

JULY-AUGUST 2021

VOL. 21-7

PRATT'S

# ENERGY LAW

## REPORT



LexisNexis

**EDITOR'S NOTE: RENEWABLE ENERGY**

Victoria Prussen Spears

**THE RELATIONSHIP BETWEEN VOLUNTARY AND COMPLIANCE RENEWABLE ENERGY MARKETS**

Flossie Davis and Lynn Fountain

**CHANGING COURSE: FERC ADOPTS NEW POLICY ON ITS CONSIDERATION OF CERTAIN CLIMATE IMPACTS IN REVIEWING PROPOSED INTERSTATE PIPELINE (AND LNG?) INFRASTRUCTURE**

Brooksany Barrowes, Robert S. Fleishman, Nicholas Gladd, and Ammaar Joya

**FERC PROMOTES GREATER PARTICIPATION OF DISTRIBUTED ENERGY RESOURCES AND DEMAND RESPONSE IN ENERGY MARKETS**

Levi McAllister and Patrick R. Pennella

**NEW YORK ISSUES FINAL RENEWABLE ENERGY SITING REGULATIONS TO STREAMLINE PERMITTING**

M. Benjamin Cowan and Stephen Bright

**ESG IN U.S. OFFSHORE WIND (AND NOT FOR THE REASON THAT YOU PROBABLY ARE THINKING)**

J. Paul Forrester

**THE GENUINE LINK AND THE FLAG STATE IN MARITIME LAW**

Zaid Mahmoud Aladwan

# Pratt's Energy Law Report

---

VOLUME 21

NUMBER 7

July–August 2021

---

**Editor's Note: Renewable Energy**

Victoria Prussen Spears

209

**The Relationship Between Voluntary and Compliance Renewable Energy Markets**

Flossie Davis and Lynn Fountain

211

**Changing Course: FERC Adopts New Policy on Its Consideration of Certain Climate Impacts in Reviewing Proposed Interstate Pipeline (and LNG?) Infrastructure**

Brooksany Barrowes, Robert S. Fleishman, Nicholas Gladd, and Ammaar Joya

221

**FERC Promotes Greater Participation of Distributed Energy Resources and Demand Response in Energy Markets**

Levi McAllister and Patrick R. Pennella

226

**New York Issues Final Renewable Energy Siting Regulations to Streamline Permitting**

M. Benjamin Cowan and Stephen Bright

230

**ESG in U.S. Offshore Wind (and Not for the Reason That You Probably Are Thinking)**

J. Paul Forrester

234

**The Genuine Link and the Flag State in Maritime Law**

Zaid Mahmoud Aladwan

240

**QUESTIONS ABOUT THIS PUBLICATION?**

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please email:

Jacqueline M. Morris at ..... (908) 673-1528  
Email: ..... jacqueline.m.morris@lexisnexus.com  
Outside the United States and Canada, please call ..... (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexus.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

ISBN: 978-1-6328-0836-3 (print)  
ISBN: 978-1-6328-0837-0 (ebook)  
ISSN: 2374-3395 (print)  
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]  
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY  
LAW REPORT 4 (LexisNexis A.S. Pratt)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexus.com](http://www.lexisnexus.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**SAMUEL B. BOXERMAN**

*Partner, Sidley Austin LLP*

**ANDREW CALDER**

*Partner, Kirkland & Ellis LLP*

**M. SETH GINTHER**

*Partner, Hirschler Fleischer, P.C.*

**STEPHEN J. HUMES**

*Partner, Holland & Knight LLP*

**R. TODD JOHNSON**

*Partner, Jones Day*

**BARCLAY NICHOLSON**

*Partner, Norton Rose Fulbright*

**BRADLEY A. WALKER**

*Counsel, Buchanan Ingersoll & Rooney PC*

**ELAINE M. WALSH**

*Partner, Baker Botts L.L.P.*

**SEAN T. WHEELER**

*Partner, Kirkland & Ellis LLP*

---

## **Hydraulic Fracturing Developments**

**ERIC ROTHENBERG**

*Partner, O'Melveny & Myers LLP*

---

*Pratt's Energy Law Report* is published 10 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Energy Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# New York Issues Final Renewable Energy Siting Regulations to Streamline Permitting

*By M. Benjamin Cowan and Stephen Bright\**

*The authors explain that New York's new regulations should vastly improve the siting process for qualifying large-scale renewables in the state.*

New York State has passed the Accelerated Renewable Energy Growth and Community Benefit Act (“Act”). The Act established a new Office of Renewable Energy Siting (“ORES”) within the New York State Department of State with the intent of streamlining the current siting process for renewable energy projects in the state. This is the first state agency dedicated exclusively to the siting of renewable energy projects.

New York’s current siting process, known as Article 10, has widely been considered overly complex and burdensome, and is often cited as an obstacle to achieving the state’s renewable energy goals. To alleviate those issues, the Act required ORES to establish a uniform set of standards and conditions for the siting, design, construction, and operation of each type of major renewable energy facility.

ORES now has issued its final regulations. Although there are some notable changes, the final regulations are substantively similar to the draft regulations issued on September 16, 2020, and should vastly improve the siting process for qualifying large-scale renewables (25 MW and larger) in New York State.

## **DETAILED PRE-APPLICATION REQUIREMENTS**

The regulations establish a clear and uniform set of standards and requirements for obtaining siting approval for a proposed facility, which includes the following pre-application requirements:

- No less than 60 days before the filing of its application, the applicant must conduct a pre-application meeting with the chief executive officer of the local municipality or municipalities within which the project will be sited, along with any local agencies identified by the chief executive officer. The applicant is required to share certain information with the municipality, including a summary of local laws applicable to the

---

\* M. Benjamin Cowan, a partner in the Houston office of Locke Lord LLP, is chair of the firm’s Renewable Energy Section and serves as national environmental counsel to several of the largest renewable energy development companies in the United States. Stephen Bright, an associate in the firm’s Boston office, focuses his practice on energy, public utility, and communications regulatory matters. The authors may be contacted at [bcowan@lockelord.com](mailto:bcowan@lockelord.com) and [steve.bright@lockelord.com](mailto:steve.bright@lockelord.com), respectively.

project and its plans for complying with such laws.

- A similar requirement to hold a meeting with community members that may be adversely impacted by the siting of the facility no less than 60 days before the date of an application. The applicant is required to provide copies of transcripts, presentation materials, and a summary of questions raised during the pre-application meetings.
- At the earliest possible point in the project's preliminary planning, the applicant shall conduct a wetland delineation to identify the jurisdictional boundaries of all wetlands on the project site and within 100 feet of areas to be disturbed by construction. The applicant is required to submit a draft report for review by ORES.
- The applicant must undertake a similar review to identify all federal, state, and local waters present on site and those within 100 feet of areas to be disturbed by construction, as well as those one hundred feet beyond the limit of disturbance that may be hydrologically or ecologically influenced by site development.
- The applicant is additionally required to prepare and provide a wildlife site characterization report on species listed as threatened, endangered, or of special concern to ORES. The report is required to document species at the proposed facility, habitat suitability, and landscape on and within five miles of the project site, among other information. ORES will review within 30 days of submittal and provide a draft determination regarding a path forward to mitigate the impacts on threatened and endangered species, if relevant.
- Uniform setback requirements for Wind Turbine Towers and Solar Facility Components from property lines, centerlines of public roads, and residences.

The list above is not exhaustive, but it is indicative of the clear directives for project applicants in comparison to the Article 10 process, in which different state agencies would often impose conflicting requirements or standards on applicants.

## **CONSISTENT STANDARDS AND PROCESS**

The ORES regulations establish consistent requirements for minimization of project impacts to a variety of resources including noise, viewsheds, wetlands and aquatic resources, protected species, cultural resources and more.

One notable change from the draft regulations is the inclusion of additional, more specific requirements for evaluating impacts to threatened and endangered species.

Specifically, the final regulations require applicants to identify the migratory routes of birds and bats through the project site, require an adjustment to the project's limits of disturbance or construction schedule in certain circumstances such as when an active nest is discovered, and specify how mitigation requirements will be calculated in certain situations where net conservation benefit plans are required. While imposing more stringent standards than previously existed, the regulations at least establish clear standards that developers can plan and account for.

The final regulations encourage local governments and communities to participate in the permitting process. Public review and comment, as well as adjudicatory hearings, will be required when substantive issues are identified. These procedures, along with the enhanced communication between applicants and ORES, are intended to foster a productive process for addressing project impacts and give applicants the flexibility necessary to implement effective mitigation strategies.

The Act provided ORES with the authority to function as a central hub in the siting process, increasing certainty and predictability.

Importantly, ORES is required to issue a permit within one year of the date on which an application is deemed complete, or within six months if the facility is proposed to be located on a "repurposed site," defined as an existing or abandoned commercial or industrial use property, including without limitation, brownfields, landfills, dormant electric generating facility or other previously disturbed location. ORES must make its completeness determination within 60 days of receiving an application. Through the imposition of these time limits the ORES regulations seek to ensure that projects that have been planned in a manner consistent with the pre-application requirements will move through its amended process predictably and efficiently.

### **APPLICABILITY TO EXISTING PROJECTS**

Qualifying projects currently in the Article 10 process may seek a transfer from the Article 10 process to the new ORES process. The final regulations provide guidance for transferring for several categories of projects:

- (a) Pending Article 10 facilities for which a completeness determination has been issued;
- (b) Pending Article 10 facilities for which an application has been filed but have not yet been deemed complete; and
- (c) Facilities between 20 MW and 25 MW that seek to opt in to the ORES process.

Each facility requesting to transfer must submit notice to ORES as well as certain additional information depending on its Article 10 application status.



Applicants will need to weigh the administrative burden of transferring, which should be relatively minor, against the additional certainty and efficiency expected to be provided by the ORES process, recognizing that as with any new regulatory framework, and particularly one involving a newly formed agency, there are likely to be unexpected challenges and delays.

These potential hiccups notwithstanding, the Act provides a clear signal that New York State recognized the problems that have hampered the Article 10 process, and there is reason to expect that the new ORES siting process will be smoother, faster, and more predictable than its predecessor.