thus will not be fully determined until those actions are completed.

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