



Rochester Birding Association, 5 Cranswick Lane Rochester, NY 14618

December 7, 2020

RE: Comments on the THE NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING Draft Regulations Chapter XVIII Title 19 (Subpart 900-6)

The Accelerated Renewable Energy Growth and Community Benefit Act (Act) has the potential to be an outstanding piece of legislation which will be copied and adopted across the United States. However in its current form it also has an extremely high likelihood of creating dangerous unintended but permanent environmental consequences.

There are six key concerns with the draft regulations to implement the Act in its current form that need to be revised:

1. There is a Lack of Provisions to Ensure Appropriate Facility Siting

The draft regulations show no clear mechanism to influence facility or turbine siting. It is also not clear that there is any location or scenario under which a project proposal might be denied.

This concern can be partially ameliorated by identifying and requiring science-based setbacks from areas of importance to wildlife, including areas where wildlife concentrate. For example:

A flow chart with 3 categories the result would be the majority of projects proceeding at a fast pace while there would be a disincentive of taking more time and doing more studies in those areas of more environmental concern. A project could still happen but would have a greater level of study (minimum 2 year on site) prior to project submittal and a time line which allows for good quality science to happen. Similar to the State regulations for the NYS Department of Transportation version of SEQR with Exempt Actions, Type II and Non Type II projects.

For reclaimed brownfield sites not impacting environmental justice communities or located in sensitive 'set a side' areas would get a greenlight with minimal review.

Then there would be a series of questions to determine 'set a side' or sensitive areas:

- Is project located within 5 miles of large body of water (Great Lake/ Finger Lake, Sound, Atlantic) coastline (migratory flyway concern), 3 K (1.9 miles) distance from major river (Hudson, Genesee, Niagara, Delaware, Susquehanna, etc), 3 K (10000 ft or 2 miles) distance from Wildlife Refuge or sensitive habitat area ie Bergen Swamp, mountain peaks, other?
- Is the project in an area with probable habitat for Species of Greater Conservation Need, Special Concern, sensitive species or sensitive habitat types S1 - S2, G1 - G3?
- Are there other issues such as sensitive archaeological or geological or environmental justice concerns?

If so onsite surveys such as required under Article 10 must happen prior to project submission.



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Projects which do not have siting issues can proceed in a way similar to legislation as written.

The majority of projects would move at a faster pace than under SEQR or Article 10.

2. Lack of Consideration for Non-Listed Wildlife Species

The draft regulations provide some reasonable considerations for wildlife species listed as State Threatened or Endangered. However, there are no such considerations for non-listed species.

Also the rarer the species, the less likely a spot study will capture it therefore good science uses the criteria of Probable Habitat. Defined as all the aspects of habitat needed for a species are present.

This concern can be partially ameliorated by expanding the scope of species to be considered in studies and project planning to include state-designated species of Special Concern and High Priority Species of Greatest Conservation Need. Additionally habitat use needs to be defined as probable habitat use rather than occupied habitat.

3. Unrealistic and Inappropriate Timelines and Automatic Project Approvals

The aggressive timelines and automatic approvals at key deadlines in the various planning stages pose too great a risk for unforeseen and unavoidable issues to compromise the legitimacy of the review process. Automatic approvals pose a high likelihood of advancing projects that may be unacceptably harmful to birds. Collectively, these create opportunities for exploitation. For example, a developer could submit multiple proposals at one time in order to overwhelm agency staff and obtain automatic approvals. This leaves the process vulnerable to becoming a de facto approval, rather than an informed evaluation that serves the public good.

Numerous developers have already said they plan to submit multiple projects at the same time hoping to get projects to be automatically greenlighted as the review deadline is missed.

This concern can be ameliorated by: (1) removing or extending unrealistic deadlines for NYS-DEC review and automatic approvals, and (2) requiring certain field studies to be completed before an application is submitted for a given project.

4. Lack of Required Pre-Application Field Studies

The draft regulations provide opportunities for the New York State Department of Environmental Conservation (NYSDEC) to provide input on proposed project plans, albeit with limited time to do so. However, this input is based on a desktop analysis, using what is often limited available information. Because of this, field studies to characterize wildlife populations are crucial to assess likely impacts and inform low-impact project siting, establish compensatory mitigation needs, and set a baseline for impact assessment. However, the draft regulations currently only allow for a single year of study based on input from NYSDEC and other agencies, with no guidelines for timing of these surveys.



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This is problematic for two reasons. First, some studies must be conducted over multiple seasons (e.g., for species present in winter as well as spring and fall migration). Studies must be conducted over multiple years for rare species or those with high inter-annual variation in presence and abundance. Unusual climatic conditions in a given year and other uncontrollable factors can substantially influence species' presence, reinforcing the need for additional study in some instances. Second, it is important that field studies encompass a survey season, and not be interrupted due to the timing of pre-application meetings. Sufficient field study data is crucial to minimizing conflict, and reducing the chance of projects being approved despite unacceptable risks and impacts.

This concern can be ameliorated by requiring, at minimum, a single year of appropriate wildlife studies prior to submission of the wildlife site characterization, using the State's 2016 *Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects* as guidance. The agency can then review the study(ies) and require an additional year of studies as stated in 900-1.3(g)(2) of the draft regulations, if needed. This is standard procedure for the industry and poses no burden on renewable energy developers - they typically work with biological consultants, who advise them regarding surveys that are needed to evaluate risks to wildlife, and then conduct these studies. The State's 2016 guidance would assure that practices are relevant and appropriate.

As stated in key concern #1, projects sited in vulnerable areas would be required to have additional site specific studies (minimum 2 years) prior to submission.

5. Inappropriate Restrictions on Public Input and Lack of Data Transparency

The importance of public input cannot be overstated. State biologists cannot be expected to have detailed understanding of wildlife populations everywhere, especially on private lands where most renewable energy projects are located. This is particularly problematic given the short time windows for input allowed to state biologists in the draft regulations. Local and other expert input is thus invaluable and must be gathered and fully considered at key points in the planning process.

The State has an opportunity to create a positive precedent by making this data publicly available, providing an understanding of the actual impacts to interested parties. This would inform substantive discussion, evaluation of cumulative impacts, and project-specific adaptive management. The concern of public input and lack of data transparency can be partially ameliorated by: (1) revising proposed restrictions on public hearings and input, and (2) requiring that pre- and post-construction wildlife data be made public.

6. Lack of Post-Construction Wildlife Mortality Monitoring

Monitoring direct wildlife impacts from wind energy facility operations, i.e., bird and bat collisions with turbines, is a standard practice in the industry. Accurate wildlife fatality data is crucial to understand actual impacts because pre-construction wildlife risk assessment is not yet a reliable predictor.



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Fatality monitoring is particularly important when species of conservation concern are known to inhabit a site, and thus likely to be negatively affected by development. It is also difficult to understand how mitigation requirements will be determined if impacts are not evaluated. Without accurate fatality monitoring, the actual impacts are not known, creating unnecessary uncertainty and associated conflict.

This concern can be partially ameliorated by requiring post-construction mortality monitoring in appropriate instances. As with the solution for Key Concern #4 above, this is standard procedure for the industry and does not pose a burden on renewable energy developers. A recommended protocol for these surveys and supporting science can be provided if that would be beneficial.

This potentially stellar piece of legislation has serious concerns about the lack of consideration of impacts to birds, other wildlife, and habitat.

Not fixing these issues will result in greater conflicts. Lets fix the issues in this piece of legislation and avoid the slow downs and expense of court cases.

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17 NYCRR PART 15 (§15.14 Transportation Type II)