

APPLICANT'S PARTIAL LOSS OF SITE CONTROL RESULTS IN FIRST ORES DENIAL OF SECTION 94-C PERMIT APPLICATION

Hodgson Russ Renewable Energy Alert
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One of the fundamental aspects of any generating project review by a local or state agency is that the applicant must have site control. Now, the partial loss of site control has resulted in the first denial of an Executive Law § 94-c application. On February 6, 2024, the New York State Office of Renewable Energy Siting (“ORES”) Executive Director Houtan Moaveni issued a decision^[1] dismissing without prejudice Hecate Energy Columbia County 1 LLC’s (“Hecate’s”) application for a Section 94-c siting permit for its Shepherd’s Run Solar project after the company lost control over part of the project site. Importantly, the Decision rejected Hecate’s request that they be allowed to amend the Application, determining that the controlling regulations prohibit amendments to a siting application following the issuance of a notice of complete application.

Hecate filed its application in March 2022 for a 60 megawatt (MW) solar project in the Town of Copake (“the Town”), located in Columbia County. By August 2023, the application was deemed complete, and ORES issued a draft siting permit in October 2023. However, the Town moved to dismiss the application on January 2, 2024, asserting that almost 60 acres of the project site, representing about 20% of its footprint, had been sold to a third party following the expiration of Hecate’s property option agreement. The Town requested either a denial of the application with prejudice, or that the project’s notice of complete application be withdrawn, with a notice of incomplete application issued.

The Administrative Law Judge assigned to the matter directed the Town to refile its motion as part of its issues statement due two weeks later. The Town sought to appeal to the ORES Executive Director, claiming that the ruling would result in significant inefficiencies in the hearing process. That appeal was permitted to proceed.

Hecate subsequently argued that the Executive Director should instead either vacate the application’s notice of completion or hold the proceedings in abeyance until it could submit a revised plan. This plan involved downsizing the project to 42 MW and reducing its footprint to 215 acres due to the loss of the option property. Hecate asserted that the 94-c regulations would not allow for a new notice of incomplete or supplemental submissions, as this would be “wholly inconsistent with both the

Attorneys

Evan Anderson
Christine Bonaguide
Matthew Cameron
Brandon Cottrell
Emanuela (Amy) D'Ambrogio
Krystal Daniels
John Dax
Collin Doane
Joseph Endres
Christofer Fattey
Andrea Gervais
Michael Hecker
Elizabeth Holden
Alicia Legland
Matthew Liponis
Charles Malcomb
Rosellen Marohn
William McLaughlin
Paul Meosky
Chelsea Reinhardt
Joseph Reynolds
Robert Sands III
Aaron Saykin
Daniel Spitzer
Alicia Stoklosa
Jeffrey Stravino
Brienne Szopinski
William Turkovich
Sujata Yalamanchili
John Zak

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efficient administration of this proceeding and the spirit of both Executive Law § 94-c and the ORES regulations.”

The ORES Executive Director treated the Town’s motion to dismiss as a motion for summary judgment in accordance with Section 900-8.3(b) of ORES’s regulations. In doing so, Executive Director Moaveni found that the Town established a prima facie case for dismissal due to Hecate’s inability to obtain the necessary property rights for its project. Recognizing that Hecate’s application would need to be amended for the project to proceed, the decision found that ORES regulations prohibit amendments following the issuance of a notice of complete application. The Executive Director additionally concluded an abeyance would be improper due to the one-year statutory timeframe for ORES to issue a decision on the project.

The Town’s request to deny the application with prejudice was not granted. ORES concluded that the Town had failed to make a sufficient showing that the project could not be approved if modified to exclude the option property, or that there was sufficient intentional conduct on the part of Hecate to justify such a decision. The door remains open for Hecate to submit a new 94-c application for the project, which may propose a similar but modified facility.

Hodgson Russ Insight: The decision distinguished the process set forth under the current ORES regulations from the current Public Service Law (“PSL”) Article 10 and former PSL Article X, which permitted post-completeness amendments. Most permitting processes encourage, rather than prohibit, amendment, thereby effectively promoting applicant collaboration with the public and agencies.

[1] New York State Office of Renewable Energy Siting, Application of Hecate Energy Columbia County Matter No. 21-02553 for a 94-c Permit for Major Renewable Energy Facility, Decision of the Executive Director, (Issued February 6, 2024).

For any questions regarding the ORES regulatory process, or about energy siting in New York State, please contact [John Dax](#), [Charles Malcomb](#), [Bill McLaughlin](#), [Dan Spitzer](#) or any other member of the [Hodgson Russ Energy team](#).

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Henry Zomerfeld

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