Will Section 94-C Enable Renewable Energy Project Siting and Help New York State Achieve Its Energy Targets?

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Through the enactment of the Climate Leadership and Community Protection Act (CLCPA), New York State (NYS) has adopted highly ambitious targets to address climate change. Achieving these targets will require a transformation of NYS's electricity generation system, including a massive buildout of new large-scale wind and solar power projects. The success of this endeavor will depend on the ability of new projects to be efficiently sited through a streamlined process. This Note argues that the new framework adopted under Section 94-C of Article 6 of the New York Executive Law (Section 94-C) should enable this transformation. However, this is highly contingent upon whether the newly-created Office of Renewable Energy Siting (ORES) promulgates and enforces regulations and standards with the explicit intent of meeting the CLCPA targets.

This Note examines how Section 94-C is an improvement from earlier siting regimes in NYS, which emphasized a time-intensive and comprehensive approval process primarily tailored to the environmental and socioeconomic impacts of fossil-fuel power projects. This Note explains how Section 94-C sought to bridge the historical disconnect between old siting statutes with NYS's more recent priorities for renewable energy adoption and addressing climate change. This Note demonstrates how Section 94-C can bypass massive delays, provided that ORES establishes more reasonable and predictable substantive standards, as well

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as reduces the complexity and extent of procedural requirements for developers.

Table of Abbreviations

Article 10……...New York Public Service Law, Article 10 (2020)
Article VIII……New York Public Service Law, article VIII (1972) and (1978)
Article X……New York Public Service Law, article X (1992)
CLCPA……..Climate Leadership and Community Protection Act of 2019
DAM ……Department of Agriculture and Markets
DEC ……..Department of Environmental Conservation
DPS ……..Department of Public Service
EIS……Environmental Impact Statement
FTE ..... Full-Time Equivalent

The Fund……..Endangered and Threatened Species Mitigation Bank Fund
GW ..... gigawatt
ITC ..... Investment Tax Credit
MW..... megawatt
NYS.....New York State
NYSERDA…….New York State Energy Research and Development Authority
ORES ……..Office of Renewable Energy Siting
PIP……..Public Involvement Plan
PILOTS.....Payment in Lieu of Taxes
PPA ..... Power Purchase Agreement
PSC ..... Public Service Commission
PSS……...Preliminary Scoping Statement
PTC……Production Tax Credit
SEQRA.....State Environmental Quality Review Act
Section 94-C…….....New York Executive Law, article 6, § 94-C
Siting Board……..New York State Board on Electric Generation Siting and the Environment
Title 9-B……Clean Energy Resources Development and Incentive Program
VIA……Visual Impact Assessment

I. INTRODUCTION

For nearly 50 years, New York State (NYS) has been concerned about environmental and socioeconomic impacts when issuing siting permits for energy projects.[1] In 1972, NYS instituted its first specialized regime to govern the siting of fossil-fuel and nuclear power plants. The various iterations of NYS's siting regime have established complicated, time-intensive processes that failed to adapt to the pace of NYS's new energy initiatives.

1. For the purposes of this Note, "siting" refers to the process of finding and seeking approval for a location for a proposed energy project. "Project" will refer to both the overall business endeavor to develop and construct an electricity-generating facility, as well as the specific facility that produces electricity and its ancillary equipment and infrastructure.

As interest in renewable energy, particularly wind power and solar power, grew in response to rapidly declining costs and growing concerns about the grave impacts of unchecked climate change, NYS set increasingly robust targets for electricity generation from renewable energy sources.[2] To achieve a drastic reduction in carbon emissions, NYS adopted the Climate Leadership and Community Protection Act (CLCPA) in 2019. The CLCPA requires that 70% of NYS's electricity come from renewable energy by 2030 and that NYS's electricity-demand system must generate net-zero carbon emissions by 2040.[3] The CLCPA also has specific renewable energy installation targets of 6 gigawatts (GW) of distributed solar power by 2025 and 9 GW of offshore wind power by 2035.[4]

Meeting the CLCPA's targets to decarbonize NYS's electricity sector will require a massive expansion of new renewable energy projects. In 2018, only 6% of NYS's electricity generation came from renewable energy sources other than hydropower.[5] In addition, NYS currently relies on nuclear power and natural gas plants for significant amounts of electricity, but most of NYS's nuclear power plants are scheduled to close before 2040[6] and carbon-intensive natural gas

2. NYS's Renewable Portfolio Standard initially called for 25% of NYS's electricity generation to come from renewable energy sources by 2013. ORDER REGARDING RETAIL RENEWABLE PORTFOLIO STANDARD, Case 03-E-00188 (N.Y. Pub. Serv. Comm'n 2004), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=17612. In 2010, the RPS target was increased to 30%, with a deadline of 2015. ORDER ESTABLISHING NEW RPS GOAL AND RESOLVING MAIN TIER ISSUES, Case 03-E-0188 (N.Y Pub. Serv. Comm'n 2010), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=17612. In 2016, NYS replaced its RPS with the Clean Energy Standard, which called for renewable energy to provide 50% of NYS's electricity by 2030. ORDER ADOPTING A CLEAN ENERGY STANDARD, Case 15-E-0302 (N.Y Pub. Serv. Comm'n 2016), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=15-E-0302.

3. CLCPA, N.Y. ENVTL. CONSERV. LAW § 75 (McKinney 2019). Estimates suggest that 8.9 GW of wind power capacity, 15.5 GW of offshore wind power capacity, and 45.9 GW of solar power capacity would be required to meet the CLCPA's climate targets. ENERGY + ENVT'L ECONS., NEW YORK STATE DECARBONIZATION PATHWAYS ANALYSIS: SUMMARY OF DRAFT FINDINGS 14 (2020).

4. CLCPA, N.Y. ENVTL. CONSERV. LAW § 75 (McKinney 2019).

5. N.Y. INDEP. SYS. OPERATOR, RELIABILITY AND A GREENER GRID: POWER TRENDS 2019 27 (2019). Within that total, there is only 1.5 GW of distributed solar power. Michael B. Gerrard & Edward McTiernan, *New Climate Law Will Reshape NY's Key Sectors*, 262 N. Y. L.J. (2019).

6. *Governor Cuomo Announces 10th Proposal of the 2017 State of the State: Closure of the Indian Point Nuclear Power Plant by 2021*, GOVERNOR ANDREW M. CUOMO (Jan. 9,

plants will need to close to meet the CLCPA's targets.[7] Not only will these power sources need to be replaced with renewable energy sources, but also the overall amount of electricity generation will need to increase to meet an expected surge in NYS's electricity demand over the coming decades.[8]

Given these circumstances, NYS recognized that its siting regime approved the construction of new renewable energy projects at a much slower rate than would be necessary to replace shortfalls in current energy supply and meet the CLCPA's ambitious targets. Article 10 of the New York Public Service Law (Article 10) has extensive regulatory requirements and compliance procedures that have stymied the siting of new energy projects. NYS's time-intensive and comprehensive approval process created a disconnect between its siting program, which was primarily tailored to fossil-fuel power projects, and its more recent priorities for adopting renewable energy and addressing climate change.

To address this disconnect, NYS passed Section 94-C of Article 6 of the New York Executive Law (Section 94-C), which established a new renewable energy development program. Under Section 94-C, NYS empowered the newly-established Office of Renewable Energy Siting (ORES) to oversee an efficient siting process and promulgate regulations conducive to the construction of new projects. This Note explains how Section 94-C's framework and accelerated review process attempt to streamline siting approval with the express intent of meeting the CLCPA's ambitious targets for renewable energy development and the reduction of carbon emissions.

Part I discusses the evolution of NYS's statutes governing energy project siting. Part II compares Section 94-C's statutory framework to Article 10's framework. Part III explains how

2017), *available at* https://perma.cc/9PZW-YGWF. It is unlikely that NYS will build new nuclear power plants within this timeframe. *See* Gerrard & McTiernan, *supra* note 5.

7. Since the CLCPA does not permit electricity-generating facilities to use offsets to reduce carbon emissions, many of NYS's natural gas plants, which currently provide a significant percentage of NYS's electricity, will also likely need to be retired to meet the CLCPA's targets. Gerrard & McTiernan, *supra* note 5.

8. Sources of increased demand include the projected electrification of passenger transportation and of much space heating. *See* GOVERNOR ANDREW M. CUOMO, 2018 STATE OF THE STATE, 308–11 (2018); VEIC, RAMPING UP HEAT PUMP ADOPTION IN NYS: TARGETS AND PROGRAMS TO ACCELERATE SAVINGS (2018).

Section 94-C was designed to address shortcomings and massive ensuing delays under the Article 10 regime. Section 94-C aims to establish more reasonable and predictable substantive standards, as well as reduce the complexity and extent of procedural requirements. Finally, Part IV recommends potential regulatory guidance and considers whether Section 94-C can overcome Article 10's issues. Section 94-C's success is contingent upon ORES promulgating regulations that are conducive to new project construction and actually enforcing a streamlined and efficient siting process.

II. THE EVOLUTION OF NEW YORK STATE'S SITING LAWS

Section A discusses NYS's siting laws that predated Article 10. These laws were enacted when the energy landscape was dominated by large fossil-fuel power plants, which had large environmental impacts that needed to be thoroughly considered in siting decisions. Section B discusses the adoption of Article 10, which is NYS's current siting regime. Although NYS's energy landscape has changed tremendously due to the exponential growth of renewable energy sources, Article 10's framework remained largely the same as under the previous siting laws. Finally, Section C discusses the adoption of Section 94-C, which is designed to expedite the siting process to more closely reflect the more limited scope of environmental impacts from renewable energy projects.

A. New York State's Siting Statutes Before Article 10

NYS's prior siting statutes provided exclusive jurisdiction over siting decisions to the New York State Board on Electric Generation Siting and the Environment (the Siting Board), which determined whether to provide a certificate to permit the construction and operation of a proposed project.[9] The Siting Board made this determination by balancing considerations of the proposed project's environmental impacts, state and local

9. MICHAEL B. GERRARD, DANIEL A. RUZOW & PHILIP WEINBERG, ENVIRONMENTAL IMPACT REVIEW IN NEW YORK, Vol. 2, § 8B.02 (Mathew Bender ed. 2000). The Siting Board is still currently active under the Article 10 regime, and will remain so until the transition to the Section 94-C regime has been completed. *See infra* Part II.

interests and permitting requirements, and public need.[10] The Siting Board could preempt local procedural laws and most state permitting requirements, and could refuse to apply requirements of local laws that it deemed to be "unreasonably restrictive."[11] Applications were exempt from review under the State Environmental Quality Review Act (SEQRA), given that the Siting Board's requirements and review process were functionally equivalent.[12]

1. Article VIII (1972)

In 1972, NYS enacted Article VIII of the New York Public Service Law (Article VIII) to govern the siting of "steam-electric" generating projects, including fossil fuel-burning and nuclear power plants with at least 50 megawatts (MW) of capacity.[13] When Article VIII was enacted, NYS had a shortage of electricity capacity due to inadequate forecasting of increasing future electricity needs. Article VIII was designed to increase cooperation among state agencies and reduce delays in the approval of essential new power plants to meet growing demand.[14]

At the time, vertically-integrated utilities provided the majority of NYS's electricity generation and operated as natural monopolies for electricity generation and distribution.[15] Under Article VIII, utilities could build and operate energy projects only if NYS's Public Service Commission (PSC) determined that

10. GERRARD ET AL., *supra* note 9. After the deregulation of electricity markets and the introduction of market-based electricity pricing, "public need" was no longer a required consideration for the Siting Board.

11. *Id*. The Siting Board could not preempt state permitting requirements pursuant to delegation from the Environmental Protection Agency, primarily under the federal Clean Air Act and Clean Water Act.

12. *Id*. SEQRA is a NYS statute that requires state and local government agencies to consider the environmental impacts of proposed actions and projects that they undertake, fund, or approve. N.Y. COMP. CODES R. & REGS tit. 6, § 617 (McKinney 2019).

13. Steam-electric generating projects generated electricity by producing steam that rotated turbines. Jennifer Cordes, Note, *Article X: The Future of Electric Generating Facility Siting in New York*, 6 ALB. L. ENVTL. OUTLOOK 37, 39 (2001) (citing 1972 N.Y. Laws 823).

14. *Id*.

15. G.S. Peter Bergen, *It's Time to Repeal Article X,* 6 ALB. L. ENVTL. OUTLOOK 11, 12 (2001). The PSC regulated the electricity rates that utilities could charge to customers. GERRARD ET AL., *supra* note 9.

there was a "public need" for such projects.[16] The PSC, however, allowed utilities to recover costs from energy projects that were constructed, regardless of whether they were constructed completed on time.[17] Thus, there were no incentives to speed up the siting approval process.

2. Article VII (1978)

Article VIII was repealed and replaced in 1978, largely because of delays in project approvals.[18] The new Article VIII set a 24-month deadline for application decisions, required evaluation earlier in the process about whether proposed projects were preferable to alternatives, and required that projects be consistent with NYS's energy plan.[19] Despite these changes to expedite the siting process, only one new project was built by the time Article VIII lapsed at the end of 1988.[20] With no siting statute in place between January 1989 and June 1992, NYS reviewed energy project applications under SEQRA, which subjected applications to numerous state and local requirements, and no new projects were built during this period.[21]

3. Article X (1992)

Recognizing there was a need for a centralized regime, in July 1992, NYS enacted Article X of the New York Public Service Law (Article X) to govern the siting of "major" electric generating projects of at least 80 MW.[22] Article X was designed to provide "a one-stop process" that balanced the public need for new energy projects with those projects' negative environmental impacts.[23] Article X was largely identical to the revised Article

16. The PSC wanted to ensure that utilities were not investing capital in unnecessary new plants and then recovering those costs by increasing their electricity rates. Bergen, *supra* note 15, at 11.

17. *Id.*

18. This new statute was also titled Article VIII. Cordes, *supra* note 13, at 40 (citing 1972 N.Y. Laws 824).

19. *Id*. (citing 1978 N.Y. Laws, *Governor's Memorandum*, at 1837–38).

20. Applications for eight other projects had been submitted. GERRARD ET AL., *supra* note 9.

21. Cordes, *supra* note 13, at 40.

22. *Id*. (citing 1992 N.Y. Laws 1477).

23. *Id*. (citing 1992 N.Y. Laws, *Governor's Memorandum* at 2898.)

VIII, but it also covered natural gas turbines as well as wind and solar power facilities.[24]

However, no Article X applications were submitted until 1996, when NYS deregulated its electricity industry and utilities relinquished their ownership of electricity generation facilities to independent power producers.[25] Deregulation made project development more attractive to independent power producers because they could now set competitive electricity rates, rather than rely on the PSC's approval under a regulated framework. Between 1996 and 2002, six projects were built after undergoing Article X review; applications for 18 other projects were filed.[26] After Article X expired in 2002, the siting of new energy projects was again subject to SEQRA review.[27]

Although NYS adopted different siting laws, these laws were all premised on the assumption that electricity generation was a regulated industry that required strong consumer protection from incumbent utilities and strong environmental protection from large fossil-fuel energy projects.[28] Even after NYS deregulated its electricity industry, the laws and regulations governing the Siting Board's review and certification process were still very stringent.[29]

B. The Adoption of Article 10

In 2011, NYS enacted Article 10 to govern the siting of new, as well as repowered or modified, electric-generating projects with at least 25 MW of capacity.[30] Like earlier siting statutes, Article 10 granted authority to the Siting Board to oversee the siting process and to streamline the issuance of certificates for these projects to be constructed and operated.[31]

Article 10 was intended to provide a single proceeding that would expedite project approval and siting, without requiring

24. GERRARD ET AL., *supra* note 9, at § 8B.02.
25. *Id*.
26. *Id*.
27. *Id*.
28. Bergen, *supra* note 15, at 12.
29. *Id*. at 11.
30. N.Y. PUB. SERV. LAW § 160-73 (McKinney 2011). Article 10 was enacted as part of the Power NY Act of 2011. Article 10 is the successor statute to Article X, which had been expired in 2002.
31. *Id*.

developers to seek multiple state and local permits.[32] Most projects would be approved within one year of their applications being submitted.[33] Compared to earlier siting statutes, Article 10 placed a greater emphasis on public involvement, including new "pre-application" public outreach requirements and a mandate that developers provide additional funding to intervenors participating in public hearings.[34] These changes have allowed such intervenors—including nonprofit organizations, commercial and industrial companies, and consumer interest groups—to participate in the Article 10 process.[35]

When Article 10 was adopted in 2011, nearly all of the electricity in NYS was generated by non-renewable energy sources, nuclear power, and hydropower.[36] Wind power provided only 1.7% of NYS's electricity generation; solar power provided a negligible percentage.[37] Around this time, NYS began to show greater concern about climate change and other systemic negative environmental impacts. Article 10 required projects to limit their carbon emissions[38] and consider potential environmental justice issues.[39]

Many observers believed that Article 10 could be more centralized and faster than SEQRA and could address local opposition, which had stymied project approval.[40] However,

32. *Article 10 Law*, BOARD ON ELECTRIC GENERATION SITING AND THE ENVIRONMENT, *available at* https://perma.cc/E8N3-GSSW.

33. *Legislative Bill and Veto Jackets*, ch. 388, § 12, 2011 N.Y. COUNSEL TO THE GOVERNOR (2011).

34. *Article 10 Law*, *supra* note 32. "Intervenors" refer to third parties who get involved in ongoing legal proceedings (i.e., Article 10 hearings overseen by the Siting Board).

35. *See* Assemb. B. No. A08510, 2011-2012 Reg. Sess. (N.Y. 2011) (memorandum in support of legislation); S.B. No. S5844, 2011-2012 Reg. Sess. (N.Y. 2011) (memorandum in support of legislation).

36. N.Y. STATE ENERGY RESEARCH AND DEV. AGENCY [hereinafter NYSERDA], PATTERNS AND TRENDS: NYS'S ENERGY PROFILES: 1997–2011, ix (2013). In 2011, NYS's electricity generation included natural gas (31.1%), nuclear power (26.1%), hydropower (17.4%), net imported electricity (15.4%), coal (5.8%), "Other" (1.7%), and petroleum (0.7%). This Note assumes that at least a significant amount of net-imported electricity came from non-renewable energy sources.

37. *Id*.

38. *See* N.Y. Assemb. B. No. A08510 (memorandum in support of legislation); N,Y. S.B. No. S5844 (memorandum in support of legislation).

39. *Id*.

40. *See e.g.*, Cordes, *supra* note 13.

some observers warned that subjecting renewable energy projects to a complex and evidence-intensive process would discourage their development.[41] The Siting Board did not heed those concerns. In 2012, pursuant to Article 10, the Siting Board, in conjunction with the NYS Department of Public Service (DPS),[42] promulgated regulations for application and project approval requirements.[43] Although these regulations contain some requirements specific to wind power projects, they do not contain procedures to specifically *expedite* the approval of wind and solar power projects.[44]

By enacting Article 10, NYS sought to create an "affordable, clean and reliable energy supply" and "improve the environment,"[45] yet Article 10's design has impeded the efficient development of new wind and solar power projects. Article 10's detailed and onerous requirements are tailored to fossil-fuel projects, which have far greater negative environmental impacts and require a more time-intensive environmental review process.

C. The Adoption of Section 94-C

There is a profound disconnect between Article 10's requirements and CLCPA's urgency to install new zero-carbon electricity generation capacity.[46] As of April 2020, no projects had completed construction under Article 10; only one project

41. *See e.g.*, Christine A. Fazio & Judith Wallace, *Re-Enact the Former Article X of the Public Service Law*, CARTER, LEDYARD, & MILBURN LLP: PUBL'NS (Mar. 5, 2008), *available at* https://perma.cc/UL9D-QP9B.

42. The NYS Department of Public Service (DPS) is the staff arm of the NYS Public Service Commission. *Department of Public Service – About*, N.Y. STATE DEP'T OF PUB. SERV. *available at* https://perma.cc/26MZ-BH8T. The Siting Board is sited within DPS. *Siting Board – Frequently Asked Questions: Q: What is the "Siting Board,"* N.Y. STATE DEP'T OF PUB. SERV., *available at* https://perma.cc/BXD4-XQCK.

43. N. Y. COMP. CODES R. & REGS tit. 16, § X.A (McKinney 2012). DEC also promulgated its own regulations pertaining to environmental justice issues that arise under Article 10 review. N. Y. COMP. CODES R. & REGS tit. 6, §487 (McKinney 2012).

44. *See* N.Y. COMP. CODES R. & REGS tit. 16, § X.A (McKinney 2012).

45. N,Y. S.B. No. S5844.

46. Skyler Drennen, *Can New York Build Renewables Fast Enough to Comply with Renewable Targets? Not Without Reform,* PV MAG. (Dec. 13, 2019), *available at* https://perma.cc/8RVX-9LJZ. There were also issues with the processes for the siting of new transmission lines for new energy projects under Article VII of the New York Public Service Law ("Article VII"), which occurs concurrently with Article 10 approval. *See e.g.*, N.Y. I.S.O., RELIABILITY AND A GREENER GRID: POWER TRENDS 2019 (2019), *available at* https://perma.cc/VC74-26BC.

had even begun construction. Many advocates, including environmental groups and renewable energy developers, called for an overhaul of the Article 10 process to address barriers and delays in the approval and construction of new renewable energy projects.[47] To address these concerns, in April 2020, NYS enacted Section 94-C, as part of the Accelerated Renewable Energy Growth and Community Benefit Act (the Act),[48] to codify a new regime for siting major renewable energy facilities with at least 25 MW of capacity.[49] Section 94-C consolidates the review and permitting of projects under ORES, a new office within the NYS Department of State, and grants ORES the sole authority to issue "siting permits" for these projects to be constructed and operated.[50]

Section 94-C was touted as a solution for the massive delays arising under the Article 10 regime.[51] NYS's legislative findings for Section 94-C recognized the importance of expediting wind and solar power construction, while accounting for local laws and maintaining a strong commitment to environmental protection.[52] Some of Section 94-C's primary public policy purposes include "expediting the regulatory review" and

47. *See, e.g.*, E-mail from Sierra Club et al. to Governor Andrew Cuomo, Majority Leader Stewart-Cousins, and Speaker Heastie (Mar. 4, 2020), *available at* https://perma.cc/WN5B-9W7J.

48. Section 94-C was included in Part JJJ of the 2020–2021 NYS Budget. Accelerated Renewable Energy Growth and Cmty. Benefit Act, 2020 N.Y. Sess. Laws, ch. 58, Part JJJ, 14, 102 (McKinney 2020) *available at* https://perma.cc/4DZP-FK97. The Act's title suggests that NYS prioritized accelerating renewable energy growth, while also providing community benefits that would arise from new renewable energy generation. The Act also amends Article VII and includes other measures to expedite the siting of transmission lines, such as by directing DPS to conduct a system-wide grid study and for the New York Power Authority to construct new large-scale transmission infrastructure. *Id.*

49. N.Y. EXEC. LAW §94-C (McKinney 2020), *available at* https://perma.cc/A67W-QMKL. "Major renewable energy facility" means any renewable energy system with at least 25 MW of capacity, as well as any co-located energy storage system storing electricity generated from a renewable energy system. N.Y. EXEC. LAW §94-C(2)(h) (2020) (citing the definition of "renewable energy system" in N.Y. PUB. SERV. LAW § 66-P*2(1)(b)). Developers of renewable energy projects between 20 to 25 MW can also opt into the approval process created by Section 94-C. *See infra*, Part II.B.

50. N.Y. EXEC. LAW § 94-C(3)(a) (McKinney 2020). The Siting Board still maintains authority over the siting of electricity-generating projects of at least 25 MW that are not powered by renewable energy source.

51. Sierra Club et al., *supra* note 47.

52. Accelerated Renewable Energy Growth and Community Benefit Act, 2020 N.Y. Sess. Laws, ch. 58, Part JJJ §§2.1, 2.2(a) 14, 103 (McKinney 2020), *available at* https://perma.cc/4DZP-FK97.

"developing uniform permit standards and conditions."[53] Most importantly, Section 94-C explicitly codifies the necessity of approving and siting new renewable energy projects to meet the CLCPA targets.[54]

Section 94-C was also praised for providing a way for NYS's economy to recover from the COVID-19 pandemic.[55] Given that Section 94-C was included as part of a 30-day amendment immediately prior to passing the 2020–2021 NYS budget,[56] it appears that NYS's Governor and Legislature considered streamlining the renewable energy siting process to be an urgent priority. Section 94-C's proponents celebrated NYS's decisive action, noting that expediting renewable energy development would provide essential green jobs and new revenue for communities, while also addressing climate change's public health impacts.[57]

III. THE SECTION 94-C REGIME ESTABLISHES MORE STANDARDIZED CONDITIONS AND STRICTER TIMELINES COMPARED TO ARTICLE 10

Before Section 94-C takes effect, there will be a transition period during which ORES must establish uniform project standards and conditions, as well as promulgate regulations outlining the required content of Section 94-C applications.[58] Until then, applications submitted to ORES "shall conform substantially to the form and content of an [Article 10] application."[59] Even after ORES has established uniform standards and conditions, as well as promulgated regulations for

53. *Id.* §§ 2.4(a), 2.4(c) 14, 103-104 (McKinney 2020), *available at* https://perma.cc/4DZP-FK97.

54. N.Y. EXEC. LAW §94-C(3)(d) (McKinney 2020), *available at* https://perma.cc/A67W-QMKL.

55. Sierra Club et al., *supra* note 47.

56. 2020 Amendments to Senate S. 7508, Assembly A. 9508 (TED Article VII Bill). "The State Constitution permits the Governor to amend or supplement the Executive Budget within 30 calendar days after its submission (. . .) Such revisions, additions or deletions (. . .) reflect necessary corrections or responses to new situations or conditions arising after the preparation of the Executive Budget." N.Y. DEPT. OF BUDGET, Financial Terminology, *available at* https://perma.cc/J3UB-AB6R.

57. Sierra Club et al., *supra* note 47.

58. N.Y. EXEC. LAW § 94-C(5)(a) (McKinney 2020).

59. *Id.*

Section 94-C applications, it appears that the Article 10 process will likely still exist in some capacity.

A. Overview of the Old Article 10 Process

Article 10 theoretically created a "one-stop" framework for the Siting Board to oversee the siting of electricity generation projects of at least 25 MW of capacity.[60] DPS is the staff arm of the PSC and is responsible for providing administrative support to the Siting Board. This includes liaising with developers and other relevant parties, and managing Article 10's daily operations.[61] However, it has been extremely difficult for DPS, in consultation with other NYS agencies, to determine when projects should be approved and can actually begin construction. As of August 2020, there is a large queue of 54 pending Article 10 wind and solar power projects.[62]

Before a developer can officially submit an Article 10 application to the Siting Board for consideration, they must satisfy the pre-application procedures.[63] As a first step, the developer must submit a Public Involvement Plan (PIP), which outlines their strategy for facilitating communication with interested parties and providing opportunities for public involvement throughout the Article 10 process.[64] After at least 150 days and upon receiving final approval of the PIP from

60. See *supra* Part I.B.

61. *Id*.

62. This includes projects that have received approval from the Siting Board, but have not yet completed construction and subsequently been certified. This also includes projects that are dormant or dead, but have not been formally withdrawn. *Active Article 10 Queue*, N.Y. BD. ON ELEC. GENERATION SITING AND THE ENV'T, *available at* https://perma.cc/P3W2-RAZ7. Three wind power projects have been withdrawn from the Article 10 process and are not included. *Projects Withdrawn from Article 10 Review*, N.Y. BD. ON ELEC. GENERATION SITING AND THE ENV'T, *available at* https://perma.cc/V2YK-E3US.

63. N.Y. PUB. SERV. LAW §§ 160–173 (McKinney 2011). Even before the Article 10 pre-application procedures, developers often dedicate significant time and resources to prepare their projects. This includes, but is not limited to, acquiring outside financing, receiving land use rights, and entering into power purchase agreements with third parties. *See, e.g.*, Practical Law Finance, *Wind Energy Project Development Issues: Preliminary Considerations*, THOMSON REUTERS PRACTICAL LAW (last visited Jan. 16, 2021); Stephen J. Humes, *Solar Energy Project Development Issues: Preliminary Considerations*, THOMSON REUTERS PRACTICAL LAW (last visited Jan. 16, 2021).

64. N.Y. COMP. CODES R. & REGS tit. 16, § 1000.4(c) (McKinney 2012) (listing specific requirements for what must be included in the PIP).

DPS,[65] a Preliminary Scoping Statement (PSS) can be submitted as notice that the developer is planning to submit an Article 10 application.[66] The PSS must describe the proposed site; detail potential adverse environmental and health impacts, studies to evaluate those impacts, and measures to avoid or mitigate those impacts; provide a list of alternate sites; and include a list of all relevant laws and regulations.[67] The PSS must also address concerns raised during the public comment period and the developer must set up an intervenor funding account, which covers expenses incurred by municipalities and the public to participate in Article 10 proceedings.[68] DPS will then designate a hearing examiner to preside over the rest of the pre-application procedures and a public evidentiary hearing.[69] The developer can also enter into stipulations with NYS agencies, or any interested party or municipality, to reach agreements about any aspect of the PSS.[70]

After the developer completes the pre-application procedures, they can submit an application to the Siting Board. Article 10 application requirements are extensive and include detailed requirements for 41 different exhibits.[71] Within 60 days of receiving the application,[72] the Siting Board will advise the developer on which deficiencies must be corrected before the application can be deemed compliant and whether supplemental information must be filed.[73] Once the Siting Board has deemed

65. Every Article 10 project has received some suggested revisions to its PIP submitted for review by DPS.

66. N.Y. PUB. SERV. LAW § 163(1) (McKinney 2011).

67. *Id.* Additional PSS requirements are enumerated in greater detail in the Article 10 regulations. N. Y. COMP. CODES R. & REGS tit. 16, § 1000.5 (McKinney 2012).

68. N.Y. PUB. SERV. LAW § 163(4)(a) (McKinney 2011); N.Y. COMP. CODES R. & REGS tit. 16, § 1000.10 (McKinney 2012).

Expenses can include hiring experts to review applications and lawyers to advocate on their behalf.

69. N.Y. PUB. SERV. LAW § 163(5) (McKinney 2011). *See also* N.Y. COMP. CODES R. & REGS tit. 16, §§ 1000.5(h), 1005.(i) (McKinney 2012).

70. N.Y. PUB. SERV. LAW § 163(5) (Consol. 2011). *See also* N.Y. COMP. CODES R. & REGS tit. 16, § X.A.1000.5(j) (McKinney 2012). Stipulations are used to get parties to agree in advance about this information to reduce the number of potential disputes later in the Article 10 process. *See Article 10 Law*, *supra* note 32.

71. N.Y. COMP. CODES R. & REGS tit. 16, § X.A.1001 (2012).

72. N.Y. PUB. SERV. LAW § 165(1) (Consol. 2011).

73. *Article 10 Law*, *supra* note 32. Every Article 10 project that has been reviewed by DPS has been required to correct deficiencies in the application that were identified and has been required to make additional filings.

the application compliant, the Siting Board will hold a public evidentiary hearing,[74] which must provide parties with opportunities to provide evidence and rebuttal for all factual issues.[75] The hearing examiner and assistant hearing examiner must provide a recommended decision to the Siting Board within 12 months of the application's submission.[76]

The Siting Board then reviews the hearing examiners' recommended decision and decides whether to issue a certificate.[77] The Siting Board must make several findings about the proposed project, including determinations whether the project will benefit NYS's electricity generation capacity, serve the public interest, and minimize environmental impacts "to the maximum extent practicable."[78] As part of these determinations, the Siting Board can choose to disregard any local law affecting the project that it deems to be "unreasonably burdensome" in view of existing technology, as well as ratepayer needs or costs.[79] If the Siting Board grants a certificate, any aggrieved party can apply for a rehearing within 30 days after the decision. That rehearing must be completed within 90 days of the deadline for filing rehearing petitions.[80]

Even after a certificate has been granted, a developer cannot commence construction of the facility or any interconnections

74. N.Y. PUB. SERV. LAW § 165(1) (Consol. 2011). The hearing is preceded by a prehearing conference to specify the issues that will be raised at the hearing, allow parties to enter into stipulations, and address other relevant concerns. N.Y. PUB. SERV. LAW §§ 165(2), 165(3) (Consol. 2011).

75. N.Y. PUB. SERV. LAW §§ 165(3), 165(4), 166, 167 (Consol. 2011).

76. N.Y. PUB. SERV. LAW § 165(1) (Consol. 2011). The 12-month deadline can be waived by the applicant or the Siting Board can determine that circumstances require the deadline to be extended by six months to develop an adequate record. No Article 10 projects have complied with the 12-month deadline. *Active Article 10 Queue*, *supra* note 62.

77. N.Y. PUB. SERV. LAW § 168 (Consol. 2011).

78. N.Y. PUB. SERV. LAW § 168(2) (Consol. 2011). *See* § 168(3) for factors that the Siting Board must consider in making such determinations. N.Y. PUB. SERV. LAW § 168(3) (Consol. 2011).

79. N.Y. PUB. SERV. LAW § 168(3) (Consol. 2011). The Siting Board "may elect not to apply, in whole, or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement." For this Note, the term "local laws" will refer to any procedural or substantive requirements of any applicable local laws and regulations concerning the environment, or public health and safety that can be waived by the Siting Board for Article 10 proceedings and by ORES for Section 94-C proceedings. *See infra* Part II.B.

80. N.Y. PUB. SERV. LAW § 170 (Consol. 2011). All Article 10 applications that have come before the Siting Board have been approved.

without completing all compliance filings required by the Siting Board.[81] "Post-certificate" compliance requires a developer to file all necessary engineering and design documents, and to complete all mandatory conditions set by the Siting Board.[82] DPS must confirm that the developer has satisfied the compliance requirements prior to construction, as well as monitor long-term compliance with those requirements.[83]

Article 10's extensive statutory and regulatory requirements have created substantial delays, requiring developers to go through years of application preparation and hearings before their projects are granted certificates.[84] Even after developers receive this approval, the Siting Board often imposes extensive post-compliance conditions.[85]

B. Overview of the New Section 94-C Process

Section 94-C provides a centralized, uniform permitting regime overseen by ORES, "which is charged with accepting applications and evaluating, issuing, amending, [and] approving the assignment and/or transfer of siting permits."[86] Compared to Article 10, the new Section 94-C could substantially streamline the project approval process by imposing strict deadlines. Under Section 94-C, developers may be subject to less extensive pre-application procedures prior to submitting applications to ORES.[87] Additionally, as under Article 10, the developer must set up an intervenor funding account, which will enable local agencies and community groups to participate in public comment periods and hearings.[88]

81. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1002.2–3 (McKinney 2012).
82. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1002.3 (McKinney 2012).
83. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1002.4 (McKinney 2012).
84. *See infra* Part III.
85. *Id*.
86. "[ORES] shall exercise its authority by and through the executive director," which is a newly-created position. N.Y. EXEC. LAW § 94-C(3)(a) (McKinney 2020). Although Section 94-C applies to renewable energy projects of at least 25 MW of capacity, developers with projects of at least 20 MW can apply to become subject to Section 94-C by filing an application with ORES. N.Y. EXEC. LAW § 94-C(4)(g) (McKinney 2020) (Renewable energy projects with between 20 MW to 25 MW of capacity "shall be treated as 'major renewable energy facilit[ies]' exclusively for the purposes of permitting under [Section 94-C].").
87. N.Y. EXEC. LAW § 94-C(5) (McKinney 2020).
88. N.Y. EXEC. LAW § 94-C(7)(a) (McKinney 2020).

Within 60 days of receiving an application, ORES must "determine whether the application is complete and must notify the [developer] of its determination."[89] To have a complete application, the developer must provide proof that it has consulted with the municipality where the project will be sited about its local laws.[90] Within 60 days of deeming the application complete, and after the developer has consulted with any relevant NYS agencies, ORES must publish draft permit conditions for the project and provide a minimum 60-day notice-and-comment period.[91] During this period, the municipality must submit a statement to ORES indicating whether the project complies with its local laws.[92] If public comments, including those from the municipality, raise "substantive and significant" issues, then ORES must hold an adjudicatory hearing[93] and issue a final written hearing report.[94] If the municipality indicates that the project does not comply with its local laws and ORES opts not to hold an adjudicatory hearing, then ORES must hold a non-adjudicatory public hearing.[95] After the hearing has concluded and the comment period has ended, ORES must issue a summary of comments and an assessment of comments received.[96]

89. N.Y. EXEC. LAW § 94-C(5)(b) (McKinney 2020). If an application is deemed incomplete, ORES must provide the developer with written reasons of its determination. However, if ORES fails to make a determination within the 60-day period, then the application shall be deemed complete. *Id.*

90. *Id.* "Municipality" in the context of Section 94-C will be used in this Note to refer to any "municipality," which means any county, city, town, or village, or "local agency," which means "any local agency, board, district, commission or governing body, including any city, county, and other political subdivision of the state." N.Y. EXEC. LAW §§ 94-C(1)(d), (1)(e) (McKinney 2020). A project may be located in more than one municipality or political subdivision.

91. N.Y. EXEC. LAW § 94-C(5)(c)(i) (McKinney 2020). "NYS agency" in the context of Section 94-C will be used in this Note to refer to any NYS agency or authority. This subsection appears to indicate that developers should consult with relevant NYS agencies that have subject matter expertise and regulatory authority over specific topics covered in the 94-C application.

92. N.Y. EXEC. LAW § 94-C(5)(c)(ii) (McKinney 2020).

93. N.Y. EXEC. LAW § 94-C(5)(d) (McKinney 2020). Unlike under Article 10, public comments appear to be restricted to this period. *See supra* Part II.A. ORES has not yet promulgated final regulations specifying the requirements of Section 94-C adjudicatory and non-adjudicatory hearings.

94. N.Y. EXEC. LAW § 94-C(5)(e) (McKinney 2020).

95. N.Y. EXEC. LAW § 94-C(5)(c)(ii) (McKinney 2020).

96. N.Y. EXEC. LAW § 94-C(5)(e) (McKinney 2020).

Within one year from when the application was deemed complete, ORES must determine whether to grant a siting permit.[97] For projects on "build-ready sites," the determination must be made within six months.[98] Section 94-C requires that a developer must receive a siting permit before preparing a site or beginning construction on a project.[99] ORES can only issue a siting permit upon finding that the project will comply with all applicable uniform standards and site-specific conditions, as well as with all local laws that ORES has not chosen to waive.[100] If ORES has not made its determination by the relevant deadline,[101] then the siting permit will be automatically issued.[102]

Once the siting permit has been issued, the developer must comply with all relevant uniform standards or site-specific conditions, as well as provide a "host community benefit."[103] A party may seek judicial review of ORES's determination to grant or to deny the issuance of a siting permit, subject to a relatively limited scope of review, in the Appellate Division of the NYS Supreme Court in the county where the project will be sited.[104]

97. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020).

98. A "build-ready site" can have "an existing or abandoned commercial use, including without limitation, brownfields, landfills, former commercial or industrial sites, dormant electric generating sites, and abandoned or otherwise underutilized sites." *Id.*; *see also* N.Y. PUBL. AUTH. art. 8, tit. 9-B §§ 1901(8), 1902 (McKinney 2020).

99. N.Y. EXEC. LAW § 94-C(4)(a) (McKinney 2020).

100. N.Y. EXEC. LAW § 94-C(5)(e) (McKinney 2020). ORES can choose not to apply certain local laws that it finds to be "unreasonably burdensome." *See infra* Part III.C.

101. ORES and the developer can also agree to a 30-day extension from the relevant deadline from when ORES must make a final determination about whether to grant the project a siting permit. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020).

102. *Id.*

103. *Id.* A host community benefit refers to a financial benefit, such as a credit on utility bills, that a developer will provide to the residents of a municipality where a renewable energy project is proposed to be sited. In the Matter of a Renewable Energy Facility Host Community Benefit Program, Case 20-E-0249, 1–2 (N.Y. Dept. Pub. Serv. Sep. 23, 2020). A host community benefit may be of the type determined by the PSC pursuant to Section 8 of the Act, a project determined by ORES, or as agreed to between the project developer and host community. *Id.*; N.Y. PUBL. AUTH. LAW art. 8, tit. 9-B §§ 1901(5), 1903 (McKinney 2020).

104. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020). Other than the provisions outlined in Section 94-C, Article 78 of NYS Civil Practice Law and Rules will apply to these judicial appeals. N.Y. EXEC. LAW § 94-C(5)(g)(iii) (McKinney 2020).

C. The Transition from Article 10 to Section 94-C

Until ORES finalizes uniform standards and permitting conditions, as well as regulations outlining the required content of Section 94-C applications, Article 10 will continue to govern the siting process.[105] Section 94-C's requirements will not automatically apply to the 54 renewable energy projects for which Article 10 PIPs were submitted on or before Section 94-C's enactment in April 2020.[106] However, developers of those projects can opt into the Section 94-C process by filing their applications with ORES.[107]

For previously proposed Article 10 projects, Section 94-C's regulations "shall set forth an expedited permitting process to account for matters and issues already presented and resolved" in Article 10 proceedings.[108] Article 10 projects with submitted applications, but which have not yet been deemed compliant, will be considered under Section 94-C. This will start the 60-day period during which ORES must determine whether the application is complete. Article 10 projects with applications that were deemed compliant will be considered to have complete Section 94-C applications.[109] After developers have consulted with relevant NYS agencies, this will start the 60-day period during which ORES must publish draft permit conditions and will start the 60-day notice-and-comment period.

On September 16, 2020, ORES issued draft versions of the Section 94-C uniform standards and conditions for permits and procedural regulations for applications.[110] As required by Section 94-C,[111] ORES announced that it would hold a series of public hearings, which occurred in November 2020, to solicit public comments.[112] ORES must issue final versions of the uniform standards and conditions and the regulations by April

105. *See* Part II *supra*.
106. N.Y. EXEC. LAW § 94-C(4)(e)(iii) (McKinney 2020).
107. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020).
108. *Id.*
109. N.Y. EXEC. LAW § 94-C(5)(f)(i) (McKinney 2020).
110. Chapter XVIII, Title 19 of NYCRR Part 900, §900-1, 900-14.
111. N.Y. EXEC. LAW § 94-C(3)(b) (McKinney 2020).
112. *Events*, OFFICE OF RENEWABLE ENERGY SITING, *available at* https://perma.cc/BJ9M-EBCN.

3, 2021.[113] This Note does not discuss these topics because they will likely not be finalized by when this Note is published.

IV. SECTION 94-C CAN ADDRESS ISSUES THAT FREQUENTLY AROSE UNDER ARTICLE 10

Many issues plague the Article 10 process, driven by extensive requirements, and have created protracted delays. Discretionary NYS agency decisions, including failing to enforce statutory deadlines and requiring strict compliance with procedural guidelines, have diminished Article 10's efficacy. When drafting Section 94-C, NYS policymakers were keenly aware of these issues and sought to streamline and standardize project requirements and conditions, establish firm deadlines, and limit opportunities to derail project approval. Section A discusses how the Section 94-C statute can address issues under Article 10.

A. Article 10 Pre-Application Issues

1. Section 94-C Appears to Eliminate Pre-Application Procedures and Intervenor Fees

Unlike Article 10, it appears that Section 94-C does not set forth any statutory pre-application procedures prior to a developer's application being submitted.[114] Reducing pre-application procedures could create significant time savings. On average, Article 10 applicants must wait at least eight months from starting the process to submitting applications.[115] On average, under Article 10, it takes over two years for developers to go from submitting initial PIPs to submitting applications.[116]

113. N.Y. EXEC. LAW § 94-C(3)(b), (g) (McKinney 2020).

114. *See supra* Part II.B. However, Section 94-C regulations may impose certain requirements for pre-application procedures that were not specifically set forth in the Section 94-C statute.

115. According to Article 10 regulations, developers must submit their PIPs to DPS at least 150 days prior to submitting their PSSs. Developers must submit their PSSs to DPS, several other NYS agencies, and the municipalities where the projects will be sited, at least 90 days prior to submitting their Article 10 applications to the Siting Board. N. Y. COMP. CODES R. & REGS tit. 16, §§ X.A.1000.4(d), 1000.5(c) (McKinney 2012). *See supra* Part II.A.

116. *Active Article 10 Queue*, *supra* note 62.

Section 94-C also appears to eliminate pre-application intervenor fees, which would allow developers to avoid another project expense. Under Article 10 regulations, developers are required to include an intervenor fee of $350 per MW of the facility's generating capacity, capped at $200,000, when submitting their PSSs.[117] Given that Section 94-C eliminates the pre-application procedures, it does not make sense to require developers to provide intervenor funding before they begin their involvement with ORES.

2. Section 94-C Still Allows for Meaningful Public Participation

Although Section 94-C appears to eliminate pre-application comment periods, local groups and municipalities can still voice their concerns after an application has been submitted.[118] Even if developers have entered into stipulations, parties not involved in those stipulations, including local groups, can still "raise objections at the hearing as to the methodology or scope of any study or program of studies performed in compliance with such stipulation" at the evidentiary hearing.[119] Under Section 94-C, having a comment period only after an application has been submitted could result in more concentrated and constructive public comments.

Additionally, Section 94-C currently does not have a stipulations process, which contributed to delays under Article 10. Although stipulations are technically optional under Article 10,[120] the Siting Board has strongly encouraged developers to enter into preliminary stipulation discussions as an unofficial prerequisite to submitting applications.[121] After developers conduct procedural conferences and enter into negotiations with

117. For PSSs that were "substantially modified or revised subsequent to [their] filing," the Siting Board can require an additional intervenor fee of up to $25,000. N.Y. PUB. SERV. LAW § 164(3) (McKinney 2011).

118. Often, comment periods earlier in the Article 10 process have not resulted in many substantive improvements to proposed projects. *See supra* Part II.A. However, Section 94-C regulations may impose certain requirements for pre-application comment periods that were not set forth in the Section 94-C statute.

119. N.Y. PUB. SERV. LAW § 163(5) (McKinney 2011).

120. *Id.*

121. *See supra* Part II.B; *Article 10 Law*, *supra* note 32.

relevant NYS agencies,[122] they can submit draft stipulations to the Siting Board. These can take months to prepare. After being submitted, stipulations often receive many comments and undergo several rounds of edits.[123] There is no required timeline for the stipulations process, nor a deadline for parties to raise issues.[124] It is still unclear whether a stipulations process will be outlined in the final version of ORES's Section 94-C regulations. Despite any potential changes to the stipulations process, there will still be opportunities for public participation.

3. Section 94-C Enables Developers, ORES, and NYS Agencies to Cooperate

Section 94-C also encourages ORES and NYS agencies to cooperate in the siting process. Under Section 94-C, NYS agencies are "authorized to provide support and render services to [ORES] within their respective functions."[125] Employees from other NYS state agencies who are necessary to ORES's activities can be transferred to ORES to help review projects.[126]

Under Article 10, delays frequently arise from a lack of coordination and communication among developers, the Siting Board, and NYS agencies.[127] The Siting Board and NYS agencies often have different goals when providing feedback to developers. These problems are compound by understaffing at some NYS agencies, particularly DEC and the NYS Department of Agriculture and Markets ("DAM"),[128] which has limited their ability to proactively answer developers' questions and to flag potential issues. Section 94-C may foster closer working relationships and minimize earlier procedural hurdles for developers by requiring that other NYS agencies support ORES.

122. N.Y. COMP. CODES R. & REGS. tit. 16, § X.A.1000.5 (McKinney 2012).

123. CULLEN HOWE, NEW YORK LEAGUE OF CONSERVATION VOTERS EDUCATION FUND, [NYLCVEF], BREAKING DOWN THE BARRIERS TO SITING RENEWABLE ENERGY IN NEW YORK STATE 20 (2019).

124. *Id*.

125. N.Y. EXEC. LAW § 94-C(3)(h) (McKinney 2020).

126. N.Y. EXEC. LAW § 94-C(3)(i) (McKinney 2020).

127. HOWE, *supra* note 123.

128. *Id*. at 7.

B. Article 10 Application and Hearing Issues

Article 10 applications are very extensive, covering many areas, and including some requirements with limited applicability to wind and solar power projects.[129] Many of the substantive requirements pertaining to wind and solar power projects have been applied unpredictably. Article 10 application issues that have been disputed by local groups, municipalities, and NYS agencies in hearings have concerned agricultural land, wetlands, birds and bats, setbacks, visual impacts and shadow flicker, noise, and decommissioning.[130] Section 94-C is designed to sidestep these disputes by requiring new uniform standards for these issues.

1. Article 10 Hearings Have Involved Frequent Disputes About Many Issues

i. Agricultural Land

Article 10 regulations require developers to analyze the impacts on agricultural resources from their projects.[131] At some hearings, disputes have concerned restrictions on the installation of poles and underground transmission wires at facility sites, which could impose engineering constraints.[132] DAM has consistently recommended that developers should avoid siting their projects on agricultural land out of a fear that

129. N. Y. COMP. CODES R. & REGS. tit. 16, § X.A. (McKinney 2012). A number of Article 10 exhibits appear to provide safeguards from the environmental impacts of natural gas and other fossil-fuel powered projects. Some examples include: "Exhibit 7: Natural Gas Power Facilities," "Exhibit 16: Pollution Control Facilities," "Exhibit 17: Air Emissions," "Exhibit 30: Nuclear Facilities," and "Exhibit 36: Gas Interconnection."

130. This is not an exclusive list of Article 10 hearing issues. Other issues disputed typically only at the earlier stages of these hearings include forest fragmentation and slopes, groundwater and wells, invasive species, and streams.

131. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.22(q) (McKinney 2012).

132. *See e.g.*, Cassadaga Wind Application: Notice of Recommended Decision, Case No. 14-F-0490, 36-38 (N.Y. State Board on Electric Generation Siting and the Environment Nov. 8, 2017) [Cassadaga Wind Recommended Decision], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number; Number Three Wind Application: Notice of Issuance of the Recommended Decision and Schedule for Filing Exceptions, Case No. 16-F-0328, 49-51 (N.Y. State Board on Electric Generation Siting and the Environment Aug. 22, 2019) [Number Three Wind Recommended Decision], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=50941&MNO=16-F-0328.

these projects could permanently convert farmland into non-agricultural use.[133] DAM has been worried that farmers cannot use their land while projects are operational.[134]

ii. Wetlands

Article 10 regulations enumerate requirements for wetlands protection.[135] This includes identifying all regulated wetlands on the project site or within 500 feet of adjacent properties or interconnections, providing quantitative and qualitative assessments of impacts to onsite wetlands, identifying offsite wetlands that could be impacted by construction, and developing reasonable avoidance or mitigation measures for those impacts.[136]

Some hearings have included disputes about the effects on wetlands and adjacent areas from installing collection lines and underground electrical wires, and from building access roads.[137] Even when projects may affect only small wetland areas, developers must produce detailed compliance plans[138] and typically commission surveys at their own expense.[139]

133. Gene Kelly and Michelle Piasecki, *The Impossible Search for Perfect Land: Siting Renewable Energy Projects in New York State*, 30 ENVIRONMENTAL LAW IN NEW YORK 167, 170 (2019).

134. Prepared Testimony of Jason Mulford, CPESC, In the Matter of Application of Mohawk Solar L.L.C. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to construct the Solar Electric Generating Facility, Case No. 17-F-0182, 7–8 (N.Y. State Board on Elec. Generation Siting and the Env't Mar. 27, 2020), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-F-0182&submit=Search. These concerns are particularly relevant for solar projects sited on large land plots. *Id*. at 6–7. Wind projects have comparatively smaller physical footprints. *See e.g.*, Bluestone Wind Application: Notice of Schedule for Filing Exceptions, Case No. 16-F-0559, 38–39 (N.Y. State Board on Elec. Generation Siting and the Env't Oct. 1, 2019) [hereinafter Bluestone Wind Recommended Decision], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0559&submit=Search.

135. These requirements are mandated in addition to existing federal and NYS requirements for wetlands protection.

136. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.22 (McKinney 2012).

137. *See e.g.*, Cassadaga Wind Recommended Decision, *supra* note 132, at 49–51; Baron Winds Application: Notice of Schedule for Filing Exceptions, Case No. 15-F-0122, 48–50 (N.Y. State Board on Elec. Generation Siting and the Env't May 24, 2019) [Baron Winds Recommended Decision], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-F-0122&submit=Search.

138. *See e.g.*, Cassadaga Wind Recommended Decision, *supra* note 132, at 49–51.

139. *Id*. at 47–49; Baron Winds Recommended Decision, *supra* note 137, at 45–46.

iii. Birds and Bats

Article 10 regulations require developers to commission pre-construction studies of environmental impacts to birds and bats, post-construction monitoring programs, and plans to avoid or minimize impacts during the construction and operation of projects.[140] With regards to threatened bats, disputes about wind projects have concerned the level of risk of population-level declines and incidental takings,[141] as well as whether these impacts should require the preparation of comprehensive mitigation plans.[142] When considering the effects on threatened bird species, disputes have occurred about whether birds have been seen near wind turbines and measures necessary to shield them from harm.[143] Disputes have also arisen over the possible destruction of grassland bird habitats by solar power projects.[144]

iv. Setbacks

Article 10 regulations require that wind power project applications list all applicable setback requirements, which indicate how far away turbines should be built from roads, occupied structures, transmission lines, and other structures,[145] as well as explain how developers will comply with those

140. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.22(h) (McKinney 2012). More generally, developers must identify any endangered and threatened species with habitats on project sites that could be affected, as well as develop avoidance or mitigation plans. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.22(o) (McKinney 2012).

141. *See e.g.*, Cassadaga Wind Recommended Decision, *supra* note 132, at 61–64; Baron Winds Recommended Decision, *supra* note 137, at 58–59, 62–63.

142. *See e.g.*, Cassadaga Wind Recommended Decision, *supra* note 132, at 62–64; Baron Winds Recommended Decision, *supra* note 137, at 58–59, 62–63.

143. *See e.g.*, Baron Winds Recommended Decision, *supra* note 137, at 70–75; Number Three Wind Recommended Decision, *supra* note 132, at 75–77 (Aug. 22, 2019).

144. *See e.g.*, Prepared Testimony of Brianna Denoncour, Paul Novak, and Matthew Palumbo, Ph.D., In the Matter of Application of Mohawk Solar L.L.C. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to construct the Solar Electric Generating Facility, Case No. 17-F-0182, 15-18 (N.Y. State Board on Elec. Generation Siting and the Env't Mar. 27, 2020), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-F-0182&submit=Search.

145. N. Y. COMP. CODES R. & REGS tit. 16, § X.A .1001.6 (McKinney 2012). Setback requirements are typically calculated as a minimum multiple of the turbine height. *See e.g.*, Baron Winds Recommended Decision, *supra* note 137, at 93–96.

requirements.[146] Often, municipalities argue that restrictive setback requirements are necessary to prevent damage from wind turbines collapsing or ice thrown from turbine blades in the winter.[147] Setback requirements restrict where developers can site their projects and can sometimes overcompensate for safety concerns. Additionally, they do not necessarily account for the current technical capabilities of wind turbines to prevent those potential harms.

v. Visual Impacts and Shadow Flicker

Article 10 regulations requires a Visual Impact Assessment ("VIA") to "determine the extent and assess the significance of facility visibility."[148] The VIA must address several areas, including the project's visibility and its operational characteristics, the project's appearance upon completion, the visual change from project and interconnection line construction, and the description of all visual resources affected by the project.[149]

Many communities have expressed concerns about the visibility of wind and solar power projects juxtaposed against forests and agricultural landscapes, which could diminish their aesthetic character and could result in lower property values near the project sites.[150] Solar projects also have to account for glare from their panels, which could be a nuisance to nearby property.[151] Given that renewable energy facilities will

146. This explanation must be supported by third-party review and certification of the plan. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.6 (McKinney 2012).

147. *See e.g.*, Application of Canisteo Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction and Operation of a Wind Energy Facility in Steuben County: Notice of Issuance of the Recommended Decisions and Schedule for Filing Exceptions, 122–23 (N.Y. State Board on Elec. Generation Siting and the Env't 2019) [Canisteo Wind Energy Recommended Decision], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0205&submit=Search.

148. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1001.24(a) (McKinney 2012).

149. *Id.*

150. *See e.g.*, Eight Point Wind Recommended Decision, Case No. 16-F-0062, 74 (N.Y. State Board on Elec. Generation Siting and the Env't May 23, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0062&submit=Search; Baron Winds Recommended Decision, *supra* note 137, at 104.

151. *See e.g.*, HIGH RIVER ENERGY CENTER, UPDATE TO GLINT AND GLARE ANALYSIS – ALTERNATIVE LAYOUT (2020), *available at* https://perma.cc/JXT5-MFFS.

inevitably have some visibility, questions often arise about what constitutes "reasonable mitigation" of visual impacts to avoid the impractical alternative of not developing projects.[152]

As part of the VIA, developers of wind power projects must also analyze impacts from shadow flicker,[153] which occurs when moving shadows are cast by a wind turbine when the sky is not obscured, the sun is aligned with a turbine and receptor, and enough wind is blowing.[154] There have been disputes about the appropriate daily or yearly limits for the occurrence of shadow flicker because of potential seizure risks to people with epilepsy, as well as nuisance.[155]

vi. Noise

Article 10 regulations require "[a] study of the noise impacts of the construction and operation of the facility, related facilities and ancillary equipment."[156] The study must address several issues, including the pre-construction baseline noise level, noise levels during the facility's construction and operation, noise standards set by municipalities, and an evaluation of reasonable noise abatement measures.[157] Noise disputes have concerned the appropriate design goals to address nuisance,[158] as well as whether turbine noise levels would harm public health.[159]

vii. Decommissioning

Article 10 regulations require developers to provide decommissioning plans to restore the site at the end of the project's life or if the project cannot be completed.[160] Relevant

152. *Id.*

153. N. Y. COMP. CODES R. & REGS tit. 16, § 1001.24(a)(9) (McKinney 2012).

154. Baron Winds Recommended Decision, *supra* note 137, at 85.

155. *See, e.g.*, *id.* at 84–86. Many disputes have concerned whether developers should be required to comply with the more restrictive daily shadow flicker limits proposed in a study issued by the National Association of Regulatory Utility Commissioners or whether less restrictive yearly limits would be sufficient. *See, e.g.*, *id.* at 86.

156. N. Y. COMP. CODES R. & REGS tit. 16, § 1001.19 (McKinney 2012).

157. *Id.*

158. These disputes have concerned whether developers should be required to comply with the more restrictive World Health Organization 2018 guidelines for wind turbine noise levels or whether less restrictive limits would be sufficient. *See, e.g.*, Baron Winds Recommended Decision, *supra* note 137, at 102–03.

159. *See, e.g.*, Number Three Wind Recommended Decision, *supra* note 132, at 99–109.

160. N. Y. COMP. CODES R. & REGS tit. 16, § 1001.29 (McKinney 2012).

considerations include safely removing hazardous materials, remediating environmental impacts, and salvaging or recycling project equipment.[161] The decommissioning plan also requires the developer to have a guarantor's backing or to grant a security interest to the landowner on whose land the project will be sited.[162] Disputes about decommissioning plans have involved cost estimates and the required type of security interest,[163] as well as the plan's scope of work.[164]

2. Section 94-C Can Circumvent Many Application and Hearing Issues

To limit the scope of disputes initiated by NYS agencies, municipalities, and local groups, Section 94-C standardizes application requirements.[165] It should be easier for developers to confirm with ORES whether their applications are compliant. ORES has broad authority to carry out this mandate.[166]

Section 94-C requires that ORES must "establish a set of uniform standards and conditions for the siting, design, construction and operation" of "major renewable energy projects" by April 2021.[167] These standards must encompass common renewable energy project development issues for solar power, wind power, and energy storage projects.[168] However, these standards must still "avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts."[169] ORES is required to develop these standards in consultation with the NYS Energy Research and Development Authority ("NYSERDA"), DEC, DPS, DAM, and other NYS agencies with subject matter expertise.[170] Prior to adopting these standards, ORES must hold four public hearings

161. *Id.*
162. N. Y. COMP. CODES R. & REGS tit. 16, § 1001.29(c) (McKinney 2012).
163. *See, e.g.*, Cassadaga Wind Recommended Decision, *supra* note 132, at 143–50.
164. *See, e.g.*, Number Three Wind Recommended Decision, *supra* note 132, at 156–60.
165. *See supra* Part II.B.
166. N.Y. EXEC. LAW § 94-C(3)(f) (McKinney 2020).
167. N.Y. EXEC. LAW § 94-C(3)(b) (McKinney 2020).
168. *Id.*
169. N.Y. EXEC. LAW § 94-C(3)(c) (McKinney 2020).
170. N.Y. EXEC. LAW § 94-C(3)(b) (McKinney 2020).

across NYS to solicit comments from municipalities and the public.[171]

Section 94-C improves on Article 10 by requiring more consistent permit conditions, based on common issues in Article 10 hearings. Going forward, this should reduce disputes about the minutiae of which standards should apply to a particular project. For developers, greater standardization would likely reduce the costs of hiring experts to prepare applications, siting plans, and other technical documents. ORES should promulgate appropriate permit conditions that enable project development and should reject restrictive permit conditions that are proposed by local groups merely to derail project approval.[172]

Section 94-C's scheme nonetheless provides flexibility to deviate from uniform permit standards when necessary. If a project has site-specific environmental impacts that cannot be addressed by ORES's standards, ORES will consult with DEC to draft site-specific conditions, including avoidance and mitigation measures tailored to that site.[173] When proposing site-specific conditions, ORES must also consider the necessity of the project to meet the CLCPA targets, as well as the project's environmental benefits.[174] If the project's environmental impacts cannot be completely avoided or mitigated through site-specific conditions, ORES may instead require the developer to pay a fee to achieve "off-site mitigation."[175] If impacts to endangered or threatened species cannot be mitigated, ORES may require the developer to contribute to the newly-established Endangered and Threatened Species Mitigation Bank Fund (the "Fund").[176]

Additionally, Section 94-C grants ORES broad authorization to conduct hearings and dispute resolution proceedings to

171. *Id.*

172. *See infra* Part III.B.

173. N.Y. EXEC. LAW § 94-C(3)(d) (McKinney 2020). The site-specific conditions must achieve a net conservation benefit to any impacted endangered and threatened species. *Id.*

174. These environmental benefits would likely be reductions in carbon emissions and other emissions. *Id.*

175. N.Y. EXEC. LAW § 94-C(3)(e) (McKinney 2020).

176. ORES, in consultation with DEC, may determine that a payment is required as part of the developer's final siting permit, if this can produce a net conservation benefit for endangered and threatened species. *Id.* The Fund is established pursuant to N.Y. STATE FIN. LAW § 99-HH*3 (McKinney 2020).

determine whether to issue a siting permit.[177] Under Section 94-C, only one hearing is required and ORES must make a final permit decision within a set timeframe.[178] Furthermore, Section 94-C requires findings that should be more straightforward and easier for developers to achieve.[179] These changes should dissuade municipalities and local groups from bringing up excessive procedural challenges and facilitate more timely project approval. For developers, streamlined hearings would likely reduce costs associated with hiring experts to testify on their behalf.

Like Article 10,[180] Section 94-C requires a developer to include an intervenor fee of $1,000 per MW of the project's capacity.[181] Section 94-C specifies that the intervenor fee is available for municipalities to determine whether a project will comply with their local laws.[182] Although Section 94-C does not mandate other uses for the intervenor fee, the statute allows ORES to promulgate regulations for how funds will be disbursed.[183] Given Article 10's history, it appears that intervenor funds will likely still be designated for municipalities and local groups to participate in comments and hearings. However, with this regulatory flexibility, ORES may choose to limit the availability of funds so they cannot be used to derail project approval.

Finally, Section 94-C mandates that ORES promulgate regulations to implement the permit program by April 2021.[184]

177. N.Y. EXEC. LAW §§ 94-C(3)(f), (4)(d) (McKinney 2020).

178. *See supra* Part II.B. Unless there is an agreement between the developer and the municipality, there is no right or process for extending this set timeframe. *Id*. Conversely, Article 10 requires two hearings and does not provide a definite time frame by which the Siting Board must make its decision. *See supra* Part II.A.

179. *See supra* Part II.B.

180. Article 10 regulations mandated that the intervenor fee is $1,000 per MW of the facility's generating capacity, capped at $400,000. If an amendment to an application is determined to be a revision, then the presiding hearing examiner can require an additional intervenor fee of up to $75,000. N.Y. PUB. SERV. LAW § 164(6) (McKinney 2011).

181. N.Y. EXEC. LAW § 94-C(7)(a) (McKinney 2020). This fee may be periodically adjusted for inflation. *Id*.

182. *Id*. The intervenor fee will be deposited in a general local agency account established by NYSERDA and maintained in a segregated account overseen by the NYS Commissioner of Taxation and Finance. *Id*.

183. *Id*.

184. N.Y. EXEC. LAW § 94-C(3)(g) (McKinney 2020).

ORES should be able to establish standards and procedures conducive to renewable energy project development, while still ensuring robust environmental protection. As projects begin submitting Section 94-C applications, it will eventually become clear whether ORES's regulations will line up with these statewide goals. Nevertheless, ORES has broad authority to modify the regulations to improve the Section 94-C regime over time.[185]

C. "Unreasonably Burdensome" Local Laws Impede Project Development

1. Limited Exercise of Waiver Authority Under Article 10

Article 10 mandates that projects must comply with all applicable local laws, but the Siting Board may elect not to apply any local laws that it deems to be "unreasonably burdensome."[186] The Siting Board's waiver authority was intended to be a powerful bulwark against local laws designed to impede project siting.[187] Examples of local laws that the Siting Board has reviewed include a prohibition on wind turbine construction on Saturdays[188] and a moratorium on the siting of wind power facilities and ancillary equipment.[189] The Siting Board appeared to finally clarify the meaning of "unreasonably burdensome" via a balancing test:

> In considering whether the burden imposed on a project is unreasonable, the Applicant must demonstrate that the burdens (e.g., construction delays, increased cost, impossibility, impingement on the public interest, etc.)

185. *Id.*

186. N.Y. PUB. SERV. LAW § 168(3) (McKinney 2011).

187. Michael B. Gerrard and Edward McTiernan, *State Authority to Preempt Local Laws Regulating Renewable Energy Projects*, 259 N.Y. L.J. (2018).

188. Baron Winds Application: Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, 153 (N.Y. State Board on Elec. Generation Siting and the Env't Sep. 12, 2019) [Baron Winds Certificate], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-F-0122&submit=Search.

189. Bluestone Wind Application: Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, Case No. 16-F-0559, 79–82 (N.Y. State Board on Elec. Generation Siting and the Env't Dec. 16, 2019) [Bluestone Wind Certificate], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0559&submit=Search.

> outweigh the benefits associated with applying the local law (managing traffic and construction noise impacts, etc.), as well as the impacts of refusing to apply it.[190]

At the same hearing, the Siting Board was extremely reluctant to exercise its waiver authority and was more willing to continue enforcing local laws.[191] The Siting Board has construed its discretion narrowly and has not overruled any other local laws for being unreasonably burdensome.[192] Additionally, the Siting Board has created hurdles by requiring developers to strictly follow procedures applying to local laws. At one hearing, the Siting Board refused to waive two local laws because the developer failed to provide evidence that they were unreasonably burdensome, despite having already entered into an agreement with municipalities to not enforce their local laws.[193] It is unclear whether the Siting Board will provide a more general rule about how it decides whether to waive unreasonably burdensome local laws.[194]

2. Potential for Broader Exercise of Waiver Authority Under Section 94-C

Under Section 94-C, ORES, in determining whether to grant a siting permit, may choose not to apply any local law that is "unreasonably burdensome in view of the CLCPA targets and the environmental benefits" of a project.[195] Rather than insisting upon strict compliance, Section 94-C takes a broader view that prioritizes statewide values. Unlike the Siting Board, which applied the "unreasonably burdensome" standard in

190. Baron Winds Certificate, *supra* note 188, at 153–54.

191. *Id.*

192. However, the Siting Board waived a municipality's moratorium on the siting of wind power projects and ancillary equipment because it was imposed after the evidentiary hearing for a project had concluded and the municipality never provided evidence in support of the local law. Bluestone Wind Certificate, *supra* note 189, at 79–82.

193. Number Three Wind Application: Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, Case No. 16-F-0328, 90, 98–99 (N.Y. State Board on Elec. Generation Siting and the Env't Nov. 12, 2019) [Number Three Wind Certificate], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=50941&MNO=16-F-0328.

194. *See e.g.*, THE NATURE CONSERVANCY AND THE ALLIANCE FOR CLEAN ENERGY, ACCELERATING LARGE SCALE WIND AND SOLAR ENERGY IN NEW YORK 16 (2017).

195. N.Y. EXEC. LAW § 94-C(5)(e) (McKinney 2020).

Article 10 hearings, Section 94-C appears to reverse this presumption in favor of expediting project approval and against restrictive local laws.

Section 94-C also requires that after the developer has filed its application, the municipality must submit a statement to ORES within 60 days indicating whether the project will comply with its local laws.[196] Section 94-C appears to minimize the importance of local laws, compared to other issues. The relevant provisions about compliance with local laws are included in the subsection about non-adjudicatory hearings, rather than in the subsection about adjudicatory hearings, which discusses "substantive and significant issue[s]."[197] Requiring municipalities to determine within a set timeframe whether developers comply with local laws will likely incentivize municipalities to expedite the review process. This will also encourage developers to work with municipalities to avoid disputes about local laws.

D. Article 10 Certificate Conditions and Commencing Project Construction

Even after the Siting Board has granted certificates for Article 10 projects, developers must comply with conditions prior to starting construction.[198] These certificate conditions have an outsized impact on project viability.[199] Local groups have often submitted comments about Article 10 projects' compliance filings to relitigate settled issues and to persuade the Siting Board to impose additional conditions.[200] Similarly, the Siting Board has focused on determining whether developers complied

196. N.Y. EXEC. LAW § 94-C(5)(c)(ii) (McKinney 2020).

197. *See* N.Y. EXEC. LAW §§ 94-C(5)(c)(ii), (5)(d) (McKinney 2020).

198. *See supra* Part II.A.

199. *See e.g.*, Petition of Number Three Wind LLC for Rehearing of Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, In the Matter Of: Number Three Wind Application (N.Y. State Board on Electric Generation Siting and the Environment Dec. 12, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=50941&MNO=16-F-0328 ("For applicants, Certificate Conditions are the central focus because they determine how much time will be required to complete construction; how costly construction will be; and the revenue potential of the Project once built and placed in service.")

200. *See infra* Part III.E.

with certificate conditions and submitted compliance filings, rather than facilitating the start of construction.

To avoid this additional multistep process, Section 94-C eliminates post-certificate compliance conditions. Developers can now begin construction after ORES has granted a siting permit.[201] Although there are stricter limits on the involvement of municipalities and NYS agencies,[202] there is also a different appeals process,[203] which may create new delays.

1. Nearly Unending Post-Certificate Compliance Process Under Article 10

As of August 2020, only one Article 10 project has begun construction, following a post-certificate compliance process that lasted more than two years.[204] The project's certificate includes 161 conditions, which concern nearly all aspects of the application.[205] There were many procedural challenges, including a petition for a rehearing about the project's bird and bat conservation strategy and noise monitoring plan,[206] as well as opposition to the developer's petitions to relocate the facility's point of interconnection and transmission lines[207] and to allow

201. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020).

202. N.Y. EXEC. LAW § 94-C(6) (McKinney 2020).

203. N.Y. EXEC. LAW §§ 94-C(4)(c), (4)(d) (McKinney 2020).

204. On January 17, 2018, Cassadaga Wind was the first project to receive a certificate from the Siting Board under the Article 10 process. Cassadaga Wind Application: Order Granting Certificate of Environmental Compatibility and Public Need, With Conditions, Case 14-F-0490, 9 (N.Y. State Board on Elec. Generation Siting & Envt Jan. 17, 2018) [Cassadaga Wind Certificate], *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number. Construction appears to have begun on March 29, 2020, but has been delayed. *See supra* Part II.A.

205. These conditions include, but are not limited to, preparing and implementing a wetlands preservation plan, a net conservation benefit plan for bats, a shadow flicker impacts analysis and mitigation plan, and a tree and vegetation clearing plan to protect birds and bats. Cassadaga Wind Certificate, *supra* note 204, at Appendix A.

206. Order on Rehearing, In the Matter of: Cassadaga Wind Application (N.Y. State Board on Elec. Generation Siting and the Env't May 15, 2018), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number; Order Approving Compliance Filing, In the Matter of: Cassadaga Wind Application, Case 14-F-0490 (N.Y. State Board on Electric Generation Siting and the Environment Aug. 9, 2018), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number.

207. Cassadaga Wind Application, Case No. 14-F-0490 (N.Y. State Board on Elec. Generation Siting and the Env't Aug. 8, 2018), *available at*

year-round tree clearing.[208] The Siting Board determined that the changes were revisions, rather than minor modifications, which required additional review and a new evidentiary hearing.[209]

After the delays in this project's compliance process, some developers avoided appealing to the Siting Board.[210] Rather than seeking less stringent certificate requirements, some developers decided that complying with the Siting Board's conditions would provide the path of least resistance.[211] However, there are still no guarantees that they will receive timely approval to begin construction. There is still uncertainty and risk in the post-certificate compliance process.[212]

2. Finite Period to Begin Construction Under Section 94-C

By eliminating post-certificate compliance requirements, Section 94-C provides more predictability for developers and a definite endpoint when ORES must issue a final decision

http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number.

208. Cassadaga Wind Certificate, *supra* note 204, at Appendix A; Order Granting Amendment of Certificate of Environmental Compatibility and Public Need Subject to Conditions, Cassadaga Wind Application (N.Y. State Board on Elec. Generation Siting and the Env't Apr. 26, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number.

209. Amendments to Article 10 certificates that are determined by the Siting Board to be "major changes" or "revisions," rather than "minor modifications," require new evidentiary hearings. N. Y. COMP. CODES R. & REGS tit. 16, § X.A.1000.16 (McKinney 2012); Notice of Recommended Decision, Cassadaga Wind Application, Case No. 14-F-0490 (N.Y. State Board on Elec. Generation Siting and the Env't Nov. 26, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=14-f-0490&submit=Search+by+Case+Number.

210. *See e.g.*, Eight Point Wind Application, Case No. 16-F-0062 (N.Y. State Board on Elec. Generation Siting and the Env't Environment Sep. 17, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=16-F-0062&submit=Search.

211. *See e.g.*, Baron Winds Application (N.Y. State Board on Elec. Generation Siting and the Env't Oct. 11, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=15-F-0122&submit=Search. "The lengthy Article 10 process, including the rehearing process, coupled with the uncertainty of the compliance phase leaves Baron Winds no other option except to accept the Certificate (. . .) There are no clear deadlines or timeframes in the Article 10 regulations for the review and approval of compliance filings, and consequently there is no defined period to ascertain when a project will be approved to proceed with construction." *Id.*

212. *Id.*

whether to grant a siting permit.[213] At most, ORES and the developer can agree to grant ORES a 30-day extension.[214] Given that a developer would be unlikely to delay approval of its project, Section 94-C prevents ORES from indefinitely and unilaterally extending the approval process. However, if ORES or the developer initiates an amendment to a siting permit that materially increases any environmental impacts or substantially changes a siting permit's terms or conditions, then an additional notice-and-comment period and hearing are required.[215]

Additionally, Section 94-C imposes limits on municipalities and NYS agencies from slowing down approvals of renewable energy projects. Under Section 94-C, municipalities and NYS agencies, unless expressly authorized under Section 94-C or by regulations promulgated by ORES, cannot require any consents, permits, or other conditions for a developer to begin constructing or operating a Section 94-C project.[216] This provision consolidates the authority to site renewable energy projects within ORES. It also prevents NYS agencies and municipalities from imposing requirements, particularly zoning laws and environmental permits, that go beyond Section 94-C's mandates. However, this arrangement will not diminish developers' accountability to follow ORES's standards and site-specific conditions. Under Section 94-C, DPS and the PSC are responsible for monitoring and enforcing compliance with siting permit conditions when constructing and operating their projects.[217]

Section 94-C still provides opportunities for aggrieved parties, including local groups, to petition for review of ORES's decision to grant or deny a siting permit.[218] By allowing for limited judicial review of specified substantive issues through NYS courts, Section 94-C should reduce the number of procedural disputes slowing down project construction.

213. The developer must have already provided notice to the municipality that it submitted a Section 94-C application to ORES. N.Y. EXEC. LAW § 94-C(5)(f) (McKinney 2020).

214. *Id.*

215. N.Y. EXEC. LAW § 94-C(4)(c) (McKinney 2020).

216. N.Y. EXEC. LAW § 94-C(6)(a) (McKinney 2020).

217. N.Y. EXEC. LAW § 94-C(6)(c) (McKinney 2020).

218. N.Y. EXEC. LAW § 94-C(5)(g) (McKinney 2020).

Although judicial review and appeals could create new delays, they are unlikely to result in the same headaches as Article 10 compliance filings and rehearings, allowing developers to avoid relitigating issues.[219]

The current experience under SEQRA siting renewable energy projects of less than 25 MW[220] suggests that judicial review in NYS courts can still result in project construction. Under SEQRA, all state and local agencies must "determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment," which could require the preparation of an environmental impact statement ("EIS").[221] The "lead agency,"[222] which is "principally responsible for undertaking, funding or approving an action," will determine whether an EIS is required[223] and must involve other agencies and the developer in the SEQRA process.[224] Because this process is still contentious, renewable energy projects approved under SEQRA have been subject to considerable litigation.[225] Some local opponents of renewable energy projects have appealed to NYS courts to challenge agency decisions to award permits under SEQRA.[226] Despite court challenges, developers have installed over 310 MW of solar power projects approved by SEQRA review.[227]

219. Steven C. Russo & Zackary D. Knaub, *New York State Legislature Passes Renewable Energy Siting Law in Step Toward Meeting Ambitious Renewable Energy Mandates*, NAT'L L. REV. (Apr. 3, 2020), *available at* https://perma.cc/K9FW-Z7BM.

220. Prior to the adoption of Section 94-C, these projects have been subject to SEQRA review, rather than the Article 10 process. N. Y. COMP. CODES R. & REGS tit. 6, § 617 (McKinney 2019).

221. N.Y. COMP. CODES R. & REGS tit. 6, § 617.1(c) (McKinney 2019).

222. In practice, a local zoning board, town board, or municipal board is likely to be the lead agency. If a major environmental permit is required, then a state agency may be the lead agency by itself or jointly with the relevant local entity. READ AND LANIANDO, LLP, NEW YORK PRACTICE SERIES: ENVIRONMENTAL LAW AND REGULATION IN NEW YORK § 15:2 (Philip Weinberg et al. eds., 2d. ed. 2019).

223. N.Y. COMP. CODES R. & REGS tit. 6, § 617.2(v) (McKinney 2019). *See also* N.Y. COMP. CODES R. & REGS tit. 6, § 617.6(b) (McKinney 2019) for detailed procedures about determining which entity will serve as the lead agency for a SEQRA action.

224. N.Y. COMP. CODES R. & REGS tit. 6, § 617.3(d) (McKinney 2019).

225. Christine A. Fazio and Judith Wallace, *Re-Enact the Former Article X of the Public Service Law*, CARTER LEDYARD & MILBURN LLP (Mar. 5, 2008), *available at* https://perma.cc/TYX8-YWN3.

226. *Id.*

227. Drennen, *supra* note 46.

E. Balancing Economic Concerns of Project Developers and Communities

1. Article 10 Has Impaired the Economic Viability of Renewable Energy Projects

Under Article 10, persistent delays in renewable energy project construction have major financial implications for developers. Renewable energy projects generate revenue by selling electricity to off-takers through Power Purchase Agreements ("PPAs") only after construction is completed and the projects are turned on.[228] Having operational PPAs in place is essential to the financial viability of renewable energy projects and dictates how equity investors and creditors can recoup their capital investments and loans for these projects.[229]

In particular, Article 10's post-certificate compliance delays have jeopardized developers' ability to qualify for federal tax incentives: the Production Tax Credit ("PTC") for wind power projects[230] and the Investment Tax Credit ("ITC") for solar power projects.[231] There is widespread consensus that the PTC and ITC have enabled exponential growth in renewable energy installation in the United States.[232] However, the ITC is being gradually reduced for projects that began construction after

228. PAUL SCHWABE ET AL., NATIONAL RENEWABLE ENERGY LABORATORY, WIND ENERGY FINANCE IN THE UNITED STATES: CURRENT PRACTICE AND OPPORTUNITIES 24 (August 2017).

229. *Id.*

230. The PTC currently provides 1.5¢ per kilowatt-hour of electricity generated at a wind power facility during its first 10 years of operation. Projects beginning construction before January 1, 2021 are eligible to receive 40% of the PTC. I.R.C. § 45 (2019).

231. The ITC currently provides a 26% federal tax credit against the tax liability for commercial, industrial, and utility-scale solar energy property. Prior to January 1, 2020, the ITC provided a 30% federal tax credit. I.R.C. 48 (2019).

232. *See, e.g.*, MOLLY SHERLOCK, THE RENEWABLE ENERGY PRODUCTION TAX CREDIT: IN BRIEF, CONG. RESEARCH SERV. (2018); Martin DeBono, *The ITC Creates Local American Jobs. Why End It Now?*, PV MAG. (October 14, 2019), *available at* https://perma.cc/2RZV-MZR7.

December 31, 2019[233] and the PTC is being phased out for projects that begin construction after December 31, 2020.[234]

Despite developers' pleas to expedite the start of construction on wind projects to qualify for the PTC, the Siting Board has failed to recognize the urgency of these impending deadlines.[235] Rather than easing compliance in light of the importance of federal tax credits to the projects' financial viability, the Siting Board has stubbornly insisted upon strict compliance with post-certificate compliance conditions and local laws prior to construction. It is unclear whether any Article 10 projects will qualify for the PTC[236] or the full ITC.[237]

2. Section 94-C Will Mutually Benefit Project Developers and Communities

Section 94-C is a major improvement over Article 10 because it enables more timely construction and greater receptiveness to renewable energy project economics. Section 94-C will facilitate more predictable planning and financing arrangements. More generally, Section 94-C should create a more welcoming environment for new renewable energy projects in NYS. Attracting and retaining new renewable energy investment,

233. The ITC will step down to 22% for projects beginning construction after December 31, 2020, and to 10% for projects beginning construction after December 31, 2021. I.R.C. § 45 (2019). The IRS has promulgated guidance clarifying when a solar project is considered to have begun construction. Some projects that will be placed into service prior to December 31, 2023 may still qualify for the 30% ITC. I.R.S. Notice 2018-59 (July 9, 2018). Due to delays caused by the COVID-19 pandemic, the IRS has promulgated guidance expanding certain safe harbors for the start of construction. I.R.S. Notice 2020-44 (May 28, 2020).

234. Prior to December 20, 2019, the PTC was originally scheduled to be phased out for projects that began construction after December 31, 2019. Further Consolidations Appropriations Bill, 2020, S. 94 116th Cong. §127(c) (2019). The IRS's guidance accounting for delays arising COVID-19 pandemic also applies to the PTC. *See* IRS, *supra* note 233.

235. *See e.g.,* Baron Winds Certificate, *supra* note 188, at 152–53; Number Three Wind Certificate, *supra* note 193, at 26–32.

236. Depending on when construction begins, some or all of the projects that have received certificates from the Siting Board may be able to qualify for the PTC. More likely than not, most other proposed wind power projects will not begin construction in time to qualify for the PTC.

237. See *supra* Part II.A. Depending on how developers have structured their construction processes, it could still be possible to qualify for the full amount of the ITC, as per IRS Guidance.

including by providing favorable financial conditions for developers, is imperative to meeting the CLCPA targets.

At the same time, it is essential that local communities benefit from the massive projected growth in renewable energy development. To accomplish this goal, there are several recently-enacted initiatives that will operate in conjunction with the Section 94-C process. First, the Clean Energy Resources Development and Incentive Program ("Title 9-B")[238] empowers NYSERDA to "incentivize the re-use of previously developed sites for renewable energy facilities," as well as to "support the provision of benefits to communities that host renewable energy facilities." [239] Under Title 9-B, NYSERDA is tasked with locating, identifying, and assessing build-ready sites for new renewable energy projects, including by prioritizing previously developed sites.[240] After locating these difficult-to-develop build-ready sites, NYSERDA will enter into negotiated agreements with the landowners or lessors to secure the necessary property interests, while providing notice to the relevant municipalities to encourage cooperation.[241] NYSERDA will also undertake all work and secure permits deemed to be necessary for the build-ready sites and will establish a program for transferring these property interests to developers through a competitive bidding process.[242] While doing so, NYSERDA, in consultation with DEC, must determine if the build-ready sites are located in or near environmental justice areas that would be adversely affected by development.[243]

238. The Clean Energy Resources Development and Incentive Program was enacted as Title 9-B of Article 8 of the NYS Public Authorities Law. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B (McKinney 2020).

239. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1900 (McKinney 2020). Title 9-B also calls for NYSERDA to foster and encourage an orderly and expedient Section 94-C process. *Id.*

240. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B §§ 1902(1)(a), (1)(b) (McKinney 2020); *see supra* Part II.B. In its assessment of sites, NYSERDA can consider factors such as: natural conditions at the site favorable to renewable energy generation; current land uses and environmental conditions at or near the site; the availability of transmission and distribution facilities on or near the site; the potential for developing energy storage facilities at or near the sites; and other factors in line with achieving the CLCPA targets. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(1)(a) (McKinney 2020).

241. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B §§ 1902(2), (3)(a) (McKinney 2020).

242. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B §§ 1902(4), (5) (McKinney 2020).

243. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(3)(b) (McKinney 2020). "'Environmental justice area' shall mean a minority or low-income community that

By providing expedited review for build-ready sites, Section 94-C incentivizes developers to consider siting their renewable energy projects where it was not previously attractive or feasible to do so. Developers will incur less risk when pursuing these projects, given that NYSERDA will have already developed the sites, as well as entered into land use agreements with property owners.[244] Under Title 9-B, NYSERDA is required to reinvest any proceeds earned in its build-ready program, in accordance with a plan approved by the PSC.[245] The revenues that NYSERDA will receive from developers through these competitive auctions can go directly to NYS communities for hosting renewable energy projects.

Under Title 9-B, NYSERDA must establish incentive programs for property owners and communities to host renewable energy projects.[246] Title 9-B broadly allows NYSERDA to scale up the programs, including by entering into payments in lieu of taxes ("PILOTs") with property owners and communities, transferring property interests in build-ready sites to developers after competitive auctions, and providing information and guidance to stakeholders.[247]

NYSERDA, in consultation with other NYS agencies, must also assess the need for workforce development in areas near build-ready sites to support green jobs growth.[248] To achieve this goal, NYSERDA must make financial support available for the local workforce and underemployed populations.[249] In addition to incentives provided by NYSERDA, the NYS PSC must establish a host community benefit program that would provide utility bill discounts or credits or "compensatory or environmental benefit[s]" to utility customers in host

may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1901(4) (McKinney 2020).

244. Russo & Knaub, *supra* note 219.

245. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(9) (McKinney 2020).

246. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(6) (McKinney 2020).

247. *Id*. To administer these incentives, NYSERDA can receive assistance from other NYS agencies, including DEC, DAM, and DPS. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(11) (McKinney 2020).

248. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(8) (McKinney 2020).

249. *Id*.

communities. [250] This program will be funded by Section 94-C renewable energy project owners.[251] In May 2020, the PSC began a proceeding to determine the amount of the benefit.[252]

By requiring that developers provide host community benefits,[253] as well as by promoting green job growth, Section 94-C should have positive economic and environmental impacts in communities where renewable energy projects will be sited. These new incentives can generate additional tax revenue for communities. Section 94-C provides flexibility in these arrangements, including by allowing ORES to determine alternate benefits, as well as by allowing developers to negotiate directly with municipalities about benefits. [254]This framework should allow local groups and municipalities to provide their input and to cooperate with developers and NYS agencies to determine the amount and scope of host community benefits. Likewise, new workforce development programs for renewable energy projects support the growth of local jobs, such as for construction workers and electricians.

Ultimately, these new programs should make renewable energy projects even more economically beneficial for NYS communities. To acquire land rights for projects, developers enter into land lease agreements with landowners, as well as PILOTs with municipalities.[255] Often, these lease payments provide farmers and landowners with more income than they could generate from other activities or leaving their land unused.[256] Although some municipalities have been concerned

250. N.Y. SESS. LAWS Ch. 58, Part JJJ § 8.2 (McKinney 2020).

251. *Id.*

252. IN THE MATTER OF A RENEWABLE ENERGY FACILITY HOST COMMUNITY BENEFIT PROGRAM: NOTICE SOLICITING COMMENTS, Case No. 20-E-0-249 (N.Y. Pub. Serv. Comm'n May 29, 2020), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=20-E-0249. DPS staff will eventually publish a proposal for the program that will be open to public comments. *Id.* at 2–3.

253. N.Y. PUBL. AUTH. LAW art. 8, tit. 9-B §1902(5)(f) (McKinney 2020). Section 94-C mentions host community benefits that includes those proposed under Title 9-C, as well as those established by the PSC. *Id.*

254. *Id.*

255. *See supra* Part II.B.

256. As an example, one farmer noted: "We got a choice: plant corn and lose $300 an acre or do nothing and get $1,500 an acre." Gene Kelly and Michelle Piasecki, *The Impossible Search for Perfect Land: Siting Renewable Energy Projects in New York State*, 30 ENVTL. L. IN N.Y. 167 (2019).

that renewable energy projects may produce negative socioeconomic impacts, such as the loss of available farmland,[257] renewable energy projects can produce even greater benefits that are not mutually exclusive with community wellbeing. For example, "agrivoltaic" systems in NYS now allow landowners to co-locate solar panels and agricultural production.[258] Many farmers actively want to be able to site wind or solar power on their land to monetize the value of electricity generation, while reserving other land for agricultural production.[259]

V. RECOMMENDATIONS TO ENSURE THE SUCCESS OF SECTION 94-C

Local opposition has limited the acceleration of renewable energy project siting. Local groups have tried to stop projects at every point in the Article 10 process, and in response, the Siting Board has insisted on developers' strict compliance with local laws and procedural requirements. However, Section 94-C, as a statewide siting framework, allows ORES to supersede many of these barriers and is directly tied to NYS's obligations under the CLCPA. Although Section 94-C is a meaningful reform, ORES must take further action and promulgate feasible final standards and regulations to accomplish NYS's climate change targets.

A. Addressing the Transition from Article 10 to Section 94-C

ORES must ensure there is a smooth transition between the Article 10 and Section 94-C regimes to reduce developer uncertainty and to prevent a backlog of project approvals. Currently, it is unclear when developers should start submitting applications to ORES, as well as how long the Article 10 process

257. *See e.g.*, Letter from Teresa M. Bakner to Secretary Kathleen H. Burgess and Mark Eilers, RE: Case 17-F-0812, Mohawk Solar Project (Nov. 8, 2017), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=17-F-0182&submit=Search.

258. *See e.g.*, Kevin Campbell, *Solar Power and Agriculture can be Combined in New York*, ROCHESTER BUS. J. (Dec. 23, 2019), *available at* https://perma.cc/KE2R-VUUH/.

259. *See* Friends of Flint Mine Solar v. Town Board of Coxsackie, No. 19-0216 (N.Y. Sup. Ct. filed Sept. 13, 2019), *available at* http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2019/20190913_docket-19-0216_decision.pdf.

will continue to exist after ORES has promulgated regulations outlining the required content of Section 94-C applications.[260] Although Section 94-C calls for an expedited permitting process for already-proposed Article 10 projects,[261] ORES must clarify its methodology for evaluating issues that the Siting Board has historically considered, including whether compliance with certain procedural requirements is necessary. ORES and the Siting Board must reach an understanding about projects moving from the Article 10 regime to the Section 94-C regime to avoid jurisdictional disputes.

First, ORES must clarify that Section 94-C will substitute for SEQRA review. Article 10 contained explicit language specifying that the process substituted for SEQRA review. Although it is clearly Section 94-C's intent that projects will not need to undergo both types of review, ORES will need to make this distinction clear. Failing to do so, and requiring developers to comply with two approval processes, would create a disaster for timely project construction.

For projects with between 20 MW to 25 MW of capacity already in the SEQRA process, it is unclear what the transition to Section 94-C would look like. Although some developers may choose to remain under the SEQRA regime, particularly if they have good working relationships with local groups and municipalities, many developers will likely try to opt into the Section 94-C regime.[262] ORES should clarify that Section 94-C's expedited permitting process would also apply to SEQRA projects that are considered to be major renewable energy projects for the purpose of Section 94-C. Since SEQRA requires rigorous environmental review and has already been used to grant siting permits to renewable energy projects, it appears likely that eligible SEQRA project applications would not need to be reviewed much differently under Section 94-C.

B. Addressing Article 10 Pre-Application Issues

Although Section 94-C provides a welcome departure from Article 10 by appearing to reduce extensive pre-application

260. *See supra* Part II.C.
261. *Id.*
262. N.Y. EXEC. LAW § 94-C(4)(e)(iii) (McKinney 2020).

requirements, ORES must still take steps to ensure that developers will not encounter barriers prior to submitting their Section 94-C applications. ORES must clarify in its regulations whether developers can enter into stipulation discussions with relevant NYS agencies, given that they are not mentioned in Section 94-C, but were common under the Article 10 regime. If stipulations are allowed, then ORES should reiterate they are optional and should not pressure developers to enter into time-intensive stipulations negotiations.[263] For developers who choose to pursue stipulations, ORES should set concrete guidelines and timelines, ensuring that stipulations will be limited to the scope and methodology of the studies and contents of their applications.[264] As part of stipulations discussions, ORES should take an active role in resolving potential issues to avoid disputes later in the Section 94-C process.[265]

Additionally, ORES must be provided with adequate funding and staffing to carry out its functions. NYS's 2020-2021 budget appears to provide funding for ORES to hire full-time equivalents ("FTEs") and allows for additional funding as needed.[266] However, unless ORES actually receives a sufficient staffing budget, ORES will not have enough people to process the large number of Section 94-C applications that are expected and desired. To complement ORES's efforts, NYS agencies closely involved in the Section 94-C process, including DEC and DAM, are authorized to support ORES.[267] While Section 94-C also mandates the transfer of NYS agency employees necessary to ORES's functions,[268] NYS must also ensure that these agencies have adequate funding to pay the employees who will carry out this work.[269] Once properly staffed, ORES must

263. HOWE, *supra* note 123.

264. *Id.*

265. *Id.* at 15.

266. N.Y. SESS. LAWS Ch. 58, Part JJJ (2020). It is unclear whether there will be reductions in ORES's budget due to massive shortfalls in the NYS budget arising from the negative impacts of the COVID-19 pandemic.

267. *See supra* Part III.A.3.

268. *Id.*

269. This budgetary problem was evident under the Article 10 regime. The 2020 NYS budget provided for eight additional full-time equivalents ("FTEs") for DPS for Article 10 matters, but did not provide for any additional DAM or DEC FTEs for Article 10 matters. N.Y. STATE SENATE DEMOCRATIC COUNSEL AND FINANCE STAFF,

cooperate with other relevant NYS agencies to avoid infighting and prioritizing individual agendas over the broader statewide CLCPA targets.

C. Addressing Article 10 Application and Hearing Issues

Section 94-C improves upon Article 10 by requiring that ORES must establish uniform standards for siting permit applications, while providing flexibility to accommodate site-specific conditions, as needed.[270] However, ORES's regulations should establish standards and procedures more conducive to renewable energy project development to meet the CLCPA targets, while still ensuring robust environmental protection. If ORES requires applications to have the same level of detail and extensive technical analyses as the Siting Board did for Article 10 applications, this will remain a lengthy and expensive process for developers to get to the starting line and submit Section 94-C applications.

ORES will need to establish reasonable standards for common issues affecting renewable energy projects, including effects on agricultural land, wetlands, birds and bats, setbacks, visual impacts and shadow flicker, noise, and decommissioning.[271] ORES's regulations should also remove any procedural hurdles that could slow down the approval of Section 94-C applications. For example, ORES should clarify that a developer's revised application will be considered complete if ORES fails to make a determination about the revisions within the statutorily required timeframe.[272] Similarly, ORES should clarify whether there is a deadline for developers to resubmit applications that ORES has deemed incomplete.[273] This pragmatic approach will provide clearer expectations for developers before they submit their Section 94-

NEW YORK STATE SENATE DEMOCRATIC MAJORITY STAFF ANALYSIS OF 2019–20 EXECUTIVE BUDGET, 152–54 (2019), *available at* https://perma.cc/JN2E-2JRX.

270. *See supra* Part III.B.2.

271. *See supra* Part III.B.1.

272. Currently, Section 94-C only states that if ORES receives an application and fails to make a determination about its completeness, then the application will be deemed complete. This does not specify whether a *revised* application will be treated in the same manner. *See supra* Part II.B.

273. Russo & Knaub, *supra* note 219.

C applications, as well as reduce barriers to receiving siting permits.

ORES must also promulgate regulations about how local groups and municipalities can file for intervenor funding, as well as how these funds will be disbursed, after Section 94-C applications are submitted.[274] Section 94-C provides overarching guidance about how developers' application fees will be deposited and will be disbursed to municipalities to determine compliance with local laws, but does not lay out more detailed procedures for how parties can access these funds. ORES must also determine the amount of intervenor funding that developers must make available to each local group and municipality that seeks funding.

More importantly, ORES should reconsider the criteria for disbursing intervenor funding to encourage more constructive public participation. Intervenor funding was provided in earlier siting statutes to ensure municipal and local parties could express their concerns about where regulated utilities would construct new facilities, which imposed costs on them as ratepayers.[275] Under Article 10, intervenor funding provided local groups with the financial resources to vigorously oppose new projects at every stage of the process.[276] While local groups and municipalities should be able to communicate their concerns to developers,[277] ORES should ensure that this is tailored to addressing substantive and significant issues, particularly since renewable energy projects have relatively minimal environmental impacts compared to fossil-fuel power plants, and local groups do not bear the financial risk of those projects.[278]

ORES should also develop a broader vision for public involvement that does not conflict with achieving the CLCPA's targets. At a minimum, the Siting Board should disburse intervenor funding at a level that is commensurate with potential project impacts and is directed more to municipalities, which represent the people most directly affected.[279] As a

274. *See supra* Part III.B.2.
275. *See supra* Part I.A.
276. Drennen, *supra* note 46.
277. *Id.*
278. *See supra* Part I.A.
279. HOWE, *supra* note 123.

further step, ORES should make intervenor funding available to local groups in support of renewable energy projects in their communities. This reallocation of funds can provide local supporters with more opportunities to advocate for the economic and environmental benefits of these projects and facilitate more balanced siting permit conversations. Nevertheless, the disbursal of intervenor funding will be contentious, and developers should still actively engage with local communities early on and throughout the Section 94-C process.[280]

D. Addressing "Unreasonably Burdensome" Local Laws

Although Section 94-C provides considerably more flexibility for when ORES can waive local laws,[281] ORES should promulgate regulations that officially define "unreasonably burdensome."[282] ORES, along with NYS courts, should confirm that this provision is intended to provide more support for renewable energy projects and should provide concrete examples of local laws that would be considered unreasonably burdensome. More importantly, ORES should be willing to waive unreasonably burdensome local laws earlier in the Section 94-C process to avoid restrictions on renewable energy projects. Unlike the Siting Board under the Article 10 regime, ORES should use its existing authority under Section 94-C to provide a backstop against overambitious local opposition to projects, as the drafters of the statute appear to have intended.

Additionally, ORES should promulgate regulations clarifying what should happen in certain scenarios where municipalities may not be interested in cooperating with developers. This includes addressing what would occur if a municipality does not submit a statement indicating whether the renewable energy project complies with its local laws.[283] Similarly, ORES should clarify whether municipalities are allowed to impose moratoria on all renewable energy project siting, both before and after developers have submitted Section

280. *Id.* at 9.

281. *See supra* Part III.C.

282. *See* THE RENEWABLES ON THE GROUND ROUNDTABLE, ACCELERATING LARGE SCALE WIND AND SOLAR ENERGY IN NEW YORK 17 (2017), *available at* https://perma.cc/B3L9-DTF3; HOWE, *supra* note 123.

283. *See supra* Part III.C.

94-C applications. Regardless of how ORES proceeds, developers should still consult with municipalities about the underlying justifications for their local laws pertaining to renewable energy projects and to reach understandings about how to properly comply with those local laws.

E. Addressing Article 10 Certificate Conditions and Construction Delays

Although Section 94-C now allows project construction to begin after a siting permit has been granted, ORES should clarify when an amendment to a siting permit would result in a material increase in an environmental impact or involve a substantial change. Since developers could be required to go through additional notice-and-comment periods and hearings prior to construction, it is important that ORES limits the scope and extent of these determinations unless they are truly necessary. Failing to do so would expose developers to the risk that an amendment would be considered a substantial change, as occurred frequently under the Article 10 regime,[284] and would impede the construction of new renewable energy projects.

Additionally, ORES should promulgate regulations about the extent to which other NYS agencies can enforce compliance with siting permit standards and site-specific conditions. Under Section 94-C, only ORES can require permits and conditions for construction, but DPS and the PSC are tasked with enforcement.[285] ORES should clarify that it possesses the authority to establish what developers must do prior to and during construction, while DPS and the PSC merely oversee compliance with these requirements. Since DPS has a history of insisting upon strict compliance with conditions for energy project siting under Article 10,[286] ORES should ensure that Section 94-C projects are not stymied by relatively minor procedural conditions.

Finally, NYS courts should move expeditiously through appeals hearings, while still providing substantive judicial review. When reviewing siting permit standards and conditions,

284. *See supra* Part III.D.1.
285. *See supra* Part III.D.2.
286. *See supra* Part III.D.1.

NYS courts should limit the ability of project opponents to retry factual findings, if ORES has already approved the developer's plans. Although Section 94-C provides for expedited review by NYS courts, it does not provide a deadline by which appeals must be concluded.[287] NYS courts should strongly consider the legislative intent of Section 94-C's drafters: prioritizing timely project approval and construction to meet the statewide CLCPA targets.

F. Addressing Economic Concerns of Project Developers and Communities

By requiring that developers provide host community benefits, Section 94-C codifies developers' commitment to supporting NYS communities by constructing new renewable energy projects.[288] Nevertheless, ORES must cooperate with NYSERDA to promulgate regulations that clarify the scope of host community benefits offered, as well as who will be eligible to receive these benefits.[289] For build-ready sites, NYSERDA and DEC should clarify the precautions that developers must take to address environmental justice concerns that may arise.[290] While Title 9-B mentions PILOTs as a potential benefit, it neither provides a methodology to calculate these payments nor specifies how traditional property tax assessments for renewable energy projects would be determined.[291] Similarly, the PSC will need to clarify how its host community benefit program will interact with the Section 94-C program.[292] Based

287. *See supra* Part III.D.2.

288. *See supra* Part III.E.

289. N.Y. PUB. AUTH. LAW art. 8, tit. 9-B § 1902(3) (McKinney 2020). Title 9-B also requires that as of April 2021, NYSERDA must issue an annual report specifying any proceeds earned by NYSERDA, the sites auctioned for development, the developers to whom rights have been transferred, and the resulting renewable energy production. *Id.* § 1902(5) (McKinney 2020).

290. *See supra* Part III.E.

291. Neil J. Alexander, *Support for the Energy Sector in New York State, Part 3: Long Term*, CUDDY & FEDDER LLP (Apr. 22, 2020), *available at* https://perma.cc/FUB8-TJ4Q.

292. Dwight Kanyuck, *Public Service Commission Requests Comment on Community Host Benefit Program for Renewable Energy Projects*, KNAUF SHAW LLP, *available at* https://perma.cc/3UTM-ETLW.

on the language in the Act[293] and prior PSC orders requiring utility-bill credits,[294] it appears likely that communities will be able to receive discounts from their utilities, in addition to host community benefits that will be provided by NYSERDA.

VI. CONCLUSION

NYS has finally begun to bridge the disconnect between the framework of its siting statutes and the urgency of accelerating the construction of renewable energy projects. Section 94-C departs from earlier statutes, which were designed to provide a deliberate and thorough process for reviewing the siting of fossil-fuel plants. These statutes were not designed to streamline the siting of renewable energy projects. Section 94-C seeks to transform renewable energy project siting from a bureaucratic headache into a catalyst for meeting the CLCPA targets. By adopting Section 94-C's new framework and reducing the complexity and extent of procedural and regulatory requirements, NYS can reduce the massive approval and construction delays that occurred under Article 10. These changes will preserve projects' financial viability—particularly as federal tax incentives are being phased out—and will enable developers to establish more durable long-term plans.

Much of Section 94-C's success will depend on whether ORES will promulgate regulations that are conducive to the construction of new renewable energy projects, as well as whether ORES will be able to enforce a streamlined and efficient siting process. Failing to do so would reproduce the difficulties endured under the Article 10 regime and would substantially jeopardize NYS's ability to meet the CLCPA targets. Efforts at meaningful reform will likely be unpopular in some places, so ORES and developers will need to foster a cooperative approach with local groups and municipalities. Showcasing renewable energy projects' economic benefits for host communities and

293. N.Y. SESS. LAWS Ch. 58, Part JJJ § 8.2 (McKinney 2020).

294. *See e.g.*, IN THE MATTER OF CONSOLIDATED BILLING FOR DISTRIBUTED ENERGY RESOURCES: ORDER REGARDING CONSOLIDATED BILLING FOR COMMUNITY DISTRIBUTED GENERATION, Case No. 19-M-0463 (N.Y. Pub. Serv. Comm'n Dec. 12, 2019), *available at* http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?Mattercaseno=19-M-0463 (implementing net crediting, which requires utilities to provide credits for electricity generation provided by community solar projects).

environmental benefits will be essential to garner community support. Hopefully, Section 94-C will provide the necessary framework to accelerate renewable energy growth to achieve the CLCPA targets, while also benefiting communities.