

## NY Gets Serious About Legal Reforms to Achieve Climate and Energy Goals

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By Christopher Rizzo and Karen E. Meara. Published in the *New York Law Journal*.

For anyone paying attention, the ambitious 2019 Climate Leadership and Community Protection Act (CLCPA) raised serious questions about how New York intends to achieve near-net zero greenhouse emissions by 2050. Electrification of cars and building heating systems will be key. But that begs the question of how the state will meet the demand for electricity. Electric cars and electric heaters are only as carbon-free as the generating sources powering them. In 2019 only about a quarter of the electricity generated in New York came from renewable sources, primarily hydropower. To achieve CLCPA's ambitious goals, New York must dramatically expand renewable energy production and intra-state transmission of that energy.

Buried in the 2020 budget bill is a new law intended to make it easier to do just that. The Accelerated Renewable Energy Growth and Community Benefit Act aims to speed up the review and approval process for wind and solar facilities by taking the process away from the Department of Public Service's New York State Board on Electric Generation Siting and the Environment, and giving site permit authority to a new Office of Renewable Energy Siting (ORES) within the Department of State. Draft rules have been issued, and ORES will be holding hearings and accepting comments in the coming weeks. This article summarizes the Act, its draft implementing regulations, and the challenges that remain.

### New York's Climate and Energy Goals

To recap, the CLCPA calls for a 40% reduction in emissions from all sources by 2030 (over 1990 levels) and an 85% reduction by 2050. It calls for 70% of electricity to come from renewable sources by 2030 and for net-zero greenhouse gas emissions from electricity by 2040. Finally, it calls for a massive increase in the amount of power coming from wind and solar as well as energy storage. New York is nowhere near meeting these goals. And the state's existing permitting process for new power plants above 25 megawatts (governed by Article 10 of the NYS Public Service Law) has been slow and laborious for proponents of both fossil fuel and renewable energy facilities.

### The Act

The Act explicitly aims to expedite the review process for siting renewable energy projects generating 25 MW or more by consolidating all aspects of that review within the new Office of Renewable Energy Siting (ORES). The process is supposed to become quicker and more predictable than Article 10 with uniform environmental review standards, better resolution of local concerns and stricter timeframes.

In lieu of requiring compliance with the requirements of the State Environmental Quality Review Act (SEQRA), the Act sets up an alternative environmental framework in three parts. First, ORES is charged with setting uniform standards and conditions for the "siting, design, construction and operation of each class of major renewable energy facilities" to avoid or minimize potential significant impacts common for each class. This is similar in concept to general permits under the Clean Water Act's NPDES/SPDES program and could go a long way compared to Article 10 procedures to increasing certainty and eliminating duplicative efforts. Second, where ORES, in consultation with the

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Department of Environmental Conservation, determines that a particular site specific project would have significant adverse environmental impacts despite compliance with the uniform standards and conditions, ORES must, in consultation with DEC, develop site specific terms and conditions to avoid or minimize those impacts. Finally, where significant adverse impacts cannot be adequately mitigated onsite, the Act contains a unique provision allowing ORES to charge developers fees to fund off-site mitigation.

Recognizing that renewable energy facilities can create intense opposition due to visual and noise impacts, the Act, like Article 10, empowers ORES to override local zoning restrictions, provided it finds that those restrictions would be “unduly burdensome.” But if zoning overrides are the stick, the Act also includes a carrot: all siting permits must require the applicant to provide a “host community benefit” to be determined by the Public Service Commission or negotiated between the developer and the host community. The PSC is authorized to issue two types of benefits—utility discounts or credits and “compensatory environmental benefits.”

In terms of schedule, the Act includes a series of deadlines designed to speed up the review process, including a one-year deadline for decision on complete applications and a mere six months for facilities on brownfields (i.e., formerly developed sites).

The Act does not tackle the state’s lack of transmission capacity to move renewable power to where it is needed—the other half of the state’s renewable energy problem. But it does require the Department of State to undertake a “comprehensive study” to identify ways to expand transmission to achieve the state’s climate goals. It also empowers the PSC to come up with an expedited process for reviewing permit applications for certain major transmission projects proposed to be constructed within or through minor expansion of existing utility right of ways.

### **The Draft Regulations**

The draft regulations are over 150 pages and too substantial to summarize here. But there are three key aspects to note. First, although ORES will only have a year to review and decide upon a complete application, the regulations prescribe a lengthy pre-application process for developers including consultation with localities, consultation with impacted communities and preparation of a detailed environmental impact statement. Even though the regulations will allow ORES to override local regulations, ORES will clearly be looking to developers to minimize conflicts with localities and local laws. These steps could easily take one to two years. Second, although the developers will bypass SEQRA, the regulations contain detailed requirements for the alternative environmental impact statement—far more detailed and prescriptive than SEQRA itself. For example, the regulations include detailed noise limits for operation of wind farms (noise and vibration impacts have been one of the key criticisms of these facilities). Third, the regulations require the developers to plan for the future by outlining the facilities’ eventual decommissioning process and cost to do so, including establishing a financial security fund with the municipality in which the facility is located.

In sum, although the regulations include many improvements over the existing Article 10 process, there is no guarantee that it will function any faster than Article 10 given the expansive pre-application requirements. To truly expedite the approval process, the state will need to provide strong political support to ORES, a large and qualified agency staff, and extensive outreach to impacted municipalities.

### **Authors’ Note About the Supreme Court**

It had been our intention to focus this article on the environmental record for Supreme Court nominee, Judge Amy Coney Barrett. That article would have continued a long tradition of this column. But in contrast to, for example, Justice Brett Kavanaugh, who had decided approximately 70 environmental cases by the time he was nominated to replace Justice Anthony Kennedy, Judge Barrett’s environmental record is thin. In her three years on the U.S. Court of Appeals for the Seventh Circuit, it appears she has heard only two environmental cases. In one decision she sided with the majority in ruling against the U.S. Army Corps of Engineers and with a housing developer in finding that certain wetlands were not subject to federal regulation under the Clean Water Act, finding the Corps’ factual determination supporting jurisdiction insufficient. In another, she sided with the City of Chicago and dismissed a challenge to the construction of President Obama’s presidential library on public

parkland, finding that park advocates had no standing (there might have been a different result under New York's slightly more accommodating standing precedents). Both could bode poorly for environmental protection, but they are hardly a record.

Turning to her academic writing from more than a decade as a law professor at Notre Dame, she has said little about the environment. But her judicial philosophies are clear. In her last article, "Justice Scalia and the Federal Courts: Originalism and Stare Decisis," Judge Barrett praised former Supreme Court Justice Scalia's willingness to disregard stare decisis and court precedent when he felt it was necessary to adhere to the "original" intent of the U.S. Constitution or statutory law. That bodes poorly for federal efforts to combat climate change which rely on an expansive reading of the Commerce Clause and the broad wording of the Clean Air Act as bases to regulate greenhouse gas emissions as "pollutants." If, as expected, Judge Barrett is confirmed, the future of federal climate and other environmental regulation may hinge more heavily on the outcome of the November election and the political will of Congress to pass legislation that could withstand the scrutiny of strict "constructionists" or "originalists." In the meantime, state efforts to eliminate greenhouse gas emissions like the Accelerated Renewable Energy Growth and Community Benefit Act will continue to have vital importance as they have for the past 20 years.

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