



**Office of Renewable
Energy Siting**

Office of Renewable Energy Siting (ORES)

Processes and Procedures

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Chief Administrative Law Judge

Office of Renewable Energy Siting

April 27, 2022

Accelerated Renewable Energy Growth and Community Benefit Act: Introduction



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- Laws of 2020, chapter 58, part JJJ, eff. April 3, 2020

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- Establishes the State's Major Renewable Energy Development Program



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- Laws of 2020, chapter 58, part JJJ, eff. April 3, 2020
- Establishes the State's Major Renewable Energy Development Program
- Purposes:
 - Expedite regulatory review for the siting of major renewable energy facilities and transmission infrastructure necessary to meet the targets of the Climate Leadership and Community Protection Act (CLCPA). Among the CLCPA targets are:
 - Minimum of 70 percent of statewide electric generation produced by renewable energy systems by 2030;
 - Statewide electrical demand energy system to generate zero emissions by 2040; and
 - Procurement of at least 9 GW of off-shore wind by 2035; 6 GW of photovoltaic solar generation by 2025; and support for 3 GW of statewide energy storage capacity by 2030



Accelerated Renewable Energy Growth and Community Benefit Act: Introduction

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- Establishes the State's Major Renewable Energy Development Program
- Purposes:
 - Expedite regulatory review for the siting of major renewable energy facilities and transmission infrastructure necessary to meet the targets of the Climate Leadership and Community Protection Act (CLCPA).
 - Implement programs to provide benefits to owners of land and communities where renewable energy facilities and transmission infrastructure would be sited.
 - Incentivize the re-use or adaptation of sites with existing or abandoned commercial or industrial uses, such as brownfields, landfills, and dormant electric generating sites.
 - Implement the State's policy to protect threatened and endangered (T&E) species and establish mechanisms to facilitate achievement of a net conservation benefit (NCB) for those species.
- Centerpiece of Act is Executive Law § 94-c.



Major Renewable Energy Development Program: Executive Law § 94-c



Executive Law § 94-c: Purpose

- To consolidate environmental review and permitting of major renewable energy (MRE) facilities to provide a single forum to undertake a coordinated and timely review of proposed MRE facilities to meet the State's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in decision making (§ 94-c[1])
- Establishes a siting permit requirement for the construction of a new MRE or an increase in capacity of an existing MRE (§ 94-c[4][a])



Executive Law § 94-c: Office of Renewable Energy Siting (ORES)

- Established within Department of State; acts by and through an Executive Director (§ 94-c[3][a])
- Powers: authorized to conduct hearings and dispute resolution proceedings, issue permits, and adopt rules and regulations (§ 94-c[3][f]). Note: no subpoena power.
- Hearings and dispute resolution proceedings conducted by Exec. Dir. or delegee of Exec. Dir. (§ 94-c[4][d])
- Siting permit enforcement: DPS or PSC (§ 94-c[6][c])



Executive Law § 94-c: Applicability

- **Major renewable energy facility 25 MW or greater (§ 94-c[4][a])**
 - Any renewable energy system as defined by PSL § 66-p with a nameplate generating capacity of 25 MW or more, and
 - any co-located system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission system, including all associated appurtenances to electric plants as defined under PSL § 2, including electric transmission facilities less than ten miles in length in order to provide access to load and to integrate such facilities into the State's bulk electric transmission system
 - PSL § 66-p: "Renewable energy systems" means systems that generate electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity



Executive Law § 94-c: Applicability

- Major renewable energy facility 25 MW or greater (§ 94-c[4][a])
- Renewable energy system under PSL § 66-p – 20 MW or greater by election (§ 94-c[4][g])
- PSL article 10 application or PIP – by election (§ 94-c[4][f]): Includes:
 - Art 10 projects with application compliance determination
 - Art 10 projects without application compliance determination
 - Art 10 proceedings closed after filing of notice of election pursuant to PSL § 162(4)(e)
- Siting permit transfers; amendments (§ 94-c[4][b], [c])



Executive Law § 94-c: Applicability

Not applicable to:

- Facilities subject to exclusive federal jurisdiction
- Normal repairs, maintenance, replacements, and so on
- Art 10 applications or PIPs unless election (§ 94-c[4][e])



Executive Law § 94-c: Key Features

- **One-stop permitting (§ 94-c[1], [6][a])**
 - Compare PSL article 10
 - ORES sole permitting authority for MRE facilities.
 - State and local procedural requirements superseded.
 - Exception: DEC remains the permitting authority for federally delegated or approved permits



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- **Local substantive law waiver (§ 94-c[5][e])**
 - Substantive provisions of applicable State and local laws apply.
 - Exception: ORES may elect not to apply, in whole or in part, any local law or ordinance based on a finding that such law is “unreasonably burdensome in view of the CLCPA targets and the environmental benefits” of the proposed MRE facility.
 - Compare: PSL § 168(2)(e)



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- Local substantive law waiver (§ 94-c[5][e])
- **Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])**
 - Uniform standards and conditions are to be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a MRE facility; apply to those environmental impacts the office determines are common to each type of MRE facility (§ 94-c[3][c])



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- Local substantive law waiver (§ 94-c[5][e])
- Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])
- **Pre-hearing application review; draft siting permit**
- Draft permit to include:
 - uniform standards and conditions
 - Site-specific permit terms and conditions to address site-specific environmental impacts not addressed by uniform standards and conditions (§ 94-c[3][d])



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- Local substantive law waiver (§ 94-c[5][e])
- Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])
- Pre-hearing application review; draft siting permit
- **Off-site mitigation fund (§ 94-c[3][e])**
 - Specifically establishes a T&E species mitigation fund
 - If ORES, in consultation with DEC, determines that mitigation of impacts to T&E species that achieves a NCB can be achieved by off-site mitigation, amount to be paid for such off-site mitigation into the T&E species mitigation fund included in the final siting permit



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- Local substantive law waiver (§ 94-c[5][e])
- Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])
- Pre-hearing application review; draft siting permit
- Off-site mitigation fund (§ 94-c[3][e])
- **An adjudicatory hearing to adjudicate substantive and significant issues regarding the draft permit (§ 94-c[5][d])**



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- One-stop permitting (§ 94-c[1], [6][a])
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- Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])
- Pre-hearing application review; draft siting permit
- Off-site mitigation fund (§ 94-c[3][e])
- An adjudicatory hearing to adjudicate substantive and significant issues regarding the draft permit (§ 94-c[5][d])
- **Local agency account (§ 94-c[7])**



Executive Law § 94-c: Key Features

- One-stop permitting (§ 94-c[1], [6][a])
- Local substantive law waiver (§ 94-c[5][e])
- Uniform standards and conditions for siting permits (§ 94-c[3][b], [c])
- Pre-hearing application review; draft siting permit
- Off-site mitigation fund (§ 94-c[3][e])
- An adjudicatory hearing to adjudicate substantive and significant issues regarding the draft permit (§ 94-c[5][d])
- Local agency account (§ 94-c[7])
- **Costs (§ 94-c[7][d])**



Executive Law § 94-c: Key Features

- **Limited statutorily-required findings (§ 94-c[5][e]):** A siting permit may only be issued if the Office makes a finding that the proposed project, together with any applicable provisions of the uniform standards and conditions (USCs), necessary site-specific conditions, and applicable compliance filings:
 - complies with Executive Law § 94-c and applicable provisions of the Office's regulations at 19 NYCRR part 900;
 - complies with substantive provisions of applicable State laws and regulations;
 - complies with substantive provisions of applicable local laws and ordinances, except those provisions the Office has elected not to apply based on a finding that they are unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the facility;
 - avoids, minimizes, or mitigates to the maximum extent practicable potential significant adverse environmental impacts of the facility; and
 - achieves a net conservation benefit with respect to any impacted threatened or endangered species.



Executive Law § 94-c: Key Features

- **Limited statutorily-required findings (§ 94-c[5][e])**
 - Project complies with applicable laws and regulations
 - Waiver of local laws based on finding laws are unreasonably burdensome
- **In making the required findings, the Office considers the CLCPA targets and the environmental benefits of the project. (See Exec Law § 94-c[3][b]-[d], [5][e]; see also ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 22, 2022, at 8-9.)**



Executive Law § 94-c: Statutory Timeframes

- **Final decision one year from complete application / six months if sited on existing or abandoned commercial use (§ 94-c[5][f])**
 - 30-day extension by applicant
 - If deadline missed, draft siting permit deemed automatically granted



Executive Law § 94-c: Statutory Timeframes

- Final decision one year from complete application / six months if sited on existing or abandoned commercial use (§ 94-c[5][f])
- **Complete application determination (§ 94-c[5][b])**
 - Within 60 days of receipt of application
 - Applicant may consent to extension
 - Application deemed complete if deadline missed



Executive Law § 94-c: Statutory Timeframes

- Final decision one year from complete application / six months if sited on existing or abandoned commercial use (§ 94-c[5][f])
- Complete application determination (§ 94-c[5][b])
- **Draft permit conditions (§ 94-c[5][c][i])**
 - To be published for public comment no later than 60 days after application deemed complete



Executive Law § 94-c: Statutory Timeframes

- Final decision one year from complete application / six months if sited on existing or abandoned commercial use (§ 94-c[5][f])
- Complete application determination (§ 94-c[5][b])
- Draft permit conditions (§ 94-c[5][c][i])
- **Public comment period on draft permit (§ 94-c[5][c][i])**
 - No less than 60 days from public notice
 - Municipality's statement of compliance with local laws and regulation due within the public comment period



Office of Renewable Energy Siting Regulations: 19 NYCRR Part 900 Overview



Part 900: Applicability; Definitions

- Notice of proposed rulemaking Sept. 16, 2020; modeled on 6 NYCRR parts 621 and 624
- Purpose and Applicability (§ 900-1.1)
 - Tracks § 94-c
 - Adds stand-alone battery energy storage systems to the list of projects not subject to Part 900



Part 900: Applicability; Definitions

- Definitions -- § 900-1.2
 - Office or ORES: the Office of Renewable Energy Siting (§ 900-1.2[aw])
 - Office of hearings: the office within ORES principally responsible for conducting adjudicatory hearings pursuant to Part 900 (§ 900-1.2[ax])
 - Office staff: those Office personnel participating in a hearing, but does not include the Executive Director, or their designee, the ALJ or those personnel in the Office of Hearings advising or consulting with the Executive Director, or their designee, or the ALJ (§ 900-1.2[ay])
 - Repurposed site: an existing or abandoned commercial or industrial use property, including without limitation, brownfields, landfills, dormant electric generating or other previously disturbed location which, if applicable, has been remediated to permit the siting of a major renewable energy facility (§ 900-1.2[bo])



Part 900: Pre-application Procedures

- Pre-application Procedures (§ 900-1.3)
 - Consultation with local agencies (at least 60 days prior to application)
 - Consultation with community members (same)
 - Notice of intent to file an application (same)
 - Wetland and stream delineations
 - Wildlife site characterization – including NYS T&E species
 - Archaeological resources consultation
 - For projects other than solar or onshore wind, consultation with ORES (at least 1 year prior to application)



Part 900: Applications

- General Requirements (§ 900-1.4): including:
 - Local agency account fee (§ 900-1.4[a][8]): \$1,000 for each 1,000 KW of capacity
 - ORES review fee (§ 900-1.5): \$1,000 for each 1,000 KW of capacity
 - Water quality certification request



Part 900: Applications

- General Requirements (§ 900-1.4)
- **Application Exhibits (subpart 900-2)**
 - 25 Exhibits (see table of contents)
 - Many exhibits contain standards and conditions
 - Exhibit 7: Noise and Vibration – contains design goals and modeling standards
 - Exhibit 6: Public Health, Safety, and Security – requires an evaluation and discussion of efforts made to avoid and minimize potential adverse impacts of the construction and operation of the facility, the interconnections, and related facilities on the environment, public health, and safety, other than as already detailed in other relevant exhibits
 - If the proposed site is a repurposed site, information about the site is required in Exhibit 3: Location of Facilities and Surrounding Land Uses (§ 900-2.4)



Part 900: Applications

- General Requirements (§ 900-1.4)
- Application Exhibits (subpart 900-2)
- Request for site specific conditions (§ 900-1.4[a][3])

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- Filing, Service and Publication (§ 900-1.6)



Part 900: Applications

- General Requirements (§ 900-1.4)
- Application Exhibits (subpart 900-2)
- Request for site specific conditions (§ 900-1.4[a][3])
- Filing, Service and Publication (§ 900-1.6)
- **Transfer Applications (subpart 900-3)**
 - Opt-in renewable energy facilities (20 MW up to 25 MW) (§ 900-3.1)
 - Pending Art 10 facilities with completeness determination (§ 900-3.2[a]) – applications deemed complete upon filing
 - Pending Art 10 facilities without completeness determination (§ 900-3.2[b])



Part 900: Local Agency Accounts (§ 900-5.1)

- Local agencies and potential community intervenors – submit request within 30 days after siting permit application filed
- Within 30 days after deadline for funding request, ALJ awards funds; 75 percent reserved for local agencies
- ORES contracts with awardees and reviews vouchers and reports
- Disbursements administered by NYSERDA at direction of ORES on vouchers approved by ORES



Part 900: Application Review and Draft Permit

- Application completeness review (§ 900-4.1)
 - Notice of complete application



Part 900: Application Review and Draft Permit

- Application completeness review (§ 900-4.1)
- Amendment of application (§ 900-7.1)
 - Only allowed prior to completeness determination



Part 900: Application Review and Draft Permit

- Application completeness review (§ 900-4.1)
- Amendment of application (§ 900-7.1)
- Draft Siting Permit
 - Publication of draft siting permit or notice of intent to deny no later than 60 days following completeness determination (§ 900-8.1)
 - Uniform Standards and Conditions (subpart 900-6) - see table of contents
 - Site-specific conditions (§ 94-c[3][d]) - developed in consultation with DEC
 - Fee for off-site mitigation (§ 94-c[3][e])
 - Host community benefit (§ 94-c[5][f])
 - final permit to require permittee to provide a host community benefit, as determined pursuant to a program established by the PSC pursuant to § 8 of the Act, or as determined by ORES, or as subsequently agreed to between applicant and the host community



Part 900: Hearing Process and Final Determination

- Hearing Process (Subpart 900-8)
- Final Determination on Applications (Subpart 900-9)

Part 900: Post-Decision Procedures

- Compliance Filings (subpart 900-10)
 - Pre-construction compliance filings administered by ORES
 - Post-construction compliance filings administered by DPS
- Modifying, transferring or relinquishing permits; ORES-initiated permit modifications (subpart 900-11)
 - Major modifications to permit or approved compliance filing: 60-day public comment period and hearings on substantive and significant issues
 - ORES-initiated modifications: hearings if requested by permittee
- Enforcement (§ 900-12.1)
 - DPS or PSC authorized to enforce ORES-issued siting permits



Siting Permit Hearing Process: 19 NYCRR Subpart 900-8 Overview



Subpart 900-8: Overview

- Subpart 900-8 is based on DEC's permit hearing procedures at 6 NYCRR part 624.
- Administrative decisions by the Commissioner of Environmental Conservation interpreting corollary provisions of 6 NYCRR part 624 provide persuasive authority for the interpretation of subpart 900-8 (see ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Decision of the Executive Director, Jan. 13, 2022, at 10 n 28).
- See ORES Process Map



Subpart 900-8: Pre-hearing Proceedings

- Order authorizing electronic service and filing on DMM
- Confidentiality agreement and order



Subpart 900-8: Pre-hearing Proceedings

- Order authorizing electronic service and filing on DMM
- Confidentiality agreement and order
- Local Agency Account Award (19 NYCRR 900-5.1)



Subpart 900-8: Pre-hearing Proceedings

- Order authorizing electronic service and filing on DMM
- Confidentiality agreement and order
- Local Agency Account Award (19 NYCRR 900-5.1)
- Notice of Complete Application; ALJ Assignment



Subpart 900-8: Pre-hearing Proceedings

- Order authorizing electronic service and filing on DMM
- Confidentiality agreement and order
- Local Agency Account Award (19 NYCRR 900-5.1)
- Notice of Complete Application; ALJ Assignment
- Pre-hearing Conference



Subpart 900-8: Publication of Draft Permit

Publication of draft siting permit or statement of intent to deny (§ 900-8.1[a])

- Published by ORES staff on ORES website
- No later than 60 days from date application deemed complete



Subpart 900-8: Combined Notice

Combined notice of availability of draft permit conditions or statement of intent to deny, public comment period and public comment hearing, and issues determination

- Issued by ALJ (§ 900-8.2[a])
- Published on ORES website no later than 60 days from date application deemed complete. Also published in:
 - At least one newspaper of general circulation in project area; applicant's cost
 - Sent to CEO of municipality in which project proposed
 - Sent to anyone believed to have an interest
- Served on parties entitled to receive a copy of the application or notice of the application.



Subpart 900-8: Combined Notice

Contents (§ 900-8.2[d]):

- Deadline and instructions for public comments; comment period minimum of 60 days from date of issuance of combined notice
- Date, time and location of public comment hearing
- Notice of commencement of issues determination procedure and instructions for filing petitions for party status
 - Petitions due a minimum of 60 days from date of issuance of combine notice.
- Deadline and instructions to municipalities to file statement of compliance with local law and regulations



Subpart 900-8: Public Comment Hearing

- Public comment on siting permit application -- not evidence, but may provide basis for further inquiry by ALJ during issues conference
- Scheduled on or around close of public comment period
- Stenographically recorded; applicant's cost
- Written or oral comments accepted



Subpart 900-8: Issues Determination Procedure

- Purpose – To limit and define subject matter of adjudicatory hearing and determine party status (see § 900-8.3[b][2]); similar to summary judgment, but without evidentiary proof.

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- Purpose – To limit and define subject matter of adjudicatory hearing and determine party status (see § 900-8.3[b][2]); similar to summary judgment, but without evidentiary proof.
- The specific purposes are to:
 - receive argument on whether party status should be granted to any petitioner;
 - narrow or resolve disputed issues of fact without resort to taking testimony;
 - receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudication;
 - determine whether legal issues exists whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and
- decide any pending motions.



Subpart 900-8: Issues Determination Procedure

- Purpose – To limit and define subject matter of adjudicatory hearing and determine party status (see § 900-8.3[b][2]); similar to summary judgment, but without evidentiary proof.
- Specific purposes – to determine if adjudicable fact issues are raised
- Outcome: ALJ Ruling on Issues and Party Status (§ 900-8.3[b][5])



Subpart 900-8: Issues Determination Procedure

- **Adjudicable Issues** -- An issue is adjudicable if:
 - it relates to a substantive and significant dispute between staff and applicant over a proposed term or condition of the draft permit;
 - it relates to a matter cited by staff as a basis to deny the permit and is contested by applicant;
 - it is proposed by a potential party (intervenor) and is substantive and significant; or
 - public comments, including comments by a municipality, raise a substantive and significant issue (§ 900-8.3[c][1])
- Note: Completeness of application is not an issue for adjudication (§ 900-8.3[c][6])

Subpart 900-8: Issues Determination Procedure

Substantive and Significant Standard

- Substantive – “sufficient doubt” about applicant’s ability to meet statutory or regulatory criteria “such that a reasonable person would inquire further” (§ 900-8.3[c][2])
- Significant – “has the potential to result” in permit denial, major modification to proposed project, or imposition of significant permit conditions in addition to those in the draft permit (§ 900-8.3[c][3])



Subpart 900-8: Issues Determination Procedure

Substantive and Significant Standard

- Substantive – “sufficient doubt” about applicant’s ability to meet statutory or regulatory criteria “such that a reasonable person would inquire further” (§ 900-8.3[c][2])
- Significant – “has the potential to result” in permit denial, major modification to proposed project, or imposition of significant permit conditions in addition to those in the draft permit (§ 900-8.3[c][3])
- In determining whether an issue is substantive and significant, 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 (§ 900-8.3[c][2])



Subpart 900-8: Issues Determination Procedure

Burdens of Persuasion

- Where staff and applicant disagree, issue by definition adjudicable
 - Must still determine whether dispute is a factual one requiring adjudication, or a legal dispute that may be resolved in the issues ruling.
- Where staff finds component of applicant's project, as proposed or conditioned by draft permit, conforms to all applicable requirements of statute and regulations, burden of persuasion upon potential party proposing any issue related to that component to demonstrate that it is both substantive and significant (see § 900-8.3[c][4])



Subpart 900-8: Issues Determination Procedure

Standards of Review

- Disputed factual issues – party seeking to litigate a factual issue must demonstrate a triable issue of fact through a sufficient offer of proof, usually through the proffer of expert evidence (900-8.4[c][2][ii]).
- Legal determinations of ORES staff as reflected in the draft permit are reviewed for an error of law.
- Policy decisions and exercises of discretion are reviewed for an abuse of discretion. (See ORES DMM Matter No. 21-00026, Matter of Heritage Wind, LLC, Interim Decision of the Executive Director, Sept. 27, 2021, at 5-6.)



Subpart 900-8: Issues Determination Procedure

Procedures

- Conducted solely on papers, unless the ALJ, in the exercise of discretion, authorizes oral argument (§ 900-8.3[b][1]).
- Parties: ORES staff, staff from other involved State agencies, applicant, and any person filing a petition for party status (§ 900-8.3[b][3]).



Subpart 900-8: Issues Determination Procedure

Procedures

- Applicant statement of issues (§ 900-8.4[b][1])
- Petitions for Party Status (§ 900-8.4[c])
 - Full-party status
 - Amicus-party status
- Municipal statement of compliance with local laws and regulations (§ 900-8.4[d])
- Responsive papers: ORES staff and applicant
- Briefs / Memoranda of Law



Subpart 900-8: Issues Determination Procedure

ALJ Ruling on Issues and Party Status (§ 900-8.3[b][5])

Within 30 days after the date of receipt of written submissions for issues determination and responses thereto, the ALJ shall:

- Determine which persons will be granted party status (see § 900-8.4[f]);
- Determine which issues satisfy the requirements for being adjudicable issues at § 900-8.3(c), and define those issues as precisely as possible;
- Rule on the merits of any legal issue where ruling does not depend on the resolution of disputed issues of fact;
- Decide any pending motions to the extent practicable; and
- Summarize comments received on the application and draft permit conditions or intent to deny.



Subpart 900-8: Issues Determination Procedure

Order of Disposition

If the ALJ determines that there are no adjudicable issues, the ALJ shall direct that no adjudicatory hearing be held and that ORES staff continue processing the application to issue the requested siting permit or intent to deny, and issue a written summary and assessment of public comments received during the public comment period on issues not otherwise addressed in the ALJ's ruling (§ 900-8.3[c][5]).



Subpart 900-8: Issues Determination Procedure

Appeals from Issues Ruling

- Appeal from order of disposition (§ 900-8.7[d][1][i])
- Appeal from ALJ issues ruling finding adjudicable issues (§ 900-8.7[d][2][ii])
- Hearing is not adjourned while an appeal or motion for permission to appeal is pending except by permission of the ALJ or ED
- Executive Director's decision on appeal
 - No adjudicable issues: If the ED concludes on an appeal from an issues ruling that there are no issues for adjudication, the ED will remand the matter to ORES staff to finalize the siting permit or intent to deny, and issue a summary and assessment of public comments not otherwise addressed.
 - Adjudicable issues: If the ED concludes on an appeal that adjudicable issues exist, the ED will remand the matter to the ALJ for further proceedings consistent with the ED's interim decision.

Subpart 900-8: Pre-hearing Procedures

- Notice of adjudicatory hearing (§ 900-8.2); hearing participation
- Disclosure (§ 900-8.6)
- Pre-filed testimony (§ 900-8.6[e])



Subpart 900-8: Conduct of Adjudicatory Hearing

- ALJ has broad authority to conduct hearing (§ 900-8.7[b]). Based on SAPA § 304 (Powers of the Presiding Officer)
- Trial-like proceedings: Opening statements; presentation of witnesses and documentary evidence; direct and cross examination; closing statements (§ 900-8.7[a]; § 900-8.8[a])
- Evidence (§ 900-8.8[a])
- Burden of Proof (§ 900-8.8[b])
- Standard of Proof (§ 900-8.8[c])
 - preponderance of the evidence



Subpart 900-8: Post-hearing Proceedings

- Closing Briefs and Replies: if allowed by ALJ (§ 900-8.7[a][5], [6]) -- Opportunity to appeal rulings directly to ED
- Close of record (§ 900-8.7[a][5])
- Hearing costs (§ 900-8.10)



Subpart 900-8: Final Decision

ALJ's Recommended Decision and Hearing Report

- 45 days after close of record
- Contains findings of fact, conclusions of law, and recommendations on all issues before ALJ (see § 900-8.12[a][1])
- Issued to the parties for comment.



Subpart 900-8: Final Decision

Comments by Parties

- Parties have 14 days after receipt to file comments; further responsive filings within sole discretion of ED (§ 900-8.12[a][2]).
- ORES staff has 14 days to written summary and assessment of public comments received during the public comment period on issues not otherwise addressed in the recommended decision and hearing report (§ 900-8.12[a][3]).



Subpart 900-8: Final Decision

Executive Director's Decision

- 30 days after receipt of all comments on recommended decision (§ 900-8.12[c])
- Contains findings of fact and conclusions of law, or reasons for decision, determination or order (SAPA § 307)
- If the permit is granted, a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations (§ 94-c[5][e]).
- In making the determination, the ED may elect not to apply, in whole or in part, any local law or ordinance if the ED makes the finding that, as applied to the proposed project, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the project (§ 94-c[5][e])

Subpart 900-9: Final Decision

Final Determination on Application (§ 900-9.1)

- ORES shall mail to the applicant and its representative, if applicable, a determination in the form of: a permit, including all applicable uniform standards and conditions and any site-specific conditions, or a statement that the permit applied for has been denied, with an explanation for the denial
- Within 6 months of application completeness if the proposed site is a repurposed site as defined by Part 900; or
- Within 1 year of ORES application completeness for all other MRE facilities.
- Upon mutual consent of applicant and ORES, the time periods set forth above may be extended up to an additional 30 days.



Subpart 900-8: Other Procedural Considerations

Stipulations (§ 900-8.12[b])

- A stipulation executed by all parties resolving any or all issues removes such issue(s) from further consideration in the proceeding.
- Within 5 days of the execution of a stipulation, the applicant shall serve a copy of the fully executed stipulation on all parties and file a copy of the fully executed stipulation with the ALJ.
- Upon receipt of an executed stipulation that resolves all issues in the proceeding, the ALJ shall close the proceeding and remand the matter to ORES staff to continue processing the application to issue the requested siting permit.



Administrative Issues and Ethical Considerations



Ethical Issues and Rules

State Administrative Procedure Act (SAPA) article 3

- Hearings under subpart 900-8 are “adjudicatory hearings” under State law and, therefore, are governed by SAPA article 3.
- SAPA article 3 requires that adjudicatory hearings provide certain minimal due process rights. Those due process rights include:
 - a hearing before an impartial decision maker,
 - with notice and an opportunity to be heard, and
 - a determination based upon and limited to a record.
- Key feature of SAPA: ex parte communication rule (SAPA § 307[2])



Ex Parte Communication Rule: ALJs (§ 900-8.9)

- Except as provided below, an ALJ shall not directly or through a representative, communicate with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.
- An ALJ may consult on questions of law or procedures with supervisors or other staff in the Office of hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.
- An ALJ and the Chief ALJ may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.
- Parties or their representatives shall not communicate with the ALJ, the Chief ALJ or the Executive Director, or any person advising or consulting with any of them, in connection with any issue without providing proper notice to all the other parties.



Ex Parte Communication Rule: Executive Director

- Applies to members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an adjudicatory proceeding -- i.e. Commissioners, ALJs, etc.
- Questions of Fact: “Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or make findings of fact and conclusions of law in an adjudicatory proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party” (SAPA § 307[2]).
- Questions of Law: Agency member or employee shall not communicate “with any party or his representative, except upon notice and opportunity for all parties to participate. Any such agency member (a) may communicate with other members of the agency, and (b) may have the aid and advice of agency staff other than staff which has been or is engaged in the investigative or prosecuting functions in connection with the case under consideration or factually related case” (SAPA § 307[2]).



Freedom of Information Law (Public Officers Law art 6)

- As a State office that performs a governmental function, ORES is an agency subject to the Freedom of Information Law (FOIL) (see Public Officers Law [POL] § 86[3]).
- Under FOIL, records in the custody of State agencies are presumptively accessible except records or portions of records that fall within one of eleven categories of deniable records.



Freedom of Information Law (Public Officers Law art 6)

- Of particular relevance to siting permit application proceedings before ORES, FOIL exempts from disclosure records or portions of records that:
 - are exempt from disclosure by State or federal statute (POL § 87[2][a]);
 - are trade secrets or confidential commercial information (POL § 87[2][d]);
 - are inter-agency or intra-agency communications that are not statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; or external audits (non-final deliberative inter-agency materials) (POL § 87[2][g]);
 - contain critical infrastructure information (POL § 89[5][a][1-a]); or
 - if disclosed would constitute an unwarranted invasion of personal privacy (POL § 87[2][b]).



Conclusion and Questions



Thank You

James T. McClymonds

Chief Administrative Law Judge

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