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 G

- Review and comments regarding the draft regulation procedures and on several application exhibits as proposed in the draft regulations, including revisions needed to ensure stakeholders who would be asked to host large-scale renewable energy projects can participate in the review of siting proposals. Prepared by Kate Kremer, Save Ontario Shores, Inc. VP

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State of New York
Department of State
Office of Renewable Energy Siting

Subject: Comments on Behalf of Save Ontario Shores, Inc.
Draft Regulations: Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1–900-14

Addressing the following Draft Regulations Sections:

900-1.3 Preapplication procedures

900-1.6 Filing, Service and Publication of an Application

900-2.18 Exhibit 17: Consistency with Energy Planning Objectives

900-2.19 Exhibit 18: Socioeconomic Effects

900-2.25 Exhibit 24: Local Laws and Ordinances

900-4.1 Office of Renewable Energy Siting Action on Applications

900-8.1. Publication of draft siting permit.

900-8.3 Public comment hearing and issues determination

900-10.2 Pre-Construction Compliance Filings

900-11.1 Permit modifications requested by Permittee

900-1.3 Preapplication procedures

900-1.3 (a): The draft regulations require consultation with local agencies a minimum of 60 days prior to filing an application. This minimum is arbitrary and not reasonable in light of required preapplication procedures and data collection.

During the preapplication stage, Applicants need to complete extensive site characterization, meet with State agencies, secure leases from landowners and collect visual and other data from the municipalities and local agencies. Since Applicants must engage with landowners, state agencies and municipalities early in the process, they should be required to formally notify them that preapplication procedures and collection have begun. Regulations should require that developers contact municipalities and the public within four weeks of an applicant's initial meetings with any agencies or landowners regarding a project proposal.

This early contact and communication will facilitate the rapid process that is the goal of these regulations. Towns and residents who have not been engaged early in the process will be less likely to support the project. Delay between when a developer begins working on a project and when it formally contacts municipalities and citizens does not support communication and transparency.

900-1.3 (a)(8): The requirement that a local agency or community intervenor submit a request for initial funding within 30 days of the application filing is an additional reason to require early municipal and public notification that preapplication activities have begun. Funding requests require knowledge of the issues, review of documents and cost estimates. Without such early notification, 30 days from the time of notice of an application to request intervenor funding is untenable.

900-1.3 (b): Community members should be accorded the same notice as local agencies. See 900-1.3 (a) comments above.

The phrase "*who may be adversely impacted*" should be removed. This language limits the applicants' responsibility to conduct a meeting for community members to those who may be adversely impacted. Who will determine those who will be adversely impacted when no one but the developer has data on the project? How will stakeholders who learn late in the expedited process about a project proposal be treated? Limiting notice to a subset of the community is not reasonable. All people who reside full- or part-time, who own property or businesses, or who work in the host communities should be notified and encouraged to attend all community meetings by the applicant.

The purpose of the meeting must be not only to educate the public, as listed in the regulation, but also *to gain information from the public*. Merely educating them 60 days before the application assumes local stakeholders have no information about whether

the applicant has selected an appropriate site. Nor does one-way communication promote transparency, participation and engagement. The first meeting with the public should be held within four weeks of local or agency engagement, in the same time frame as listed for formal meeting with municipalities.

In addition to revising the regulations so that meetings between the applicant and the public, and the applicant and municipalities, happen early in the process, the regulations should also require that the applicant notify municipalities and citizens within the project area of ongoing available information, changes, and developments. This can be facilitated by a centralized website operated by ORES for each project.

900-1.3 (e), (f), (g): Pre-application site characterizations should be made public.

During the pre-application phase, an applicant must complete site characterizations of surface waters (wetlands, streams and other waterbodies), (§900-1.3(e), (f)), and wildlife (bird, bat, and other species, (§900-1.3(g)). The characterization of surface waters must be approved within 60 days, in consultation with NYSDEC, and approval of the wildlife characterization within 30 days. These time frames are, based on experience, infeasibly short. Moreover, ORES will need to show that staffing at its office and at NYSDEC is sufficient to conduct such reviews under any time frame, since the underlying purpose of the regulations is to expedite projects. Thus, the draft proposal in this regard will inevitably result in no meaningful review of an applicant's self-serving site characterizations. The likelihood that the applicant's characterizations will be inaccurate, or improperly limited in scope, is heightened by the absence of any requirement to consider public comments on these site characterizations.

There should be some provision requiring site characterizations developed by an applicant during the pre-application phase to be made available to the public, including local stakeholders. As Article 10 has shown, applicants squander the pre-application phase, during which it is able to develop the information required for an application, and then complain when agency staff and intervenors raise issues presented by inadequately developed environmental information. The draft ORES regulations can be expected to have a similar result because they do not address the underlying problem that delays the determination of appropriate siting issues: environmental site characterizations take more than a year and, where species of special concern occupy the site, up to three years of site surveys are called for under current guidelines for siting large-scale wind energy facilities.

Accordingly, the Draft regulations should provide for preapplication review, should authorize ORES staff to advise applicants regarding the adequacy of an applicant's preapplication activities, and should make those activities sufficiently transparent that the public can comment on their adequacy to ORES staff.

900-1.3 (g)(2): All municipalities within the project study area should be included in the meeting with the Office, NYSDEC and the applicant regarding the wildlife site characterization and project details. There is no benefit to excluding municipalities from

this meeting. Municipal leaders know their towns and the sites and may have information to offer and questions to ask.

Additionally, the ~~4~~ four-week time limit for the Office and NYSDEC to determine if NYS threatened or endangered species are present on the facility and recommend assessments and/or field surveys is not realistic~~.~~ The pre-application period should be flexible enough to ensure that natural resources are not unreasonably harmed, and that natural resources agency staff are able to determine whether a proposed site requires greater scrutiny than could be afforded under a four-week deadline. If multiple projects submit wildlife site characterization documents, or if extremely large projects submit documents, or if they are submitted during holidays, then four weeks will not be adequate. The draft regulations must be revised to include a reasonable opportunity for State agencies and ORES to extend the time for preapplication procedures, preapplication reviews and preapplication meetings. The time for preapplication should be in staff's control and should not *depend upon applicant approval.*

900-1.3 (g)(2)(iv): Habitat assessments and/or field surveys must not be limited to one year as set forth in the draft regulations. Because some sites will require longer to assess under established guidelines, one year is arbitrary and lacks scientific basis. In many cases, such a short time period will require that decisions are made without adequate data. Given the statutory 12-month limit on review of applications, the preapplication phase must ensure that applications are complete. This preapplication time limitation for field surveys will ensure that many are not, making it impossible to adequately review applications within the time allowed.

900-1.3 (g)(8): The Net Conservation Benefit Plan (NCBP) needs to be defined and made public. Financial statements, requirements, standards and payments for providing net conservation benefits must be made public. The assumptions upon which financial payment is made to compensate for wildlife mortality, displacement, and habitat degradation should be documented and made public and be provided for public review, critique and revision.

The draft regulations should require publicly accessible supporting information that demonstrates how the NCBP complies with all federal and state laws including the Migratory Bird Treaty Act, The Bald and Golden Eagle Protection Act and the Endangered Species Act.

Transparency and trust in the process require that each Net Conservation Benefit Plan provide details of what species will be negatively impacted by the project, what payment will be made, and how that payment will provide a net conservation benefit. And the NCBP must require and set forth a comprehensive mortality monitoring and study protocol during all phases of the project. The NCBP for each project must be reviewed periodically and revised if the monitoring finds that the payment is inadequate. Additionally, monitoring must be ongoing for the life of the project to provide data for other projects and project reviews and such data must be made publicly available for these purposes.

The establishment of the NCBP highlights the need for adequate wildlife surveys which is, in most cases, a minimum of two years. NCBP is evidence-based and, if there is minimal data, then the plan will not reflect the impacts and the costs will not be in line with the harm. If developers want to minimize their payment and survey time they should search for locations with low wildlife impacts.

Migrating birds, raptors, and other large birds of conservation concern are part of the public trust and we have a duty to protect them. Wind energy projects in particular are a leading cause of the decline of such species. The NCBP is effective when it is a financial incentive for developers to make environmentally reasonable siting choices. The Net Conservation Benefit Plan must include cumulative impacts to a large number of wildlife, including non-listed species as well as endangered species or species of concern impacts, and be defined in such a manner that a determination can be made whether the harm is so extensive that an appropriate NCBP payment makes the project uneconomic.

900-1.6 Filing, Service and Publication of an Application

In addition to the listed locations for electronic and paper copies of the application, the Office should post these documents in a central and publicly available website along with all comments, letters, and other documentation from state agencies, municipalities or the public. This is reasonable if the intent is to speed up the permit process and still retain municipal and community involvement.

Requiring citizens or municipalities to FOIL the Office for documents, as the Office suggests that the public do in order to obtain copies of comments to these regulations, is not reasonable and will only heighten public mistrust. Unreasonable acceleration of the process, as drafted in these regulations, alongside the withholding of immediate access via website to all public documents, creates substantial barriers to public participation.

900-2.18 Exhibit 17: Consistency with Energy Planning Objectives

900-2.18 (a-g): Each element of Exhibit 17 should contain a set reference point and state wide data upon which calculations are made. And all calculations should be done for the life of the project. Calculations should not be left to the creativity of the applicant but should show data that can be applied across projects. Location of the project and the energy mix in the region of the project must be reviewed and described. Calculations must be based on the electricity grid that is currently available in New York State and not one hoped for in the future.

900-2.19 Exhibit 18: Socioeconomic Effects

900-2.19 (a)(b)(c):All estimates of construction and operation work force and payroll must include an estimate for New York State employees and employees who are to be

hired within the project's local labor market, including the project host community, surrounding towns and the county.

900-2.19 (k): The applicant should be required to estimate the State and local taxes that they will pay during the life of the project.

Missing from this Exhibit is any information about socioeconomic impacts in other parts of the world caused by component manufacturers' supply chains, such as the impacts of necessary mineral extraction. The extensive renewables expansion in New York and in other states will have global impacts that diminish their global environmental benefits. Since achieving such benefits is the very purpose of ORES, it is surprising that the draft regulations appear unconcerned with global impacts. New York should, in addition to siting effective projects, hold project sponsors accountable for environmental, social and economic impacts of mineral extraction, parts manufacturing and transportation.

The global benefits of carbon reduction can then be balanced against the global impacts of the buildout. In some cases, adequate information may show that the social and environmental cost is too high. For example, it has been reported for years that cobalt is essential for large scale battery production and that the main source for this material involves child labor in the Democratic Republic of the Congo. Pressure to reveal supply chain data will push corporate renewables to require socially just sourcing.

New York State's Climate Leadership and Community Protection Act (CLCPA) includes a goal of having 40% of the benefits of clean energy investments going to disadvantaged communities in the state. This recognition of the socioeconomic impacts of energy production must extend to the global community that is impacted by New York's massive renewables expansion plans. Otherwise, relief to our historically disadvantaged communities will come at the expense of presently suffering communities abroad. This Exhibit must be amended to include sourcing information from all manufacturers and material supply companies and subcontractors that ensures human rights and environmental standards are upheld.

900-2.25 Exhibit 24: Local Laws and Ordinances

Under the New York State Constitution, the determination of a waiver of municipal laws must not be done as a matter of course by the director of a State Office. And yet this is what the regulations set forth. Municipal laws passed after careful consideration and public hearing must be given great weight. ORES regulations regarding local law waivers consider the "unreasonable" burden on the applicant without consideration of the unreasonable burden that the project places on the municipality, including the impacts on regional comprehensive plans and Local Waterfront Revitalization Plans (LWRP).

New York State has millions of acres and many industrialized areas upon which to build renewable energy projects. No one project is essential to CLCPA targets. There are many avenues for reaching these targets. Given the extensive possibilities for siting renewable projects in New York and the wide variety of types of projects and size of

projects, and also given the very heavy burden that one large scale project may have on a municipality and its environment, the local burden of these projects must be given great weight and the regulations should be modified accordingly.

These regulations now give the developers three separate arguments for overturning municipal laws. The first involves technology. Will there be no limit to the technology permitted? Under these regulations there is no limit. If industrial wind turbines can be 1500 feet tall and it is economic to do so, then a town will have no power to say they are too tall for the region. The fact that a company will make more money and the State will gain more energy does not make every technology acceptable or beneficial in every location. This, along with issues of financial benefit vs community character under demonstration 2, or a balancing of state versus local benefits and needs in demonstration 3, amount to unconstitutional authority given to one State Office employee to overturn duly enacted local laws implemented by the elected officials and citizens.

900-4.1 Office of Renewable Energy Siting Action on Applications

90-4.1 (c-d): These draft regulations cannot change the poorly drafted statute. The 60 day period set forth in these regulations as the time for the Office to determine if the application is complete and list all deficiencies is part of the April 2020 Act.

What procedure in these regulations will protect the public against an inadequately staffed ORES office and overwhelmed NYSDEC staff during the application review? If several or many applications are filed at the same time, then there will be portions of an application that are overlooked or perhaps hastily determined to be low priority.

There are two ways that the regulations can address this. First, the regulations can provide for extended time periods, if needed, in the preapplication phase of project development. See discussion of Section 900-1.3 (e-g).

The immovable 60 day review period at the time of the application submission makes a careful and transparent pre-application review imperative.

The second way that the regulations can address potential problems flowing from the mandated 60 day application review period is to provide the public an opportunity to comment on the submitted application prior to it being determined complete. Public review of the filed application can help to ensure that it addresses the minimum information requirements.

The draft regulations do not provide a procedure for this to occur. A sixty day time limit without possibility of Office initiated extension and with no procedure for public comment leaves the fate of our rural communities to the speed with which these state agencies can review massive sprawling industrial projects. This appears to be a prescription for applicants to game the procedures.

900-5.1. Local Agency Account

900-5.1(a) The draft regulations require a 60 day notice, by applicants to local agencies and potential community intervenors, stating that they have a mere 30 days after an application has been filed to submit a request for funds. This 60 day notice is mentioned several times in the draft regulations. The notice does not give meaningful opportunity to prepare for the funding request because during this time there is no public access to project information. Prior to submitting the application, the draft regulations do not require that draft or preliminary application information be provided to local agencies and community intervenors. The first access they have is the application. Even after the application is filed, ORES does not have plans to post it on a centralized project website, making access more difficult.

The draft regulations should be revised to provide extended time for funding applications, at a minimum, 30 days after end of the public comment period on the draft permit conditions. The public comment period will raise additional issues and it is reasonable that potential concerns and issues, which will impact funding needs, will not be fully known prior to this time.

900-8.1. Publication of draft siting permit.

900-8.1 (a-b): The regulations are not clear as to exactly what information will be available to the public. The draft regulations should provide for a centralized website for all documents including preapplication, application, required plans, permits, maps, exhibits, revisions, State agency comments and documents, public and municipal comments. Given the rapid siting anticipated in the draft regulations, this centralized posting of documents is essential. The DPS website is a model of what should be provided. Anyone in the State can review all the documents. Anything less is not transparent and will diminish public education, understanding, participation and involvement, and erode public confidence in the process.

900-8.3 Public comment hearing and issues determination

900-8.3 (a)(1): The transcript of public statements at a public comment hearing should be posted on the central ORES website, and available to the public without filing a FOIL request.

900-8.3 (c)(2): The definition of a “substantive” issue under the ORES regulations should be modified to include the following language: An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, *or if there are environmental, safety, health or economic issues not adequately addressed*, such that a reasonable person would require further inquiry.

The problem with the draft regulation definition of “substantive” is that it takes the statutes and regulations and standards, that are promulgated as part of the draft regulations, and uses them to limit the issues that can be raised for a hearing. For example, if a sound standard is listed in the regulations but new data is provided to indicate it is not sufficient, will this be a cause for a hearing? It is unclear from the

regulation whether new data not considered in the development of the draft regulations could provide the basis for a hearing if the applicant satisfies the regulation.

Hearing examiners under Article 10 were able to review studies and data as they were published and use the new information to evaluate the project before them. Because the science and technology involved in these projects is constantly changing, hearings must be liberally granted so that citizens and their environment can be protected and not unduly burdened.

900-8.3 (c)(4): This section places substantial resource and financial burdens on municipalities and citizens. Reliance on a generic permit appears to mean that ORES would always find that the project meets the requirements of statute and regulation. For this reason, the moving party will always have a very high, even practically impossible burden of persuasion. This is fine for the deep pocket applicant but it is a financial burden for municipalities and citizens that harms their ability to review project proposals. This section should be removed. Parties should be encouraged to raise issues, and reasonable issues should be given a hearing.

This additional burden of persuasion has not been offset with additional intervenor funding. The intervenor funds have been diminished from what was available under Article 10. To the extent that intervenor funding promotes public participation, it appears the intent of the draft regulations is specifically to diminish public participation. Because the subject of the energy transition is the object of research and policy proposals around the world, ORES should be open to relevant new information. This section does not evince an interest in new information.

900-10.2 Pre-Construction Compliance Filings

900-10.2(d): Certification as required under draft regulation 900-10.2(d) specifies the international standard (International Electrotechnical Commission (IEC) 61400-1). However, the draft regulations must be modified to state that the certification will include type, component and project certification, completed by an independent third party that is qualified to make such certifications as set forth in Article 10 Appendix 1001.6 (c). Type and component certification assures that the turbine or solar panel and components have been designed, manufactured and tested to be in conformity with site conditions and international standards. Project certification includes documentation that the project as transported, erected and operated will remain safe under the specific conditions at the site. These certifications provide safety assurances to the host community and financial assurances to funders.

900-11.1 Permit modifications requested by Permittee

This section provides for public comment on a major modification but not on the decision as to whether a modification is major or minor. Developers can modify the turbine or other component late in the permit process or after they receive a permit and the public has no opportunity for comment. The draft regulations should be revised to give parties and host municipalities notice of modification requests and opportunity to

comment on whether the modification is major or minor. Increases in height and blade length should be presumed major modifications as they impact wildlife and the visual environment.

Modifications are sought by permittees on a regular basis and 900-8.8(b)(3) specifies how the permittee can provide a prima facie case in support of applications for modification. There is no funding and minimal opportunity for municipalities and the public to present critical information.

The goal of these draft regulations is to speed the siting process. What took three to four years will now happen in slightly more than a year. This will present less need for projects to swap out turbines or make other significant changes after the permit process has been completed. It seems reasonable, given the speed of the process and the reduced public opportunity for input, that significant late changes would be discouraged. The draft regulations should be modified to present more opportunity for public notice and comment and less incentive for permittees to utilize late stage modifications.