

GREAT LAKES OFFSHORE WIND: PERMITTING AND CONTRACTING CONSIDERATIONS

Hodgson Russ Renewable Energy Alert
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As part of its October 15, 2020 Order regarding how New York State will reach the goal of 70 percent renewable energy consumption by 2030 under the Climate Leadership and Community Protection Act (“CLCPA”), the New York State Public Service Commission (“PSC”) – in a move that got little attention compared to the Commission’s higher profile Order provisions – authorized and directed the New York State Energy Research and Development Authority (“NYSERDA”) within 180 days to commence a feasibility study regarding “stakeholder outreach, analysis, and policy options” for offshore wind facilities in the Great Lakes. The State has spent years performing exhaustive studies, designing programs and running complex solicitations to support offshore wind projects in federal waters of the Atlantic Ocean. But beyond the fact that they both involve wind turbines standing in the water, Atlantic Ocean and Great Lakes offshore wind projects have very little in common. Indeed, Great Lakes offshore wind presents a unique set of variables – economic, permitting and regulatory – with which New York State energy policymakers and project developers have yet to grapple.

Like offshore wind projects in the Atlantic Ocean, federal law governs certain construction activities in the Great Lakes and imposes several risk-mitigation requirements. But New York law governs the use of land under State waters in the Great Lakes, and so State regulatory consideration will be much more central to project siting and construction. Indeed, even in the State Environmental Quality Review Act Findings Statement appended to Commission’s October 15 Order, DPS staff noted that further analysis is warranted regarding potential visual impacts, fish disturbance, commercial and recreational vessel impacts, and impacts on birds and bats.

In this alert, we summarize the likely required permits, approvals and contracts that have dynamics unique to Great Lakes offshore wind projects. We also identify processes that will likely be needed to support these projects but are not yet in place. We do not assess the federal permits that are generally applicable to any large offshore project, such as from the Federal Aviation Administration and United State Coast Guard.

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Leases and Easements from the Office of General Services

Under New York State Public Lands Law Section 75, the State holds title to the lands under the Great Lakes in trust on behalf of its citizens. New York's jurisdiction extends from the coast to the international boundary line, and the New York State Office of General Services ("OGS") has the authority – akin to BOEM at the federal level – to grant leases and easements to the State's underwater lands. Therefore, although no regulations specific to such Great Lakes offshore wind leases or easements currently exist, offshore wind developers will be required to obtain such rights from OGS to construct and site the wind farm and transmission lines. The specifics of this OGS process, and its timing within the project development cycle – especially coordinated with any procurement of the energy or other attributes associated with the facility – will be an important consideration for state policymakers and market participants.

Office of Renewable Energy Siting

Under the Accelerated Renewable Energy Growth and Community Benefit Act (the "Act"), passed in April 2020, large-scale renewable energy projects – 25 MW or more – sited within the State's jurisdiction must seek a siting permit from the Office of Renewable Energy Siting ("ORES"), which is within the Department of State. ORES's authority extends not only to a facility's generating component, but also to any co-located energy storage system and transmission lines less than 10 miles in length that are necessary to integrate the new renewable energy facility into the state's bulk transmission grid. The proposed regulations issued by ORES in September 2020, however, do not address potential Great Lakes wind facilities – they only provide uniform standards and conditions, application review procedures, etc..., regarding on-shore large-scale renewable energy projects. New regulations would most likely need to be promulgated for ORES to consider project applications for such a unique facility as a Great Lakes wind farm.

United States Department of State & International Joint Commission Review

Under the 1909 Boundary Waters Treaty, the International Joint Commission ("IJC") must approve applications for obstructions, uses, or diversions of water that affect the natural level or flow of water across the U.S.-Canada border. The U.S. Department of State facilitates the approval process on behalf of U.S. applicants. Great Lakes offshore wind developers would likely be required to submit to the State Department a request for approval under the Treaty, which would be reviewed by the State Department and Global Affairs Canada to determine whether the proposed project will require approval under the treaty and any further action from the IJC.

Transmission Permitting – New York State Department of Public Service

Transmission lines that exceed 10 miles in length are subject to the permitting process under Public Service Law ("PSL") Article VII, for which the Act now requires an expedited permitting process. The Public Service Commission ("PSC") will promulgate regulations to amend its Article VII process, including the requirement that a permit be issued within one year of an application being deemed complete. The Article VII permit is subject to SEQRA review, which is broader than NEPA; it requires an EIS for *any* action which may have a significant effect on the environment, whereas NEPA requires an EIS only for *major* federal actions that will have such an effect. SEQRA provides for coordinated federal and state environmental review, eliminating the need for an EIS under SEQRA where one has been prepared under NEPA. Still, the

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findings mandated by SEQRA must be made even when a federal EIS has been prepared.

With respect to the transmission line, the PSC would control wetlands permitting and other approvals that are required under New York's substantive environmental statutes such as the Protection of Waters, Coastal Erosion, State Pollutant Discharge Elimination System ("SPDES"), the National Pollutant Discharge Elimination System, Freshwater Wetlands and State Endangered Species Permits. Unless their transmission line is not less than 10 miles long, developers will need to obtain an Article VII permit for transmission lines in addition to the project approvals for the generation facility.

New York State Department of Environmental Conservation

Under Section 401 of the Clean Water Act, applicants for certain federal permits – which includes the Section 10 and Section 404 permits issued by USACE – must obtain a Water Quality Certificate from the NYSDEC, certifying that the proposed activity will not violate water quality standards. Great Lakes offshore wind project developers will need to submit a joint permit application with NYSDEC and USACE to streamline the permit application process; however, each agency processes the application separately, and approval from one agency does not necessitate approval from the other. Because USACE cannot issue the Section 10 and Section 404 permits without a Water Quality Certificate, developers should prioritize this approval.

New York Department of State: Division of Coastal Resources

The Department of State ("DOS") is responsible for administering the New York State Coastal Management Program pursuant to the federal Coastal Zone Management Act ("CZMA").^[1] The CZMA was enacted to preserve and manage the nation's coastal communities, including the Great Lakes. The CZMA also allows local governments to participate in the State's coastal management program by adopting Local Waterfront Revitalization Plans ("LWRP"). Once a state's coastal program is approved under the CZMP, any federal or state action must be consistent with the state's program and any LWRP.

In New York, the DOS must conduct a consistency review before a federal agency can issue a permit for a project located in the State's coastal area. In addition, state agencies must complete a Coastal Assessment Form as soon as the agency contemplates an action that may impact the policies for the coastal area or any approved LWRP. The Coastal Assessment Form is designed to assist the State agency in making a determination regarding the consistency of its action with coastal policies or an approved LWRP. It is also intended to aid the State's lead agency for SEQRA in making its determination of significance. Therefore, if a Great Lakes wind project or its transmission line are proposed for a designated coastal zone, the developer should request a consistency determination at the same time they submit their federal application materials to USACE.

Renewable Energy Credit Contracts

Like other clean energy resources, offshore wind projects in the Great Lakes will likely require State support through its Clean Energy Standard energy credit contracts. Under these programs, and with State ratepayer funding, NYSERDA executes contracts to pay a particular price for the attributes – renewable energy credits – associated with the generation of clean and renewable electricity. The Zero Emission Credit program, which supports the upstate nuclear fleet, sets that

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payment at a value informed by, among other variables, the cost of carbon. The Renewable Energy Standard program, which supports new onshore solar, wind, and other renewable resources, awards contracts through a competitive solicitation. The State's existing offshore wind program also awards contracts through a competitive solicitation, though with different program rules from the Renewable Energy Standard and through a separate competition given the technologies' very different cost bases and development requirements.

Great Lakes offshore wind will have a set of economic drivers, potential revenue streams, cost considerations, development cycles and competition factors that are even further distinct from the other resources already supported by the State. Like the nuclear facilities, there may not be a feasible competitive solicitation to run without significantly more projects in the early stages of development; wholesale energy costs in upstate New York, into which markets Great Lakes wind would sell their energy and capacity resources, are significantly lower than downstate; and development costs are expected to be notably higher than onshore projects. All of these factors point toward the need for a new, distinct contracting program for Great Lakes offshore wind to be authorized by the PSC, instead of requiring the resource to compete with more traditional resources.

Even with all the unknowns regarding offshore wind in the Great Lakes, the CLCPA's charge to achieve 70 percent renewable energy by 2030, 100 percent clean energy by 2040 and 85 percent greenhouse gas reduction by mid-century – below pre-industrial levels – requires the State to use every clean energy tool available. With the feasibility study now authorized by the PSC, the State will provide much of the market certainty needed to give this resource a chance at success.

Contact [Mike Hecker](#) (716.848.1599), [Dan Spitzer](#) (716.848.1420) or [John Dax](#) (518.433.2414) with any questions regarding how these developments may impact your business.

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[1] 16 U.S.C. § 1451.