STATE OF NEW YORK
DEPARTMENT OF STATE
OFFICE OF RENEWABLE ENERGY SITING

COMMENTS ON
Draft Regulations
Chapter XVIII, Title 19 of NYCRR Part 900
Subparts 900-1 – 900-14

On Behalf of Save Ontario Shores, Inc.
and named signatories across upstate, western and
the Southern Tier of New York

Appendix C

- Comments on the legally questionable use of different health and safety standards for project "participants", compared to everyone else, prepared by Gary A. Abraham, attorney

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Draft ORES regulations, to implement Section 94-c of the New York State Executive Law
Comments on behalf of Save Ontario Shores, Inc.

PROJECT "PARTICIPANTS" AND "NON-PARTICIPANTS" SHOULD BE TREATED ALIKE

The Draft regulations at §900-2.9(d)(6) limit exposure to shadow flicker to "non-participants" only. For project "participants" there is no limit.[1] A project "participant" is defined as a "property whose owner has signed a participation agreement or other type of [agreement] addressing potential facility impacts (e.g., noise, shadow flicker, setback, etc.)." Draft regulation §900-10.2(h)(3).

The Draft regulations at §900-2.8(b)(1)(i) would limit wind turbine noise exposure to 45 dBA long-term mean level for "non-participants", and 55 dBA for "participants".

Allowing project sponsors to impose greater adverse impacts on those with whom they have a contract than on neighboring property owners who have not is unworkable as a practical matter. This is quite apparent when siting a wind farm. The distinction between project "participants" and "non-participants" allows the "participant" to agree to site one or more wind turbines generating more than 100 decibels of noise on her land without regard to the impacts on her neighbor. In many cases it will be impossible limit wind turbine noise exposure on a "non-participating" parcel to 45 dBA, for example, when wind turbines are allowed to emit 55 dBA on the neighboring parcel.

Allowing project sponsors to impose greater adverse impacts on their contract partners than on others is legally questionable. Up to now, this distinction has been employed by project sponsors, who have prevailed on potential host town governments to adopt local laws incorporating the distinction. PSL Article 10 siting decisions have incorporated the distinction under the Siting Board's authority to apply local laws, but not without criticism.[2] Power plant siting officials in other jurisdictions have struggled with this arrangement. The Maryland Public Service Commission issued a decision in the matter of Dan's Mountain Wind Force, LLC, for a Certificate of Public Convenience and Necessity, concluding that "requiring compliance with the setback and separation distances in the [local wind facility] Ordinance for those property owners that are willing to agree to live in close proximity to a turbine is not reasonable."[3] The

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1 In addition, the Draft regulations provide no per-day limit on shadow flicker exposure for anyone, and allow 30 hours of exposure per year. As discussed in our comments on shadow flicker, these are arbitrary limits, and other jurisdictions adopt more protective limits.

2 *See* Case 14-F-0490, Recommended Decision, 82 ("We share the concern expressed both by DPS Staff and Concerned Citizens that private contract rights should not be allowed to obviate local laws or other legal requirements where those requirements exist.").

3 Maryland PSC, Case 9413, *In the Matter of the Application of Dan's Mountain Wind Force, LLC for a Certificate of Public Convenience and Necessity to Construct a 59.5 MW Wind Energy Generating Facility in Allegany County, Maryland*, Proposed Order of the Public Utility Law Judge (January 25, 2017), 56, affirmed by Maryland PSC, Order No. 88260 (June 16, 2017), both available at <http://www.psc.state.md.us/electricity/> (search on Case

Maryland PSC determined that separate setbacks from wind turbines for "Participating Properties" would nevertheless be appropriate because "the Participating Property Owners have the choice, once the Wind Project is operational, to sell the property on which the residence is located to the Applicant without requiring any basis for the election."[4]

It has long been held in this nation that contracts may not interfere with regulatory protections that "relate to the safety, health, morals and general welfare of the public".[5] ORES should delete the references to "non-participants" at §§900-2.8(b)(1)(i), 900-2.9(d)(6) and 900-10.2(h)(3).

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Docket No. 9413).

4 *Id.*, 57.

5 *Lochner v. New York*, 198 U.S. 45, 53, 25 S. Ct. 539, 541, 1905 U.S. LEXIS 1153, *13-14 (1905). See *PPM Atlantic Renewable v. Fayette County Zoning Hearing Board*, 93 A.3d 536, 2014 Pa. Commw. unpub. LEXIS 311 (Pa. Commw. Ct. 2014) (allowing more lax height and setback requirements for "participants" compared to "non-participants" in a wind project project is an improper restriction on health, safety and welfare protections).