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Michael B. Gerrard  
Editor

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## The Impossible Search for Perfect Land: Siting Renewable Generation Projects in New York State

Gene Kelly and Michelle Piasecki

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### Introduction

There is near universal acceptance in the United States that the Earth is warming,<sup>1</sup> and that it has been doing so for at least several decades. Recognizing this fact, so-called “climate deniers” have largely shifted in recent years from a position of outright denial to a position of questioning the link between the warming of the planet and anthropogenic causes. Those who maintain that humans are not responsible for climate change, however, find themselves in a distinct minority—particularly in the world’s scientific community, as 97% of published scientists around the world say human activity is responsible for global warming.<sup>2</sup>

Greater awareness of the impacts of fossil fuel use on global climate has, in relatively short order, transformed energy markets in the U.S. and Europe, where the growth of renewable energy has been aggressive and sustained. In fact, within the last decade, coal-fired generation has decreased from 45% of the national energy mix to just 25%.<sup>3</sup>

<sup>1</sup> For the sake of brevity, the terms “climate change” and “global warming” will be used interchangeably. The science supporting these concepts typically points out that, while the Earth is surely warming, the effects of this phenomenon are not limited to a warming of the planet. Such effects can be seen in a wide array of impacts arising from significant changes now underway that are adversely affecting climates around the globe.

<sup>2</sup> See, e.g., U.S. GLOBAL CHANGE RESEARCH PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: VOLUME II—IMPACTS, RISKS, AND ADAPTATION IN THE UNITED STATES (2018), [https://nca2018.globalchange.gov/downloads/NCA4\\_2018\\_FullReport.pdf](https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf); John Cook et al., *Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, ENVTL. RES. LTRS. vol. 11, no. 4, 048002 (Apr. 2016); David Herring, *Global Warming Frequently Asked Questions*, CLIMATE.GOV (Jan. 23, 2014), <https://www.climate.gov/news-features/understanding-climate/global-warming-frequently-asked-questions>; *The Causes of Climate Change*, GLOBAL CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, <https://climate.nasa.gov/causes/> (last updated July 22, 2019).

<sup>3</sup> N.Y. INDEP. SYS. OPERATOR, 2018 POWER TRENDS 17 (2018) [hereinafter 2018 POWER TRENDS REPORT], <https://www.nyiso.com/documents/20142/2223020/2018-Power-Trends.pdf/4cd3a2a6-838a-bb54-f631-8982a7bdfa7a> (stating that 19% of the eastern region’s coal capacity retired in the past decade); Joe Ryan, *First U.S. Coal Plant in Years Opens Where No Options Exist*, BLOOMBERG (Feb. 11, 2019, 11:29 AM EST), <https://www.bloomberg.com/news/articles/2019-02-11/coal-s-final-flicker-1st-new-u-s-plant-since-2015-set-to-open>.

with every year bringing more announcements of major coal-fired plant retirements.<sup>4</sup>

Such plant retirements have not been limited to the coal sector. In early 2019, Los Angeles Mayor Eric Garcetti announced that three aging natural gas power plants that had previously been slated for refurbishment and modernization would instead be retired in favor of investments in renewable energy. Saying that “[t]he climate crisis demands that we move more quickly to end dependence on fossil fuel,” the mayor stated that Los Angeles would seek to be carbon-neutral by 2050.<sup>5</sup>

### A New York State of Mind

The devastating effects of Superstorm Sandy reinforced what most had long recognized—that climate change was with us and should not be viewed as merely a topic of continuing debate. In 2014, New York Governor Andrew M. Cuomo announced the launch of his Reforming the Energy Vision (REV) initiative, a comprehensive energy strategy for New York.<sup>6</sup> REV seeks to rebuild, strengthen, and modernize New York’s energy system while bringing economic growth to the state. It includes more than 40 initiatives to build a “clean, resilient, and more affordable energy system.”<sup>7</sup>

As a means of strengthening fuel diversity and achieving the State’s clean energy goals consistent with REV, the New York State Public Service Commission (PSC) in 2016 approved the state’s Clean Energy Standard (CES), which Governor Cuomo touted at the time as “the most comprehensive and ambitious clean energy mandate in the state’s history.”<sup>8</sup>

The CES, in its most basic form, requires 50% of New York’s electricity to come from renewable energy sources such as wind

and solar by 2030. The overall goal is to reduce greenhouse gas emissions by 40% from 1990 levels by 2030, and by 80% by 2050.<sup>9</sup>

In his announcement of the CES, Governor Cuomo said the PSC would work with the New York Independent System Operator (NYISO), the operator of the state’s electric power grid, and other stakeholders to ensure that necessary investments are made in storage, transmission, and other technologies to secure a reliable electric system. In addition, the PSC must conduct triennial reviews of the CES to ensure that economic and clean energy goals are being achieved.<sup>10</sup>

By all accounts, despite the appearance of climate leadership, New York is seriously lagging in attaining its overall targets. By the end of 2017, only 28% of the state’s power generation was from renewable sources.<sup>11</sup> To achieve the CES targets, the state needs an additional 29,200 gigawatt hours of renewable energy by 2030, but very little new renewable generation has been added since adoption of the CES.<sup>12</sup> For the reasons noted below, renewable energy developers are finding it difficult to site new renewable generation at a quick enough pace.

Despite (or perhaps because of) the lack of defined progress in moving toward CES goals, as the 2018–19 session of the State Legislature was winding down in late June, both houses passed the landmark Climate Leadership and Community Protection Act (CLCPA). Governor Cuomo signed the bill on July 18, 2019.<sup>13</sup> This legislation, which puts New York squarely at the forefront of climate change action planning, led Governor Cuomo to proclaim, “We are now taking another historic step forward to stop the imminent threat of climate change by establishing the most aggressive greenhouse gas reduction mandate in the nation and, we believe, in the entire world.”<sup>14</sup>

<sup>4</sup> Mark Hand, *Coal on Its Last Legs in New York After State Proposes Tough Emissions Rule*, THINKPROGRESS (May 17, 2018, 11:53 AM), <https://thinkprogress.org/new-york-rule-could-lead-to-closure-of-coal-plants-ae94276d60c1/> (noting that coal currently represented only two percent of the state’s overall generating capacity and that nearly 3,000 megawatts (MW) of coal-fired generation had been retired since 2000); Laurel Morales, *Looming Shutdown of the Navajo Generating Station Means New Jobs Far from Home*, NPR (Nov. 11, 2018, 7:45 AM ET), <https://www.npr.org/2018/11/11/660627883/looming-shutdown-of-the-navajo-generating-station-means-new-jobs-far-from-home>; *U.S. Coal Plant Retirements Near All-Time High*, BLOOMBERGNEF (Nov. 9, 2018), <https://about.bnef.com/blog/u-s-coal-plant-retirements-near-all-time-high/>.

<sup>5</sup> Nichola Groom, *Los Angeles Abandons New Natural Gas Plants in Favor of Renewables*, REUTERS (Feb. 12, 2019, 1:42 PM), <https://www.reuters.com/article/us-usa-california-natgas/los-angeles-abandons-new-natural-gas-plants-in-favor-of-renewables-idUSKCN1Q12C9>.

<sup>6</sup> *See About REV*, REV, <https://rev.ny.gov/about/> (last visited July 23, 2019).

<sup>7</sup> *REV Initiatives*, REV, <https://rev.ny.gov/rev-initiatives> (last visited July 23, 2019).

<sup>8</sup> *See* Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Establishment of Clean Energy Standard That Mandates 50 Percent Renewables by 2030 (Aug. 1, 2016), <https://www.governor.ny.gov/news/governor-cuomo-announces-establishment-clean-energy-standard-mandates-50-percent-renewables>; *see also* Order Adopting a Clean Energy Standard, Proceeding on Motion of the Commission to Implement a Large-Scale Renewable Program and a Clean Energy Standard, Case 15-E-0302 (Aug. 1, 2016), <https://on.ny.gov/2aKtpgA>.

<sup>9</sup> Press Release, Governor Andrew M. Cuomo, *supra* note 8.

<sup>10</sup> *See* Press Release, Governor Andrew M. Cuomo, *supra* note 8.

<sup>11</sup> Kay Dervishi, *How to Get to ‘50 by 30,’* CITY & STATE N.Y. (Aug. 22, 2018), <https://cityandstateny.com/articles/policy/energy-environment/how-to-get-to-50-30.html>.

<sup>12</sup> 2018 POWER TRENDS REPORT, *supra* note 3, at 30.

<sup>13</sup> 2019 N.Y. Laws ch. 106.

<sup>14</sup> Press Release, Governor Andrew M. Cuomo, Statement from Governor Andrew M. Cuomo on the Passage of the Climate Leadership and Community Protection Act (June 20, 2019), <https://www.governor.ny.gov/news/statement-governor-andrew-m-cuomo-passage-climate-leadership-and-community-protection-act>.

New York's leaders have thus positioned the State to claim the mantle of climate leadership on the global stage, but will these efforts on the legislative front translate to actual climate progress sufficient to enable New York to earn the Global Leader title it now claims?

### Article 10: Cumbersome, Protracted, and Unnecessarily Challenging

When Governor Cuomo took office in 2011, only 19% of the state's power came from renewable sources.<sup>15</sup> It was in that year that the Power NY Act of 2011<sup>16</sup> was enacted (replacing a previously expired version of the law), establishing a process for the siting of large-scale electric generating facilities and re-powering projects. As part of that process, known as "Article 10," a multi-agency Siting Board was charged with streamlining the permitting process for power plants of 25 megawatts (MW) or greater.<sup>17</sup> Regulations implementing the law were promulgated in 2012.<sup>18</sup>

When the enactment of the new Article 10 was first announced, developers had great expectations for the seamless and efficient siting of renewable resources in the state, particularly in light of claims that the new law "encourages investments," "provides a clear framework to site and repower facilities," and "reinvigorates the energy industry."<sup>19</sup> Unfortunately, companies seeking to develop renewable energy projects in New York have experienced a different reality as they struggle to navigate a system beset with often-competing agendas and limited agency resources available to process applications for the necessary State approvals.

Indeed, in the seven-plus years since the new Article 10 was adopted, only one renewable energy project has emerged from the process with the Certificate of Environmental Compatibility and Public Need necessary to complete construction of a large-scale energy project. This prolonged process has served to dampen enthusiasm among renewable energy developers and

has led to questions about the State's ability to reach the energy targets outlined in REV, CES, and CLCPA.<sup>20</sup> Instead of a seamless path towards development, applicants seeking to construct solar and wind projects have experienced what the Alliance for Clean Energy New York (ACE NY) has described as an "unnecessarily complicated and time-consuming" process that is slowing construction of renewable projects "at a time it desperately needs to accelerate."<sup>21</sup>

The calls for improvements to the Article 10 process are not limited to those of developers. In an April 2019 letter sent to PSC Chair John Rhodes, a coalition of major environmental organizations likewise called for changes to the Article 10 siting process, urging adoption of a set of measures focused on speeding up the lagging project review process.<sup>22</sup>

### Five Issues That Slow Down Article 10 Reviews

A host of issues give rise to developers' and environmental organizations' frustration with the Article 10 process. While no responsible developer would dispute the need for proposed projects to undergo a reasonable degree of regulatory review, there is broad consensus that these reviews have been onerous and unnecessarily protracted, particularly in light of the governor's aggressive renewable energy targets. The issues giving rise to these delays include: (1) wetlands; (2) rare, threatened, or endangered (R/T/E) species; (3) farmland conversion; (4) grid interconnection; and (5) visual impacts and local community concerns.

#### Wetlands

Developers of solar projects typically seek to site their projects on land that is as flat and clear of trees as possible, with good southern exposure. For ease of development, they, as well as wind developers, prefer to deal with landowners who own large, contiguous tracts of land.

<sup>15</sup> Marie J. French, *Challenges Loom for Cuomo's Environmental Promises*, POLITICO (Dec. 2, 2017, 5:01 AM EST), <https://www.politico.com/states/new-york/albany/story/2017/12/07/challenges-loom-for-cuomos-environmental-promises-135419>.

<sup>16</sup> 2011 N.Y. Laws ch. 388. For brevity, the Power NY Act of 2011 will be referred to as "Article 10," since it was later codified at Public Service Law, Article X.

<sup>17</sup> N.Y. PUB. SERV. LAW § 162.

<sup>18</sup> 16 N.Y.C.R.R. §§ 1000.1–1002.4.

<sup>19</sup> Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs Power NY Legislation (Aug. 4, 2011), <https://www.governor.ny.gov/news/governor-cuomo-signs-power-ny-legislation>.

<sup>20</sup> French, *supra* note 15 (stating that some of the State's environmental goals are in danger of not being realized); Marie J. French, *Group Outlines Renewable Siting Challenges, Solutions Facing State*, POLITICO (Feb. 28, 2019), <https://www.politico.com/states/new-york/albany/story/2019/02/28/group-outlines-renewable-siting-challenges-solutions-facing-state-877871> (noting that "while the Article 10 process is meant to take an estimated two years, pending projects are well behind that schedule"); Marie J. French, *Slow Pace of Energy Efficiency May Imperil Cuomo's Green Goals*, POLITICO (Dec. 14, 2017, 5:01 AM EST), <https://www.politico.com/states/new-york/albany/story/2017/12/14/slow-pace-of-energy-efficiency-may-imperil-cuomos-green-goals-144994> (noting same); Marie J. French, *Solar Market Worries*, POLITICO (Jan. 23, 2019), <https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2019/01/23/solar-market-worries-165846> (explaining that in order to meet New York's aggressive clean energy goals, the State must install about 1 gigawatt of solar energy per year but that so far "the State has installed about a gigawatt of solar capacity in total" and was on pace to install only 300 additional MW of solar in 2018).

<sup>21</sup> Letter from Alliance for Clean Energy New York, Inc. to Governor Andrew M. Cuomo (Jan. 8, 2019) (on file with authors).

<sup>22</sup> Letter from Environmental Organizations to Chairman John B. Rhodes (Apr. 22, 2019) (on file with authors). Signatories to the letter were Audubon New York, Catskill Mountainkeeper, Citizens Campaign for the Environment, Clean Coalition, Catskill Mountainkeeper, Natural Resources Defense Council, New York League of Conservation Voters, NY-GEO, Pace Energy and Climate Center, Sierra Club, and The Nature Conservancy in New York.

If this land recipe sounds like a farm would be an ideal host for such a project, it is. Adding to the factors making farmland desirable for the siting of a large-scale project is the challenging economic reality of farming in the United States in the 21st century. It goes without saying that the financial pressures facing the family farm in recent years have seriously eroded the historical practice of successive generations keeping the family farm in business. Stated simply, dwindling income and soaring expenses are the primary culprits behind the disappearing family farm.<sup>23</sup>

The kind of land that is typically used for growing crops—flat, open fields—often contains wet areas that may, once no longer used for agricultural operations, fall into the regulatory jurisdiction of the New York State Department of Environmental Conservation (DEC) or the U.S. Army Corps of Engineers (Corps).

In the wet Northeast, a significant percentage of the land that is suitable for development of renewable power projects may contain areas that could be classified as wetlands. Although DEC has historically mapped these areas, those maps are generally not current. As a consequence, developers of renewable power who seek to site utility-scale projects on agricultural lands are frequently required to perform a full field delineation of the prospective project site. Since many of these projects involve a project study area that comprises several hundred acres (or more depending on the size of the project), the time invested in field wetland surveys can be quite substantial. Adding to the burden is the fact that wetland surveys generally cannot be performed between the months of November and March.

In addition to the timing concerns associated with the delineation of wetlands, developers are constrained by the need to design the project layout so as to avoid, to the maximum extent practicable, the presence of jurisdictional wetlands. The layout must take into account DEC or Corps concerns and potential local restrictions while still encompassing enough area to meet the project's sizing requirements and to allow for ease of interconnection to the electric grid.

#### *R/T/E Species*

Renewable energy developers can face demands by DEC for a dizzying array of wildlife studies. This is true regardless of whether the developer proposes to use undeveloped land or land that has long been used for crop production. Considering that crop land is typically managed fairly aggressively year-to-year through mechanized tilling, application of fertilizers and pesticides, and cultivation, DEC's demand for multi-season studies aimed at determining whether an agricultural site is being used as wildlife habitat might be considered overly burdensome.

Since renewable energy developers generally prefer open land, most potential project sites almost exclusively comprise land that has been under active crop cultivation or haying operations. There are relatively few species that will tolerate the intensity of human activity attendant to such agricultural activities. Yet it is commonplace for DEC wildlife biologists to demand that project applicants commit substantial time and money for consultants to perform studies to prove what DEC staff may already suspect—namely, that land under active crop production does not contain habitat for protected wildlife.

Renewable energy developers are frequently frustrated by the delays and higher costs that these studies create for projects, particularly because they often produce results that are predictable. However, because developers likely wish to avoid protracted disputes with regulatory agencies, they often feel captive to the process.

#### *Farmland*

Juxtaposed with the concerns of DEC, which seeks to minimize impacts to wetlands and areas that may support wildlife habitat, the New York State Department of Agriculture and Markets (DAM) consistently takes issue with the siting of renewable energy projects on farmland. According to DAM, farmland that is utilized for a renewable energy project is considered “permanently converted” to non-agricultural use. As a result, DAM seeks to push projects out of cropland areas and into areas that the farmer is not utilizing for agricultural production, such as forested areas and lands that are too wet to support crop production.

DEC and DAM thus approach the issue of project site selection from seemingly diametrically opposed, irreconcilable positions. Because land that has been cultivated for crop production will, generally speaking, not be a habitat-rich environment, DEC would raise fewer objections to the siting of a project on that land. However, contrary to DAM's preference for siting projects in forested areas, DEC can be expected to raise a host of concerns about siting in such areas due to the possibility that they serve as habitat for protected species (e.g., the Northern Long-Eared Bat) and would result in significantly more clear-cutting than necessary if the project was sited on already cleared cropland.

There is no middle ground. DEC's and DAM's objectives are at war, and it is the project developer who is caught in between.

Furthermore, irrespective of any financial pressures that the farmer may be facing due to an array of factors that make farming a risky and speculative venture (e.g., extreme weather, crop failures, declining commodity prices, rising costs, labor shortages, etc.), DAM takes the position that farmers should not permit their land to be used to produce energy. This position

<sup>23</sup> See Siena Chrisman, *American Farmers Are in Crisis*, EATER (Sept. 14, 2018), <https://www.eater.com/2018/9/14/17855080/american-farmers-crisis-trade-war>; Roberto A. Ferdman, *The Decline of the Small American Family Farm in One Chart*, WASH. POST (Sept. 16, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/09/16/the-decline-of-the-small-american-family-farm-in-one-chart/>; Lela Nargi, *What's Behind the Crippling Dairy Crisis? Family Farmers Speak Out*, CIVIL EATS (Nov. 5, 2018), <https://civileats.com/2018/11/05/whats-behind-the-crippling-dairy-crisis-family-farmers-speak-out/>.



frustrates farmers who feel they should have the ultimate say in how their land should be utilized.

Indeed, a growing number of farmers are looking to solar as a way of preserving their farms' financial viability and preventing the farms from succumbing to these economic pressures. Many farmers that have participated in renewable projects speak glowingly of the decision to do so.<sup>24</sup> For example, the economic plight of the farmer is well-described in remarks by a farmer in an article published in the *Buffalo News* in August 2018: "We got a choice: plant corn and lose \$300 an acre or do nothing and get \$1,500 an acre. . . ."<sup>25</sup>

The lease payments that rural landowners can expect to obtain from renewable energy projects are generally far greater, with far less risk, than the landowner can expect to derive from agricultural uses. Farmers are siding with the developers, pointing out the reality of present-day farming: it's not profitable. As farmers in the Hudson Valley explained when asked why they turned to solar energy to develop an additional source of income:

Most farmers that are working farmers can't just farm and they need to do something else and make money. . . . I have a perfect location . . . . We have 50 acres open field with no trees, and I'd really like to do it. I could probably supply enough power to generate enough power for the whole town [sic]. . . .

It's extra income. . . . I thought it would be a good opportunity for some clean tech and possibly make some money.<sup>26</sup>

Often the lease payments from renewable generation projects are the only thing keeping the farmer in business and the land from being sold and developed for less environmentally friendly uses. As one Orange County farmer said, "Twenty acres is being used for . . . solar. That keeps 220 open for agriculture, and not houses."<sup>27</sup>

DAM's position creates unnecessary obstacles and resistance to the Article 10 applicant. DAM's stance is particularly confounding, considering the State's avowed interest in spurring the growth of utility-scale renewable power projects. Moreover, considering that the state's agricultural sector has much to lose if climate change continues unabated, DAM's position would seem to be at odds with the State's interest in encouraging the development of these projects.

#### *Interconnection Issues*

Making matters worse for developers is the scarcity of interconnection lines across the state to allow renewable generation

projects to connect to the electric grid. As a result, a significant amount of land is completely foreclosed from development because it is simply too remote from the available points of interconnection.

In addition, while NYISO (at the behest of stakeholders) has made great efforts to streamline and improve the interconnection process to reduce the project queue, the process is still prolonged and cumbersome. In fact, the NYISO is currently engaging stakeholders in a comment process to further streamline the interconnection process and avoid a repeat of the issues faced in reviewing and approving the 2017 Class Year. The review for those projects is still ongoing and has taken an additional year beyond the anticipated timeline for completion.

#### *Visual Impacts and Local Community/NIMBY Concerns*

Nearly any survey conducted in the last few years will show broad public support for renewable energy. There seems to be no shortage of people who identify with and support environmental causes. Perhaps nowhere is this more evident than when asked whether we need to depend less on fossil fuels and more on renewable energy. Standing in stark contrast to the public's general support for renewable energy, however, is the fact that renewable energy projects, regardless of proposed location, seem never to fail to engender opposition from local residents. Everyone wants to support the development of renewable energy, as long as it is sited somewhere else, which frustrates and hampers renewable energy developers who are willing to put capital at risk in order to construct and operate these projects that are the keystone to the transition from fossil fuels.

Opponents of wind and solar projects often decry the fact that these projects, while delivering emissions-free, sustainable power, can present visual impacts that may defy even the best-designed mitigation efforts. There is little room for debate that a wind or solar project may be more visible to more people than would a traditional power plant of corresponding power capacity. Stated simply, it is an inescapable fact that to quickly address climate change it will be necessary to accept trade-offs and compromises. Without a more flexible approach, we are consigned to a future filled with uncertainty, or worse. The stakes are extremely high.

Much has been written about the dire consequences of failing to successfully tackle climate change. While some may dismiss these predictions as exaggerated or hyperbolic, there is universal acceptance that the impacts will be severe, that they will be felt planet-wide, and that certain populated portions of Earth will be rendered uninhabitable. This point is made quite convincingly by

<sup>24</sup> Mark Flach, *My View: Solar Saves Farms*, HUDSONVALLEY360 (July 31, 2018, 11:55 AM), <https://www.hudsonvalley360.com/article/my-view-solar-saves-farms>; *Upstate Farms Contributing to Gov. Cuomo's Ambitious Plan For Renewable Energy Sources*, CBS NEW YORK (Mar. 19, 2019), <https://newyork.cbslocal.com/2019/03/19/solar-dairy-farms-orange-county-westtown-solar-energy/>.

<sup>25</sup> Thomas J. Prohaska, *Wanted: Niagara County Farmland, Space for Solar Panels*, BUFF. NEWS (Aug. 18, 2018), <https://buffalonews.com/2018/08/18/solar-power-promoters-looking-for-niagara-county-farmland/>.

<sup>26</sup> Amy Wu, *Solar Projects Surge: Landowners Reaching for the Sun, Savings*, POUGHKEEPSIE J. (May 5, 2018, 2:04 PM), <https://www.poughkeepsiejournal.com/story/tech/science/environment/2018/05/02/solar-energy-renewables/438026002/>.

<sup>27</sup> *Upstate Farms Contributing to Gov. Cuomo's Ambitious Plan For Renewable Energy Sources*, *supra* note 24.

350.org founder, Middlebury College professor and author Bill McKibben in a 2018 article in the *New Yorker*, “How Extreme Weather is Shrinking the Planet.”<sup>28</sup>

Without question, it is reasonable to expect renewable energy developers to mitigate visual impacts, but the expectations of what can be considered “reasonable mitigation” must be viewed through the lens of the alternative to constructing these projects. In other words, if we refuse to accept that these projects entail a degree of unavoidable visual impacts, the Article 10 process becomes overly focused on issues that cannot be avoided.

Opposition to solar energy projects, while perhaps less virulent than the kind of opposition that wind projects may generate, is nonetheless a serious concern of project developers and investors. According to a 2011 report issued by the U.S. Chamber of Commerce, “Project No Project,” roughly 45% of challenged renewable energy projects across the nation in the period covered by the study were delayed or stopped due to “not in my back yard” (NIMBY) activism.<sup>29</sup> In fact, in many instances developers conduct extensive due diligence to select potential project locations in municipalities that support renewable energy development (through the adoption of comprehensive plans and ordinances), only to later have those same municipalities impose moratoriums and adopt unfavorable modifications to their laws that severely hamper, limit, or outright prohibit development.

### DPS Acknowledgement of Problems

New York regulators themselves recognize that criticism of the Article 10 process is valid. Last October, Sarah Osgood, the Director of Policy Implementation at the New York State Department of Public Service (DPS), acknowledged the need to improve the process for utility-scale energy projects, saying it needs to become “frictionless.”<sup>30</sup> Acknowledging that the process is not serving the governor’s clean energy agenda well, Ms. Osgood said:

We need to have a rigorous and comprehensive application and Review process but—and this is I think a very big but—the process must work. Hard stop. It must work. It needs to

be as frictionless and smooth as possible, and we’re moving in that direction but we clearly have work to do.<sup>31</sup>

Ms. Osgood further stated:

We need to improve communication generally among the development community and the local communities that may not be aware of potential benefits or negative impacts from the project. . . . Really we’re looking to provide clarity to the process, establish more general standards . . . (and) make it easier for all the parties to understand what’s in the application.<sup>32</sup>

Finally, in apparent recognition of the conflicting DAM and DEC positions, Ms. Osgood said: “Given where we are with our current resources, we see a need to better coordinate with our sister agencies . . . and make sure we appropriately capture the position the state is taking.”<sup>33</sup>

### Renewable Energy Projects Under SEQRA

Article 10 is the exception to the rule that development projects are subject to environmental review under the State Environmental Quality Review Act (SEQRA).<sup>34</sup> Thus, SEQRA will govern the review of all but the very largest renewable energy projects (those over Article 10’s 25 MW threshold). Most renewable energy projects being reviewed under SEQRA are solar projects since very few, if any, wind energy projects fail to meet the Article 10 threshold of 25 MW. Conversely, most solar projects fail to reach the Article 10 threshold and are reviewed pursuant to SEQRA.

Under SEQRA, the local land use board (generally speaking, the local planning board) is responsible for conducting an environmental analysis of a project before it can be approved. This local board will assume the role of lead agency,<sup>35</sup> meaning it is principally responsible for undertaking, funding, or approving the proposed project and is responsible for determining the scope of review that is required before a final determination of approvability can be rendered.

The planning board will typically determine whether the project requires site plan approval, a special use permit, a

<sup>28</sup> Bill McKibben, *How Extreme Weather Is Shrinking the Planet*, NEW YORKER (Nov. 16, 2018), <https://www.newyorker.com/magazine/2018/11/26/how-extreme-weather-is-shrinking-the-planet>.

<sup>29</sup> STEVE POCIASK & JOSEPH P. FUHR, JR., PROJECT NO PROJECT—PROGRESS DENIED: A STUDY ON THE POTENTIAL ECONOMIC IMPACT OF PERMITTING CHALLENGES FACING PROPOSED ENERGY PROJECTS (Mar. 10, 2011), [https://www.uschamber.com/sites/default/files/pnp\\_economicstudy.pdf](https://www.uschamber.com/sites/default/files/pnp_economicstudy.pdf).

<sup>30</sup> Marie J. French, *Agency Changes Tone on Large-Scale Renewable Siting*, POLITICO (Oct. 10, 2018), <https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2018/10/11/state-shifts-on-article-10-121067>.

<sup>31</sup> French, *supra* note 30.

<sup>32</sup> Marie J. French, *Developers, State Policymakers Seek Improvements to Renewable Siting Process*, POLITICO (Nov. 15, 2018), <https://subscriber.politicopro.com/states/new-york/albany/story/2018/11/15/developers-state-policymakers-seek-improvements-to-renewable-siting-process-697983>.

<sup>33</sup> French, *supra* note 32.

<sup>34</sup> See N.Y. ENVTL. CONSERV. LAW art. 8; 6 N.Y.C.R.R. part 617.

<sup>35</sup> 6 N.Y.C.R.R. § 617.2(v).

variance, or other special authorization. To commence this process, the project proponent must complete either the long or short Environmental Assessment Form (EAF), depending on the type of action the project involves. Once a completed EAF is submitted, the lead agency will then make a determination of significance, determining whether the project will likely result in a significant adverse environmental impact. If that determination is negative, no further environmental review is required, and the lead agency can approve the project, generally with a formal resolution supported by a reasoned negative declaration.

If the lead agency determines that the solar project may have a significant adverse impact on the environment, it will issue a positive declaration, triggering the requirement to prepare a full environmental impact statement (EIS). An EIS is a significant undertaking, necessitating a range of studies and analyses. Under DEC's recent revisions to the SEQRA regulations, scoping of the issues to be addressed by the EIS is mandatory.<sup>36</sup>

Generally speaking, very few solar projects that fall below the Article 10 size threshold result in lead agency issuance of a positive declaration. Unless there is something exceptional about the proposed project site, it would be rare for a lead agency to issue a positive declaration for the common small-scale solar project. Local municipalities that have failed to place restrictions on the siting of a solar project may resort to a positive declaration as a means of discouraging the project, or as a means of exerting greater control over the applicant. Either way, such an unusual occurrence generally sends a message to the applicant that they may be in for a rough time.

Unlike the Article 10 process, a SEQRA review can generally result in an expeditious outcome, with the entire process being measured in months, rather than years. Further, a SEQRA review can be much more streamlined than the Article 10 process, which requires a lengthy pre-application process typically lasting at least nine months and submission of a detailed application, followed by what may include a prolonged process of stipulations and an adversarial hearing (and possibly rehearing) before hearing examiners from both DEC and DPS. By contrast, the applicant in a SEQRA process deals directly with the lead agency in a less formal way, conforming the project to address the lead agency's issues, ideally leading to final approval.

SEQRA is not without its challenges, however. Critics have long complained that the process is subject to abuse by hostile lead agencies and can be lacking in transparency. DEC's 2018 revisions to its SEQRA regulations sought, among other purposes, to limit the ability of a lead agency to delay review of projects or to raise new issues with the apparent purpose of stringing applicants along. However, while DEC attempted to address widespread concern that SEQRA was frequently being used as a tool of delay and hindrance, the agency has no role in

overseeing local governments' implementation of SEQRA on the local level. DEC explicitly acknowledges this in its *SEQRA Handbook*.<sup>37</sup> As a result, a project developer stymied by a lead agency endeavoring to erect barriers to project approval is left to respond to bad-faith implementation of SEQRA through what most would consider the unattractive recourse of litigation, or even project abandonment.

Experienced attorneys who successfully guide projects through the array of legal hoops that may stand between a project proposal and its ultimate approval may be able to smooth the path to approval through what we refer to as "advance diligence." By advance diligence, we mean the process of engaging with officials before the formal commencement of project review. It can be immensely helpful to take the time to better understand the objectives of those who hold approval authority over a project and to develop conceptual attributes that may be able to address those concerns and facilitate a smoother process of project approval. Unfortunately, there is no guarantee that even the best-laid plans, buttressed by proactive engagement, will result in a favorable outcome.

## Recommendations and Conclusions

If New York is to reach the CES and CLCPA targets, significant improvements must be made to the Article 10 process. Since the new Article 10 process was finalized in 2012, only one utility-scale renewable energy project has been approved. With 2030 now just 11 years away, there is precious little time to implement changes that will ensure that many more of these renewable projects are sited, constructed, and placed in service.

In addition to the suggestions for improvement proposed by ACE NY in its January 2019 letter to the Governor, we suggest the following:

1. Dedicate sufficient resources to Article 10 statutory agencies with primary review responsibilities (DPS, DEC, and DAM) to enable project reviews to proceed more quickly.
2. Impose firm time deadlines, for all stages of the Article 10 process, on reviewing agencies to improve processing times.
3. Impose limits on the ability of reviewing agencies to raise issues not raised in response to the Preliminary Scoping Statement. This change would be similar to DEC's recent revision to the SEQRA regulations limiting lead agencies' ability to raise new issues beyond those originally scoped.
4. For projects proposed to be sited on lands currently in agricultural use, establish a presumption that the site will

<sup>36</sup> 6 N.Y.C.R.R. § 617.8(a).

<sup>37</sup> DEC, *The SEQRA Handbook*, Fourth Edition (Draft) 13 (Jan. 2, 2019), [https://www.dec.ny.gov/docs/permits\\_ej\\_operations\\_pdf/dseqrhandbook.pdf](https://www.dec.ny.gov/docs/permits_ej_operations_pdf/dseqrhandbook.pdf) ("DEC has no authority to review the implementation of SEQRA by other agencies.").

- return to agricultural use post-decommissioning, meaning that the project proponent shall not be required to conduct natural resources studies that would not be required of an active agricultural operation.
5. Direct DEC to rely exclusively on the inventory of freshwater wetlands mapped pursuant to Article 24 of the Environmental Conservation Law in determining requirements for development of specific renewable energy sites. National Wetlands Inventory (NWI) maps may be used to supplement State-mapped wetlands, but only insofar as NWI wetlands maps may implicate non-duplicative federal requirements.
  6. Direct DEC to develop a general permit for freshwater wetlands that will establish standard practices for all renewable energy projects, regardless of size, on sites that contain mapped wetlands.
  7. Direct the commissioners of Article 10 statutory agencies to identify and implement opportunities to expedite project reviews.
  8. Identify and implement standards for all agreed-upon (or non-controversial) environmental issues in order to limit the adjudicatory proceeding to necessary issues.
  9. When necessary, be prepared to overrule local laws to allow for siting and construction of renewable projects.

*Director of DEC Region 4. Michelle Piasecki is an associate attorney at Harris Beach. Her practice is focused entirely on energy law, with a robust practice before the Public Service Commission.*

Legitimate debate over climate change is essentially over. It is real and it is with us. The only question remaining is how to limit its effects. The community of scientists have spoken with one voice: we must significantly limit our contribution of greenhouse gases without delay.

With the enactment of the Climate Leadership and Community Protection Act, New York has established itself as the national leader of climate change action. Maintaining this leadership position and ensuring that its objectives will actually be realized will require bold steps involving compromise and trade-offs.

Those opposed to accepting trade-offs should consider the fact that unless compromises are made, and made quickly, the continuing progression of climate change will impose a far more dire set of circumstances that will quickly dwarf the scope and magnitude of compromise necessary for the deployment of renewable energy projects.

It would not be melodramatic to suggest that without rapid action to address climate change, we face an uncertain future. With the necessary changes to address siting challenges faced by renewable energy developers, New York can site the projects needed to make the State's ambitious climate goals a reality.

*Gene Kelly is a partner at Harris Beach PLLC whose practice is focused on energy and environmental law. Prior to coming to Harris Beach, he served 21 years in state public service, highlighted by 10 years at the New York Attorney General's Environmental Protection Bureau and 7 years as the Regional*