



ACE NY
ALLIANCE FOR CLEAN ENERGY NEW YORK, INC.

Update on Solar and Wind Project Development, Permitting and Standardized Taxation

February 21, 2022

Association of Towns Annual Meeting

Session Speakers

- **James Muscato, Esq. – Partner, Young / Sommer LLC**
- **Daniel A. Spitzer, Esq. – Partner, Hodgson & Russ LLP**
- **Kyle Rabin – Policy Analyst, Alliance for Clean Energy NY**

About ACE NY

- ACE NY is a membership-based organization
- Our Mission: To promote the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution.
- Our website: www.aceny.org

What Does Climate Change Mean for New York State?

- Greater localized heat stress
- Heavy rainfall events that exacerbate localized flooding
- Sea-level rise threatens sensitive coastal communities and ecosystems
- NY's most vulnerable populations disproportionately affected

2021 marked by extremes across U.S., including exceptional warmth & devastating severe weather

 National Oceanic and Atmospheric Administration
U.S. Department of Commerce

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U.S. saw its 4th-warmest year on record, fueled by a record-warm December

Nation struck with 20 separate billion-dollar disasters in 2021

Focus areas: [Climate](#), [Satellites](#) Topics: [climate reports](#), [climate data](#), [climate change](#), [Billion-Dollar Disasters](#), [temperature rankings](#) Share: [Twitter](#) [Facebook](#) [Email](#) [Print](#)

January 10, 2022



On September 4, 2021, the Joint Base Lewis-McChord Soldiers and the Bureau of Land Management-California's Folsom Lake Veterans Hand Crew constructed a handline, cleared brush, and dealt with hot spots north of Lake Davis and Portola during the largest wildfire of 2021-California's Dixie Fire. The western wildfires of 2021 were one of 20 separate billion-dollar disasters that struck the United States last year. (Joe Bradshaw/Bureau of Land Management)

The year 2021 was marked by extremes across the U.S., including exceptional warmth, devastating severe weather and the second-highest number of billion-dollar weather and climate disasters on record.









The nation also saw an active wildfire year across the West as the north Atlantic Basin stayed busy with its third most-active Atlantic hurricane season on record, according to scientists from NOAA's National Centers for Environmental Information.

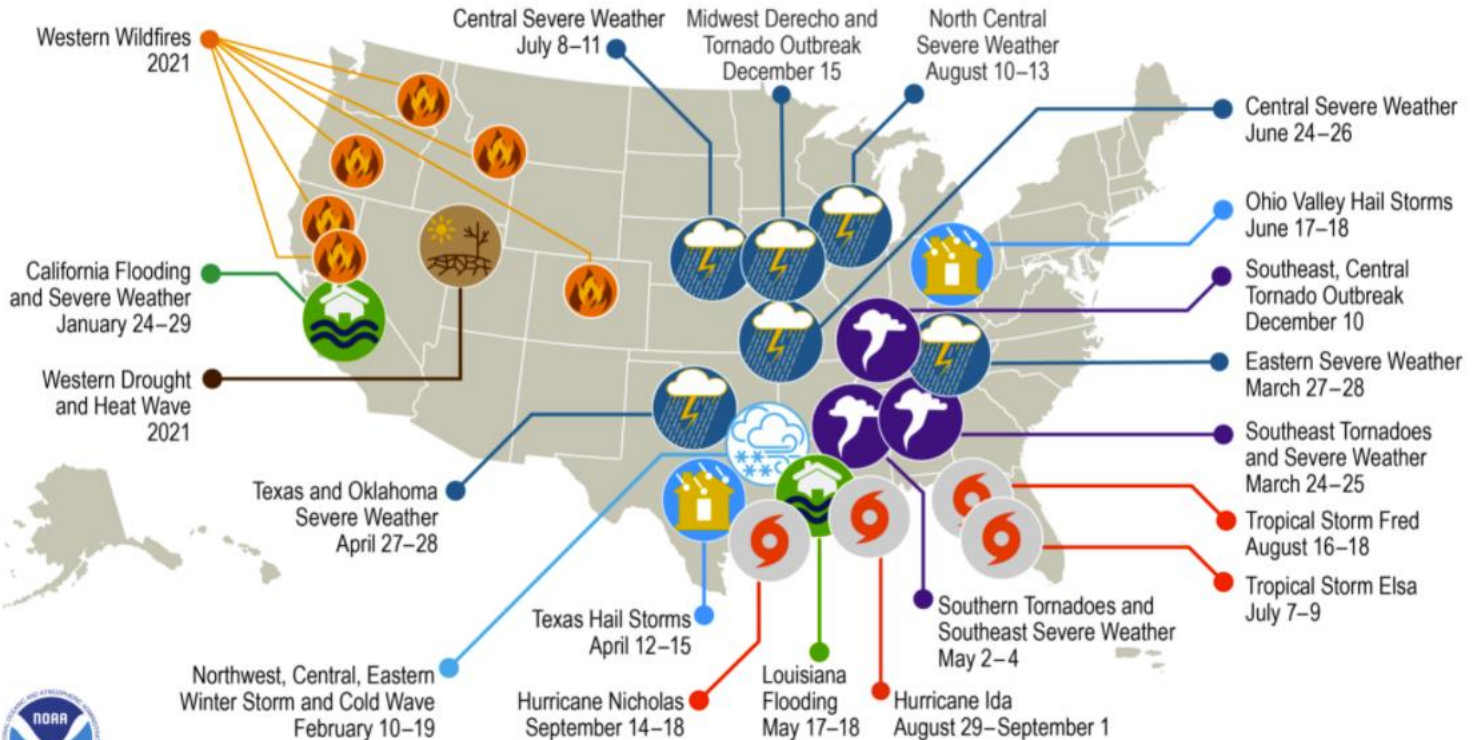
Climate Emergency & the Need for Climate Action

- Each increase in warming is harmful for the planet
- Global temps accelerating toward 1.5° Celsius of warming
- A warmer world has more evaporation, leading to more water in the atmosphere
- These changing conditions put our agriculture, health, water supply and more at risk
- We can slow the pace of climate change
- Large- or Grid-Scale Renewables can play a key role in cutting GHG emissions

20 weather/climate events in 2021

U.S. 2021 Billion-Dollar Weather and Climate Disasters

-  Drought/Heat Wave
-  Flooding
-  Hail
-  Hurricane
-  Tornado Outbreak
-  Severe Weather
-  Wildfire
-  Winter Storm/Cold Wave



This map denotes the approximate location for each of the 20 separate billion-dollar weather and climate disasters that impacted the United States in 2021

New York's Clean Energy Goals

Climate Leadership and Community Protection Act (CLCPA)

Carbon neutral economy, mandating at least an 85% reduction in emissions below 1990 levels

40% reduction in emissions by 2030

100% zero-carbon electricity by 2040

70% renewable electricity by 2030

9,000 MW of offshore wind by 2035

6,000 MW of distributed solar by 2025

3,000 MW of energy storage by 2030

185 TBtu on-site energy savings by 2025

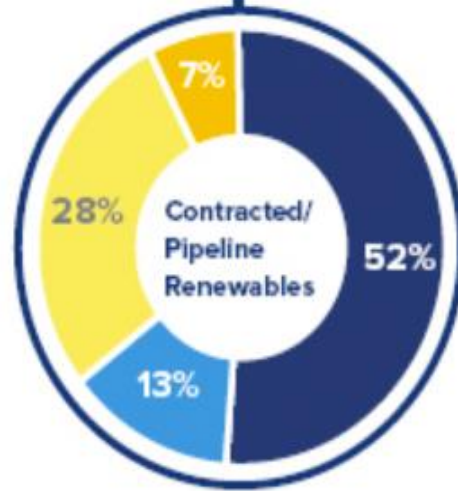
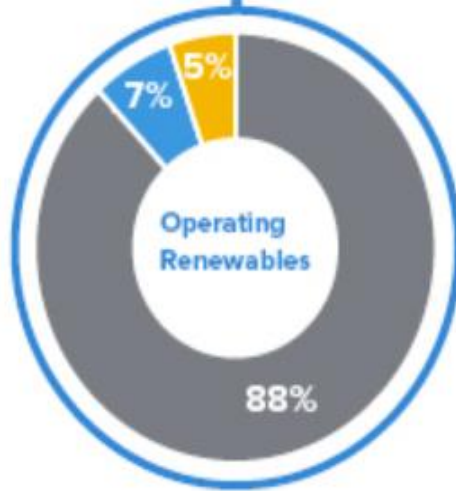
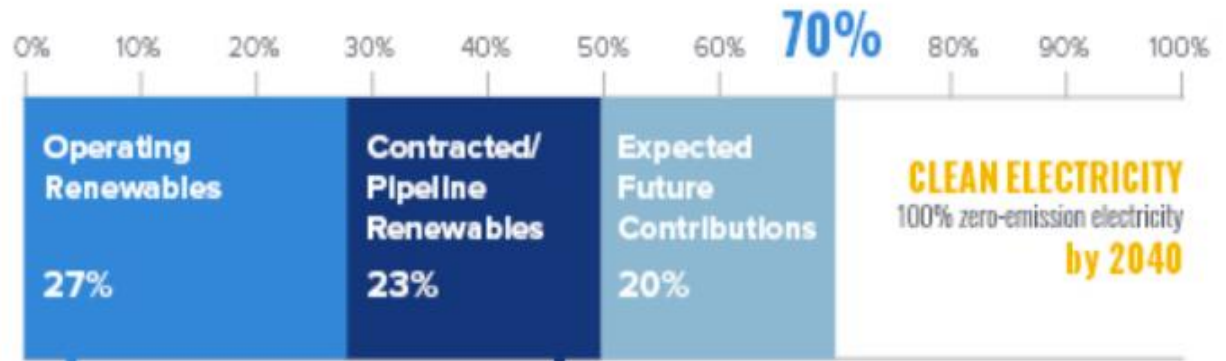
Commitments to climate justice and just transition

Electricity and NY's Climate Goals

- Nearly 3 years since the passage of NY's landmark climate law, which requires 70% RE by 2030 & 100% carbon free electricity by 2040.
- Currently, NY gets about 27.4% of its total electricity from RE, and the vast majority of this comes from hydropower facilities.
- To reach the 70% and 100% goals, we need thousands of additional megawatts of renewable generating capacity to be built.
 - We also need dramatic energy efficiency improvements.
 - Electrification will increase electricity demand between now and 2040.
 - Electrification will shift peak demand from summer to winter.

Clean Energy Progress to Date

70%
renewable
energy by
2030



- Hydroelectric
- Land-Based Wind
- Offshore Wind
- Distributed Solar
- Large-Scale Solar

LSR Projects under Construction and Entering Operation

- 2021: **19** Large-Scale Renewable (LSR) generation projects were under construction
- 2021: **5** LSR projects entered operation under the CES
- 2022: NYSERDA expects an increase in both LSR projects under construction and entering commercial operation; 700 + MW of new renewable capacity is anticipated

“Grid-Scale” Renewable Energy

Facilities that use renewable technologies & sell wholesale power on the transmission grid.



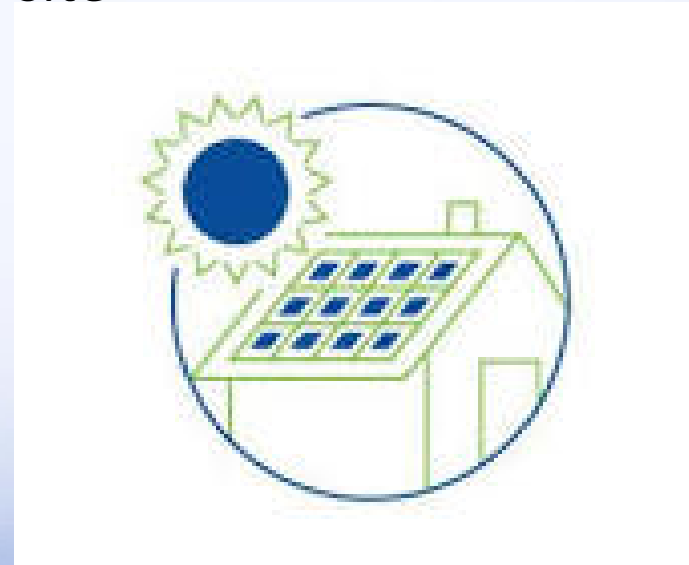
- Wind Turbines
- Hydropower
- Solar
- Biomass or Biogas
- Offshore Wind
- Fuel Cells

“Distributed” Renewable Energy



Rooftop Solar = traditional distributed renewable project. **Community Solar** projects are larger, and start to blur the lines between small, distributed solar and large, grid-scale solar.

- Distributed energy resources (DER) = smaller sized projects located at a customer's site



Two Key Pieces to Getting Renewables Built in NYS

- New Permitting/Siting Regulations
- New Standardized Taxation

The background of the slide features a close-up, low-angle view of a large array of solar panels on the left, and a white wind turbine on the right, set against a clear blue sky with some light clouds. The solar panels are dark blue with a grid of silver lines and small white dots. The wind turbine has three blades and a central hub.

Young / Sommer LLC

Renewable Energy Project Permitting in New York State

James Muscato, Esq.

INTRODUCTION

Young / Sommer LLC

Young/Sommer LLC is a recognized leader in environmental and energy law in New York. Our attorneys' decades of experience in private practice and State government allow us to understand the challenges facing small businesses, municipalities, large corporations and individuals.

- Environmental
- Energy
- Land Use
- Municipal
- Commercial litigation
- Telecommunications,
- Permitting/SEQRA,
- Project finance
- Pollution, brownfields and remediation.

Young/Sommer has been ranked for sixteen consecutive years among the top ten New York State environmental law firms by Chambers USA.

Young / Sommer LLC

Renewable Energy, & Transmission Law Practice

- **Small-Scale & Large-Scale Facility Development**
- **State/Municipal Review of Renewable Energy Projects**
- **Solar, Wind, Energy Storage Siting**
- **Permits/Approvals for Approximately 2000 MWs of Projects**
- **Renewable Energy Developers and Municipalities**

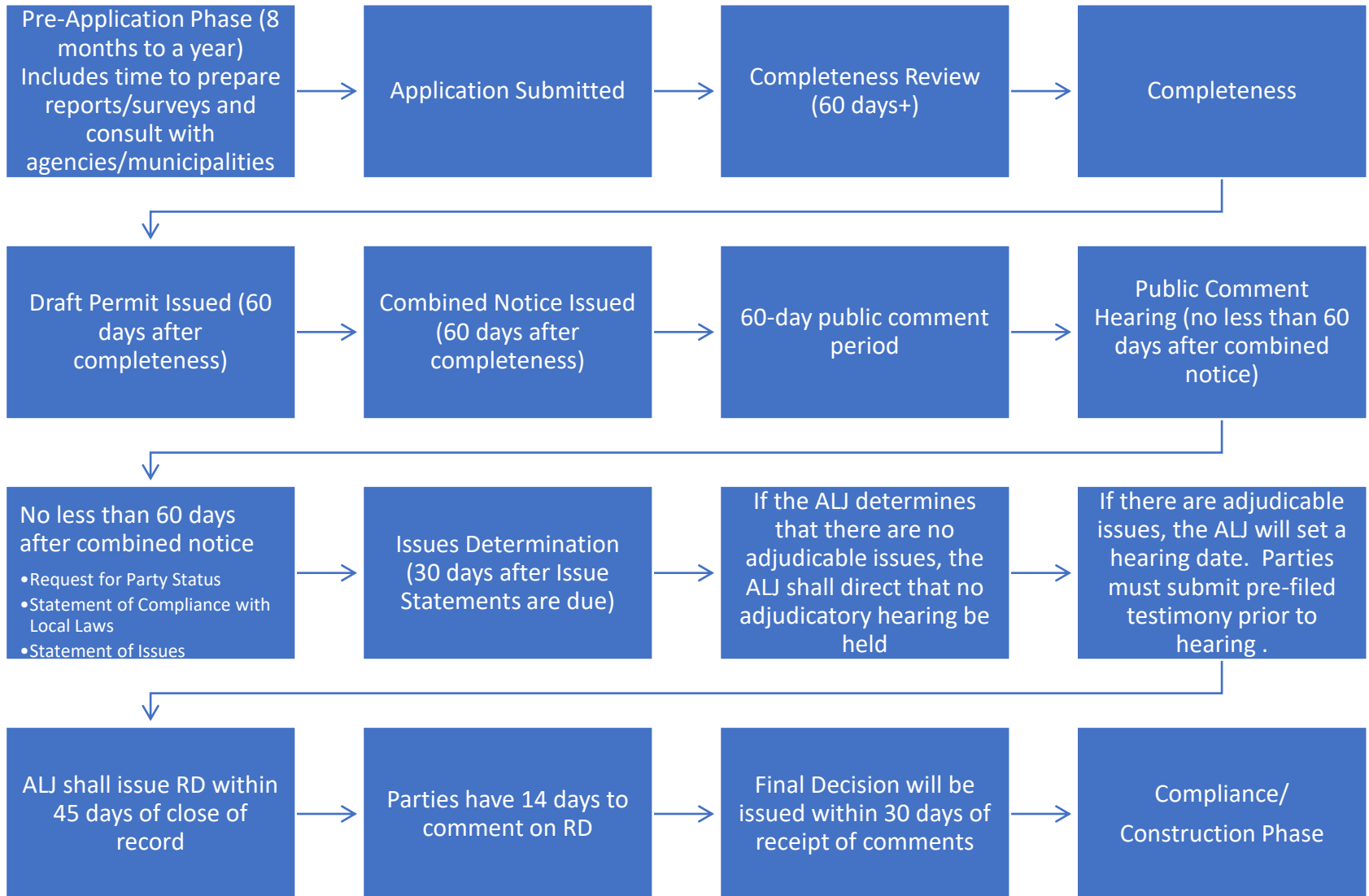
New York State Permitting Overview

- Previous state Siting Process was under Article 10 of the Public Service Law regulated by the Department of Public Service (2012)
 - First project approved under Article 10 was the Cassadaga Wind Farm in 2018. Cassadaga went COD in 2021.
 - 16 projects have been approved under Article 10
 - 9 wind and 7 solar
- In 2020 NYS passed the Accelerated Renewable Energy Growth and Community Benefit Act. The Act is intended to assist NYS in achieving the renewable energy production and greenhouse gas emission reduction goals of the 2019 Climate Leadership and Community Protection Act (CLCPA) by, among other things, establishing an expedited process for reviewing renewable energy projects to replace the Article 10 process (the new “94-c process”).
- The 94-c process creates the Office of Renewable Energy Siting (ORES or the Office) to oversee permitting of large-scale renewable energy projects (25 MW or more)
 - So far 4 projects have been permitted. 3 solar and 1 wind.

94-c Overview

- Decision made by the Office of Renewable Energy Siting (ORES) within the Department of State.
- Requires pre-application consultations with state agencies, host municipalities and meeting with community members.
- 94-c includes Uniform Standards and Conditions (USCs) applicable to all projects
- Site-specific conditions may be developed in consultation with ORES and DEC – for those impacts unable to be addressed by USC.
- Office must make finding that the project, along with uniform and site-specific conditions, would comply with applicable local laws and regulations.
- ORES can elect not to apply a local law that is unreasonably burdensome in view of CLCPA targets and environmental benefits of project.
- Only projects with “substantive and significant” issues require hearings and briefing.

94-c Process



Timelines

- Pre-Application Consultations (8 months to a year)
- Application Review for Completeness (approximately 6 months)
- Permit Review (8 months to a year)
- Compliance (4 to 6 months)
 - In total from Application submission until construction we estimate the timeline to be between 15 and 24 months
- Appeal from Final Decision must be brought in 90 days
- Appeal process can take 12 to 18 months to a final decision by the Appellate Court.

Uniform Standards and Conditions & Draft Permit

- No later than sixty (60) days following the date upon which an application has been deemed complete the Office will publish draft permit conditions (or intent to deny).
- One of the biggest benefits of the 94-c process is that it includes standard permit conditions also called Uniform Standards and Conditions (USC) which will be issued in every proceeding.
- The draft permit will be a combination of the Uniform Standard Conditions and any site-specific conditions.
- The issuance of the Draft Permit starts the public comment period and issues determination process.
- During this time parties and “prospective parties” will be given an opportunity to submit issues for adjudication in the proceeding, including the Applicant, state agencies, local municipalities and intervenors (groups or individuals).

Who can raise issues and what issues can they raise?

- 94-c has a party status process that allows any person to submit a party status request with issues for adjudication in the proceeding. There is no limitation, such as proximity to the project, regarding who can submit a party status request.
- Party status is only granted to those parties who have “raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party” *and* who have “a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.”
- If the ALJ determines that there are no substantive and significant issues, the ALJ shall direct that no adjudicatory hearing be held, and that Office Staff continue processing the application to issue the requested siting permit.
- If the ALJ determines there are substantive and significant issues, then the ALJ will schedule a hearing on those issues.

Substantive and Significant Issue

- An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ shall consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination and any subsequent written or oral arguments authorized by the ALJ.
- An issue is significant if it has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions.

Compliance

- Unlike Article 10, the 94-c regulations include the compliance filings required to be submitted after the final decision is issued.
- The Office (or DPS staff in the case of post-construction filings) shall review the filing and, within sixty (60) days of receipt thereof, inform the permittee as to whether the compliance filing has been approved. Very similar to application review for completeness.
- ORES has indicated a willingness to approve construction in phases but will consider this on a case-by-case basis.

Young / Sommer LLC

James A. Muscato II, Partner
Executive Woods
5 Palisades Drive, Suite 300
Albany, NY 12205
518.438.9907 x 243
jmuscato@youngsommer.com

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Daniel A. Spitzer, Esq

Albany | Buffalo | Hackensack | New York City | Palm Beach | Rochester | Saratoga Springs | Toronto

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Introduction to Hodgson Russ

Broad-Ranged, Full Service Firm with Deep Roots and Capabilities

- More than 200 attorneys practicing in all major areas of U.S. law
- Offices in New York City, Albany, Buffalo, Saratoga Springs, Palm Beach, Hackensack, Rochester, and Toronto
- Founded in 1817, with two former U.S. Presidents in its alumni, Hodgson Russ has experience in markets across Europe, North America, and Asia
- Deep New York State history – instrumental in the first Buffalo's City Charter, completion of the Erie Canal and formation of the Peace Bridge Authority, securing low-cost power program from the Robert Moses Niagara Power Plant, and development of many major industrial, health care, educational, and cultural organizations

Frequently Recognized for Excellence

- *The National Law Journal's* "NLJ 500"
- *Chambers USA: America's Leading Lawyers for Business*
- *Best Lawyers*, "Best Law Firms" and "Best Lawyers in America"
- "Best-Branded Law Firm," *2019 BTI Brand Elite: Client Perceptions of the Best-Branded Law Firms Report*
- *American Lawyer's* AmLaw 200, 2019-2021, and ranked 10th in the "A-List for Female Equity Partnership"
- *Super Lawyers*



Hodgson Russ Headquarters, The Guaranty Building, Buffalo, NY

Practice Areas

- Multidisciplinary team cost-effectively guides clients through virtually every aspect of a project's lifecycle:
 - Strategic Planning
 - Zoning and State Permitting
 - State and Federal Regulatory
 - Environmental Review
 - Financing
 - Lease and Easement Agreements
 - Title Insurance and Curatives
 - Contracts and Agreements
 - Taxation
 - Litigation
 - Insurance
 - Corporate Structuring and Collaborations
 - Purchase, sale, and related due diligence

- **Projects:** Experienced in wind, solar, energy storage, landfill gas-to-energy, bioenergy projects, electric vehicle infrastructure, energy efficiency, and decarbonization strategies
- **Clients:** Developers, lenders, acquirers, landowners, permitting agencies, development agencies, parts and service suppliers, manufacturers, contractors, and investors
- **International Expertise:** Counsel foreign entities participating in United States projects involving cross-border finance, CFIUS, FACTA Compliance, immigration issues, licensing and technology transfer, protection of foreign patents, international taxation and Tax Treaty compliance, multinational mergers and acquisitions, NAFTA, and other trade issues



What are we talking about?

- The rise of renewable energy physical infrastructure in the form of wind, solar, energy storage, geothermal, and other generating facilities has created significant questions for purposes of real property tax valuation.
- The purpose of this discussion is the focus on what the state has dictated as the methodology for wind and solar, how it is to be employed, and what are the likely next steps in the process.



The issue is solely real property value

- **It's about the value of the real property not the value of the project.**
- A significant misconception has been that the purpose of the valuation is what a willing buyer would pay a willing seller for the project, but the only issue is the real property valuation.
- Like any business, a significant portion of the value is not in the real property. But taxation is only concerned with real property values.



Pre-RPTL § 575-b

- Before the adoption of RPTL §575-b, there was significant disagreement as to how to assess wind and solar projects in New York.
- Few projects have come before the courts, although virtually every appraisal submitted into court or in support or opposition to project assessments by independent appraisers, was prepared on the income capitalization basis.

Why not the cost basis?

- Some assessors argued that the cost basis was the required methodology, but the New York Court of Appeals disfavors the use of cost because “the reproduction cost less depreciation formula ... is the one most likely to result in overvaluation and, thus, its use is generally limited to properties deemed “specialties.” *Saratoga Harness Racing Inc. v. Williams*, 91 N.Y.2d 639, 646 (1998).
- For solar and wind projects, the income and expenses, and market-based expectations related to discount rates, are available both for the industry and for specific projects, therefore they do not qualify as specialty properties.

What does RPTL § 575-b do?

- First, it unquestionably resolves the issue of how the assessed value for solar and wind projects will be determined by commanding that DCF be used, and by establishing both the Model and the applicable discount rate.
- Only wind and solar are covered by the law.
- It covers all projects as of the next taxable status date, not just new projects.



How does the Model work?

- The Model utilizes earnings before interest, taxes, depreciation, and amortization (“EBITDA”). The unlocked Model on the DOTF website does not currently supply details on the expense side, it is not clear therefore whether regional expense variations such as for labor costs are built into the Model, as on the revenue side.
- DOTF has published three variations of the DCF Model and associated discount rates: Large-scale solar (5 megawatts and larger), Value of Distributed Energy Resources (“VDER”) Solar 1-5 megawatts, and Wind, 1 megawatt and larger.
- As required by the legislation, DOTF included regional differences by incorporating the different NYISO zones, as well as the local utility.
- The solar model also differentiate between fixed axis and tracker type.

About the Discount Rates

- The discount rates are pre-tax Weighted Average Cost of Capital (“WACC”) calculations with different ratios between debt and equity for each of the three project types. The Models follow New York law by using the “assessor’s formula,” where the local full-value property tax rate is added to the DOTF-established discount rate to determine the rate to be used in valuing the property.
- Not clear where the Department got its discount rates, as they have not disclosed the source. Neither assessors (too high!) nor the industry (too low!) think they got it right.

What does RPTL § 575-b NOT do?

- RPTL § 575-b does not change the basics of New York assessment law, only the methodology required and the discount rate to be employed is settled. Assessments still cannot exceed fair market value, a limitation in the State Constitution, art. XVI, § 2 (“Assessments shall in no case exceed full value.”).
- Per the Court of Appeals, the “concept of ‘full value’ is typically equated with market value, or what ‘a seller under no compulsion to sell and a buyer under no compulsion to buy’ would agree to as the subject property’s price.”

RPTL § 575-b and PILOTs

- The Model does not address the financial viability of projects where a PILOT Agreement is not available from one or more jurisdictions or through the industrial development agency. Few if any energy-generating plants of any type in the state can afford to pay full taxes. Setting fair valuations will not address that situation, which presents a significant impediment to achieving New York's climate change goals.
- Nor will the Model inform municipalities as to what is a fair PILOT. NYSERDA previously produced a PILOT tool which helped numerous communities and developers reach agreement based on an understanding of what projects can afford. At most, the Model establishes the outer limit of RPTL § 487 PILOTs, which cannot exceed full taxation.

Unanswered Questions (there are many)

- As assessors are required to provide both a total valuation and the land valuation in establishing the tax rolls, it is not clear how the Model is to be implemented.
- Remote Net Metering projects are not VDER, so how do you value?
- The Model is not a USPAP compliant appraisal – how will the courts handle?
- Can assessors and assessment boards still settle cases via RPTL article 5 procedures?

Where does the model stand?

- The Department has already made one adjustment for smaller scale projects, reflecting an error in the valuation of certain revenue streams.
- The legislation anticipates that the model will be updated annually, and while the Department is not limited to annual updates, no further changes until October are anticipated.
- Specific issues have been presented concerning the failure to include loss of revenue due to constrained access to the grid, failure to consider a O & M costs on a regional basis, mandatory Host Community Benefit costs, and significant disputes about the discount rates.

Litigation anyone?

- One aim was to reduce the possibility of litigation over assessed valuations. As the vast majority of systems are covered by PILOTs for at least the first 15 years, there is little incentive to challenge assessments now. But projects are already starting to age out of those exemptions.



- Litigation so far has been over what is real property, validity of opt-outs, and extent of exemptions.

The Governor's Proposal

- There is a proposal in the Governor's budget to move the defense of assessments set under the model to Albany, where the State would be responsible for defending the assessment.
- **The only basis for a grievance to the Board of Assessment Review would be that the model inputs made by the assessor are incorrect.**
- Challenges to the model itself or the rates used therein would have to be brought against the Tax Department in an Article 78 proceeding.
- **But the model doesn't cover land values, so do you have to still sue locally if the land value has been increased?**
- State may handle the litigation, but not the refunds.

Questions?

Daniel A. Spitzer, Esq.

Hodgson Russ LLP

Dspitzer@hodgsonruss.com

716 848 1420

THANK YOU

- James Muscato, Esq. (Young/Sommer)
JMuscato@youngsommer.com
- Dan Spitzer, Esq. (Hodgson Russ)
DSpitzer@hodgsonruss.com
- Kyle Rabin (ACE NY)
krabin@aceny.org

