Chapter XVIII, Title 19 of NYCRR Part 900 Office of Renewable Energy Siting

INTRODUCTION

The Office of Renewable Energy Siting (hereafter the Office or ORES) provides this combined assessment of public comments to summarize and respond to the public comments received on two rulemakings proposed to implement Section 94-c of the Executive Law. Executive Law Section 94-c empowers the Office to issue a permit authorizing the construction and operation of major renewable energy facilities and requires the Office to promulgate uniform standards and conditions (USCs) and other requirements for such facilities.

BACKGROUND

On April 3, 2020, the Legislature enacted Section 94-c of the Executive Law to consolidate the environmental review and permitting of major renewable energy 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 the decision to permit such facilities. The statute established the Office to provide a single forum for the coordinated and timely review of major renewable energy facilities and requires the Office to promulgate regulations to implement Section 94-c of the Executive Law within one year of its effective date.

NOTICE OF PROPOSED RULE MAKING

Notices of Proposed Rulemaking concerning the regulations under consideration here were published in the State Register on September 16, 2020 (DOS-37-20-00016-P and DOS-37-20-00015-P). All stakeholders and the public had an opportunity to formally submit comments on the draft regulations, Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15), and the draft uniform standards and conditions, Chapter XVIII Title 19 (Subpart 900-6), until December 7, 2020. The original deadline to submit comments on the draft regulations, Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15), was November 16, 2020; the Office extended this public comment period until December 7, 2020 (Notice of Comment Extension 11252020).

The Office sought public comments on the draft USCs Chapter XVIII Title 19 (Subpart 900-6), through seven public hearings, while complying with public health and safety guidelines due to the circumstances presented by the COVID-19 pandemic. The statute did not require that all substantive regulations be the subject of public hearings. Rather, such hearings were required for the uniform standards and conditions that would be included in siting permits. Nonetheless, the Office considered all comments received at the public hearings, including comments on Subparts 900-1 through 900-5 and 900-7 through 900-15. In total, over 5,000 comment letters were received during the public comment period and nearly 200 individuals commented during the public hearings. Many comments and submissions raised distinct individualized issues, while many of the form letters, emails and mass mailings repeated similar concerns.

Because many of the submissions commented on different aspects of the proposed regulations, the Office separated submissions by topic and grouped related comments together. After careful consideration of all of the comments received, the Office made several non-substantive changes to address the comments and to clarify the proposed regulations, as set forth below.

DISCUSSION AND ANALYSIS OF COMMENTS

Part 900 General Comments

The Office received a significant number of general comments which are captured and summarized herein below. Many of these comments set forth suggestions to the Office on how it should exercise its judgement or fall outside of the purview of Executive Law §94-c and the jurisdiction of the Office, rather than setting forth specific comments related to the proposed language of the regulations.

Comment

Multiple commenters suggested that the review period for the USCs should have been extended. Commenters noted that because the hearings mandated by Executive Law §94-c were converted to virtual events as a result of the COVID-19 pandemic, the people who would be impacted the most by the regulations were the least likely to be able to attend the hearings due to the lack of high-speed internet and unreliable phone service. They requested that the USCs not be finalized until in-person hearings are held for rural residents.

Discussion

The Office promoted public participation in this rulemaking process by following the safest, most protective and responsive course, in light of the global pandemic and in consideration of the Office's obligation to meet the statutory deadline to promulgate the regulations by April 3, 2021. Due to concerns related to the pandemic (i.e., increasing rates of COVID-19 infection in Erie and Monroe Counties and the Governor's November 9, 2020 designation of those areas as "yellow zones"), the Office changed the format of its November 17th, 18th, and 19th hearings from in-person to virtual pursuant Executive Orders (EOs) 202.1 and 202.15, extended by EO 202.72. As a result of the Office's significant planning efforts, the five virtual public hearings provided the public with meaningful opportunities to participate and comment on the proposed rulemaking safely. The virtual hearings were much more widely attended than the two in-person hearings in Albany and Long Island. Participants without internet access were able to register for and participate in the public hearings by telephone; translators and disability assistance were available upon request. Comments were accepted via email, hard-copy mail, and an online public comment system through the Office's website. Such written comments were given equal weight to oral comments. Consequently, over 5,000 comment letters were received on the regulations overall, and nearly 200 individuals commented during the public hearings. Written and oral comments were submitted by residents, municipalities, private and public organizations, and the renewable energy industry.

Comment

A commenter asserted that by including the USCs in the procedural regulations, the Office was depriving the public the opportunity for a hearing on the USCs, as required by Executive Law §94-c, Section 3(b).

Discussion

Notices of Proposed Rulemaking concerning the regulations were published in the State Register on September 16, 2020. The draft regulations are split into two parts: 1) the draft regulations Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15); and 2) the draft USCs, Chapter XVIII Title 19 (Subpart 900-6). The draft regulations and draft USCs were made available on the ORES website. The public had opportunities to comment on the proposed USCs during seven public hearings on the proposed regulations. Although the hearings were specifically held to accept comments on the USCs as required by Executive Law §94-c(3)(b), the Office considered all comments, regardless of which section of the proposed regulations was addressed.

Comment

Several commenters noted that the Office's adoption of regulations is an action subject to the New York State Environmental Quality Review Act (SEQRA).

Discussion

The Office conducted a review of the potential environmental impacts of the regulations pursuant to SEQRA and completed an updated Short Environmental Assessment Form, Coastal Assessment Form, and negative declaration.

Comment

A commenter stated that the regulations do not require the Office to issue formal findings regarding the environmental impacts of a project. Other commenters added that under Article 8 of the Environmental Conservation Law, projects eligible for review under §94-c are subject to and not exempt from SEQRA as a Type II action, similar to other projects subject to Article 8, Article X, Article 10, and Article VII of the Public Service Law (PSL).

Discussion

Executive Law §94-c does not require the Office to issue formal findings with respect to the potential environmental impacts of a proposed facility prior to issuing a siting permit. The legislative direction in Section 94-c, like SEQRA, is for the Office to identify those permitting conditions necessary to ensure that potential adverse environmental impacts from major renewable energy facilities are avoided or minimized to the greatest extent practicable, which makes project review under Section 94-c equivalent to review under SEQRA. Similarly, the Legislature excluded energy projects under Public Service Law Article 8, Article X, Article 10 and Article VII projects from SEQRA, which reflects the fact that the Legislature considered environmental review under these processes as comprehensive as that required under SEQRA. Likewise, the Section 94-c regulations, which only apply to major renewable energy facilities that would otherwise be subject to the PSL provisions, are as comprehensive and as protective as SEQRA. Finally, Executive Law §94-c specifically provides as follows: "Notwithstanding any other provision of law, including without limitation article eight of the environmental conservation law and article seven of the public service law, no other state agency . . . may…require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed...".

Comment

A commenter stated that the cumulative environmental impacts of implementing the Climate Leadership and Community Protection Act (CLCPA) and the Accelerated Renewable Energy Siting and Community Benefit Act (the Act) have not been considered and suggested that the Office should analyze potential cumulative environmental impacts associated with the adoption of the regulations.

Discussion

While Executive Law §94-c requires the Office to consult with other agencies and to consider the statutory targets set by the Climate Leadership and Community Protection Act in the development of these proposed rules, the proposed rulemakings are a discrete action intended to implement Executive Law. In conducting its SEQRA review of the regulations, the Office considered the environmental reviews conducted by the Board on Electric Generation Siting and the Environment (Siting Board) for implementation of Article 10 of the Public Service Law and notes that no cumulative impacts are present since the two processes will be complimentary and project reviews under both processes are consistent with one another. ORES also reviewed the Large-Scale Renewable Program and Clean Energy Standard and the Climate Leadership and Community Protection Act (Case 15-E-0302) and the Reforming the Energy Vision and Clean Energy Fund proceedings (Cases 14-M-00094 and 14-M-0101) and finds no significant adverse environmental impacts will result from the proposed action.

Comment

Multiple commenters expressed their support of the regulations and the reform to the siting process for renewable energy facilities. Commenters acknowledged that the regulations will accelerate the state's adoption of renewable, zero-carbon energy resources, and will help to fight climate change, create thousands of new jobs and drive clean energy investment to New York. Many believed that the positive economic impacts will be felt by rural and urban New Yorkers alike because renewable energy facilities are viable state-wide.

Other commenters expressed opposite sentiments and objected to the regulations and the USCs. Commenters asserted that the regulations exceed the Office's authority and improperly elevate project economics and profitability (with regard to certain resources). They encouraged the Office to adopt Article 10 protective standards, and to redraft its proposed procedural regulations in a manner that allows for a robust, open, and meaningful review of the myriad of impacts caused by large-scale renewable energy facilities. Further, comments in opposition asserted the statute is in violation of home rule principles and the regulations are not sufficiently protective of the communities, environment, natural resources, prime agricultural land, archaeological or historical sites, and the health, welfare, and safety of New York state residents.

Discussion

The Office acknowledges the various comments and different viewpoints, including support for or objection to Executive Law §94-c and the proposed regulations. In enacting the Accelerated Renewable Energy Growth and Community Benefit Act, the New York State Legislature found that the public's interest would be served by "expediting the regulatory review for the siting of major renewable energy facilities and transmission infrastructure necessary to meet the CLCPA targets, in recognition of the importance of

these facilities and their ability to lower carbon emissions," and by "developing uniform permit standards and conditions that are applicable to classes and categories of renewable energy facilities, that reflect the environmental benefits of such facilities and address common conditions necessary to minimize impacts to the surrounding community and environment." Act, Section 2, §§4(a), (c).

Executive Law §94-c(1) clearly provides:

> "It is the purpose of this section to consolidate the environmental review and permitting of major renewable energy facilities in this state and to provide a single forum in which the office of renewable energy siting created by this section may undertake a coordinated and timely review of proposed major renewable energy 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 the decision to permit such facilities as more specifically provided in this section."

Executive Law §94-c(5)(e) further provides in relevant part:

> ". . . A final siting permit may only be issued if the office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations. In making this determination, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility."

Executive Law §94-c(6)(a) also provides in relevant part:

> "Notwithstanding any other provision of law, including without limitation article eight of the environmental conservation law and article seven of the public service law, no other state agency, department or authority, or any municipality or political subdivision or any agency thereof may, except as expressly authorized under this section or the rules and regulations promulgated under this section, require any approval, consent, permit, certificate, contract, agreement, or other condition for the development, design, construction, operation, or decommissioning of a major renewable energy facility with respect to which an application for a siting permit has been filed, provided in the case of a municipality, political subdivision or an agency thereof, such entity has received notice of the filing of the application therefor. . ."

The regulations are consistent with, and do not alter or diminish, the statutory provisions in the Act and Executive Law §94-c with regard to municipal home rule principles. The regulations require a robust review of all potential significant environmental, public health and safety impacts associated with the construction and operation of a proposed major renewable energy facility. The responsible siting of renewable energy facilities in New York will result in overall benefits to human health and the environment from the reduction of greenhouse gas emissions, while protecting other environmental resources.

Comment

Multiple commenters recommended expanding the regulations to apply to smaller solar projects of 20 megawatts (MW) and under.

Discussion

Executive Law §94-c defines major renewable energy facilities as those facilities with a nameplate generating capacity of 25 MW or more. The statute also allows developers of renewable energy facilities with a nameplate capacity of at least 20 MW, but less than 25 MW, to elect to apply for a siting permit. The Office has no authority to expand the applicability of the siting program to additional facilities. No change is warranted.

Comment

Multiple commenters expressed concern that the draft regulations are not as protective as what is currently required under Article 10 certificate conditions and do not allow for the robust and meaningful identification, assessment, or mitigation of the negative environmental impacts caused by large-scale renewable energy development. A commenter suggested that "lessons learned" during the Article 10 process should be incorporated into the new regulations and standards, emphasizing that input from independent and varied experts and the use of the "most up-to-date" information should be considered.

Discussion

Executive Law §94-c(3)(c) specifically directs the Office to develop USCs "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 major renewable energy facility." The regulations are comprehensive, and in fact are more prescriptive regarding the analysis and assessment of potential significant adverse impacts than those conducted pursuant to Article 10.

The regulations are developed to guide applicants to avoid and minimize potential significant adverse impacts in the first instance and, where possible, to specify mitigation to address unavoidable impacts. An important distinction between Article 10 and Executive Law §94-c is the pre-application consultations required under the Executive Law §94-c regulations to proactively address potential siting impacts. Through the pre-application process, applicants are expected to work closely with local municipalities, communities and New York State agencies to avoid and minimize potential significant adverse impacts. The substantive preapplication consultations further ensure responsible project design layout to avoid and minimize significant environmental impacts to natural resources in the first instance before an application is submitted. This will minimize the likelihood of the Office receiving incomplete applications or poorly sited projects, which historically have been a very cumbersome aspect of the Article 10 process.

The Executive Law §94-c permit applications are more prescriptive regarding the assessment and analysis of potential significant adverse impacts and require more relevant and specific details than currently required under Article 10. These application requirements ensure that the assessment of potential impacts from the development of major renewable energy facilities is as comprehensive as the assessments conducted pursuant to Article 10.

One of the key challenges to navigating the Article 10 process is the need to individually negotiate terms and conditions for each project in each impact category, even though the impacts are often similar

among various projects. Rather than negotiating or litigating avoidance, minimization and mitigation requirements for each impact category with multiple state agencies at every individual site, the USCs required by Executive Law §94-c will provide the majority of the substantive requirements that will be imposed in a siting permit. The application process is designed to drive applicants toward compliance with the relevant USCs. The development of USCs as part of the regulations is critical toward establishing a consolidated process that sets forth how renewable energy projects should be sited and designed to avoid and minimize potential significant adverse impacts in a consistent manner. The regulations also include mitigation requirements where projects cannot avoid or minimize significant adverse impacts.

The USCs were developed based on the many certificate conditions developed through the Article 10 process and in consultation with other state agencies that provided both substantive expertise and experience with Article 10, including the New York State Department of Public Service (NYSDPS), the New York Department of Environmental Conservation (NYSDEC), the New York State Department of Agriculture and Markets (NYSAGM), and the Office of Parks, Recreation and Historic Preservation (OPRHP). In addition, the Office will continue to monitor developments in renewable energy technologies and industry standards, including new information regarding the potential impacts thereof, and will develop guidance and/or update the regulations as necessary.

Comment

Commenters recommended early evaluation of the siting of major renewable energy facilities to avoid areas not well-suited to development, such as wetlands, waterbodies, or streams.

Discussion

The Office supports the development of major renewable energy facilities in a way that ensures the protection of the State's valuable natural resources. The Office must consider a variety of factors in determining where and under what conditions major renewable energy facilities should be permitted. As noted above, the regulations are designed to identify natural and cultural resources early in the process to allow applicants to design the proposed facility to avoid and minimize impacts to such resources (§900-1.3). In addition, §900-2.4 requires a detailed analysis of surrounding land uses, and Executive Law §94-c provides that a final siting permit may only be issued if the Office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions, will comply with applicable local laws and regulations, unless it determines that compliance with a given provision would be unreasonably burdensome taking into account the CLCPA targets and the environmental benefits of the facility. No change is warranted.

Comment

Multiple commenters also expressed concerns regarding the siting and operation of wind turbines in Lake Erie.

Discussion

The Office sought comments on the proposed draft regulations and the USCs, but the Office did not seek comments related to any specific proposed project. Nonetheless, applicants, under the regulations, seeking a siting permit for a major renewable energy facility other than a solar facility or a land-based wind

facility must consult with the Office at least one year prior to submitting an application in order to determine the scope of studies, as well as any site-specific permit application requirements. No change is warranted.

Comment

A commenter objected to the Office's reliance on applicants to assess the potential impacts of a proposed major renewable energy facility, including on environmental health.

Discussion

The regulations include detailed requirements for the preparation of each of the application exhibits to ensure that the Office receives the information necessary to undertake a thorough review of the potential impacts and benefits associated with the construction and operation of a proposed facility. If the Office finds the impact assessments submitted by the applicant are inadequate, the Office will inform the applicant that its application is incomplete and require additional information, as necessary. No change is warranted.

Comment

A commenter recommended that the final regulations should be titled to indicate its content/substance and organized to maximize comprehension by regulated entities and the public (not all subparts of the proposed procedural regulations are titled), for ease of navigation and quick comprehension.

Discussion

The Office determined that the current structure and organization of the regulations is sufficient. No change is warranted.

Comment

Some commenters questioned under what circumstances a project might be denied.

Discussion

The Office will review application materials and determine whether to issue a draft siting permit or a notice of intent to deny a permit on a case-by-case basis. A project may be denied on any number of grounds, such as the inability of the applicant to demonstrate compliance with the USCs during the Office's review of an application resulting in a permit denial after an adjudicatory hearing. No change is warranted as the proposed rules describe the substantive and procedural requirements for review or challenge of a specific permit.

Comment

Several commenters asked when and how interested parties can challenge various interim determinations made by the Office.

Discussion

To the extent a party wishes to challenge the completeness of an application or the provisions of a draft permit, they can submit comments on the draft siting permit, propose significant and substantive issues for adjudication, and seek party status. To the extent a party wishes to challenge a final siting permit, the party may seek judicial review of the Office's final permit decision (i.e., issuance or denial of the final siting permit) as provided in Executive Law §94-c(5)(g).

Subpart 900-1

§900-1.1 Purpose and Applicability

No additional discussion is necessary.

§900-1.2 Definitions

Multiple commenters asked for corrections or clarifications to the definitions or requested the addition of new words to the definitions section of the regulations. Terms that were defined in the regulations for which no comments were received are omitted from this discussion. The corrections or requests for clarification of the definitions in the regulations are provided below:

(b) Administrative law judge

Comment

Clarification was requested to assuage conflict of interest concerns regarding whether an Administrative Law Judge would be an employee of the Office, New York State Department of State (NYSDOS), the NYSDPS, or the New York State Public Service Commission (NYSPSC).

Discussion

During the initial implementation of Executive Law §94-c, administrative law judges (ALJs) from the NYSDEC and NYSDPS will serve as hearing officers pursuant to a memorandum of understanding between the Office and the respective agencies. Eventually, the Office will employ its own ALJs. In either case, hearing officer independence and impartiality are governed by Article 3 of the State Administrative Procedures Act (SAPA), the Public Officers Law Article 4, Executive Order No. 131, judicial case law, and codes of judicial conduct applicable to State ALJs, such as the New York State Bar Association's Model Code of Judicial Conduct for State Administrative Law Judges. In addition, provisions in Subpart 900-8, such as the *ex parte* communication rule and provisions for disqualification of an ALJ, are included to further assure ALJ impartiality and independence. No change is warranted.

(h) Chief Executive Officer

Comment

One commenter recommended changing the definition of "chairman of the board of supervisors" to "chair of board of supervisors or legislature." Another commenter suggested clarifying that the chief executive officer of municipalities include the highest elected official in the County, Town, and Village where the facility will be located.

Discussion

The Office has adopted the recommended changes.

(m) Climate Leadership and Community Protection Act (CLCPA) targets

Comment

One commenter offered technical edits to the CLCPA target.

Discussion

The term "CLCPA targets" is defined in Executive Law §94-c(2)(b) and the proposed rules do not alter the statutory definition. No change is warranted.

(ac) Local agency

Comment

Commenters proposed adding a 1-mile radius for proposed solar facilities to the definition of a "local agency." Others proposed adding a radius of 5-miles for proposed wind facilities. Also, one commenter recommended excluding industrial development agencies from the "local agency" definition and from the ability to request funding.

Discussion

The Office considered the comment and has determined that no change is warranted.

(ad) Low-income community

Comment

One individual mentioned that the 2020 Census does not determine income and asked how income was being determined for "low-income communities."

Discussion

Determinations of whether a community should be considered a low-income community will be based on the most recent Census data available. No change is warranted.

(ae) Major amendment

Comment

Commenters requested adding the word "adverse" to describe the extent of the environmental impact to the definition (i.e., "result in any material increase in any identified *adverse* environmental impacts").

Discussion

The Office has adopted the recommended change.

(af) Major modification

Comment

Commenters requested adding the word "adverse" to describe the extent of the environmental impact to the definition (i.e., "result in any material increase in any identified *adverse* environmental impact").

Discussion

The Office has adopted the recommended change.

(ag) Major renewable energy facility or facility

Comment

Commenters requested deletion of the "at less than one hundred twenty-five (125) kV in order" qualifier from the description of transmission facilities.

Discussion

Consistent with statutory requirements, the Office has adopted the recommended change and made associated typographical corrections.

(ap) Non-participating property

Comment

Commenters requested adding text to clarify the agreement for non-participating properties to include those who have not executed "a lease, easement, or other" agreement.

Discussion

The Office considered the comments and has determined that no change is warranted.

(ba) Opt-in renewable energy facility

Comment

One commenter asserted that the definition of "opt-in renewable energy facility" calls into question the definitions of major and minor facilities.

Discussion

Executive Law §94-c specifically allows for any person intending to construct a renewable energy facility with a nameplate capacity of at least 20 MW but less than 25 MW to apply for a siting permit. No change is warranted.

(bf) Person

Comment

One commenter recommended that the definition of "person" include "federally/state recognized Indian Nation" and "unincorporated association or group."

Discussion

The Office has revised the definition of "person" to include federally/state recognized Indian Nations.

(bh) Potential community intervenor

Comment

A commenter recommended defining "Potential community intervenor" as "any resident or owner of property within the geographical limitations listed" and another commenter recommended that the definition be revised to include, "Municipality means a county, city, town or village."

Discussion

The Office has adopted the requested clarification related to the definition of "Potential community intervenor" to include a definition of the term "residing." "Municipality" is already adequately defined in the regulations.

(bi) Potential Party

Comment

One commenter noted that the definition of "Potential Party" should exclude any person with an interest in a "participating property."

Discussion

No basis exists in Executive Law §94-c for excluding a person with an interest in a participating property from seeking to intervene as a party in the hearing process. The regulations governing hearing participation allow potential parties to intervene in support of a project, which a participating property owner may seek to do. Such a party will still have to meet the relevant standards for identifying adjudicable issues and qualifying for party status. No change is warranted.

(bq) Repurposed site

Comment

One commenter requested "remediated" be defined to specify the level of remediation necessary such that a major renewable energy facility could be sited on a repurposed/remediated site.

Discussion

Section 900-2.4(t) sets forth clear requirements for repurposed sites with a history of environmental contamination. No change is warranted.

(bs) Service

Comment

One commenter mentioned that the definition of "service" fails to expressly allow service by email or other electronic means and proposed adding "including service by electronic mail or other authorized means" to the definition.

Discussion

The methods for completing service, including by email, are specified in §900-8.5(a) and need not be included in the general definition. No change is warranted.

(bx) Study area

Comment

Commenters requested deleting the phrase "in highly urbanized areas" and the last sentence that states, "with components spread across a rural landscape, the study area shall at a minimum include the area within a radius of at least five (5) miles from all generating facility components, interconnections, and related facilities."

Discussion

The Office has made typographical clarifications to the text of this definition to reflect the original intent of the rule to accommodate different settings of the proposed project. No further changes are warranted.

New Definitions

In addition to the comments on the definitions, commenters suggested that the Office add several additional defined terms. The Office has considered those suggestions and has added definitions of "host community benefit" and "Project Impact Area" to the regulations for purposes of clarification.

(z) "Host community benefit"

Comment

Multiple commenters requested that the Office provide a definition for "host community benefit."

Discussion

The Office has added a definition of "Host Community Benefit" in §900-1.2(z).

(bk) "Project Impact Area"

Comment

One commenter stated that the study area for archaeological resources should not be the same as for historic architectural resources. The commenter suggested that the study area for the archaeological resources should be defined as the Project Impact Area (PIA), and that the PIA be defined as the area to be disturbed by construction. The commenter added that the study area for historic architecture should be defined as the same area as the Visual Impact Area.

Discussion

The Office notes that §900-1.2 does not include a definition of "Project Impact Area." This term is used multiple times in §900-1.3(h) and in §900-2.10. Therefore, in order to distinguish the terminology from a "Study Area", the Office has provided a definition of "Project Impact Area" in §900-1.2(bk).

§900-1.3 Pre-application Procedures

Comment

Multiple commenters expressed concerns regarding the level of public participation required in the Executive Law §94-c siting process, indicating that the regulations reduced community input by eliminating opportunities for the public to participate. Commenters asserted that having only one meeting with local agencies and one meeting with community members is insufficient, and that local participation, input, and expertise should be incorporated at various key points in the planning and siting process to ensure consideration of those directly impacted by the project. Some commenters suggested that consultation with specific agencies and interested parties should be required, while others suggested the establishment of community advisory boards. Multiple commenters suggested that the ORES siting process include public participation requirements similar to what is required under Article 10. Finally, commenters stressed the importance of transparency and accessibility on the part of applicants.

Discussion

The Office recognizes that public participation is a critical part of the siting process established by Executive Law §94-c. The regulations provide local municipalities and communities with increased transparency and comprehensive protections for common local siting concerns. The regulations require applicants to share information with the public at multiple points in the process to ensure both transparency

and accessibility to local communities and government representatives. Applicants must meet at least once with local agencies and must host at least one meeting with community members in advance of submitting an application. The Office recognizes that the municipalities are in the best position to identify the relevant agencies that should be involved in the pre-application consultation, which is why the regulations require applicants to meet with the chief executive officer of any municipality within which the proposed facility would be located, as well as any local agencies identified by such chief executive officer. Furthermore, the Office encourages all applicants to work closely with local agencies and community members on all aspects of a proposed project, including host community benefits. The regulations set forth the minimum required engagement, but applicants are strongly encouraged to conduct additional engagement to identify and address the concerns of local agencies and the communities in the application materials.

In addition, applicants must publish both a notice of intent to file an application, and a subsequent notice when such application is actually filed. Notices will be published in newspapers in each municipality in which the proposed facility is to be located, in the newspaper of largest circulation in the county(ies) in which the proposed facility is to be located, and in a free newspaper publication that services the area in which the proposed facility is to be located, if any are available. The applicant will also be required to provide written notice to: 1) all persons residing within 1 mile of the proposed solar facility; 2) or within 5 miles of the proposed wind facility; and 3) each member of the state legislature in whose district any portion of the proposed facility is to be located.

The regulations require the applicant to provide copies of the application to the chief executive officer of each municipality in which any portion of the proposed facility is to be located, to a library serving the district of each member of the state legislature in whose district any portion of the proposed facility is to be located or could be adversely impacted by the proposed facility, and to the chief executive officer of any other local agency that would have permitting or approval authority with respect to any aspect of the proposed facility.

Applicants will be required to establish a website through which the applicant will provide information about the project to the public. In addition, all application documents for a project, including the required pre-application surveys/reports, will be available online for public review.

After an application is reviewed and deemed complete, the Office will publish draft permit conditions or a statement of intent to deny, combined notice of availability of draft permit conditions, public comment period and public comment hearing, and issues determination on its website for public comment. The Office will similarly provide notice of an adjudicatory hearing, if one will be held. The Office has gone beyond the statutory requirement and requires a mandatory public comment hearing in the affected municipalities for all projects. The regulations call for public hearings to be held in the Town, Village, or City in which the project is located, as reasonably near the project site as practicable.

The myriad of requirements ensures that applicants will conduct meaningful and sufficient public engagement to identify and assess potential adverse environmental impacts, avoid, minimize or mitigate to the maximum extent practicable potential adverse environmental impacts, comply with the substantive provisions of the applicable local laws, evaluate relevant resource data, and provide meaningful opportunities for public engagement in the Executive Law §94-c siting process. Accordingly, no change is warranted.

Comment

Several commenters generally supported the integrated reviews between the Office, NYSDEC, and the OPRHP, as well as the 60-day timelines on application reviews and one-year field survey provisions. Other commenters expressed concern that the timeframes were too short and suggested that there would not be adequate time for agency review. Commenters suggested that the draft regulations be revised to include a reasonable opportunity for state agencies and the Office to extend the time for pre-application procedures, pre-application reviews, and pre-application meetings without applicant approval.

Discussion

The Office consulted with the other NYS agencies and authorities in the development of the pre-application procedures. The timeframes set forth in the regulations are reasonable. No change is warranted.

Comment

One commenter requested that pre-application site characterizations of wetlands, streams and other waterbodies, and wildlife, habitat assessments, and survey reports be made available for public comment and input.

Discussion

All application documents for a project, including the required pre-application surveys/reports, will be available at a local document repository and posted online for public review; provided however, that §900-1.4(a)(6) requires that in compliance with Section 304 of the National Historic Preservation Act, any information concerning the location, character or ownership of a cultural resource shall not be disclosed publicly unless pursuant to an appropriate protective order. Regarding public comment, the delineation and characterization of these resources is appropriately determined by the Office in consultation with NYSDEC or OPRHP. No change is warranted.

Comment

Multiple commenters requested a more codified and broadened involvement of state agencies and authorities in the pre-application process.

Discussion

The Office has fully collaborated with other state agencies and authorities in the development of the draft regulations and USCs, and will continue that collaborative relationship during the pre-application and permitting processes. No change is warranted.

Subsection (a) Consultation with Local Agencies

Comment

Several commenters requested that the regulations require applicants to formally notify municipalities (as well as state agencies and landowners) once the pre-application process is initiated and recommended that notifications be made within four weeks of an applicant's initial meetings with agencies (and landowners). The commenters stated that the Article 10 public involvement timelines and community engagement process should be mimicked.

Multiple commenters also raised concern with the requirement to consult with municipalities at least 60 days prior to filing an application. The commenters stated that this was not enough time to provide local agencies, stakeholders, and the community the opportunity to review all of the information provided in the pre-application phase, to fully understand the project, and engage with the developer. The commenters recommended extending the pre-application timeline from 60 to 120 days.

Discussion

Executive Law §94-c explicitly recognizes that major renewable energy facilities must be sited in a cost-effective and timely manner. The regulatory timeframes for pre-application activities are minimum requirements; there is nothing to prevent applicants from initiating public outreach earlier in their design process and, in certain instances, it may be in the applicant's interest to do so. No change is warranted.

Comment

Commenters noted that, at a minimum, each coordinating agency (the Office, NYSDEC, municipalities, etc.) should be allowed to formally submit their comments as to the completeness of the application, which would be entered in the public record and serve as a determination of completion.

Discussion

It is the Office's responsibility and authority to make application completeness determinations per Executive Law §94-c. No change is warranted.

Comment

A commenter requested an update to the text of the regulations in the pre-application process to exclude transfer applications from pre-application meeting requirements in §900-1.3(a).

Discussion

Executive Law §94-c directs the Office to deem complete upon filing, any application for a pending Article 10 facility for which the Article 10 application has been determined to be complete. No change is warranted.

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

A commenter requested that the Office provide clarification regarding the quality and detail of project materials to be submitted to local agencies prior to filing an official application with the Office. One commenter suggested that the mapping requirements during the pre-application phase include details and potential sites for electrical substations, battery storage facilities, electric transmission system expansions, and potential solar or wind installations. Another commenter noted that it was insufficient for an applicant to present a map pre-emptively outlining large areas of a municipality or municipalities comprising the project area in which the applicant hopes to procure ground leases.

Discussion

The regulatory timeframes for pre-application consultation with local agencies and community members are minimum requirements. Depending on when an applicant elects to conduct the required pre-application consultation, the applicant may not be far enough along in the design process to provide the requested details for a proposed facility. However, §900-1.3(a)(2) requires the applicant to provide at the local agency pre-application meeting(s) a map of the proposed facility showing project components and regulatory boundaries as it pertains to substantive local law relevant to the proposed facility. No change is warranted.

Paragraph (3)

Comment

Several commenters requested to add "decommissioning" to §900-1.3(a)(3) to clarify that the summary should include applicable local laws pertaining not only to operations and maintenance of facilities but also to the decommissioning of facilities.

Discussion

The Office has added "and decommissioning" to §900-1.3(a)(3) related to pre-application procedures, as this is consistent with the intent of the regulations at §900-2.24.

Paragraphs (4)-(7)

No additional discussion is necessary.

Paragraph (8)

Comment

Several commenters raised concerns that allowing a local agency or intervenor to apply for intervenor funds 30 days after application filing does not allow adequate time for a consultant team to be in place for the pre-application phase. Changes to the regulations were proposed to either allow the use of intervenor funds during the pre-application phase, and/or to allow reimbursement once intervenor funds are available; or to extend the window from 30 to 60 days to allow for early notification and to address pre-application activities.

Discussion

The Office recognizes the importance for local agencies and community members to have access to intervenor funding. The pre-application procedures require applicants to meet with local agencies and community members at least 60 days in advance of filing an application, as well as to publish a notice of intent to file an application at least 60 days in advance of filing. The applicant must notify the local agencies and community members of both the availability of local agency account funds, as well as the need to apply for such funding within 30 days of the filing of an application. In addition, the notice of intent must include a statement regarding the availability of and deadline for applying for local agency account funds. Accordingly, potential community intervenors will have been notified at least 90 days in advance of the deadline to apply for such funding. This will allow local agencies and community members to begin assessing the need for expert advice and to begin preparing requests for such funding. The specified timeframe is necessary to conduct a workable process. No change is warranted.

Subsection (b) Meeting with Community Members

Comment

Commenters recommended explicit mailing and notification requirements within the regulations, suggesting the use of County tax rolls within project dependent radius, to inform all affected municipalities and residents.

Discussion

The regulations specify the service and notice requirements. An applicant should utilize all available information in order to fulfill its obligations to provide such service and notification. No change is warranted.

Comment

Commenters noted that the window for publication of the pre-application meeting notification was too narrow, noting that some local publications only run weekly, and recommended extending the "no sooner than" publication time limit from 21 to 30 days or deleting the time limit overall.

Discussion

The Office has revised §900-1.3(b) to require applicants to provide meeting notice no sooner than 30 days prior to the meeting.

Subsection (c)

Comment

Commenters stated that §900-1.3(c) is unacceptable, and that no application should be allowed to be submitted without a meeting.

Discussion

Section 900-1.3(c) is intended to provide the applicant with the ability to complete its application in the event it is unable to secure a meeting with a municipality, which may occur for any number of valid reasons outside the control of the applicant. Regardless, the Office views the pre-application meeting(s) with local agencies as a critical part of the siting process, and therefore an applicant that has not conducted such a meeting must provide a detailed explanation of all reasonable efforts to secure such a meeting, as well as copies of written communications with the local agencies. If the Office is not satisfied with the applicant's efforts, the application could be deemed incomplete until such a meeting is held and the relevant materials provided. No change is warranted.

Subsection (d)

Comment

Commenters recommended that, as part of the outcome of the pre-application meeting, the notice of intent to file an application be delivered to chief elected official of the county; County Planning Directors; local, county, and regional planning departments; and adjacent municipalities. This is because many counties provide technical assistance for land use to local municipalities, especially in rural areas.

Discussion

The regulations require the applicant to meet with the local agencies identified by the chief executive officers of the municipalities in which a proposed facility is located. The Office has revised the regulations at §900-1.3(d) to require that the notice of intent to file an application be sent to all local agencies in attendance at the pre-application meeting.

Subsection (e) Wetland Delineation

Comment

A number of comments were received on the wetland delineation process and the obligations of the applicant to comply with other regulatory processes outside the purview of the Office.

Discussion

The Office has clarified the regulations in §§900-1.3(e) and (f) to specify that the Office will review the applicant's draft delineation reports and determine the boundaries of state-regulated wetlands and surface waters; as set forth in §900-10.2(a), applicants are required to comply with applicable regulatory processes outside the purview of the Office and provide copies of all required federal/federally-delegated permits to the Office as part of the pre-construction compliance filings. The Office also clarified the scope of such delineations and impact assessments in §§900-2.14 and 900-2.15.

Paragraph (1)

Comment

One commenter suggested coordination with the U.S. Army Corps of Engineers (USACE) for federally designated wetlands.

Discussion

The regulations do not supersede any federal requirements. Applicants are required to coordinate with federal agencies if federal approvals or permits are required for a facility. A Section 401 Water Quality Certification (WQC) from the Office is required for areas regulated by the USACE under Section 404 of the CWA, and project components that affect water quality. The Office will coordinate with USACE as necessary for each proposed project. No change is warranted.

Comment

Commenters voiced concerns about the requirements to delineate all wetlands on the project site and recommended that §900-1.3(e)(1) be modified to limit the required wetland delineations for all federal, state, and locally regulated wetlands to those areas within 100 feet of a development footprint.

Discussion

All wetlands on the facility site and within 100 feet of areas to be disturbed by construction must be delineated in order to inform facility design and the Office's evaluation of the potential impacts of the proposed facility. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

Comment

One commenter requested correction of a typographic error—specifically deletion of the word "provide" from §900-1.3(e)(4) (now subdivision (3)) such that the NYSDEC may conduct a site visit at the request of the Office to "assist" in regulated wetland determinations.

Discussion

The Office has adopted the recommended correction. The applicant's obligation to provide a draft delineation report to the Office with a copy to NYSDEC (§900-1.3(e)(3)) was also combined into §900-1.3(e)(2) and deleted from this section (with remaining provisions being renumbered).

Paragraph (4)

Comment

Commenters suggested that that NYSDEC be present at all site visits and in wetland delineation review, rather than at the request of the Office per §900-1.3(e)(5) (now subdivision (4)).

Discussion

The Office has and will continue to collaborate with NYSDEC during the pre-application and application process. No change is warranted.

Comment

Commenters suggested that §900-1.3(e)(5) (now subdivision (4)) be modified to prevent inclement weather from delaying jurisdictional determinations for wetlands, through the use of remote sensing and existing digital data as a temporary proxy for the Office to make an official jurisdictional determination and confirm delineated wetland boundaries.

Discussion

The regulations recognize that accurate and precise wetland determinations are essential for effective site design and for developing required application exhibits. Tentative or proxy jurisdictional determinations based on digital data would lack the precision necessary to accurately determine wetland impacts during a detailed regulatory evaluation of a development plan. Development timelines should be carefully planned to allow for necessary wetland determinations to occur in accordance with appropriate seasonal requirements. No change is warranted.

Paragraph (5)

No additional discussion is necessary.

Subsection (f) Water Resources and Aquatic Ecology

Paragraph (1)

Comment

One commenter suggested that §900-1.3(f)(1) be expanded to include all surface waters, including perennial, intermittent and ephemeral streams, and all wetlands, including vernal pools within 500 feet of any area of disturbance.

Discussion

The Office has clarified the terminology of this section to reflect evaluation of all federal, state and locally regulated surface waters on the facility site and within 100 feet of areas to be disturbed by construction (§900-1.3(f)(1)). The Office believes that 100 feet is sufficient for the identification of all surface waters, including perennial, intermittent and ephemeral streams, and all wetlands, including vernal pools. No further change is warranted.

Comment

A commenter requested the removal of language in from §900-1.3(f), §900-2.14(b)(1), and §900-2.15(d) that includes the identification of impacts to hydrologically connected water resources located 100 feet beyond the limit of disturbance.

Discussion

The regulations require that all waterbodies within 100 feet of disturbance/construction activities must be delineated and depicted on a map. Accordingly, the requirement to map "hydrologically or ecologically" influenced waterbodies within 100 feet of the limit of disturbance is redundant. The Office has removed this language from §900-1.3(f) and §900-2.14(b)(1).

Paragraphs (2)-(5)

No additional discussion is necessary.

Subsection (g) NYS Threatened or Endangered Species

Paragraph (1)

Comment

A commenter requested that the Office clarify the regulations such that NYS threatened and endangered wildlife species risk assessments be conducted at the earliest point possible and that the regulations identify a specific initiation point in the project planning and siting phase (e.g., when a general project location has been identified).

Discussion

The regulations require applicants to conduct the wildlife site characterization at the earliest point possible in the applicant's preliminary project planning. Applicants must determine when to elect to commence the pre-application process, taking into account the requirements of the regulations and depending on project complexity, site features, and other factors. No change is warranted.

Comment

A commenter recommended that wildlife desktop and field surveys be conducted within 10 miles (rather than 5 miles) of the project boundary, and that the list of features assessed during the planning

process include Audubon Important Bird Areas, Great Lake shorelines, and large rivers, to ensure all species that occur within the vicinity of a project are assessed.

Discussion

The regulations in §900-1.3(g)(1)(iii) and (iv) require the applicant to conduct a thorough wildlife site characterization within 5 miles of the facility, including geographical, topographical, and other physical features within 5 miles of the facility, interconnections, connecting lines, and access roads. The Office believes this 5-mile radius for desktop wildlife site characterization is an appropriate extent for a desktop landscape-level assessment. The list of potential features to be considered in §900-1.3(g)(1) already includes Audubon Important Bird Areas and is meant to be illustrative, not exhaustive. The applicant should consider all relevant features within the 5-mile radius for the wildlife site characterization. Per §900-1.3(g)(4), the extent of field surveys required will be informed by the wildlife site characterization and determined in consultation with the Office and the NYSDEC to ensure sufficient coverage. No change is warranted.

Comment

One commenter indicated that requiring the applicant to provide documentation of NYS threatened and endangered species identified at the proposed facility from available data sources within the last five (5) years per §900-1.3(g)(1)(i) is too narrow of a window, as biologists are often unable to revisit known occurrences within this timeframe. The commenter requested that applicants be required to schedule a site visit with a NYS Natural Heritage Program biologist to determine site viability for threatened and endangered species to address this potential insufficiency of NYS threatened and endangered species documentation.

Discussion

The wildlife site characterization report should include all available information and, in addition, should specifically identify any NYS threatened or endangered species identified within the last five years. No change is warranted.

Paragraph (2)

Comment

A commenter indicated that the regulations should require one year of wildlife surveys and an additional year, if necessary. Another commenter recommended changing the timeline of wildlife surveys from “within 1 year” to “within one full survey season.”

Discussion

The regulations in §900-1.3(g)(2)(iv) recommend one year of habitat assessments and/or field surveys to ensure that all four appropriate seasonal windows will be covered if necessary. No change is warranted.

Comment

Commenters requested specific revisions to §900-1.3(g)(2) of the regulations such that additional field surveys for solar facilities would be limited to NYS threatened and endangered bird species.

Discussion

The need for habitat assessments and/or survey requirements will be determined in consideration of both the wildlife site characterization and project details. Habitat assessments and additional field surveys cannot be limited to NYS threatened and endangered bird species. No change is warranted.

Paragraph (3)

Comment

Commenters requested specific revisions to §900-1.3(g)(3) of the regulations to allow applicants to submit controverting evidence regarding areas determined to be occupied habitat.

Discussion

Applicants should provide all available information in the site wildlife characterization report, including information refuting evidence of occupied habitat. No change is warranted.

Comment

A commenter expressed concern that the timelines for the Office's review of the pre-application site characterizations of wetlands, streams and other waterbodies, and wildlife is infeasibly short. Concern was expressed that these timelines will result in no meaningful review of an applicant's site characterizations.

Discussion

The Office has consulted with NYSDEC in the preparation of the draft regulations and believes that the timeframes set forth in the regulations are sufficient. No change is warranted.

Paragraph (4)

No additional discussion is necessary.

Paragraph (5)

Comment

A commenter requested that the timeline for completion of the study and submittal of draft survey reports in §900-1.3(g)(5) be extended from 6 to 8 weeks, and another commenter requested the timeline be extended to a minimum of 10 weeks.

Discussion

The Office believes that 6 weeks is sufficient time to prepare and submit the draft survey results. If additional time is required due to the scope of the survey, the applicant can coordinate with the Office to request additional time. No change is warranted.

Comment

The Office received several comments on the scope and review of wildlife surveys and habitat assessments. Multiple commenters recommended that the NYSDEC be responsible for overseeing the planning and execution of surveys and habitat assessment, as well as the assessment of species impacts, and other commenters suggested that the Office should provide comments and require habitat assessments

or field surveys for those proposed projects located in identified suitable habitat for rare, threatened, and endangered species. Commenters also suggested that the United States Fish and Wildlife Service (USFWS) or NYSDEC conduct a pre-application review of cumulative impacts of nearby projects. Finally, commenters proposed that applicants be required to hire a third-party professional to prepare the report.

Discussion

The regulations provide that the Office, in consultation with NYSDEC, will review the wildlife site characterization report, identify necessary habitat assessments and/or site surveys, and provide a final determination as to the existence of occupied habitat for NYS threatened and endangered species on the project site. It is the responsibility of the applicant to conduct the required consultation and to have the required reports prepared by a qualified professional. The applicant is required to consult with and obtain any required permits from federal agencies with jurisdiction over the proposed facility, including the USFWS; requirements for pre-application review by federal agencies are outside the authority of the Office. No change is warranted.

Comment

Commenters suggested that §900-1.3(g)(5) be revised to remove the requirement that a summary of sightings be provided to the agencies in advance of the draft report, if sightings of NYS threatened or endangered species are documented during the surveys.

Discussion

Submission of a summary of sightings of protected species prior to the report submittal is required and beneficial, as it allows the agencies more time to consider their presence and to work with the applicant to avoid, minimize, and mitigate potential impacts. No change is warranted.

Paragraph (6)

Comment

A commenter requested extending the timeline for agency consideration of habitat plans and survey results.

Discussion

The regulations in §900-1.3(g)(6) require the agencies and the applicant to review the results of the habitat assessment(s) and survey(s) and the current facility design, as well as discuss the requirements for the Net Conservation Benefit Plan (NCBP), if applicable, within 30 days of submittal of the draft survey reports. The 30-day timeline is sufficient for this review. No change is warranted.

Paragraph (7)

Comment

Several commenters noted that threatened and endangered species may occupy habitat only seasonally or occasionally, may be secretive or difficult to identify, or may expand into suitable habitat given the opportunity. Therefore, regulations should be focused on preserving probable habitat rather than specifically occupied habitat.

Discussion

In order to be consistent with the NYSDEC's regulations concerning NYS threatened and endangered species, the regulations require an applicant to avoid and minimize impacts to occupied habitat for NYS threatened and endangered species. No change is warranted.

Comment

A commenter recommended allowing a minimum of eight weeks (instead of 30 days) for the Office to prepare the draft determination of the findings of the survey reports in §900-1.3(g)(7).

Discussion

The Office has consulted with NYSDEC in the preparation of the draft regulations. While the draft determination will be made within 30 days of the required meeting between the applicant and relevant agencies, the meeting itself will follow submission of the wildlife characterization by the applicant. Since the wildlife characterization will be available to the Office for several weeks, 30 days is sufficient to provide a draft determination. No change is warranted.

Comment

A commenter suggested the draft determination on occupied habitat in §900-1.3(g)(7) should be in written form.

Discussion

The language currently presented in the regulations is sufficient. No change is warranted.

Paragraph (8)

Comment

A commenter suggested that §900-1.3(g)(8) be revised to note that an NCBP would be required where impacts have been determined to exceed *de minimis* impact, rather than having the inclusion of an NCBP be required.

Discussion

The language currently presented in the regulations is sufficient to convey that an NCBP would be required for any project that would have an adverse impact on a NYS endangered or threatened species, and therefore that no plan would be required for impacts at *de minimis* levels. No change is warranted.

Subsection (h) Archaeological Resources Consultation

Comment

Commenters requested that Indian Nations be involved and consulted with during the Phase IA and Phase IB review process, particularly for those facilities proposed to be sited on lands within Indian Nation aboriginal territories, and where potential impacts to Indian Nation cultural resources may occur or are discovered. Commenters also requested that applicants be required to submit all Phase IA surveys to the applicable Indian Nation and OPRHP when the surveys are submitted to ORES, to ensure that the appropriate Indian Nation and the OPRHP are informed prior to decision making regarding the Phase IB analysis. In addition, commenters suggested that the Office hire an Indian Nations liaison to facilitate consultations.

Discussion

Section 900-1.3(h) requires that applicants conduct a Phase IA archaeological/cultural resources study for the project impact area if it falls within an area of archaeological sensitivity (per the statewide archeological inventory map), and to submit the results of the study to the Office and for consultation with OPRHP as to whether a Phase IB field study will be required. If warranted by the Phase I studies, a Phase II study would also be required. Comments from Indian Nations will be sought if an area specified on the "statewide archaeological inventory map" (9 NYCRR Part 426.2(h)(2)) falls within the project impact area, or if the results of a Phase IA survey indicate the potential for sites to be present. In accordance with Section 106 of the National Historic Preservation Act (NHPA), if sites are identified during the Phase IA or IB survey, or if a facility is located within an area identified in the state's inventory, Indian Nations will be consulted for their input. However, in the event the comment concerns the siting of renewable projects on sovereign land, the comment falls outside the scope of this rulemaking.

Consultation with Indian Nations in the event of unanticipated discoveries is currently covered by §900-2.10(a)(5) of the regulations. The New York Archaeological Council (NYAC) Standards, Part 5.0, states in part: "*Unless burial excavation is the purpose of or an explicit component of the approved research design, human remains should be left in-situ until consultation with the project sponsor, the SHPO, federally recognized Native American groups, concerned parties, and involved state and federal agencies has taken place."* Additionally, the historic resources study referenced in §900-2.10(b) requires consultation with federal/state-recognized Indian Nations in relevant circumstances. No change is warranted.

Subsection (i) Consultation with the Office

Comment

One commenter questioned why consultation with the Office is required one year prior to submittal of an application for applicants seeking a siting permit for other major renewable energy facilities (i.e., other than a solar facility or wind facility), but no such obligation is placed upon applicants for solar or wind facilities.

Discussion

The Office developed the required contents of the application and the uniform standards and conditions to specifically address solar and land-based wind facilities. Applicants for all other renewable energy facilities will need to consult with the Office to determine the required contents of an application and studies. No change is warranted.

§900-1.4 General Requirements for Applications

Subsection (a)

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

Several commenters requested deletions to the regulations, including reducing the number of exhibits required under §900-1.4(a)(2) if the Office notifies an applicant during the pre-application phase that a particular exhibit was irrelevant and would not be required.

Discussion

The Office has considered the comment and determined that no change is warranted. Proposed §900-1.4(a)(3) provides a means for an applicant to request a site-specific permit requirement in lieu of an exhibit or uniform standard or condition. Therefore, the proposed rules contain a sufficient amount of flexibility for applicants to seek relief from specific application requirements not relevant to their project.

Paragraph (3)

Comment

One commenter noted that §900-1.4(a)(3) improperly shifts the burden of proof by implying an applicant need not demonstrate why uniform standard conditions should apply.

Discussion

This section requires an applicant who is seeking a site-specific standard or condition to justify why such should be applied in lieu of the USCs. No change is warranted.

Paragraph (4)

No additional discussion is necessary.

Paragraph (5)

Comment

One commenter objected to the release of applicants from informing the public of anything considered trade secrets, citing a distrust of developers to disclose complete information.

Discussion

The applicants are in the best position to determine what constitutes critical infrastructure information or trade secret information in the first instance. Regardless, ALJs will review and make the final determination as to whether or not such information should be treated as confidential. No change is warranted.

Paragraphs (6)-(10)

No additional discussion is necessary.

Subsection (b) Water Quality Certification

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters requested that the language in §900-1.4(b) be clarified to only require the WQC for jurisdictional areas prior to commencing construction, and that the requests in §900-1.4(b)(3) filed after the issuance of a siting permit be treated as a request for a minor permit modification.

Discussion

All required federal permits and approvals must be provided as part of the pre-construction compliance filings; accordingly, the WQC must be issued prior to the commencement of construction. Section 900-1.4(b)(3) indicates that requests for a water quality certification post-permit issuance shall be treated as a request for a permit modification pursuant to §900-11.1. No change is warranted.

§900-1.5 Office of Renewable Energy Siting Review Fee

Subsection (a)

Comment

Several commenters requested that the regulations be updated to allow unused funds remaining from application fees paid be returned to the applicant.

Discussion

Executive Law §94-c specifically authorizes ORES to impose a fee for the purpose of recovering the costs the Office incurs related to reviewing and processing an application and §900-1.5(a) has been revised to reflect the statutory language. It is not anticipated that there would be any unused funds at the end of the permitting process, and the statute does not require the Office to return any such unused funds to the applicant. No further change is warranted.

§900-1.6 Filing, Service and Publication of an Application

Comment

Several commenters expressed their desire for an easily accessible website with information about siting projects such as: pre-application materials; meeting notices; project information (such as pre- and post-construction wildlife data); filings; applications, locations of electronic and paper copies; and administrative records, as early as possible. Further support was expressed for an online mechanism for agencies, municipalities, and the public to submit comments, thus making comments publicly available, to expedite the permitting process, and to improve community involvement. Commenters asserted that requiring citizens or municipalities to make Freedom of Information Law (FOIL) requests for documents was not reasonable and will heighten public mistrust. According to commenters, the accelerated review process, along with withholding of immediate access to all public documents online, would create substantial barriers to public participation.

Discussion

Notices and non-confidential documents related to applications submitted to the Office, including all written public comments, letters, and other agency documentation, will be made publicly available on the Office's website. The regulations require applicants to establish a website to disseminate information

to the public regarding the application, including a summary of the application materials and instructions on how to access relevant documents from the Office's website.

The public comment hearing shall be convened to hear and receive the unsworn statements of parties and non-parties relating to the siting permit application, and thereby does not afford the opportunity to submit comments on a website. However, the public will be able to submit written comments on the draft siting permit through the ORES website.

Note that the reference to FOIL in §900-8.6(a) is intended only to make clear that disclosure prior to the identification of issues for adjudication is limited to the documents that would be releasable under FOIL, not that the FOIL regulations must be followed for such disclosure. No change is warranted.

Comment

Commenters requested that adjacent landowners be notified if renewable energy leases or options to lease are signed.

Discussion

The signing of a lease or option to lease is a landowner decision and does not necessitate the filing of an application or the notice requirement of such an application. Providing public notice of landowner and private party actions is outside of the purview and jurisdiction of the Office. No change is warranted.

Subsection (a)

Comment

One commenter requested that the regulations include a requirement to serve a copy of the application on the Adirondack Park Agency and electronic and paper copies on various individuals.

Discussion

Service on the Adirondack Park Agency is required only if an applicant proposes to site a facility within the Adirondack Park. Regarding serving electronic and paper copies to various individuals, given the voluminous nature of such applications, it would be a significant waste of resources to make numerous paper copies for individuals who may not even wish to review them. Electronic copies will be available to the public through the Office's website. No change is warranted.

Paragraphs (1)-(5)

No additional discussion is necessary.

Paragraph (6)

Comment

One commenter asked why an applicant is only required to file copies with the library serving the district where the proposed facility will be located or impacted, instead of the municipal or community libraries where the project will be located.

Discussion

The libraries indicated in the regulations are a type of public library. No change is warranted.

Paragraphs (7)-(8)

No additional discussion is necessary.

Subsection (b)

Comment

One commenter indicated that publication of a notice of application should be made 30 days before the date an applicant files the application.

Discussion

Executive Law §94-c explicitly recognizes that renewable energy projects must be sited in a timely manner. The timeframes provided for a notice of application are the minimum necessary to conduct a workable process prior to the submittal of an application. No change is warranted.

Subsection (c)

Comment

One commenter proposed that the notification be short and written, in postcard form.

Discussion

Applicants have the option to provide a short, written notice in postcard form as long as the notice includes information required by §900-1.6(d). In general, the size, location, and resources affected will dictate the length and type of notice that is required. No change is warranted.

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters questioned the electronic filing, service, and publication requirements. Multiple commenters inquired about the process for the public to ask questions and receive answers. Specific requests included providing a contact person with email, website, and/or phone for submittals and responses, and a timeline for a required response.

Discussion

Filing, service, and publication requirements are set forth in §900-1.6. It is anticipated that all notices and non-confidential documents related to applications before the Office will be made publicly available on the Office's website. In addition, each project's website will contain a summary of such materials and instructions as to how to access the full materials on the Office's website. Such website will also provide contact information for the applicant. No change is warranted.

Comment

Concerns were raised regarding the notice requirements set forth in §900-1.6. Specifically, commenters asked whether or not the notice should be sent to "all residents", or "all landowners", instead

of "all persons", and suggested that adjacent or abutting facilities and/or participating and non-participating properties whose land may be affected be notified as well. Another commenter suggested that landowners directly adjacent to and abutting the facility should also be notified about the filing, service, and publication of an application. Commenters recommended that the applicant be required to notify all property owners whose land may be affected, including both participating and non-participating properties.

Discussion

Providing notification to only "all residents" or "all landowners" would not be inclusive of landowners, property owners, or residents who may or may not reside in the area. Section 900-1.3(b) requires an applicant to meet with community members and per §900-1.6(c)(3), the applicant is also required to provide written notice of application to all persons residing within one (1) mile of the proposed solar facility or within five (5) miles of the proposed wind facility, which includes landowners directly adjacent to and abutting the facility and participating and non-participating property owners whose land may be affected. No change is warranted.

Paragraph (4)

No additional discussion is necessary.

Subsections (d)-(e)

No additional discussion is necessary.

Subpart 900-2 Application Exhibits

§900-2.1 Filing Instructions

No additional discussion is necessary.

§900-2.2 Exhibit 1: General Requirements

No additional discussion is necessary.

§900-2.3 Exhibit 2: Overview and Public Involvement

No additional discussion is necessary.

§900-2.4 Exhibit 3: Location of Facilities and Surrounding Land Use

Subsection (a)

Paragraph (1)

Comment

Several commenters expressed concern that §900-2.4 outlines a process of information gathering and consultation but provides no clear mechanism to influence renewable energy siting facility siting.

Discussion

The information to be provided in §900-2.4 will assist the Office in evaluating the potential siting impacts of proposed solar and land-based facilities. No change is warranted.

Comment

Several commenters raised concerns about the absence of Battery Energy Storage Systems (BESS) siting from the regulations.

Discussion

A BESS is considered an ancillary component of a major renewable energy facility that would be subject to the facility's design review. Major renewable energy facilities (including BESS components) must comply with the New York State Uniform Fire Prevention and Building Code. In 2020, the New York State Uniform Fire Prevention and Building Code adopted the latest safety considerations for BESS in the nation. All applicable provisions of the codes and industry standards as referenced in the New York State Uniform Fire Prevention and Building Code create an all-encompassing process to safely permit all types of BESS. No change is warranted.

Comment

Several commenters requested revising the text in §900-2.4(a)(1) to exclude temporary features from the map requirements so that only permanent ancillary features located on the facility are mapped.

Discussion

The location of all ancillary features, including temporary ones, are relevant to the siting of a major renewable energy facility. No change is warranted.

Paragraphs (2)-(3)

No additional discussion is necessary.

Subsection (b)

Comment

Commenters proposed deletion of §900-2.4(b) requiring maps showing the location of the facility and all ancillary features.

Discussion

Facility and ancillary features location maps are essential in the siting process. No change is warranted.

Subsections (c)-(d)

No additional discussion is necessary.

Subsection (e)

Comment

A commenter noted that because the construction of wind farms involves cranes and other heavy equipment, all pipeline locations should be identified and avoided. In addition, the commenter suggested that applicants should be required to enter into an agreement with the pipeline owner and deed owner.

Discussion

Per §§900-2.6(f)(1)(i)(*d*) and (f)(1)(ii)(*f*), any known existing utilities (including pipelines and associated rights-of-way) shall be identified on required site plans, and per §900-10.2(c)(3), copies of any agreements entered with the owners/operators of existing high-pressure gas pipelines regarding the protection of those facilities will be required to be filed as pre-construction compliance filings. In general, the Office will assess any potential impacts to existing utilities and review proposals of applicants' plans regarding protection measures of utilities and outreach to owners/operators. No change is warranted.

Subsections (f)-(g)

No additional discussion is necessary.

Subsection (h)

Comment

A commenter requested that §900-2.4(h) be expanded to include county Natural Resources Inventory reports because not all municipalities have comprehensive plans.

Discussion

An applicant may elect to include county government Natural Resources Inventory reports in circumstances where a municipality does not have an adopted Comprehensive Plan. No change is warranted.

Subsections (i)-(l)

No additional discussion is necessary.

Subsection (m)

Comment

Requests were received to limit the radius requirement for the compatibility assessments to 300 feet instead of 1 mile.

Discussion

The Office finds that to thoroughly understand the surrounding area, a 1-mile radius and/or the study area should be considered in the qualitative assessment regardless of the type of facility. No change is warranted.

Subsections (n)-(o)

No additional discussion is necessary.

Subsection (p)

Comment

A commenter suggested that §900-2.4(p) be revised to require the submission of aerial photographs depicting only current land uses. Another commenter requested that the Office delete this requirement in its entirety.

Discussion

Aerial photographs are essential in the siting process, particularly in assessing the compatibility of a facility in relation to existing surrounding land uses, other development occurring within the area, and other information which may not be included or available in maps. No change is warranted.

Subsections (q)-(s)

No additional discussion is necessary.

Subsection (t)

Comment

Commenters recommended that developers should site projects within brownfield sites instead of greenfield sites. Commenters also asked what level of remediation would be required to permit a facility if a brownfield site were to be developed. Another commenter requested more specific guidance on the use of a contaminated site for renewable energy facilities, especially to address brownfield sites where remediation activities have not been properly implemented and how the construction or operation of renewable energy facilities could impede corrective actions required for site remediation.

Discussion

The regulations encourage the development of major renewable energy facilities on repurposed sites with a history of environmental contamination and require a final determination on such facilities within six months of the Office deeming the application complete (§900-9.1(a)(1)). For a site that has not been remediated under the oversight of NYSDEC, the applicant must provide the results of the Phase 1 and/or Phase 2 Environmental Site Assessment (ESA) per §900-2.4(t)(1) and determination by a qualified Licensed Professional Engineer that it is not anticipated that hazardous substances would be encountered during construction and/or operation of the facility. For a site that has been remediated under the oversight of the NYSDEC and received a Certificate of Completion or No Further Action letter from the NYSDEC, §900-2.4(t)(2) requires copies of the NYSDEC Site Management Plan and any deed or land use restrictions imposed, together with a certification by the applicant that it will implement and comply with the Site Management Plan, including any future clean-up measures. No change is warranted.

Subsection (u)

Paragraph (1)

Comment

Commenters suggested that the use of magnetometers should not be required unless suspected wells cannot be located.

Discussion

For any area of disturbance within 500 feet of a known oil, gas, or mineral solution well, the applicant must conduct a survey of that area of disturbance to determine the presence of any additional, unmapped wells. The Office has clarified §900-2.4(u)(1) with respect to the extent of the required survey.

As noted in §900-2.4(u)(1), an applicant may request the Office to approve a methodology other than the use of a magnetometer. No further changes are warranted.

Paragraphs (2)-(3)

No additional discussion is necessary.

§900-2.5 Exhibit 4: Real Property

Subsections (a)-(b)

No additional discussion is necessary.

Subsection (c)

Comment

Commenters requested that §900-2.5 be revised to only require information available to the applicant at the time of application submission, and that the real property record should be submitted with the pre-construction compliance filing under §900-10.2(h).

Discussion

Section 900-2.5 presumes only due diligence to reveal publicly recorded encumbrances at the point of application. A demonstration of full land control is required during pre-construction filing (§900-10.2(h)). No change is warranted.

Subsections (d)-(e)

No additional discussion is necessary.

§900-2.6 Exhibit 5: Design Drawings

Subsection (a)

Comment

Commenters requested that general site plan drawings be allowed in §900-2.6 instead of construction-ready drawings, to allow for flexibility if amendments or minor changes are required.

Discussion

In order for the Office to timely consider the proposed facility, §900-2.6 identifies the level of detail required for the Office to review and approve proposed land-based wind and solar facilities. No change is warranted.

Subsection (b)

Comment

Multiple commenters raised concerns regarding, and requested increased, property boundary setbacks requirements for wind and solar facilities set forth in Table 1 in §900-2.6(b) and Table 2 in §900-2.6(d), respectively, whereas other commenters supported the setbacks and requested a decrease. Concerns raised included proximity to residences and non-participating properties and safety related to wind tower

collapse, blade failures, ice throw, debris throw distances greater than tower height, noise, shadow flicker, solar panel structure failure, and proximity to hazardous material remediation sites. Other requests were made to establish new setbacks in consideration of noise and visual impacts, proximity to mature forests with trees over 75 feet tall, effects of vehicle accidents, and proximity to roads.

Discussion

The Office's primary concern is the health and safety of all New Yorkers, and the Office will continue to consider that paramount concern in its decisions. To protect public health and safety as well as property owners' rights, the regulations set forth minimum setback requirements based on careful consideration of the best practices for siting renewable energy projects, engineering guidelines, past precedents for Article 10 cases and typical local law requirements in New York State. Section 900-2.6(f)(5) requires that applicants submit manufacturer information regarding the design, safety, and testing information and Section 900-2.6(b) requires wind facilities meet the setback requirements in Table 1 or manufacturer setbacks, whichever are more stringent.

The setbacks will be determined for each permit application based on site-specific factors and may need to be increased beyond these minimum distances in order to address regulatory requirements regarding potential public health and safety concerns as well as other potential siting impacts such as noise, visual, environmental, cultural, etc. For example, noise levels at residences and other sensitive receptors do not only depend on distances, but also on other relevant factors such as noise emissions from the wind turbines and the number of turbines in the vicinity. Therefore, noise impacts are better addressed with absolute noise limits at the receptors and by including cumulative noise impacts from all operational sound sources in the assessment. Section 900-2.8 thoroughly establishes the design goals, methodologies, scope, and documentation to be considered in the noise and vibration studies and application materials; and §900-6.5 establishes noise limits and compliance requirements to be applied during operation of the facilities.

The regulations provide a framework to avoid, minimize or mitigate, to the maximum extent practicable, significant adverse siting impacts to the surrounding community and environment. The Office will evaluate all the above listed concerns and factors on a case-by-case basis for each impact category prior to determining if proposed setbacks are acceptable. No change is warranted.

Comment

Commenters expressed concerns regarding containment of hazardous materials, including during high wind, flood, and fire emergencies.

Discussion

A Safety Response Plan is required under §900-2.7(c). The Safety Response Plan shall include a description of all on-site equipment and systems to be provided to prevent or handle fire emergencies and hazardous substance incidents in compliance with the fire code section of the New York State Uniform Fire Prevention and Building Code adopted pursuant to Article 18 of the Executive Law, and a description of all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident. Additionally, §900-2.19(i) requires an analysis of whether all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident can be fulfilled by existing local emergency response capacity and identification of any specific equipment or

training deficiencies in local emergency response capacity. Such analysis is to be undertaken in consultation with the affected local emergency response organizations. No change is warranted.

Subsections (c)-(d)

See setbacks discussion above. No additional discussion is necessary.

Subsection (e)

Comment

Some commenters stated that the ground mounted solar array height allowances are too tall and cause visual impacts, whereas others opined that the allowance should be increased from 20 to 30 feet.

Discussion

The height limit is based on careful consideration of the best practices for siting renewable energy projects, past precedents for Article 10 cases and typical local law requirements in New York State. In developing this limit, the Office has balanced a number of relevant considerations, including visual impacts, impacts to agricultural lands, and safety concerns. No change is warranted.

Subsection (f)

Paragraph (1)

Comment

One commenter noted that the two hard copies of site plan drawings required in §900-2.6(f)(1)(i) were unnecessary as applicants are already required to provide five copies of the application and one full-size hard copy of drawings.

Discussion

Per §900-1.6(a), applicants are required to file an electronic copy and five paper copies of the application with the Office, which are expected to include 8.5” by 11” or 11” by 17” drawings; one of those paper copies should include two full size (i.e., 22” by 34”) drawings. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

Comment

Some commenters suggested procedural changes, including that site suitability reports from the original equipment manufacturers of wind turbines (showing compatibility with existing facility conditions) be submitted during pre-construction filings instead of as part of §900-2.6; others recommended that this requirement be deleted.

Discussion

For the Office to timely consider the proposed facility, the required site suitability analyses should be provided for each turbine type proposed in the application. However, this requirement does not preclude

any applicant from providing supplemental analyses for any other turbine types that are considered after the filing of the application, as final details of the design and layout of the facility are refined, and wind turbine technologies evolve. No change is warranted.

Paragraphs (4)-(5)

No additional discussion is necessary.

§900-2.7 Exhibit 6: Public Health, Safety and Security

Comment

A commenter expressed overarching concern that Occupational Health and Safety Act (OSHA) regulations are not clearly defined throughout the regulations.

Discussion

The applicant is required to comply with any and all applicable OSHA regulations during construction and operation of a facility. Since the Office is not authorized to oversee compliance with OSHA, issuance of a siting permit does not relieve an applicant from relevant OSHA requirements. No change is warranted.

Comment

A commenter suggested that the regulations require a third-party project certification (particularly for wind turbines) related to the evaluation of site-specific, wind turbine risk analysis, in order to achieve stable operation and proper risk evaluation/management.

Discussion

Third-party project certification is not required as the Office will review and assess each (wind turbine) facility to ensure that a site is designed in accordance with manufacturer guidelines, based on site suitability reports, and §900-10.2(d) requires wind turbines to be certified in compliance with the International Electrotechnical Commission (IEC) 61400-1 standard to minimize risk. The NYSDPS and the NYSPSC have the authority to monitor, administer, and enforce compliance with all terms and conditions set forth in the Office-issued siting permit, including, but not limited to, the authority set forth in Sections 25, 26, and 68 of the PSL and implementing regulations. No change is warranted.

Subsection (a)

Comment

Several commenters recommended deleting all of §900-2.7(a) requiring a discussion of efforts made to avoid and minimize potential adverse impacts to public health and safety by a facility during construction and operation.

Discussion

The requirement for applicants to identify mitigation and monitoring measures is necessary to ensure potential adverse impacts to public health, safety, and the environment are minimized and/or avoided. No change is warranted.

Paragraphs (1)-(2)

Comment

Several commenters suggested that §900-2.7(a) include the addition of a statement that requires applicants to identify and quantify hazardous substances present at the facility.

Discussion

Per §900-2.7(a)(1), all gaseous, liquid, and solid waste brought on-site, or generated during construction and operation of the facility must be identified and quantified, and proper collection, handling, storage, transport, and disposal measures must be implemented to avoid impacts to the environment. Additionally, §900-2.7(a)(2) addresses anticipated waste volumes to be released into the environment during construction and under any operation condition of the facility. No change is warranted.

Paragraph (3)

No additional discussion is necessary.

Paragraph (4)

Comment

One commenter requested removing the requirement to dispose of hazardous waste from §900-2.7, noting that hazardous waste disposal is not applicable to the construction of renewable energy facilities.

Discussion

If §900-2.7(a)(1) is not applicable to an applicant, this should be explained in the application. No change is warranted.

Paragraph (5)

No additional discussion is necessary.

Paragraph (6)

Comment

Several commenters expressed their concerns about public health and noise, vibration, infrasound, radiation, electromagnetic fields, and stray voltage associated with wind turbines. For instance, a commenter raised concerns regarding wind turbine noise, noting that the health of rural communities was not being considered and that the state could disregard local laws protecting the health and safety of residents during the approval process. Such potential health concerns that were raised includes migraines, dizziness, nausea, anxiety, ear pressure, heart palpitations, sleep disturbances, vertigo, and tinnitus. Additional concern was raised regarding the lack of research around the health effects on people in the vicinity of wind farms, including suffering from Wind Turbine Syndrome.

Discussion

The health and safety of nearby residents is of paramount concern to the Office. The Office developed the wind noise regulations to protect public health and safety and considered varied environments including those of rural communities in their development. A 45 A-weighted decibel (dBA)

$L_{eq\ (8\text{-}hour)}$ noise limit was found to be safe by the New York State Board on Electric Generation Siting and the Environment after analyzing the World Health Organization (WHO) guidelines, the Health Canada studies, the Lawrence Berkeley National Laboratory studies, and other studies presented under Article 10 cases.

In 2016, the Ministry of the Environment of Japan issued a report evaluating wind turbine noise and its effects, based on the review of an expert review panel, which echoed similar studies conducted in other jurisdictions including but not limited to Canada, Australia, Massachusetts, and Oregon. After careful assessment of the evidence obtained from peer reviewed research results from around the world, it was concluded that wind turbine noise likely has no negative effects on human health; however, wind turbine noise can lead to annoyance. No clear association is seen between infrasound or the low-frequency noise of wind turbine noise and human health. Some research results suggest that wind turbine noise related annoyance is also affected by other issues such as visual aspects or economic benefits. No change is warranted.

Comment

One commenter indicated that public health impacts associated with stormwater runoff, and disposal of project components during decommissioning and/or damaged components should also be considered in §900-2.7.

Discussion

Section 900-2.14(c)(2) states that the applicant must prepare a plan in accordance with the New York State Stormwater Management Design Manual, which identifies the post-construction stormwater management practices that will be used to manage stormwater runoff from the developed facility site. Section 900-2.24 thoroughly addresses the requirements for site restoration and decommissioning including safety and the removal of hazardous conditions. No change is warranted.

Comment

A commenter recommended that "participants" and "non-participants" be treated similarly regarding public health and safety, specifically with respect to noise limits. As such, it was recommended that the Office delete the references to non-participants at §§900-2.8(b)(1)(*i*), 900-2.9(d)(6), and 900-10.2(h)(3).

Discussion

Based on past precedents and scientific literature, annoyance for participating residents receiving compensation is lower than for non-participating residences when exposed to the same noise levels. Further, the evidence also shows that at a 55 dBA noise level annoyance for participating residents receiving compensation is not greater than annoyance for non-participating residents when exposed to a lower 45 dBA noise level.

In addition, review of the evidence discussed in the WHO's 2009 guidelines showed a zero risk for cardiovascular disease for people exposed to long-term noise levels between 50 dBA L_{night} and 55 dBA L_{night}) during the nighttime period. Therefore, the Office does not see a reason to modify precedents and apply the same limits to both participating and non-participating receptors. No change is warranted.

Paragraphs (7)-(9)

No additional discussion is necessary.

Subsection (b)

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

Commenters suggested edits to §900-2.7(b) to address concerns related to security and surveillance facilities. For instance, a request was made to limit electronic security/surveillance coverage to a facility property only, citing privacy concerns.

Discussion

The Site Security Plan is intended to ensure safe operations of the facility, and the electronic security/surveillance features will need to be inclusive of all facility components. No change is warranted.

Paragraph (3)

No additional discussion is necessary.

Paragraph (4)

Comment

Commenters proposed deleting §900-2.7(b)(4) regarding lighting of facility components to ensure aircraft safety.

Discussion

This information is required to ensure that the proposed facility will not pose safety risks to aircraft and public safety. No change is warranted.

Paragraph (5)

No additional discussion is necessary.

Subsection (c)

Paragraphs (1)-(5)

No additional discussion is necessary.

Paragraph (6)

Comment

Commenters expressed concerns about fire hazards associated with BESS and included the need to ensure local fire departments are funded, equipped, and adequately trained to handle fires and emergency

responses as needed in the event of an emergency at facilities with a BESS on-site. Another commenter stated that BESS should not be in residential communities due to the risk of toxic fires and explosions.

Discussion

Section 900-2.7(c) requires a "Safety Response Plan" including a description of all on-site equipment and systems including any BESS to be provided to prevent or handle fire emergencies and hazardous substance incidents in compliance with the fire code section of the New York State Uniform Fire Prevention and Building Code adopted pursuant to Article 18 of the Executive Law, and a description of all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident. Additionally, §900-2.19(i) requires an analysis of whether all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident can be fulfilled by existing local emergency response capacity and an identification of any specific equipment or training deficiencies in local emergency response capacity. No change is warranted.

Paragraph (7)

Comment

Several commenters proposed revising the text in §900-2.7(c)(7) to require applicants to offer training drills instead of conducting training drills with emergency responders at least once per year. This was echoed by another commenter who explained that an applicant cannot require emergency responders to participate in such training drills. Other commenters indicated that training should occur twice per year to account for how emergency responses might differ between the summer and winter seasons.

Discussion

It is critical to the public's health and safety to ensure that emergency responders are trained to respond to incidents when needed. Section 900-2.7(c)(7) requires that emergency training drills be performed at least once per year. If a community requests drills completed more than once per year, that may be considered by the applicant. If local emergency responders refuse to attend annual training drills, documentation of such should be provided with a permittee's post-construction compliance filings. No change is warranted.

Subsection (d)

Comment

Several commenters suggested that public input be included in the review of the applicant's Safety Response Plan in addition to local and county emergency responders and by state officials. For instance, commenters requested that emergency access roads to facilities be considered and evaluated by the local fire departments to ensure adequate access during emergency response related to potential fires associated with renewable energy systems such as BESS, and for facilities located within close proximity to forests (and the potential for forest fires).

Discussion

Per §900-2.7(b - d), the applicant must develop a Site Security Plan and Safety Response Plan and coordinate with State Division of Homeland Security and Emergency Services, which will assess whether the plans are adequate based on local resources and ensure that local responders are equipped and

adequately trained to handle the potential fire and emergency response. Additionally, the applicant's application and all safety plans will be made available on the Office website. No change is warranted.

Subsection (e)

Comment

Commenters requested that the regulations include consultation with the Fire Department of the City of New York during the siting and construction phases of projects to identify and resolve concerns between the State Code and City's Fire Code, and to ensure safe construction and operation of projects. A commenter specifically noted that the New York State Uniform Fire Prevention and Building Code was inadequate for projects that include BESS in dense urban environments, such as New York City. Commenters requested that BESS associated with major renewable energy facilities in New York City also conform to the New York City Fire Code.

Discussion

Executive Law §94-c specifies that a siting permit may only be issued if the Office makes a finding that the proposed facility, together with any applicable USCs and site-specific permit terms and conditions, would comply with applicable local laws and regulations, such as the New York City Fire Code, unless the Office determines that any provision of such local law or regulation would be unreasonably burdensome, taking into account the CLCPA targets and the environmental benefits of the facility. During consultations with local communities, a review of the project plans, including access by the local emergency responders, is anticipated. Additionally, §900-2.7(e) requires that if a facility is located within a city with a population over one million, the applicant must provide copies of their Site Security Plan and Safety Response Plan and request review and comment of such plans by the Local Office of Emergency Management to ensure compliance with the applicable local codes. No change is warranted.

§900-2.8 Exhibit 7: Noise and Vibration

Comment

Commenters provided an extensive review of §900-2.8 and §900-6.5 of the draft regulations and recommended editing several sections.

Discussion

The Office developed §900-2.8 and §900-6.5 to protect public health and safety as well as property rights. The regulations were developed based on careful consideration of the best practices for siting renewable energy projects and past precedents from Article 10 cases. Section 900-2.8 refers to the design goals, methodologies, scope, and documentation to be considered in the noise and vibration studies and application materials; and §900-6.5 refers to noise limits and compliance requirements to be applied during operation of the facilities. Some non-substantive clarifications to regulatory language have been made in response to recommendations from commenters. No further changes are warranted.

Subsection (a)

Comment

Several commenters requested that commercial businesses (e.g., banquet facilities, motels, inns, and similar businesses), as well as seasonal residences, cabins, and hunting camps, that could be adversely impacted by excessive noise, be added to the list of sensitive receptors. Commenters requested clarification on whether the noise limits will apply to a residence built after the project is permitted, and thus force the permittee to modify the project to comply with the limits.

Discussion

The regulations allow additional noise limits at other sensitive sound receptors on a case-by-case basis (e.g., hospitals, schools, churches, libraries). As required by §900-2.8(h)(1), a cabin identified by property tax codes and any other seasonal residence must be identified in a map as a sensitive sound receptor. Noise limits for wind facilities set forth in §900-6.5(a) apply to any residence existing as of the issuance date of the siting permit. If a residence is built after a project receives a permit, the permittee is not required to modify the project to comply with sound limits unless specified in the permit. No change is warranted.

Comment

One commenter expressed concern regarding the qualifications of the applicant's consultants, noting that the Office should require applicants to use certified experts to develop their noise studies.

Discussion

The regulations require the qualifications of the preparer(s) of the studies to be stated and provide details of professional certifications. No change is warranted.

Comment

A commenter stated that the operational noise study should demonstrate compliance with specified maximum noise limits for land-based wind and solar facilities to be consistent with the USCs. Multiple commenters raised concerns regarding the stated noise limits and asked how compliance would be assessed.

Discussion

The intent of the noise study is to demonstrate compliance with specified maximum noise limits for wind and solar facilities, and the noise study is consistent with the intent of the USCs. The overall intent of the noise and vibration threshold limits is to protect the public health and property owners' rights, minimize annoyance, and allow the safe use and development of property. No change is warranted.

Subsection (b) Design Goals

Comment

Several commenters recommended the use of noise limits used in other jurisdictions, citing that the proposed limits of 45 dBA $L_{eq\ (8\text{-}hour)}$ at non-participating residences and 55 dBA $L_{eq\ (8\text{-}hour)}$ at participating residences were too high, especially in rural environments. One commenter recommended adjusting acoustic modeling results for rural areas according to American National Standards Institute (ANSI) standard S12.9 Part 4. One commenter requested that a qualitative screening assessment be conducted in addition to the numerical modeling analysis, to assess the potential for a community to become highly annoyed during project operations. Additional comments recommended removing the different limits for

project participants and non-participants. Further suggestions were made to increase noise limits for solar facilities from 45 dBA $L_{eq\ (8\text{-}hour)}$ to 50 dBA $L_{eq\ (8\text{-}hour)}$ for non-participating residences for the daytime and revise the definition of daytime (7 a.m. to 10 p.m.) for "start of twilight" to the end of "twilight" to allow flexibility during the daytime.

Some commenters advised that the Office prescribe daytime and nighttime incremental sound level increase limits, such as 6 dBA above ambient as is included in the NYSDEC Noise Policy. One resident recommended that adjustments be made to account for characteristics such as amplitude modulation and low frequency sound when analyzing potential noise impacts associated with wind energy facilities.

Discussion

A maximum noise limit of forty-five (45) dBA $L_{eq\ (8\text{-}hour)}$, at the outside of any existing non-participating residence, and fifty-five (55) dBA $L_{eq\ (8\text{-}hour)}$ at the outside of any existing participating residence is the threshold for both wind and solar facilities. Further limitations are imposed on collector substations associated with solar and wind facilities. Through careful research of scientific literature, engineering guidelines, and based on past precedents in the State of New York, the Office has determined that the prescribed limits are sufficiently protective of adverse effects on non-participating and participating receptors, respectively. In addition, the regulations include provisions for evaluating potential prominent tonal sounds, amplitude modulation, infrasound, low frequency noise and perceptible vibrations. Definitions of daytime (7 a.m. to 10 p.m.) and nighttime (10 p.m. to 7 a.m.) are fairly standard across the United States and any special operating hours related to solar facilities will be addressed within the site-specific acoustic assessment. No change is warranted.

Regarding the use of relative assessments, no provision requires a relative criterion. Instead, the criterion is based on absolute noise levels as recommended by applicable ANSI Standards and WHO guidelines. WHO guidelines do not show any correlation between a relative change in noise levels and adverse health outcomes. For these reasons, the use of absolute noise limits is adopted in the regulations rather than the use of relative methodologies. No change is warranted.

Comment

Commenters requested that regulatory noise limits be applied at residential property lines rather than outside of residences. Others commented that a 55 dBA noise limit at property lines will often result in turbine setbacks of 400 feet and could be more restrictive than a noise limit at a non-participating residence, and that it is unclear whether the limits apply to boundary lines of schools and other receptors.

Discussion

The Office disagrees with applying the same limits imposed to residences for the boundary lines. The regulations adopted a design limit of 55 dBA $L_{eq\text{-}8\text{-}hour}$ at any non-participating land excluding wetlands and rights-of-way. Therefore, the limits also apply to schools and any other properties regardless of land use, as long as they do not participate in the project.

Noise levels at sensitive receptors do not only depend on distances, but also on other relevant factors such as noise emissions from the turbines and the number of turbines in the vicinity. Therefore, noise impacts are better addressed with noise limits at the receptors and by including cumulative noise impacts from all operational sound sources in the assessment. In general, a sound limit at a boundary line

may be less or more protective or restrictive than a sound limit at a residence, depending on the layout and other considerations. No change is warranted.

Comment

A commenter recommended reducing short-term sound limits to compensate for nighttime noise impacts, low-frequency components, infrasound, inaudible vibrations, and amplitude modulated sounds. The commenter stated that the $L_{eq\ 8\text{-}hour}$ noise descriptor is too long and ignores excessive amplitude modulations and recommends the use of sound pressure levels acquired with the sound meters set to a fast response, rather than the use of $L_{eq\ 1\text{-}hour}$ noise descriptor, because the latter obscures fluctuations, and is not informative of amplitude modulated and low frequency sounds.

Commenters also requested applying the indoor noise limits for the low frequency bands of 16 Hz, 31.5 Hz, and 63 Hz specified in the ANSI/ASA S12.2 indoor standard and reducing them by 5 to 10 dB to compensate for amplitude modulation. The commenters recommended using a short-term noise limit lower than 45 dBA to comply with the 45 dBA L_{den} recommendation from WHO-2018.

Discussion

Other than for hearing impairment, the $L_{eq\text{-}8\text{-}hour}$ metric is the shortest noise evaluation period used by WHO's 1999 guidelines for the L_{eq} noise descriptor. Other descriptors such as the L_{night} and the L_{den} recommended by WHO in 2009 and 2018, respectively, refer to one-year descriptors which are longer, not shorter than the 8-hour and 1-hour descriptors. No change is warranted.

Regarding the use of the indoor standard ANSI 12.2 rather than the use of the outdoor standard ANSI S12.9 Part 4, Annex D, the recommendations from both standards are the same for the 16 Hz and 31.5 Hz full-octave bands, but the recommendation of ANSI S12.9 Part 4 outdoor standard for the 63.5 Hz band is 5 dB lower than the recommendation from ANSI S12.2 indoor standard for the same band (65 dB versus 70 dB). Selecting an indoor sound standard is inappropriate and the regulation instead requires the evaluation of outdoor sound levels. No change is warranted.

Comment

Several commenters recommended deleting the provisions in the regulations that prohibit the presence of prominent tones, as it is allowed if a 5 dBA penalty is applied. In addition, commenters recommended using the definition of prominent discrete tones included in the 2005 version of ANSI/ASA S12.9 Part 4, rather than the 2013 version of S12.9 Part 3 in §900-2.8(e)(1), because the latter may result in false tonalities. Other commenters stated that the simplified definition may provide false negatives for tones, and recommended that other methods, such as narrow band methods included in IEC 61400-11 or ANSI S1.13 Annex A, be used before deciding whether a tonal penalty should be applied to sound levels from wind turbines.

A commenter requested that the prominent tone 5 dBA penalty be applied during the design phase as a goal for electrical connection facilities for evaluation of compliance per §900-2.8(b)(1)(ii) for wind facilities, and §900-2.8(b)(2)(iii) for solar facilities. For the evaluation of prominent tones for the design in §900-2.8(e)(2), a commenter requested that the assumption of "prominent" be eliminated and that the assumption of "tonal" be restricted to substation transformers rather than any other sources.

Discussion

The Office has clarified the prohibition on prominent tones in subsections (b)(1)(ii) and (b)(2)(iii), to be consistent with the requirement to apply a 5 dBA penalty for tonality. The constant level differences recommended in the regulations and both ANSI standards are the same. Procedures for preventing false tonalities are expected to be included in Sound Testing Compliance Protocols prescribed in the regulations. No change is warranted.

Regarding requiring the use of narrow-band methods to define prominent tones, the Office notes that it uses the simplified definition for prominent tones and does not require tonal penalties different than the one indicated in the regulations. No change is warranted.

Finally, the Office identifies transformers as a tonal noise source, and noise levels from substations for both solar and wind facilities must comply with the 40 dBA noise limit with a 5 dBA penalty to be applied if a prominent tone occurs or is expected to occur. Therefore, a 5 dBA penalty should be included in the design phase for electrical transformers. The same assumption is reasonable for other predominantly tonal noise sources that can operate continuously during the nighttime or daytime. No other change is warranted.

Comment

Some commenters requested eliminating measurement of the 16 Hz full-octave band in §900-6.5(a)(1)(iii) because of the lack of scientific publications that indicate that low frequency sound levels below 31.5 Hz pose an annoyance indicator for residences unless the noise is audible, and because they are addressed with indoor vibration measurements after complaints are reported. Commenters indicated that the method for extrapolating information below what is available from the manufacturer seems arbitrary and will contribute further to the uncertainty of any results.

Discussion

The regulations do not allow sound levels to exceed a 65 dB sound limit at the infrasound full octave band frequency of 16 Hz and the low frequency bands of 31.5 Hz and 63 Hz at any non-participating receptor. The limits not only prevent airborne induced vibrations, but also minimize annoyance from low frequency sounds as stated in the nationally recognized standard. No change is warranted.

Comment

Several commenters expressed their concern about vibrations from wind turbines.

Discussion

The regulations do not allow the creation of vibrations on existing structures exceeding the limits for human perception defined in national ANSI standards. No change is warranted.

Subsection (c) Radius of Evaluation

Comment

Commenters requested clarification regarding the approach to perform the assessment of cumulative effects, specifically how the “noise budget” would be distributed between two projects being developed in the same area but separated in time. Commenters noted two approaches to considering the cumulative noise budget. In the first approach, the first project that makes its facility layout (turbines, etc.)

public takes precedent and claims its noise budget, whereas any subsequent project(s) includes the previous project and may only use the remaining portion of the overall noise budget. However, if the first project changes its facility layout, it must account for any other projects in order not to encroach on the remaining budget that other projects have claimed. In the second approach, the first project with an application deemed complete claims the available noise budget, whereas any subsequent project(s) in queue or in review would have to revise and include other project's contribution. This second approach avoids additional complexity if there are project changes, but also provides uncertainty for other projects that are not developed first, as they would have to wait before knowing if their project should be re-designed.

The commenters recommended changes to clarify that the purpose of the cumulative analysis is not to evaluate compliance in conjunction with facilities outside of the permittee's control but rather identify whether site-specific conditions are warranted. Other commenters recommended elimination of references to the 30 dBA noise contour to define the area of evaluation and leave the radius of evaluations exclusively.

Discussion

The regulations clearly state that the acceptable approach to assessing cumulative effects for a wind facility is to evaluate noise from any wind turbines, as well as substations existing and proposed by the time of filing the application and any existing sensitive receptor within a two (2) mile radius from any wind turbine or substation proposed for the facility. For solar facilities, the cumulative noise evaluation shall include noise from any solar facility and substation existing and proposed by the time of filing the application and any existing sensitive receptors within a three thousand (3,000) foot radius from any noise source proposed for the facility or within the thirty (30) dBA noise contour, whichever is greater. The purpose of conducting a cumulative effects analysis is to ensure total potential noise impacts from all contributing wind and/or solar facilities are considered when determining potential future received sound level impacts at sensitive receptors. Therefore, this subsection has been clarified to denote that for projects with potential cumulative noise impacts as defined in §900-2.8(c), the assessment should be conducted on both a cumulative and non-cumulative basis. The Office finds that the use of the 30 dBA noise contour, in combination with a criterion based on distance, is a practical way to define the minimum area of evaluation for solar facilities, and that the subtitle and the 30 dBA noise contour should be clarified to refer to both the radius or the area of evaluation and the cumulative and non-cumulative noise contour respectively. Accordingly, no other changes are warranted.

Subsection (d) Modeling standards, input parameters, and assumptions

Paragraph (1)

Comment

Commenters requested that applicants forecast future noise impacts from wind projects by assuming stable atmospheric conditions and high wind shear.

Discussion

The regulations contain the minimum requirements to conduct computer noise modeling, and applicants are free to use conservative assumptions that exceed the minimum requirements to forecast future noise levels for wind facilities at any atmospheric propagation conditions. Regardless, applicants are required to demonstrate compliance with noise limits under the regulations, which refer to maximum sound

levels at receptors, and compliance protocols have not precluded post-construction testing at any atmospheric condition (e.g., stable, neutral, or unstable). No change is warranted.

Comment

Commenters recommended restricting noise modeling under §900-2.8(d)(1)(i) to noise sources that can operate simultaneously; eliminating the terms "maximum" from §§900-2.8(d)(1)(iv) and (v); eliminating the 1-hour and 8-hour time frame requirements in §§900-2.8(d)(1)(iv) and (v); and reporting the 31.5 and 63 Hz band results exclusively, rather than all full-octave band levels from 31.5 Hz. up to 8,000 Hertz in §900-2.8(d)(1)(iv).

Discussion

Noise modeling should be conducted at a minimum with all noise sources operating simultaneously in a single scenario and applicants may submit additional scenarios when noise sources do not operate simultaneously, as appropriate (e.g., nighttime). Modeling for the maximum 1-hour and 8-hour time periods is typically the same and results are often used indistinctly. The 8-hour timeframe should be used when evaluating conformance with overall dBA Leq (8-hour) noise limits (e.g., §§900-2.8(b)(1)(i) and (vi)), while the 1-hour designation should be used when evaluating compliance with low frequency sounds and noise limits from the collector substation equipment (e.g., §§900-2.8(b)(1)(iii) and (v)). Since multiple noise impacts from wind and solar facilities occur at different bands of the spectra, all full-octave band level results should be reported. No change is warranted.

Comment

Commenters stated that the ground factors outlined in §900-2.8(d) should be specified as a maximum.

Discussion

Ground absorption factors are already specified as maximum values and the regulations do not restrict applicants from using lower, more conservative values. No change is warranted.

Paragraph (2)

Comment

Some commenters requested specifying that the sound power levels in §900-2.8(d)(2)(i) should be denoted as "apparent", as specified in IEC Standards, and proposed minor edits in §900-2.8(d)(2)(ii) to clarify the term "uncertainty" as "adjustment".

Another commenter recommended the addition of the uncertainty factor with reference to manufacturer wind turbine specifications. The commenter stated that rather than specifying a 2 dBA uncertainty factor for sound power levels, the value used should be the one demonstrated or warranted by the turbine manufacturer, to prevent in part, that manufacturers game the system by baking the 2 dBA uncertainty factor into their noise specifications.

Discussion

The Office agrees that sound power levels should be referenced as "apparent", as denoted in the IEC 61400-Part 11 standard but disagrees that the 2 dBA should be referenced as "adjustment".

Regarding the uncertainty factor to be added, the regulations allow either the use of a height of evaluation of 4 meters with no uncertainty factor added or the use of a height of evaluation of 1.5 meters with a 2-dBA minimum uncertainty factor added. The regulations do not allow assumptions that result in sound levels that are less conservative than those, but also do not restrict applicants from taking a more conservative approach, including greater uncertainty values. Accordingly, no other change is warranted.

Paragraph (3)

No additional discussion is necessary.

Subsection (e) Evaluation of prominent tones for the design

No additional discussion is necessary.

Subsection (f) Evaluation of low frequency noise for wind facilities

Comment

A commenter stated that the analysis outlined in §900-2.8(f) is needlessly complicated and unlikely to give a reliable result.

Discussion

Subsection 900-2.8(f) provides guidance and simplifications for the analysis when multiple turbine models are considered for the facility, particularly if those models have higher low frequency sound power levels than the turbine used for modeling. Accordingly, the word “shall” in subparagraph (f) has been replaced by “can”. No additional changes are necessary.

Subsections (g)-(h)

No additional discussion is necessary.

Subsection (i)

Comment

Multiple commenters stated that the ambient noise study should be eliminated because it is not used for compliance purposes, the regulations are not prescribed relative to ambient noise, or that it should be optional. Others recommended using the ANSI weighting scale for reporting results per §900-2.8(i).

Discussion

A pre-construction survey following ANSI standards is a uniform method to describe the soundscape before new noise sources are introduced. Sound surveys may be useful to document existing noise sources with the potential for cumulative sound impacts or masking prominent tones. In addition, it may be helpful in finding and documenting any existing manmade prominent tones or low frequency sounds. The regulations require that a pre-construction survey, generally following the recommendations of ANSI standards, should be included in the application. No change is warranted.

Subsection (j)

Comment

Commenters noted that the level of detail required for the construction noise analysis, including specifying the use of the ISO 9613-2 standard and computer noise modeling parameters for construction noise from wind and solar facilities, is more stringent than for other more intensive infrastructure projects, in addition to producing results and displaying construction-related noise contours, which should not be required. Other commenters requested the use of New York State Department of Transportation (NYSDOT) requirements and elimination of §§900-2.8(j)(1) through (j)(4).

Discussion

Elevated noise levels generated during construction are a concern to nearby sensitive receptors even if construction may be considered temporary and/or short-term. The construction noise should be reviewed in a meaningful way to assist in potentially addressing future complaints and possible noise mitigation strategies. No change is warranted.

Subsection (k) Sound Levels in Graphical Format

Comment

Commenters requested using a different scale for hard-copy maps and making the requirements of §900-2.8(k)(4) contingent upon request.

Discussion

Hard copy maps in 1:12,000 scale, as required by the regulations, provide better detail of the map and sound contours and are therefore more legible than in the 1:24,000 scale, as proposed. Making the requirement contingent upon request is impractical and would delay review. No change is warranted.

Subsection (l)

Comment

Commenters requested specifying that design goals and noise limits refer to §§900-6.5(a) or (b).

Discussion

Design goals refer to §§900-2.8(b)(1) or (b)(2) while noise limits refer to §§900-6.5(a) or (b). The requirements are implicit. No change is warranted.

Subsection (m)

Comment

Commenters requested elimination of §900-2.8(m)(1) regarding hearing loss, because sound levels for construction are not extraordinary and §900-2.8(m)(2) regarding potential for structural damage from construction activities, because they are already addressed in Exhibit 10.

Discussion

The application should address potential concerns for hearing loss based on the recommendations from WHO-1999, especially for blasting noise. The scope of §900-2.8(m)(1) is not the same as the scope of Exhibit 10. Although potential for structural damage may already be addressed in Exhibit 10, a summary with the findings should be provided under this section. No change is warranted.

Subsection (n)

No additional discussion is necessary.

Subsection (o)

Comment

Several commenters recommended that the Office reconsider the use of noise reduction operations (NROs) for wind facilities. Commenters requested that restrictions on the use of NROs be eliminated during the design phase in §900-2.8(o)(1) because projects should not be restricted in their ability to deploy NRO strategies or evaluate the use of NRO modes during the permitting and design phases on a case-by-case basis. The commenters stated that placing an arbitrary limit on NROs is not effective as manufacturers can easily game the system.

Discussion

The Office has restricted the use of NRO modes during the design phase to reserve some portion of the NRO's as contingency mitigation options for operation of the facility and ultimately protect public health. By allowing applicants to use less than half of the maximum NRO available for each turbine model, the applicant must consider the level of noise mitigation needed to successfully demonstrate compliance with the requirements. To attain compliance, the applicant may have to explore alternate turbine options, reconfigure some portions of the proposed wind turbine array or propose participation in the project such that potential offsite noise impacts and inclusion of NROs are minimized. No change is warranted.

Subsection (p)

Comment

Commenters requested that the software input parameters, assumptions, associated data, and GIS files required in §900-2.8(p) only be delivered if requested because the level of detail may be overly prescriptive and not necessary in all cases. They also requested expanding the requirements of §900-2.8(p)(5) to energy storage facilities.

Discussion

The information shall be provided in all cases to avoid inefficiencies, multiple rounds of data requests and responses, and delays in the review process.

Energy storage facilities are considered ancillary components of a wind or solar facility and are already listed as noise sources in §§900-2.8(p)(3) and 2.8(p)(5). Other than introduction of the word "energy" in §900-2.8(p)(5) for clarification, no other change is warranted.

Subsection (q) Miscellaneous

Comment

Two commenters asked whether the definition/glossary should be included in the regulations themselves rather than, or in addition to, inclusion in the application.

Discussion

The glossary should describe terminology, definitions, and abbreviations as well as references mentioned in the application. A minor non-substantive clarification was made to the regulations. No further change is warranted.

§900-2.9 Exhibit 8: Visual Impacts

Subsection (a)

Paragraphs (1)-(7)

No additional discussion is necessary.

Paragraph (8)

Comment

A commenter requested that §900-2.9(a)(8) be revised to be consistent with §900-2.9(a)(7) to include above-ground interconnections.

Discussion

The Office has adopted the recommended change.

Paragraph (9)

Comment

One commenter recommended removing §900-2.9(a)(9) requiring an analysis and description of related operational effects of facilities such as visible plumes, shading, glare, and shadow flicker.

Discussion

An assessment of the long-term operational effects of a facility such as visible plumes, shading, glare, and shadow flicker is integral to the assessment and mitigation of potential adverse impacts and needs to be part of the permitting process. No change is warranted.

Paragraph (10)

No additional discussion is necessary.

Subsection (b)

Comment

Multiple commenters expressed concern that the regulations do not address visual impacts with respect to residences or businesses and that these locations should be considered in viewpoint selection. It was suggested that the regulations be revised to require the applicant to solicit input from host municipalities, public interest groups, and residents living in the project area and to allow for a selection of 50 percent of the viewpoints for study and simulations. In addition, commenters suggested that the applicant should be required to conduct at least one open house prior to conducting the visual impact analysis.

Discussion

Section 900-1.3(a)(6) requires the applicant to complete a pre-application meeting with local officials to discuss the proposed facility, including any potential impacts of the facility for which consultation with the municipality(ies) is required to inform the preparation of the visual resources exhibit to the application. Section 900-2.9(b) of the regulations requires a viewshed analysis and mapping of visually sensitive locations and the identification of viewpoints that represent views from important or representative viewpoints. Section 900-2.9(b)(4) requires that applicants confer with municipal planning representatives, the Office, and OPRHP and/or New York State Adirondack Park Agency (APA) in selection of viewpoints to be analyzed, which could include residences and/or businesses. In addition, applicants are required to host at least one meeting with community members, at which time the public can provide input into the visual impact evaluation. Section 900-2.9(b)(4)(v) also requires an evaluation of visual impacts pursuant to the requirements of adopted local laws or ordinances. The analysis is intended to be representative of the range of landscapes and uses in the areas of predicted facility visibility as well as to pinpoint public interest areas and resource locations. No change is warranted.

Paragraph (1)

Comment

Some commenters suggested changing the viewshed analysis maps to depict visibility within a 1-mile radius instead of a 2-mile radius for solar facilities.

Discussion

Viewsheds are dependent on the local topography and are intended to include all surrounding points that are within the line-of-sight, and exclude points that are beyond the horizon, or obstructed by terrain and other features (e.g., buildings, trees). The Office believes that a 2-mile radius for solar facilities is reasonable and appropriate. No change is warranted.

Comment

Other commenters indicated that scenic viewsheds should be protected regardless of distance from the wind turbines and that the regulations should require significant visual resources beyond the specified study area considered.

Discussion

Section 900-2.9(b)(1) requires that a viewshed analysis of facility visibility be conducted within five miles of a wind facility, as well as any potential visibility from specific significant visual resources beyond the specified study area. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

Comment

Several commenters asserted that taller wind turbines visually impact larger areas and recommended increasing the viewshed mapping distance. Multiple commenters suggested the viewshed mapping distance should assess a 2-mile radius for each 100 feet of turbine height.

Discussion

Section 900-2.9(b)(1) requires that a viewshed analysis of facility visibility be conducted within five miles of a wind facility, as well as any potential visibility from specific significant visual resources beyond the specified study area. The requirement of a five-mile radius is reasonable and appropriate. No change is warranted.

Paragraph (4)

No additional discussion is necessary.

Subsection (c) Visual Contrast Evaluation

No additional discussion is necessary.

Subsection (d) Visual Impacts Minimization and Mitigation Plan

Comment

Commenters requested that the text in §900-2.9(d) be modified to clarify that the Visual Impact Minimization and Mitigation Plan (VIMMP) applies to alternative wind and solar technologies as appropriate.

Discussion

The Office has considered this comment and determined that no change is warranted.

Comment

Several commenters requested that the VIMMP be developed through a transparent and collaborative process (initiated prior to application submission) and be required to address any potentially impacted public resources, including any respective adopted municipal or County Scenic Resources Inventory, and to demonstrate that impacts to those resources have been avoided or mitigated to the greatest extent practicable.

Discussion

In addition to opportunities for public engagement at the pre-application stage discussed above (Section 900-1.3), Section 900-2.9(b)(4) requires applicants to confer with the local municipality, the Office, and the OPRHP and/or APA in its selection of important or representative viewpoints. Section 900-2.9(b)(4)(v) additionally requires an assessment of visual impacts pursuant to the requirements of applicable local laws or regulations, which would include evaluating impacts to visual resources included in municipal and County Scenic Resources Inventories that have been incorporated into such local laws or regulations. The VIMMP must include a discussion of minimization and mitigation measures to address impacts to the identified visual resources. No change is warranted.

Paragraphs (1)-(5)

No additional discussion is necessary.

Paragraph (6) Shadow Flicker for Wind Facilities

Comment

One individual suggested that there should be third-party monitoring and/or intervention for shadow flicker.

Discussion

Section 900-2.9(d)(6) indicates that shadow flicker will be subject to verification using shadow modeling and operational controls at appropriate wind turbines. Subsection 900-2.9(d)(6)(ii) requires that the VIMMP include a protocol for monitoring operational conditions and potential shadow flicker exposure, and subsection 900-2.9(d)(6)(iv) includes a protocol for temporary turbine shutdowns to meet the required shadow flicker limits. The protocol is expected to establish all staffing and procedures proposed for the monitoring program. The Office will review the proposed protocol and establish that the proposed monitoring methodology is sufficient for protection of visual resources. No change is warranted.

Comment

Commenters were concerned that the 30-hour annual limit for shadow flicker was too high and would have an impact on drivers, children (particularly in relation to school(s)), local wildlife, and property use where residents may be working or recreating. Commenters also noted that more stringent shadow flicker limits are used elsewhere (e.g., European nations, New Hampshire, etc.) and suggested that shadow flicker be limited to less than 30 hours, and be reduced to 15 hours annually, 30 minutes per day for entire properties, or zero hours, especially for non-participating receptors. Others recommended that shutting down or relocating turbines should be required, as some homes cannot be shielded or blocked from view.

Discussion

Section 900-2.9(d)(6) requires that an analysis of a full year of hourly potential and realistic shadow flicker be determined and establishes a 30-hours-per-year limit at any non-participating residence. The 30-hour limit is consistent with the standards established in past precedents in Article 10 cases and the overwhelming majority of other jurisdictions and is a reasonable limit to avoid nuisance conditions at residential locations. Applying this limit to the residence rather than the adjoining property is consistent with the goal of minimizing the "flickering" nuisance conditions potentially experienced at indoor windowed environments rather than "moving shadow" conditions potentially experienced at outdoor locations. The regulations also provide shadow flicker related requirements for the VIMMP, including a protocol for monitoring operational conditions and potential shadow flicker exposure to resources. No change is warranted.

Paragraph (7) Glare for Solar Facilities

Comment

Commenters requested that the language in §900-2.9(d)(7) be modified to include an analysis that solar glare exposure will be avoided or minimized, and that the phrase "will not result in complaints" be deleted.

Discussion

The Federal Aviation Administration (FAA) developed Technical Guidance for Evaluating Selected Solar Technologies on Airports in 2010 (FAA Guidance). The FAA Guidance recommends that glare analyses should be performed on a site-specific basis using the Sandia Laboratories Solar Glare

Hazard Analysis Tool (SGHAT). Sandia developed SGHAT v. 3.0, a web-based tool and methodology, to evaluate potential glint/glare hazards associated with solar facilities.

Section 900-2.9(a)(9) of the regulations requires the applicant to provide an analysis and description of operational effects of the facility, including glare. The regulations specifically state in §900-2.9(d)(7) that solar panels shall have anti-reflective coatings (ARC) and that the applicant must use the SGHAT or equivalent to ensure that solar glare exposure will be avoided or minimized. No change is warranted.

Paragraph (8)

Comment

One commenter stated that visual screening should be required for solar projects. They suggested that there should be incentives (such as a point system for consideration of environmental resources into a facility's design) for dividing projects into smaller tracts of land to reduce visual impacts.

Discussion

Section 900-2.9(d) requires the applicant to prepare a VIMMP that includes proposed minimization and mitigation alternatives based on an assessment of mitigation strategies, including screening (landscaping) of their proposed facilities. Siting proposed facilities on a number of smaller tracts may not reduce visual and/or forest impacts, as the extent of visual impacts depends on a number of factors including, but not limited to, an area's topography, surrounding land uses, and existing vegetative cover. No change is warranted.

Comment

Multiple commenters pointed out that landscaping is an inadequate mitigation strategy for wind turbines as trees take time to grow and that trees would be too short to adequately screen or block turbine views.

Discussion

Landscaping or similar shielding would be recommended to address visual impacts from building and support facilities and is effective at mitigating light from those facilities. Moreover, plantings added in the foreground can help mitigate visual impacts for larger structures in the background. No change is warranted.

Paragraph (9)

Comment

Multiple commenters expressed concern and suggested that the regulations need to address lighting impacts on viewsheds (including wildlife and the dark, rural nighttime sky) and should require facility lighting that avoids or minimizes off-site light "trespass" or light pollution (such as certified dark-sky friendly lighting). They suggested this should be a consideration particularly during construction of wind turbines and from the use of FAA Aircraft Detection Lighting Systems (ADLS) on wind turbines.

Discussion

Lighting plan requirements, including task and facility lighting, are consistent with industry and OSHA standards to prevent light from leaving a project site. Applicants are required to use the minimum amount of lighting necessary for tasks and safety, including downcast and shielded lights which are effective at minimizing skyward or stray light. Shielding or blocking measures are not limited to example measures identified in the regulations (such as landscape plantings and window treatments per §900-2.9(d)(6)(v)), and the applicant may recommend alternative measures that would also be effective to minimize the visibility of facility components (including turbine and lighting) from specific properties or site conditions.

The regulations require applicants to evaluate visual impacts and develop a VIMMP based on the visual impact assessment. Landscaping is one of many possible light mitigation measures and can be used to improve area aesthetics, screen some portion or all of the project facilities, and restore vegetation impacted by construction. In addition, landscaping located near the viewer may result in a perceived reduction in scale of the built features located at a distance beyond the viewer as it will appear larger and more prominent in the view. No change is warranted.

Comment

Commenters suggested the use of ADLS lighting, and if it cannot be used, facilities be altered or relocated. Other commenters expressed the opposite; asked if ADLS was the preferred method for aircraft safety; and if used, suggested mitigation via the use of radar detecting systems (or that radar be a uniform standard and condition for all projects). Commenters added that if radar-detecting systems cannot be used, the project should be changed to use radar and that an initial determination occur prior to obtaining a permit.

Discussion

The wind facility aviation hazard lighting requirements are determined by technical feasibility (including FAA approval) for least impactful lighting methods. Section 900-2.9(d)(9)(iii)(*c*) of the regulations requires applicants to seek a written determination from the FAA/Department of Defense to approve the use of ADLS or other dimmable lighting options. These systems significantly reduce night-time aviation hazard lighting and help preserve rural character and night skies while maintaining safe airspace. In cases where ADLS is not technically feasible, the regulations require the consideration of other alternatives such as low intensity and/or dimmable and synchronization methods. No change is warranted.

Comment

Other commenters requested deletion of the text after the first sentence of §900-2.9(d)(9)(iii)(*c*) regarding FAA notifications and required determinations on dimmable lighting options or other means of minimizing lighting effects.

Discussion

The Office has considered this comment and determined that no change is warranted.

§900-2.10 Exhibit 9: Cultural Resources

Subsection (a)

Paragraph (1)

Comment

One commenter suggested special consideration be given to cultural resources identified by the community, including indigenous communities and disadvantaged communities.

Discussion

The identification of cultural resources is built into the regulations governing the identification and protection of historic and archaeological resources. The regulations are protective of these communities and interests because they require evaluation of relevant cultural resources and other pertinent social, economic and environmental factors (including environmental justice areas) as required by Executive Law §94-c. Accordingly, the Office has considered this comment and determined that no change is warranted.

Paragraphs (2)-(3)

No additional discussion is necessary.

Paragraph (4)

Comment

Commenters requested amending the regulations in §900-2.10(a)(4) to allow submittal of a work plan and schedule for implementation, in place of a "Phase II site evaluation."

Discussion

The results of the Phase II study are required, in part, to ensure all potential impacts to cultural resources are avoided and minimized during the permitting process. No change is warranted.

Paragraph (5)

No additional discussion is necessary.

Subsection (b)

Comment

Commenters stated that the study area for archaeological resources should not be the same as for historic architecture. Several comments were made on §900-2.10 relative to the scale of surveys to be conducted to identify both historic resources (buildings and archaeological sites).

Discussion

The Office agrees the study area for archaeological resources should not be the same as for historic resources (including architecture, structures, sites, objects, features and historic landscapes). Accordingly, the Office has provided a definition for "Project Impact Area" in §900-1.2(bk) of the regulations.

§900-2.11 Exhibit 10: Geology, Seismology and Soils

Comment

Commenters suggested adding introductory text to §900-2.11 of the regulations to indicate that §900-2.11 should only apply to projects involving blasting.

Discussion

The purpose of §900-2.11 is to evaluate the existing geologic conditions of a proposed facility site and to conduct an impact analysis of construction and operational activities on the existing geological resources, followed by establishing proposed impact avoidance and minimization measures. Blasting is not the only project activity that could cause potential impacts to these resources and therefore the analysis required in §900-2.11 should not be limited to blasting activities. No change is warranted.

Subsection (a)

Comment

Commenters suggested adding a requirement for applicants to develop a map that delineates subsurface hydrologic characteristics, groundwater levels, watersheds, and associated recharge areas.

Discussion

Section 900-2.11(a)(4) requires applicants to provide a description and analysis of subsurface hydrologic characteristics and groundwater levels, as well as a geotechnical report verifying subsurface conditions at facilities. Section 900-2.14 also requires the applicant to provide pertinent hydrological information, such as depths to high groundwater and bedrock (including a site map), surveys and maps showing groundwater recharge areas and flows, and other relevant information. No change is warranted.

Paragraphs (1)-(3)

No additional discussion is necessary.

Paragraph (4)

Comment

Several commenters stated that karst features should be added to the list of site characteristics, including assessment of impacts from excavation and blasting to ensure the protection of water resources.

Discussion

Karst features are considered a subsurface hydrologic characteristic, which is a required factor under §900-2.11(a)(4) for characterizing the subsurface conditions in areas proposed for excavation and blasting. Additionally, §900-2.11(a)(9) requires the analysis of expected impacts from construction and operation of a facility with respect to regional geology, including the analysis of potential impacts to known or suspected karst features, and an identification of minimization/mitigation measures (including for blasting and pile driving operations) in karst areas. No change is warranted.

Comment

One commenter stated that a geotechnical analysis at each turbine location prior to application submittal would be time consuming and costly, and recommended requiring analysis of representative turbine locations instead throughout the project site. This was echoed by another commenter who proposed revising the text in §900-2.11(a)(4) to limit the analysis and geotechnical engineering report verifying subsurface conditions to a representative sample of turbine locations rather than at each turbine location.

Discussion

The Office clarified the regulations in §900-2.11(a)(4) to require a representative set of borings at each mapped soil/bedrock type at the application stage, with a full geotechnical report to be submitted as a pre-construction compliance filing for each turbine location, as described in §900-10.2(f)(6).

Paragraph (5)

Comment

Commenters noted that a blasting plan should only be required if blasting is proposed for the project to ensure measures are in place to protect nearby aboveground structures, groundwater wells, groundwater recharge areas, and underground utilities.

Discussion

Sections 900-2.11(a)(5), (6) and (7) require that a project proposing blasting during construction must provide a blasting plan that includes: identification of potential impacts; an evaluation of reasonable mitigation measures associated with potential impacts to aboveground structures; and identification of subsurface features such as wells, groundwater recharge areas, and utilities. No change is warranted.

Paragraphs (6)-(13)

No additional discussion is necessary.

Subsection (b)

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

A commenter recommended that specific mitigation measures be required in §900-2.11(b) for applicants to minimize pile driving impacts, including limiting the number of hours per day, and times of day, that pile driving can occur.

Discussion

The Office will review the applicant's mitigation plan and require, if necessary, additional site-specific conditions to reduce potential impacts from pile driving activities. No change is warranted.

Paragraph (4)

No additional discussion is necessary.

§900-2.12 Exhibit 11: Terrestrial Ecology

Subsection (a)

Comment

Commenters suggested that the description of plant communities should cover the entire project area so that significant habitat fragmentation and loss can be avoided, minimized, or mitigated.

Discussion

The regulations currently require the applicant to provide an identification and description of the type of plant communities present on the facility site, and on adjacent properties within 100 feet of areas to be disturbed by construction, including the interconnections, based upon field observations and data collection which allows for identification of habitat fragmentation so it can be avoided, minimized or mitigated. No change is warranted.

Subsection (b)

No additional discussion is necessary.

Subsection (c)

Comment

Commenters requested that the Office require applicants to avoid the use of pesticides, and that applicants be required to use native and pollinator seed mixes and plantings as part of a site-specific mitigation plan.

Discussion

The regulations address herbicide use requirements in the Vegetation Management Plan required as a pre-construction filing in §900-10.2(e)(4), which will be reviewed and approved by the Office prior to issuing a Notice to Proceed with Construction. While the Office encourages the use of native and pollinator seed mixes and plantings, seed mixes will be established between applicants and the landowner or in accordance with NYSAGM guidance documents. No change is warranted.

Comment

One commenter suggested that the Office should require applicants to develop conservation plans to replace trees removed for project development.

Discussion

The regulations require an applicant to identify and evaluate measures to avoid and/or minimize impacts to vegetation (including trees) and, where impacts are unavoidable, to identify minimization measures, which could include tree replacement. To the extent that trees provide occupied habitat for NYS threatened and endangered species or are located within wetland areas, additional mitigations will be required. No change is warranted.

Comment

Multiple commenters were concerned about the potential for impacts to terrestrial resources and recommended that the regulations identify areas off-limits to renewable energy development, such as mature forests, woodlands, unlisted wildlife species habitat, state nature and historic preserve lands, and the environment in general. Commenters suggested identifying and prioritizing for development sites in areas that are degraded or already disturbed where there is little potential for wildlife conflicts. Commenters also recommended incentivizing applicants to avoid off-limit areas or designating areas as off limits to development (such as prime grassland habitat).

Discussion

The regulations require the preparation of a wildlife site characterization study at the earliest stages of project development, which must identify all species and habitats documented at the proposed facility site, including, for example, all core forest blocks and forested riparian areas within five miles of the proposed facility (§900-1.3(g)(1)(iii)). This information will allow the applicant to design the proposed facility to avoid or minimize impacts to these resources, as required by §900-2.12. Although New York State has not designated any areas "off limits" for the siting of major renewable energy facilities, the regulations require early identification of important resources to facilitate project design that preserves and protects such resources to the maximum extent practicable. In addition, requirements for the preparation of a Net Conservation Benefit Plan for impacts to NYS threatened or endangered species and the mitigation requirements for wetland impacts serve to prevent projects from moving forward if mitigation of unavoidable impacts is not possible. Accordingly, no change is warranted.

Comment

A commenter requested that projects be modified to use alternative technologies to avoid or minimize impacts to vegetation.

Discussion

Applicants are required to propose best management practices (BMPs), including the identification and evaluation of avoidance, minimization, and alternative technologies regarding impacts to terrestrial ecology (identified vegetation communities, wildlife, and wildlife habitats), and to minimize and mitigate significant impacts to terrestrial resources. In addition, §900-10.2(e)(4) requires the applicant to submit a Vegetation Management Plan that includes measures, standards, practices, and procedures for proper on-site vegetation management during project construction and operation. No change is warranted.

Subsection (d)

Comment

Commenters were concerned the regulations are not adequately protective of NYS threatened and endangered and unlisted bird and bat species migration routes and concentration areas. Commenters suggested that applicants should be required to provide information on these routes (as opposed to only ecological communities at the facility site) and that projects should not be authorized within close proximity of these areas.

Discussion

Issues like migratory corridors or other landscape features that concentrate NYS threatened and endangered and unlisted species are expected to be addressed by the applicant in the wildlife characterization report per §900-1.3(g)(1) and §900-2.13(a). The wildlife characterization report is an opportunity for the applicant to provide detailed information on NYS threatened and endangered and unlisted species, including rare grassland birds, that may occur at, or bird and bat species that migrate through, the proposed facility site and determine potential impacts. This is in addition to the requirements of §900-2.12, which require a full accounting of plant communities and wildlife present at the project site, and an assessment of avoidance and minimization measures incorporated to address any impacts to those

resources. Although all species should be considered, special consideration is given to NYS threatened and endangered species and the habitats that they inhabit, consistent with the existing laws and regulations regarding wildlife and protection of wildlife habitat. Mitigation for NYS threatened and endangered species can also provide benefits for unlisted species that utilize similar habitat. The Office has revised §900-2.12(d) to clarify that the applicant should consider bird and bat migration routes when identifying species likely to occur at the facility site. No other changes are warranted.

Subsection (e)

Comment

Multiple commenters asserted that the regulations should ensure avoidance or effective mitigation of impacts to forests and that a lack of any such standards may inadvertently result in forest conversion. The commenters emphasized the role forests play in habitat, water quality, and carbon sequestration, and suggested that the regulations add requirements to avoid and mitigate impacts to forest resources.

Other commenters suggested incorporating the use of wildlife corridors during facility design to the extent feasible, to allow for improved wildlife connectivity for all wildlife as well as threatened and endangered species (and grassland birds). Several commenters encouraged the use of wildlife-friendly fencing or no fencing to maintain the passage or movement and connectivity of wildlife through facilities.

Another commenter requested that an assessment of forest fragmentation, habitat changes, degradation, and loss be required, and that habitat fragmentation be avoided as much as possible.

Discussion

New York State does not specifically regulate forests. Impacts to forests will be considered in the analysis of impacts to terrestrial ecology. In addition, to the extent that forests are determined to be occupied habitat for a NYS threatened and endangered species, within 100 feet of a wetland, or within 50 feet of a NYS-regulated waterbody, the impacts to such forests will be considered in the context of the relevant exhibits related to those resources.

Section 900-2.12(e) of the regulations currently requires applicants to provide an assessment of impacts on wildlife corridors. Recommendations to reduce habitat fragmentation and maintain landscape connectivity will be discussed with applicants during the pre-application and application review process. As noted, there are provisions within the regulations to take into account impacts to forested habitat. The applicant is required to identify all core forest blocks and forested riparian areas within five miles of the proposed facility (§900-1.3(g)(1)(iii)). Each applicant must determine how to avoid, minimize, and, if all impacts cannot be avoided to listed species, how to ensure a net conservation benefit to any impacted listed wildlife species. The use of wildlife corridors would be one way to achieve this.

Throughout the pre-application and application process, the applicant, in consultation with the Office and NYSDEC, is required to identify, avoid, and minimize direct and indirect impacts to NYS threatened and endangered and unlisted species and the habitats that they occupy. For example, §900-2.12 requires the identification, description, and mapping of vegetation communities (including forests) and an analysis of temporary and permanent impacts of the construction and operation of the facility and the interconnections on the vegetation, wildlife, wildlife habitat, and wildlife travel corridors identified. Section 900-2.12 also requires the applicant to provide a list of wildlife (including forest species) likely to occur in

these communities, supplemented by site surveys, site observations, and publicly available sources, as necessary, and the identification and evaluation of avoidance, minimization, and alternative technologies regarding impacts to identified vegetation communities, wildlife, and wildlife habitats. Further, standard conditions on approved projects require applicants to avoid and minimize resource impacts. The regulations require mitigation for any construction that fails to avoid and minimize impacts to NYS threatened and endangered species, including forest species.

Given the site-specific considerations, and impact avoidance, minimization, and mitigation approach, that will inform the evaluation of a project's effects on forests in the context of impacts on terrestrial ecology and associated habitat and wildlife corridors, no change is warranted.

Comment

Commenters were concerned that the regulations focus only on NYS threatened and endangered species and do not address unlisted species (those not listed as NYS threatened or endangered, including, but not limited to, species of special concern, species of greatest conservation need, and other grassland species), and will not require assessment or mitigation for impacts to unlisted species.

Discussion

The regulations provide for and require applicants to consider unlisted species in the wildlife characterization report required in §900-1.3(g)(1) and in the analyses required by §900-2.12, as discussed above. Throughout the pre-application and application process, there are multiple opportunities to identify and address concerns of direct and indirect impact to NYS threatened and endangered and unlisted species, including grassland birds, and the habitats that they occupy. For example, §900-2.12 requires the identification, description, and mapping of vegetation communities (including grasslands); a list of wildlife (including grassland birds) likely to occur in these communities; analysis of temporary and permanent impacts of the construction and operation of the facility and the interconnections on the vegetation, wildlife, wildlife habitat, and wildlife travel corridors identified; and the identification and evaluation of avoidance, minimization, and alternative technologies regarding impacts to identified vegetation communities, wildlife, and wildlife habitats. The regulations require mitigation for any construction that fails to avoid and minimize impacts to NYS threatened and endangered species, and such mitigation can also provide benefits for unlisted species that utilize similar habitat. No change is warranted.

Comment

Several commenters requested further details about under what conditions the Office should be required to deny a permit if project impacts to terrestrial resources cannot be successfully offset, and a project has a high probability of causing adverse impacts.

Discussion

Determinations as to whether a permit should be issued or denied based on impacts to terrestrial resources will be made on a case-by-case basis. No change is warranted.

Subsection (f)

No additional discussion is necessary.

§900-2.13 Exhibit 12: NYS Threatened or Endangered Species

Comment

A commenter suggested that an exemption should be added to the regulations to protect applicants in the event that a NYS threatened and endangered species arrives onsite following construction (during operations), which the commenter indicated might be encouraged by the planting of native vegetation in project areas.

Discussion

The Office has considered this change and determined that no change is warranted.

Subsections (a)-(c)

No additional discussion is necessary.

Subsection (d)

Comment

Several commenters expressed concern that the draft regulations do not pay enough attention to avoiding, minimizing, or mitigating impacts to rare, threatened, and endangered species or suitable habitat such as ecologically sensitive natural areas that provide significant benefits (other than demonstrated habitat) for NYS threatened and endangered species. Commenters also stated the draft regulations' approach deviates from established norms in mitigation, which prioritizes avoiding impacts first, then minimizing and offsetting impacts.

Discussion

Section 900-1.3(g) of the regulations requires the applicant, as early in the planning process as possible, to prepare a wildlife site characterization to identify all wildlife documented at the facility site and to assess the presence of suitable habitat, including sensitive natural areas, for each species identified. The applicant will be required to conduct habitat assessments and/or site surveys for NYS threatened and endangered species in order for the Office, in consultation with NYSDEC, to identify any occupied habitat on the facility site. The purpose of this pre-application process is to allow the applicant to design its facility to avoid or minimize impacts to occupied habitat. For instance, for bird and bat species, the Office expects that applicants will utilize the siting and study recommendations provided in the New York State Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects. The applicant must then detail in its application the efforts made to avoid and minimize impacts, as well as develop an NCBP to address any identified impacts. No change is warranted.

Comment

Commenters recommended requiring a more detailed review of projects' effects on grassland bird populations, and that site-specific recommendations from wildlife experts be used to evaluate projects' impacts on grassland birds rather than general formulas used to determine necessary mitigation.

Discussion

The regulations require applicants to attend a pre-application meeting to consult with the Office and NYSDEC in the development of studies and to use established protocols. The pre-application meeting provides an opportunity to review all available information on NYS threatened and endangered species, including rare grassland birds, and to ensure that options to avoid and minimize impacts are identified. If a proposed facility will have an impact on NYS threatened and endangered grassland birds, the applicant will be required to prepare an NCBP in order to ensure that the proposed mitigation would result in a net conservation benefit to the species. The NCBP should be prepared by a qualified professional. Accordingly, no change is warranted.

Comment

Commenters stated that the proposed regulations do not provide requirements for bat survey methods (e.g., methods for identifying roosting trees) within the project area. Commenters noted that data on "known" roosting/ maternity trees are limited, and once located, it is difficult to ascertain the species using a roosting tree. Therefore, the commenter suggested the inclusion of at least 500-foot buffer from all potential roosting trees.

Discussion

Section 900-1.3(g)(2) requires the applicant to provide the results of the wildlife site characterization study and project details to the Office and the NYSDEC. The applicant must also schedule a meeting with these agencies to obtain agency feedback on the content and conclusions of the wildlife characterization study. If necessary, the agencies may enter into a non-disclosure agreement with the applicant and require the applicant to provide all additional data points beyond those identified in the draft site characterization study. The agencies will then evaluate the existing information (i.e., results of the wildlife characterization study and the agency data) to determine the presence/absence and location of NYS threatened or endangered species within the boundaries of the facility site under evaluation. If the agencies determine species-specific surveys are required, the applicant, in consultation with the agencies, will develop appropriate survey protocols. No change is warranted.

Subsection (e)

Comment

Several commenters requested clarifying the definition of *de minimis impacts*, while others suggested that this concept be removed from the regulation. Others were worried that the current language of the definition is tied to future actions outside of the Office's or applicant's control and could take years to implement, defeating the intent of the *de minimis* provision. Other commenters noted that the definition of *de minimis* is inconsistent across the regulations, and that the standards need to be more consistent so that it is easy to understand and assess throughout. Others questioned why *de minimis* determinations were limited to only NYS threatened and endangered grassland bird species and not all NYS threatened and endangered species.

Discussion

The *de minimis* designation is only applicable to grassland bird impacts and is intended to acknowledge that there are certain impacts to grassland habitat that would not result in an adverse impact to the species. For example, if a project avoids impacts to all fields containing greater than 25 acres of

occupied habitat and does not impact known nesting or roosting locations, then mitigation is not required. The regulations specify minimization and mitigation requirements based on the potential impacts of a proposed project. Impacts to other NYS threatened and endangered species will be evaluated early in the planning process in accordance with Section 900-1.3(g), on a case-by-case basis and in collaboration with NYSDEC, to ensure impacts are avoided and minimized to the extent practicable. Should applicants avoid and minimize project impacts to other NYS threatened and endangered species such that there will be no anticipated adverse impact to the species, the Office, in collaboration with the NYSDEC, has determined that no additional conditions are necessary. No change is warranted.

Comment

One commenter was concerned that incidental take permits for threatened and endangered species will be issued.

Discussion

If an applicant finds that the take of a NYS threatened and endangered species is unavoidable, the applicant can proceed with the application process by developing an NCBP as part of its complete application. The NCBP must demonstrate that the impacted species will be better off with the project on the landscape than if the project were not implemented. No take permits will be issued. Authorization to take a species will be based upon the NCBP and will be included in the issuance of a permit by the Office. No change is warranted.

Subsection (f)

Comment

Several commenters requested adding clarifying language to §900-2.13(f) to exempt facilities that have a *de minimis* impact to any NYS threatened or endangered species from preparing an NCBP. Other commenters stated that an NCBP should be required even where *de minimis* concerns are identified.

Discussion

No NCBP is required for facilities that would have only *de minimis* impacts on NYS threatened or endangered grassland bird species. An NCBP would be required to address any other impact to a NYS threatened or endangered species. No change is warranted.

§900-2.14 Exhibit 13: Water Resources and Aquatic Ecology

Subsection (a) Groundwater

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

One commenter requested that private well water surveys within 1,000 feet of the site should not be required for activities that do not require blasting. Other commenters suggested completely removing the water well survey requirement.

Discussion

§900-2.14(a)(2) requires identification of existing potable water supply wells to the maximum extent achievable based on publicly available information and the results of private, active groundwater well surveys distributed to local landowners within 1,000 feet of the facility site and §900-6.4(n) sets forth requirements for Water Supply Protection. These requirements are essential to ensure protection of public and private water supplies and are not limited to the potential need for blasting, as other project activities could have potential effects on private water wells. No change is warranted.

Comment

Commenters requested that the maps of the study area show the relation of the facility site (and associated off-site ancillary components) to public and private water supply sources within one mile of these facilities.

Discussion

The regulations require an applicant to include an analysis and evaluation of potential impacts on drinking water supplies, including public and private water supplies within a 1-mile radius of a facility site, and wellhead and aquifer protection zones, to the extent such information is publicly available and/or obtained through voluntary responses from the private groundwater well survey. No change is warranted.

Paragraph (3)

Comment

Several commenters were concerned about potential contamination of potable water sources, including USEPA-designated sole source aquifers. The commenters requested that the draft regulations include coordination with NYSDEC, NYSDOH, and New York City Department of Environmental Protection (NYCDEP) on projects within New York City's watershed, to assess and ameliorate any potential impacts to the water supply.

Discussion

The regulations include extensive provisions for the identification and protection of potable public and private water supplies, including USEPA-designated sole-source aquifers. Section 900-2.14 requires applicants to include an analysis and evaluation of a project's impact on drinking water supplies and groundwater quality and quantity. As proposed, the regulations require a comprehensive characterization of existing water supply resources within the project area and identification of existing water supplies and groundwater recharge areas based on publicly available information. The regulations also require permittees to perform pre- and post-construction water quality monitoring for wells on nearby, non-participating properties. If the results of water quality monitoring demonstrate that construction of the facility results in post-construction water samples that fail to meet NYS water potability standards, the permittee will be required to construct a new well, in consultation with the landowner. Further, the proposed USCs require that blasting be designed and controlled to adhere to ground vibration limits established by the United States

Bureau of Mines. The Office will evaluate on a case-by-case basis if coordination with NYSDEC, NYSDOH, and/or NYCDEP is required for any project to address any potential impacts to water resources within their respective jurisdictions. Accordingly, no change is warranted.

Subsection (b) Surface Water

Comment

One commenter requested that §900-2.14(b) explicitly recognize and include the right of Indian Nations to regulate surface waters located within their territories, and the right to regulate certain off-reservation waters pursuant to the CWA.

Discussion

The Office recognizes that Indian Nations have sovereign authority over surface waters located within their territories. The regulations do not alter the underlying jurisdiction of a sovereign authority. No change is warranted.

Paragraph (1)

Comment

A commenter requested that wetlands and waterbodies be identified and mapped regardless of regulatory status. Other commenters requested clarification regarding what mapped information will be included in stream delineation survey reports and how the mapping required in §900-2.14(b)(1) reflects the stream identification called for in §900-1.3(f)(1).

Discussion

The regulations require applications to contain maps depicting delineated boundaries of all federal, state, and locally regulated surface waters present within 100 feet of areas to be disturbed by construction on the facility site. As stated above, the Office has clarified the regulations in §§900-1.3(e) and (f) to specify that the Office will review the applicant's draft delineation reports and determine the boundaries of state-regulated wetlands and surface waters; as set forth in §900-10.2(a), applicants are required to comply with applicable regulatory processes outside the purview of the Office and provide copies of all required federal/federally-delegated permits to the Office as part of the pre-construction compliance filings. The Office also clarified the scope of such delineations and impact assessments in §§900-2.14 and 900-2.15. The surface water delineation and draft report required in §§900-1.3(f)(1) and (2) should provide the maps and data required to satisfy §§900-2.14(b)(1) and (2). The Office believes limiting requirements to regulated resources is consistent with legislative mandates; as set forth in §900-10.2(a), applicants are required to comply with applicable regulatory processes outside the purview of ORES and provide copies of all required federal/federally-delegated permits to ORES as part of the pre-construction compliance filings. No further change is warranted.

Comment

A commenter suggested that the regulations should maintain a 1-mile radius for identification of surface waters around a solar or wind project, and that the remaining stipulations and protections under Article 10 should be retained.

Discussion

Section 900-2.14 requires applicants to identify surface waters within 100 feet of a project's proposed limit of disturbance. The Office believes that this requirement, combined with other required site location data, provides sufficient information to determine a proposed facility's impacts to surface waters. It is noted that the current Article 10 regulations require identification of downstream surface water intakes (drinking supplies) and private wells within 1 mile (or of the nearest one), and not all surface waters as the commenter suggests. No change is warranted.

Paragraph (2)

Comment

Commenters recommended that surface water surveys be conducted throughout the entire Hydrologic Unit Code (HUC) 10 area, and that an applicant be required to describe impacts and avoidance measures to surface water resources within this area.

Discussion

Delineation of surface waters throughout the entire HUC 10 area of the project site is not practicable due to limitations in site control and access. The regulations require the submission of United States Geological Survey mapping and other basic site location data in the application. The maps will identify significant surface waters within the HUC 10 area that could potentially be affected by the proposed renewable energy facility. The applicant will be required to identify surface waters within 100 feet of areas to be disturbed by construction to demonstrate avoidance and minimization of impacts to these surface waters. Finally, mitigation for significant unavoidable surface water impacts is required within the HUC 8 sub-basin. No further change is warranted.

Paragraphs (3)-(4)

No additional discussion is necessary.

Paragraph (5)

Comment

Commenters requested revising NYS “protected waters” to NYS “regulated waters” in §900-2.14(b)(5).

Discussion

The Office has considered this comment and determined that no further change is warranted.

Comment

A commenter recommended that temporary stream crossings be completed using a temporary bridge and siting the crossing where the stream is stable.

Discussion

A temporary bridge may be used to cross a stream, where feasible. The regulations require the applicant to demonstrate impact avoidance and minimization using BMPs (e.g., temporary bridges). In

addition, the regulations require a discussion of how the proposed design considers the slopes of the NYS protected waters and the characteristics of the stream at the crossing location. No change is warranted.

Comment

Commenters were concerned with potential impacts to surface waters and drinking water supplies and suggested a minimum setback of 50 feet from NYS-regulated waterbodies, compliance with watershed regulation setback requirements, or that mitigation be required if facilities are sited closer than setback requirements.

Discussion

The regulations require the demonstration of impact avoidance and minimization by siting facility components more than 50 feet from NYS-regulated waterbodies, as set forth in §900-2.14(b)(5) and clarified in §900-2.14(b)(6)(iv)-(vi) , and more than 100 feet from NYS-regulated wetlands in §900-2.15(e). The Office recognizes the importance of maintaining specific setbacks from waterbodies, wetlands, and reservoirs for public water supplies and can require site-specific permit terms and conditions to address those impacts. No change is warranted.

Comment

A commenter recommended that all construction and maintenance impacts such as filling, grading, soil compaction, changes in floodplains, disturbance of stream banks, vegetation removal, changes in natural drainage patterns, and degradation of water quality should be evaluated. Other concerns included potential impacts on fish from changes in hydrology, vegetation, and water quality resulting from project construction. These concerns were followed by recommendations that the regulations set forth BMPs for design and waterbody mitigation requirements.

Discussion

The applicant is required to submit an analysis of identified potential impacts to surface waters associated with the proposed construction or operation of the facility. The Office will evaluate the project as a whole. For example, an evaluation of soil impacts and a determination of the drainage area potentially influenced by the facility site and interconnections is required in §900-2.11. An analysis and evaluation of groundwater flow and potential impacts from the construction and/or operation of the facility on groundwater quality and quantity in the facility area is required in §900-2.14. Culverted road crossings of waters are evaluated and, if applicable, shall be in compliance with rigorous requirements contained in §900-6.4(r)(6). Section 900-2.14 also requires that the applicant address how the facility design minimizes all tree clearing requirements, to the extent practicable, within 50 feet of NYS-protected waters. In addition, an applicant is required to prepare a Vegetation Management Plan and a Stormwater Pollution Prevention Plan (SWPPP), or a completed application for an individual SPDES permit if the facility is not eligible for coverage under the General Permit.

The Office has chosen not to define all appropriate BMPs because technology for minimizing impacts is constantly evolving. However, the applicant is required to propose BMPs to minimize significant impacts to water resources, and the regulations require incorporation of seven BMPs as well as requirements for mitigating significant impacts. No change is warranted.

Paragraph (6)

Comment

Multiple commenters suggested that the regulations be modified to state that solar panel racking or perimeter fences should not span any stream, regardless of order (§900-2.14(b)(6)(i)).

Discussion

The Office has considered this comment and determined that no change is warranted.

Comment

Commenters suggested adding clarifying language to §900-2.14(b)(6)(i) to indicate that a first order "stream has no tributaries or branches."

Discussion

The Office has considered this comment and determined that no change is warranted.

Comment

Commenters stated that the best management practices listed in §900-2.14(b)(6)(i-vii) should be rewritten to include a complete list of all practices necessary to address impacts.

Discussion

The Office has chosen not to define all appropriate BMPs because technology for minimizing impacts is constantly evolving. The list of BMPs in §§900-2.14(6)(i) through (vii) set minimum requirements and is therefore not exhaustive. The Office requires applicants to propose BMPs to minimize significant impacts to water resources as well as other BMPs and mitigation measures that reduce/avoid impacts to potentially impacted resources. No change is warranted.

Paragraph (7)

Comment

Commenters proposed deleting the prescribed mitigation ratios and types in §900-2.14(b)(7)(i). Others stated that the draft regulations were inadequate and lacked mitigation requirements related to aquatic resources. One commenter suggested that the regulations include criteria for success, such as science-based creation, restoration, and enhancement requirements and related ratios for mitigation.

Discussion

The Office believes that the mitigation requirements provide an adequate, straightforward path for compliance. The Office will work with applicants to determine appropriate mitigation options and to ensure that the proposed mitigation fully compensates project-specific impacts. No change is warranted.

Comment

Commenters suggested the regulations should require a summary table of the existing federal, state, and local permitting requirements, and a table showing all potential impacts on streams from project activities and the mitigation of those impacts.

Discussion

The applicant is required to provide a table presenting all impacts to regulated surface waters, and an appropriate mitigation plan to compensate for surface water impacts. It would be impractical for the regulations to contain a summary table describing all possible combinations of requirements for every regulatory jurisdiction across the entire state. No change is warranted.

Comment

Several commenters requested additional guidance or clarification about the stream culvert mitigation requirements, how the permitting of these culverts would be handled, and if the Office will require replacement of off-site culverts. One commenter suggested including stream enhancements as an alternative mitigation option. Others suggested that alternative compensatory mitigation outside of the same HUC 8 watershed offsite mitigation (§900-2.14(b)(7)(b)) be considered.

Discussion

Stream restoration or enhancement would generally be more complicated to develop, review, implement, and oversee. The Office decided to require culvert replacement as the mitigation requirement because of its simplicity, speed, and readily apparent environmental benefits. Additionally, the applicant has flexibility in choosing the specific culverts to be replaced and on-site or off-site options can be considered, as long as the replaced culvert meets all the criteria contained in §900-2.14(b)(7). Similarly, the Office believes that appropriate mitigation can be achieved within the same HUC 8 sub-basin. In both instances, however, the Office will be available to meet with the applicant to discuss preliminary mitigation proposals or site-specific permit terms and conditions based on the unique constraints of their facility. No change is warranted.

Subsection (c) Stormwater

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

A commenter requested clarification regarding whether applicants would be required to capture 100 percent of the stormwater runoff generated on-site.

Discussion

The regulations, including the proposed USCs, require stormwater management that is consistent and in full compliance with applicable NYSDEC requirements. Each application must include a SWPPP for the collection and management of stormwater discharges from the facility site during construction, prepared in accordance with the applicable New York State Pollution Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity (or a completed application for an individual SPDES permit if the facility is not eligible for coverage under the General Permit) and the New York State Standards and Specifications for Erosion and Sediment Control. No change is warranted.

Comment

A commenter was concerned about the volume of stormwater runoff from major renewable facilities (including potential chemical runoff from solar photovoltaic cells) and requested consideration of development of a stormwater conveyance channel system and revegetation plan that would be reviewed by the municipality, NYSDEC, and the USACE.

Discussion

The regulations require a preliminary plan, prepared in accordance with the New York State Stormwater Management Design Manual, identifying post-construction stormwater management practices that will be used to manage stormwater runoff from the developed facility site. Such practices may include runoff reduction/green infrastructure practices, water quality treatment practices, and practices that control the volume and rate of runoff. No change is warranted.

Comment

A commenter recommended that applicants be required to comply with the requirements and guidance of the 2020 New York State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity and NYSDEC's April 5, 2018 guidance memorandum.

Discussion

Section 900-2.14(c) requires compliance with the applicable New York State Pollutant Discharge Elimination System General Permit for Stormwater Discharges from Construction Activity. Regardless, the regulations do not change the stormwater requirements that apply to renewable energy facilities. No change is warranted.

Subsections (d)-(f)

No additional discussion is necessary.

§900-2.15 Exhibit 14: Wetlands

Comment

Several commenters suggested that applicants should be required to include all federal, state, and local wetlands in the mapping and analyses of wetlands impacts and mitigation required by §900-2.15. Other commenters asked to clarify if the regulations require mapping of small wetlands of "unusual local importance" such as vernal pools.

Discussion

Section 900-2.15 requires submission of a map depicting all federal, state, and locally regulated wetlands within 100 feet of areas to be disturbed by construction, as confirmed by the Office pursuant to §900-1.3(e). However, the regulations focus on impacts to state-regulated wetlands and their 100-foot adjacent areas, thus impact tables and mitigation analysis focus on those protected resources. Small wetlands of unusual local importance, which may include vernal pools, are considered NYS-regulated and therefore are included in the regulations. If a facility will impact federally regulated wetlands, the applicant will need to obtain the required federal permits and provide a copy to the Office prior to commencing construction. If a proposed facility will impact locally regulated wetlands, the applicant will need to demonstrate compliance with applicable local wetland laws and regulations, unless the Office has

determined that compliance with the local wetland requirements would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the facility. No change is warranted.

Subsection (a)

Comment

Commenters suggested adding the word "proposed" to the text in §900-2.15(a) to indicate that the map or series of maps showing locally regulated wetlands and adjacent areas present and within 100 feet of areas "proposed" to be disturbed.

Discussion

The requirement for including maps that accurately depict the boundaries of jurisdictional wetlands to be disturbed by construction is critical for evaluating the potential impacts from project activities and for making determinations regarding the need for, and adequacy of, mitigation actions. The Office believes the original wording in §900-2.15(a) more accurately describes the requirement. No change is warranted.

Comment

Several commenters requested that §900-2.15 requirements include all delineated wetlands (not just those impacted) on detailed maps.

Discussion

The regulations include requirements to provide information that are consistent with requirements under Article 10 and New York State Environmental Conservation Law (NYSECL). Wetland maps are required under §900-2.15(a). The Office has decided that focusing on NYS-regulated wetlands to be impacted is environmentally responsible and necessary to meet the strict timelines required in the regulations. No change is warranted.

Subsection (b)

Comment

Commenters suggested retaining Article 10 requirements to include a description of soils, hydrology, and vegetation data for wetlands contained on the project site.

Discussion

Applicants are required under §900-1.3 to submit a draft wetland delineation report that describes all federal, state, and locally regulated wetlands within 100 feet of areas to be disturbed by construction. This report will include information on soils, hydrology, and vegetation and this information must be included as part of the application in Exhibit 14 (§900-2.15(b)). No change is warranted.

Subsection (c)

Comment

Commenters requested that the §900-2.15 requirements include a wetland function and value assessment in accordance with Article 10 of the PSL. Several commenters recommended that wetland functions and values should also be based on wetland science, on-site conditions, and individual wetland

types, including the use of a commonly accepted functional assessment methodology, such as the *U.S. Army Corps of Engineers Highway Methodology Workbook: Wetland Functions and Values, A Descriptive Approach*, and that the hierarchy of wetland types/values be revised from "forested wetland" areas to "currently impacted" areas.

Discussion

A wetland functional assessment is required under §900-2.15(c). The applicant will determine the most appropriate methodology for its facility site and should clearly describe the assessment methodology used to determine wetland functions and values. The Office will determine the sufficiency of the assessment in its determination of completeness. No change is warranted.

Subsection (d)

No additional discussion is necessary.

Subsection (e)

Comment

One commenter suggested that §900-15(e) be revised to extend the 100-foot adjacent area buffer to all wetlands.

Discussion

The 100-foot adjacent buffer area is a specific, regulated area pursuant to Article 24 of the NYSECL. The Office does not have the authority to require additional regulated buffer areas for federal wetlands. No further change is warranted.

Comment

Commenters suggested that the regulations should clarify that the applicants should prioritize avoiding impacts to water resources (including wetlands) through facility site location and design. The regulations should be at least as stringent as those implementing Article 24, and the mitigation measures set forth in the siting regulations should be designed and applied to provide meaningful wetlands benefits.

Discussion

The regulations are consistent with the NYSDEC regulations implementing NYS ECL Article 24. The mitigation requirements in the regulations were developed in consultation with the NYSDEC. No change is warranted.

Subsection (f)

Paragraph (1)

Comment

One commenter requested that applicants evaluate how facilities can be constructed to maintain the original wetland hydrology (of wetlands) when wetland disturbance cannot be avoided.

Discussion

The regulations require that each application contain a rigorous and substantive discussion regarding how the proposed project avoids and minimizes impacts on wetlands functions and values, including those to wetland hydrology. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

As stated in the discussion of §§900-1.3(e) and (f) above, the Office clarified the scope of delineations and impact assessments in §§900-2.14 and 900-2.15.

Paragraph (4)

No additional discussion is necessary.

Subsection (g)

Comment

One commenter requested that a number of additional mitigation requirements be provided by applicants, such as its criteria for success, rationale for the type of mitigation and an explanation thereof, mitigation ratios relative to the area of impact, planting plans, and monitoring responsibilities to ensure success.

Discussion

The applicant is required to submit a Wetland Restoration and Mitigation Plan that outlines proposed mitigation actions. The specific details of the proposed mitigation should be contained in the plan. The Office will not approve the applicant's proposed plan unless it includes a discussion of monitoring requirements and criteria to evaluate the sufficiency of the mitigation. No change is warranted.

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

Several comments were received on the Wetland Mitigation Requirements table (Table 1), including some that stated the table was not based on wetland science, but equates the NYS Wetland Classification System with wetland functional value. Some commenters requested that a brief outline of mitigation requirements be added to the regulations, including: criteria used to determine mitigation success; explanations of wetland creation, restoration, and enhancement; rationale for the type of mitigation (e.g., enhancement); recommended ratios in relation to the area impacted; a planting plan if applicable; designation of the responsible entity for monitoring, and ensuring that mitigation success criteria are met; and, proactive measures to be taken in the event that mitigation success criteria are not being met.

Discussion

Section 900-2.15 of the regulations uses a long-established system of classifying wetlands that is described in 6 NYCRR Part 664. This system groups wetlands according to their ability to provide wetland benefits. Wetland mitigation requirements described in Table 1 use this classification system to assure stronger protections for those wetlands that provide more wetland benefits, and a clarifying footnote has been added to Table 1. Thus, mitigation ratios vary depending on the classification of the wetlands and are described in §900-2.15(g). Although rigorous mitigation requirements cover the regulated wetland and the 100-foot adjacent area, the regulations recognize the need for providing flexibility in siting project components. As such, Table 1 includes requirements and incentives to at least provide a 75-foot setback from wetlands when complete avoidance of the 100-foot adjacent areas is not possible. In addition, unavoidable impacts to wetlands and adjacent areas require detailed mitigation plans as outlined in the regulations. No further change is warranted.

Comment

Commenters suggested that mitigation ratios should be specific to wetland types, impacts, and site conditions and that the terminology (e.g., area of impact, broken down by cover type) in the table be described, including definitions for FWW and AA. Commenters suggested that soil conditions and specific hydrologic characteristics be required in the wetland creation paragraph.

Discussion

As noted above, the regulations use a long-established system of classifying wetlands, described in 6 NYCRR Part 664. This classification system groups wetlands according to their ability to provide wetland benefits. Wetland mitigation requirements described in Table 1 use this classification system to assure stronger protections for those wetlands that provide more wetland benefits. Thus, mitigation ratios vary depending on the classification of the wetlands and are described in §900-2.15(g). No change is warranted.

Comment

Commenters also asked for clarification on the asterisks in Table 1 – Wetland Mitigation Requirements referring to a 75-foot buffer instead of a 100-foot buffer (as required by Article 24 of the NYSECL).

Discussion

The regulations require the demonstration of impact avoidance and minimization by siting facility components more than 100 feet from NYS-regulated wetlands in §900-2.15(e). The regulations also recognize the need for providing some flexibility in siting project components, and as such, Table 1 includes requirements and incentives to at least provide a 75-foot setback from wetlands when complete avoidance of the 100-foot adjacent areas is not possible. No change is warranted.

Comment

One commenter stated that the last column in the Wetland Mitigation Requirements table is misleading and should be revised to say “mapped wetlands” or be deleted in its entirety.

Discussion

Wetlands provide critically important services for adapting to a changing climate, with larger wetlands providing particularly important flood control benefits. The regulations recognize these critical

functions and provide rigorous requirements to avoid, minimize, and mitigate disturbance to larger wetlands otherwise regulated under Article 24 of the NYSECL. The siting program established in Executive Law §94-c supersedes Article 24, and regulatory requirements stemming from Executive Law §94-c are not necessarily constrained by mapping requirements contained in Article 24. Thus, similar to projects reviewed under Article 10 of the PSL, strict adherence to Article 24 mapping requirements is not mandated. The Office has the authority to regulate inaccurately mapped wetlands and wetlands that would be eligible for mapping because they meet a minimum size threshold. Recognizing the importance of all larger wetlands, the table provides regulatory requirements for unmapped wetlands that exceed a 12.4-acre size threshold. No change is warranted.

Comment

A number of commenters requested revisions to the wetland mitigation requirements set forth in Table 1. These include changing the impacts for power interconnection activities from A(M1) to A(M3) for Class I freshwater wetlands, and from A(M2) to A(M3) for Class II freshwater wetlands. The commenters also suggested revising the mitigation requirements for "grading and manipulation of disturbed areas" from "no enhancements or mitigation required with a 75 foot or more setback," and for impacts to Class I freshwater wetlands and adjacent areas to be "A(M3)" for both.

Discussion

The Office believes that the requirements contained in Table 1 are reasonable. No change is warranted.

Comment

Commenters requested that the table list activities (e.g., vegetation clearing, grading, depositing fill, applying herbicides, draining, road construction, turbine pad construction) and impacts (e.g., decreased water storage capacity, changes in water quality, loss habitat for wildlife, changes in drainage patterns) in more detail and match mitigation with these impacts.

Discussion

The applicant is required to provide a table presenting all impacts to wetlands, and an appropriate mitigation plan to compensate for wetland impacts. The Office will work with applicants to determine appropriate mitigation options, and to ensure that the proposed mitigation fully compensates project-specific impacts. No change is warranted.

Comment

Commenters requested that facilities be exempted from the prescribed mitigation ratio and types within the same HUC 8 sub-basin, if a determination by the Office in consultation with the NYSDEC is made (§900-2.15(g)(2)(ii)).

Discussion

Section 900-2.15(g)(2) requires the applicant to "implement applicant-responsible wetland and/or adjacent area mitigation unless determined otherwise by the Office in consultation with the NYSDEC". Given subsection (ii) is applicable to all the subsections, no change is warranted.

Comment

One commenter requested that provisions be added to allow for compensatory mitigation outside of a project's watershed when mitigation options within the facility's watershed are unavailable.

Discussion

The Office believes that appropriate mitigation can be achieved within the same HUC 8 sub-basin. However, the applicant can seek site-specific permit terms and conditions based on the unique constraints of their facility. No change is warranted.

Comment

A commenter stated that applicants planting trees and/or shrubs in existing wetlands should not be credited for wetland creation but rather for wetland enhancement. The commenter added that the Office should require creation of new wetland acreage when calculating wetland creation.

Discussion

The Office has determined that in certain circumstances, the planting of trees and shrubs in an existing wetland currently devoid of trees and shrubs can be considered wetland enhancement. Whether such mitigation is classified as creation or enhancement will be determined on a case-by-case basis. The Office has made editorial clarifications to the mitigation criteria in §900-2.15(g)(2)(iv)(a - c), and determined that no further change is warranted.

Comment

Commenters stated that restoration is not the same as reclamation and requested that §900-2.15 specify how the need for wetland enhancement is determined, how success is measured, and if enhancement pertains to a wetland, its adjacent 100 foot buffer area, or both.

Discussion

The Office agrees that restoration is not the same as reclamation. The regulations require the applicant to propose and design mitigation plans to address and offset impacts to regulated wetlands. These plans will be reviewed as part of the application process to assure they meet rigorous scientific standards. The Office may include site-specific permit conditions to require success criteria and monitoring requirements to augment actions described in the Wetland Restoration and Mitigation Plan. The Office has clarified that restoration and enhancement can be undertaken in a wetland or adjacent area. No further changes are warranted.

Paragraph (3)

No additional discussion is necessary.

§900-2.16 Exhibit 15: Agricultural Resources

Comment

Several commenters suggested that §900-2.16 should be strengthened to ensure agriculture remains viable, while still allowing developers the flexibility they need. Multiple commenters requested that the regulations be more prescriptive regarding how this information will be used to determine changes to development proposals and to minimize the impact on New York agricultural resources and soils.

Discussion

The Office recognizes the importance of conserving highly productive agricultural lands in New York State. Prime farmland contains soils classified as mineral soil groups (MSG) 1-4 under NYSAGM's NYS Agriculture Land Classification system. The Office and NYSAGM identified lands with these soil groups as the State's most productive farmland or viable agriculture land, as defined in Agriculture and Markets Law §301.

Section 900-2.16 requires a thorough assessment of the impacts of a proposed project on important aspects of farmland and agricultural land uses. These specific requirements will provide the information necessary to evaluate impacts and make balanced decisions about the farmland and agricultural impacts. The regulations established a clear standard to apply in evaluating the potential impacts to agricultural resources that may result from the construction and operation of the major renewable energy facilities. This standard follows the hierarchy of avoiding, minimizing, and mitigating potential project impacts, thus balancing the need to efficiently advance a major renewable energy facility while protecting farmland and farmers. Under these provisions, applicants must show that impacts to relevant agricultural resources would be minimized or avoided to the maximum extent practicable and offer mitigation measures to offset the unavoidable impacts.

Applicants shall avoid siting major renewable energy facilities in the NYS Agricultural Land Classification MSG 1-4, and land used for active farming activities. To ensure New York State farmlands are protected over time, applicants are required to restore the land to its original state as productive farmland at the end of a project's useful life.

If a facility site includes any of the above-listed types of agricultural lands (MSG 1-4 and active farmlands), an applicant must address in an Agricultural Plan how it plans to minimize and mitigate potential agricultural impacts. The Agricultural Plan must include, to the greatest degree possible, the expected impacts the proposed footprint of a major renewable energy facility will have on agricultural resources. The Agricultural Plan must include detailed information how an applicant plans to adhere to and comply with the NYSAGM Guidelines as well as monitoring protocols to evaluate any changes over the life of the project that require further mitigation. An Agricultural Plan shall describe how vegetation maintenance will be conducted on a facility site for the life of the project and measures to reduce grading, treat project runoff, and restore disturbed topsoil. Applicants must seek to identify post-construction stormwater management areas that may limit normal agricultural cultivation, crop rotations, and harvesting, if these activities are feasible on the site.

The Office's position is that the two uses – farmland and renewable facilities – can coexist and still maintain economic viability, particularly when crop production and prices are affected by severe weather events or the global economy, which can reduce income for farmers and agricultural communities. Further, unlike other types of electrical generation facilities, the Office maintains the position that, at a minimum, the use of cover crops to the extent feasible on facility sites will continue to preserve nutrients on farmland that can later be utilized for agricultural uses. Accordingly, §900-2.16(e) addresses concerns about the co-existence of agriculture and renewable energy. The applicant may provide a co-utilization plan including itemization of the investments made to facilitate the agricultural co-utilization.

There is a balancing act on all developments, including major renewable energy facilities. The Office recognizes potential temporary impacts to agricultural resources from project construction, as well as agricultural lands used for project components that will be converted to a non-agricultural use. However, the Office does not find that the major renewable energy facilities will have a significant negative impact on the Statewide agricultural community given the minimal permanent conversion of agricultural lands. Speculation regarding whether or not landowners will resume agricultural use of restored lands does not warrant the conclusion that the impacted lands would be permanently converted, notwithstanding decommissioning and restoration.

The Office needs to consider a variety of interests in deciding where and under what conditions major renewable energy facilities can be built. Leased lands can be essential to the economic viability of some farming operations and the regulations provide farmers a way to put unused land to productive use or to explore options to allow for farming activities to continue on a portion of the site. In many cases, major renewable energy facilities will only occupy a portion of a farm, which may allow agricultural activities to continue on the remaining land. The Office is genuinely appreciative of the many comments and expects that the ideas put forth will be of great value in addressing potential impacts to agricultural resources in individual applications. This section of the proposed regulations, as written, is adequate to address the issues raised on a case-by-case basis. No change is warranted.

Comment

Several commenters expressed concern that the siting of major renewable energy facilities on farmlands is inconsistent with the state's policies for the preservation of agricultural and natural resources, set forth in the NYS Constitution. Several commenters indicated that agricultural lands and solar facilities were incompatible uses and suggested that the Office should prioritize prime agricultural land for food production or that thoughtful policy be created or focused on, to create winning scenarios for farming and renewable energy production.

Discussion

The regulations are not in conflict with the NYS Constitution. The Constitution does not prohibit development of any agricultural lands within the state, but directs the state to conserve, protect, and enhance the agricultural resource base or to effectuate policy as to not cause harm to this foundational industry.

Executive Law §94-c directs the Office to "undertake a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals while ensuring the protection of the environmental and consideration of all pertinent social, economic and environmental factors." The Office recognizes the value and importance of conserving highly productive agricultural lands in New York State and has developed regulations in consultation with NYSAGM to require applicants to avoid, minimize, and mitigate impacts to agricultural lands. No change is warranted.

Comment

Several commenters encouraged the Office to develop regional thresholds for the maximum amount of prime agricultural soils that can be used for solar and wind facilities, with the thresholds being based on the number of actively farmed acres each region would need to support a robust farming community.

Discussion

Section 900-2.16 will provide the information necessary for the Office to evaluate impacts on a case-by-case basis and make balanced decisions about the farmland and agricultural impacts. No change is warranted.

Comment

Commenters asserted that Agricultural Plans should be required for all agricultural MSG 1-7, not just MSG 1-4, as these lands in higher classes can still be farmed productively. One commenter suggested deleting language in §900-6.4(s), as agricultural land that may not be defined as active may still contain the best soil for future agricultural use, which should be protected from development. Additionally, it was recommended that the definition of actively farmed agricultural lands be expanded to 5 of the last 7 years (instead of 3 of the last 5 years).

Discussion

The Office recognizes the importance of conserving highly productive agricultural lands in the State. Applicants shall avoid siting major renewable energy facilities in the NYS Agricultural Land Classification MSG 1-4, and land used for active farming activities. The requirement is consistent with the NYSAGM's classification of highly productive soils to ensure protection for the most productive agriculture lands. The definition of actively farmed land is consistent with SEQRA guidance for considering impacts on agricultural lands, which is considered as lands that currently have, or have had, active agricultural land use within the past 5 years. No change is warranted.

Comment

Commenters stated that the regulations should quantify potential economic costs associated with the conversion of farmland and related impacts to the agricultural economy. These costs include impacts to existing farm operations and profitability, and any ripple effect within agricultural operations and agricultural related businesses in or supporting farms within a county agricultural district.

Discussion

Section 900-2.16 requires the applicant to evaluate potential impacts to agricultural resources. The consideration of potential impacts of renewable energy development on agricultural operations and profitability is the responsibility of the farmers or owners leasing the land for development. No change is warranted.

Comment

One commenter requested the establishment of a capital fund for the conversion of agricultural uses to those compatible with the renewable energy project be a required host community benefit.

Discussion

The content and terms of host community agreements must be negotiated by the applicant and the host communities and are outside the scope of the regulations. No change is warranted.

Subsection (a)

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters recommended the deletion of §900-2.16(a)(3) requiring municipal zoning districts and overlay zones in the assessment of the study area.

Discussion

The requirement to include identification and assessment of municipal zoning districts or overlay zones, including those designated for renewable energy, is essential to ensure municipalities have the opportunity to identify and work towards compliance with zoning districts, including local farmland policies. No change is warranted.

Comment

Multiple commenters stated that the proposed facility study area associated with a field verification of active agriculture land use should be further refined. It was recommended that §900-2.16 include a provision to allow for information to be obtained from NYSAGM on active agriculture land use within agricultural districts within the 1-mile study area for solar facilities.

Discussion

The Office considered the comment and has determined that no change is warranted.

Paragraphs (4)-(5)

No additional discussion is necessary.

Paragraph (6)

No additional discussion is necessary.

Paragraphs (7)-(8)

Comment

A commenter requested that the Office move two requirements, the potential construction impacts and the methods available to facilitate farming activity during construction, and temporary and/or permanent impacts to agricultural production areas, from §900-2.16(b) to §900-2.16(a).

Discussion

The Office agrees that these subsections require information that cannot be depicted on maps and has revised the regulations to adopt the suggested revisions.

Subsection (b)

Paragraph (1)

Comment

Commenters suggested revising §900-2.16(b) to limit the maps to the "facility site" instead of the "study area," and adding landowner interviews as a source of information in §900-2.16(b)(1).

Discussion

The Office has considered the comment and determined that no change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters requested deleting the previous §§900-2.16(b)(2) and (3) (referenced above) regarding potential construction impacts and methods available to facilitate farming activity during construction, and regarding temporary and/or permanent impacts to agricultural production areas within the proposed facility footprint, as well as the requirement of a "qualified or accredited" third party agricultural professional for the agricultural co-utilization plan referenced in §900-2.16(e).

Discussion

As noted above, the Office determined the information required by these subsections is essential to conduct an informed review of potential impacts on agricultural resources. If the applicant chooses not to use an accredited professional, they can submit the credentials of their proposed third-party agricultural professional to the Office for review/approval as a qualified professional. No change is warranted.

Paragraphs (4)-(6)

No additional discussion is necessary.

Subsection (c)

Comment

Several commenters expressed concern that the current level of compliance with the NYSAGM's guidelines is the bare minimum of what applicants can and should do to mitigate impacts to farmland. Commenters requested that the regulations be revised to state that the NYSAGM guidelines should be followed to the maximum extent practicable. In addition, if standards are not followed, the Office should require and define means of remediating soil impacts. Other commenters stated that the provisions for compliance with NYSAGM guidelines (including in §900-6.4) are onerous and more expensive than traditional construction practice,

Discussion

The Office has carefully considered the potential impacts to agricultural land in developing the regulations. Section 900-2.16 requires applicants to develop of an Agricultural Plan that is consistent with the NYSAGM guidelines for solar and wind facilities to the maximum extent practicable. Additionally, the uniform standards and conditions set forth in §900-6.4(s) will be imposed upon each facility to ensure consistency with NYSAGM Guidelines for Solar Energy Projects – Construction Mitigation for Agricultural Lands (dated 10/18/19) and NYSAGM Guidelines for Agricultural Mitigation for Wind Power

Projects (revised 4/19/18). The USCs will also require the hiring of a third-party agricultural monitor to oversee compliance with agricultural conditions and requirements, including the approved Agricultural Plan and Remediation Plan required pursuant to §§900-2.16(c) and (d). No change is warranted.

Comment

Several commenters requested the use of a financial mechanism to mitigate the potential impacts to the most productive farmland and noted that such a fee could incentivize applicants to site solar facilities on marginal or less productive lands. One commenter stated, for example, that NYSERDA proposes to include a mitigation fee to drive innovative siting (but that it was excluded from the Office regulations), which will limit mitigation incentives to only those projects that apply for NYSERDA's Solicitations for Large-Scale Renewables. The Commenter also requested that the proposed regulations be amended to provide for agricultural mitigation payments to a designated fund in the event of such impacts under the authority provided in Executive Law §94-c. Other commenters stated that applicants were already providing mitigation payments through the NYSERDA's Solicitations for Large-Scale Renewables to address noncompliance issues with NYSAGM guidelines.

Discussion

The Office does not have the statutory authority to require monetary mitigation of agricultural lands. Existing agricultural mitigation funds administered by NYSERDA are outside of the purview of the Office. No change is warranted.

Comment

One commenter indicated that the Agricultural Plan and Decommissioning and Site Restoration Plan should include a provision that ensures that agricultural land can be restored or returned to full (100 percent) agricultural use when renewable energy projects are decommissioned. Other commenters suggested that decompaction depths to 2 feet below grade would allow agricultural fields to be viable for future production after facility disturbance.

Discussion

The Decommissioning and Site Restoration Plan is required to address potential future uses of the site, including agricultural uses. For facilities located on leased lands, the Plan needs to include a description of restoration agreements with the landowner. Consequently, landowners have the ability to request a depth of 2 feet for decompaction during the establishment of their land use agreements. However, the standard restoration required by the NYSAGM following construction activities is decompaction to a depth of 18 inches followed by removal of all rocks greater than 4 inches in size. No change is warranted.

Subsection (d)

No additional discussion is necessary.

Subsection (e)

Comment

The Office received multiple comments supporting co-utilization, also referred to as Agrivoltaics. A recommendation was made to change the language in the draft regulations and USCs from Agricultural Co-Utilization to "Agrivoltaics Dual Use" or "Colocation."

Discussion

As agricultural lands may not be used solely for solar facilities but alternatively for wind facilities, co-utilization is the appropriate term. No change is warranted.

Comment

Commenters requested that, once defined, projects that implement co-utilization should be given preference during permit approvals. A commenter also noted that the Office should support and monitor the development of native plants and pollinator species in solar (including co-utilization) facilities that will in turn support apiaries (beekeepers/honeybees).

One commenter requested any alternative agricultural practices that are proposed to co-exist on-site with a renewable energy project should be identified along with an analysis of market and profitability. Another commenter requested that applicants should supply plans that guarantee feasibility and continuity of co-utilization throughout the lifetime of the project.

Discussion

Applicants are strongly encouraged to explore options for co-location of major renewable energy facilities and farming that results in continued agricultural production within the facility site, and/or other productive uses on the site such as sheep grazing, utilizing pollinator friendly planting practices, and apiaries. The regulations specifically contemplate co-utilization plans and allow the development of such plans, which should address proposed practices throughout the useful life of the facility. The proposed activities should be consistent with, and in support of, the existing on-farm agricultural production whenever possible. The regulations are intended to encourage innovation and flexibility, rather than being prescriptive, and to guide applicants in the process of requesting and obtaining a permit for a solar or wind facility. No change is warranted.

§900-2.17 Exhibit 16: Effect on Transportation

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

One commenter suggested that §900-2.17 include a section about the current conditions of the surrounding roadway network, as well as a description of necessary improvements (with cost estimates) to accommodate heavy equipment and construction. One commenter indicated that the site plan should show access road locations and widths, including temporary and permanent clearance widths for the entire travel route instead of only in the vicinity of the proposed facility.

Discussion

Section 900-2.17(b) requires that an application include descriptions of nearby public roadways. Relevant roads should be determined during pre-application meetings required by §900-1.3(a). Also, §900-2.17(d)(2) requires an analysis of existing road conditions and §900-10.2(e)(8)(iv) requires copies of any road use agreements to be submitted as compliance. Section 900-2.17(d) requires discussion of travel routes and potential mitigation measures regarding local roads are required by the application. No change is warranted.

Subsection (c)

No additional discussion is necessary.

Subsection (d)

Comment

Commenters were generally concerned about the additional traffic associated with industrial energy projects. Commenters requested that traffic control plans limit the number of trips per day, include traffic control contractors and monitors, document special instructions for drivers about unusual situations, and identify hazardous locations. Additional comments included concerns about trespassing hunters, litter control plans, and winter parking plans, especially as parking on the sides of roads creates a hazard for others, reduces visibility, and is hazardous for the local snowplows.

Discussion

As part of the pre-construction compliance filings required by §900-10.2(e)(8), the applicant is required to prepare and implement a Traffic Control Plan to ensure safety during facility construction, minimize potential traffic impacts and address any damage to local roads. Additional compliance with state, county, or municipal transportation permit requirements will also need to be described in the Traffic Control Plan. This may include, but is not limited to, the use of traffic control contracts or monitors, roadway use and parking restrictions, access point controls and restrictions, roadway maintenance, debris management, or any special weather-related requirements. The establishment of any access points on public roadways to facility construction or operation roadways will require compliance with state, county, or municipal transportation permit requirements. It is expected that the applicant will address controls, including agreements with affected landowners, to prohibit any unauthorized use (trespassing) of these access points onto private or leased lands. The Office finds these controls sufficient to ensure proper use of roads to address potential traffic impacts and roadway hazards. No change is warranted.

Comment

Commenters expressed concerns about the use of local roadways and access roads for heavy hauling of equipment and damages incurred, resulting in repairs required on local, state, and county roads as well as bridges, culverts, and drainage features. Commenters also expressed concerns about the restoration of these roads to pre-construction conditions and ongoing unresolved construction impacts.

Discussion

Section 900-10.2(e)(8)(iv) requires the submittal of a copy of any road use and restoration agreements regarding construction or operation damage and repair. These filings will be reviewed to ensure that appropriate repair measures are in place. As noted above, the applicant is also required to prepare and

implement during facility construction a Traffic Control Plan to ensure safety and cover any potential damage, as well as address compliance with state, county, or municipal transportation permit requirements. The Office finds these controls sufficient to ensure proper use and restoration of roads. No change is warranted.

Subsection (e)

No additional discussion is necessary.

Subsection (f)

Comment

Commenters requested deleting the requirement in §900-2.17(f) regarding the notice of proposed construction to the FAA, applicant statements of formal/informal review by the Department of Defense (DOD), applicant statements of consultation with airports and heliport operators for both military and non-military facilities, and responses received in such reviews and consultations.

Discussion

Compliance with FAA regulations and requirements (in accordance with 14 Code of Federal Regulations (CFR) Part 77) is integral to the approval process. The applicant is also responsible for informal and formal DOD review of the proposed construction or alteration in accordance with 32 CFR §211.7 and 32 CFR §211.6, respectively. As such, the Office requires the material identified in this section to ensure adequate coordination and public safety in relation to air traffic. No change is warranted.

§900-2.18 Exhibit 17: Consistency with Energy Planning Objectives

Subsection (a)

Comment

Several commenters suggested that §900-2.18 duplicates the efforts of NYSERDA and NYISO. Some commenters proposed deleting this section in its entirety, while others suggested it should be replaced with a requirement to provide the annual expected megawatt-hours of wind or solar electricity that will be generated by a facility. The commenter asserted that NYSERDA/NYISO has been mandated to meet the CLCPA targets and a project with a NYSERDA contract would have already made a demonstration of consistency with the CLCPA targets. Further, the commenter noted that NYISO ensures reliability and compatibility of new generation with the transmission system.

Discussion

Executive Law §94-c directs the Office to "undertake a coordinated and timely review of proposed major renewable energy 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" and requires that the Office consider the proposed facility's contribution to the state's ability to achieve the CLCPA targets and the environmental benefits of the facility in drafting site-specific permit conditions and determining whether compliance with local law would be unreasonably burdensome. No change is warranted.

Subsection (b)

Comment

Commenters requested that the reliability of the transmission system (i.e., upgrades to existing transmission and new transmission capability) be addressed for individual projects, and for the integration of all new renewable projects statewide.

Discussion

Section 900-2.18 requires the applicant to provide a description of the impact the proposed facility would have on reliability, regional capacity requirements, and electric transmission constraints in the state. This would involve a review of the capacity of the transmission system to handle the proposed facility to ensure reliability of the power system. The NYISO's Interconnection Process also ensures reliability and compatibility of new generation with the transmission system. These multiple reviews will ensure continued reliability of the transmission system as new renewable generation replaces existing fossil fuel generation. No change is warranted.

Subsection (c)

Comment

Commenters wanted assurance and an analysis showing that the proposed renewable generation projects would displace fossil fuel generation facilities instead of existing low or zero carbon emitting projects (e.g., hydroelectric).

Discussion

Section 900-2.18(c) requires a description of the impact of a proposed facility on fuel diversity in the state. The impact of the facility on fuel diversity would require an evaluation of the facilities that will be displaced by the project and how that would help the state achieve the CLCPA targets. Replacing hydroelectric plants with solar and wind would not support fuel diversity or help achieve the CLCPA targets. The state goal of 100 percent statewide electric generation to be derived from zero-emission sources by 2040 will require the displacement of fossil fuel facilities and not existing zero carbon generating sources. No change is warranted.

Subsections (d)-(f)

No additional discussion is necessary.

Subsection (g)

Comment

Commenters stated cleared trees and vegetation would cause a reduction in carbon sequestration capacity greater than the reduction in carbon emissions from new renewable generation projects and requested that conservation plans be developed to maintain carbon sequestration capacity. Several commenters stated that projects should provide a calculation to document the net carbon benefit of renewable energy facilities. One commenter requested that each element of §900-2.18 contain statewide data upon which calculations are made, provide calculations for the life of the project, and address the

energy mix in the region of the project. They also stated that calculations must be based on the electricity grid that is currently available in New York State rather than the projected availability of electricity grid capacity.

Discussion

Section 900-2.18 requires a description of the advantages and disadvantages of reasonable and available alternative locations and a statement explaining why the facility will promote public health and welfare, including minimizing the public health and environmental impacts related to climate change. A review of available alternative locations would help to identify sites that require less clearing of trees and other vegetation to minimize environmental impacts. Although new solar and wind facilities may result in a net reduction in carbon stocks, the reduction in carbon emissions from displaced fossil fuel facilities is substantially larger than the lost carbon sequestration capacity. The Office will ensure that these calculations are consistently performed to allow for comparison from project to project. No change is warranted.

§900-2.19 Exhibit 18: Socioeconomic Effects

Comment

Commenters requested that applicants be required to quantify potential socioeconomic costs associated with a facility, including the loss of population, loss of other economic opportunities, and potential impacts to recreation and tourism-related businesses.

Discussion

Subsection 900-2.19(e) requires that the applicant estimate potential costs that would be directly incurred as a result of project construction and operation, with these cost estimates developed following consultation with affected municipalities, public authorities, and utilities. These potential costs include operating and infrastructure costs that will be incurred for police, fire, emergency, water, sewer, solid waste disposal, highway maintenance, and other municipal, public authority, or utility services.

The types of potential impacts identified in the comment are addressed in qualitative terms elsewhere in the regulations. Concerns related to compatibility with existing land use and planning, as well as potential impacts to community character and recreation, are addressed in qualitative terms in §900-2.4 (see, for example, §§900-2.4(g), (h), (k), (l), and (s)). Although there is no requirement to quantify these types of impacts in §900-2.19, that does not lessen their importance to the review process. No change is warranted.

Comment

One commenter raised concerns that intermittent solar and wind energy generation will affect the viability of the electricity grid and increase costs and environmental impacts to residents, particularly to low-income residents.

Discussion

The impact of intermittent energy generation on the viability of the electricity grid is addressed by NYISO and the local transmission interconnection owner. Overall rate impacts are minimized by reliance

on NYISO and other markets, including NYSERDA solicitations, to help minimize the cost of obtaining the renewable energy resources needed to satisfy the CLCPA requirements. No change is warranted.

Comment

One commenter stated that community members should have the opportunity to write and approve a host community agreement.

Discussion

The content, terms, and parameters of, including designation of affected community stakeholders authorized to write, host community agreements are outside of the purview of Executive Law §94-c and the jurisdiction of the Office. No change is warranted.

Subsections (a)-(b)

No additional discussion is necessary.

Subsection (c)

Comment

One commenter was concerned about the potential loss of jobs and businesses that would not be replaced by the jobs created by renewable facilities and requested more detailed information in the application with respect to the effects to jobs.

Discussion

Sections 900-2.19(a) and (c) require detailed information describing the workforce that would be employed during project construction and operation. No change is warranted.

Comment

Commenters requested that 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. A commenter suggested differentiating between local, in state and out of state, in the estimate of the number of jobs identified in §900-2.19(c).

Discussion

Executive Law §94-c states that it "shall not impair or abrogate any federal, state or local labor laws or any otherwise applicable state law for the protection of employees engaged in the construction and operation of a major renewable energy facility." Section 900-2.19(c) requires an estimate of the number of jobs and on-site payroll, thus there is no need for "differentiating between local, in state, and out of state" jobs. No change is warranted.

Subsections (d)-(e)

No additional discussion is necessary.

Subsection (f)

Comment

Multiple commenters stated the regulations should address the potential impact of wind and solar energy development on adjacent and nearby property values. Commenters also requested the regulations address lower tax assessments and tax revenues resulting from the loss of property values. One commenter requested the regulations incorporate a Property Value Guarantee Agreement for all New York State residents living within one mile of industrial wind turbines.

Discussion

Executive Law §94-c does not require findings or studies on the effects of major renewable energy facilities on adjacent and nearby property values. No change is warranted.

Subsection (g)

Comment

Commenters requested that applicants be required to estimate the state and local taxes that will be paid during the life of the project.

Discussion

Section 900-2.19(g) requires that a description of host community benefits be provided for local jurisdictions (as defined in §900-2.19(f)), including an estimate of the incremental amount of annual taxes (and payments in lieu of taxes [PILOT], benefit charges, and user charges) that would be generated by the project. State tax estimates are outside the scope of the regulations. No change is warranted.

Subsection (h)

Comment

Commenters requested that applicants provide a comparison of local property taxes and school taxes paid 10 years prior to the proposed facility, with the tax or PILOT payments expected to be paid during the first 10 operational years of the facility. Commenters requested a detailed accounting of how PILOT money (a type of host community benefit where payments are made pursuant to a host community agreement) will be spent and whether project development will displace any existing state funding. Multiple commenters were concerned that PILOT payments will only partially compensate for property taxes and that taxes would increase to make up for lost tax revenue.

Discussion

The Real Property Tax Law (RPTL) §487 allows any taxing jurisdiction (town, school, etc.) to require an owner of a renewable energy facility to pay an annual fee or PILOT as a replacement for the taxes it would have otherwise collected. Under the law, PILOT amounts cannot exceed the pre-exemption tax amount. PILOT agreements are just one type of host community benefit potentially available. To ensure that the benefits of the major renewable energy facilities are available to the entire community, the regulations require applicants to provide a “description of the host community benefits to be provided, including an estimate of the incremental amount of annual taxes (and payments in lieu of taxes, benefit charges and user charges) it is projected would be levied against the post-construction facility site, its improvements and appurtenances, payments to be made pursuant to a host community agreement or other

project agreed to with the host community" (§900-2.19(g)). The detailed accounting requested by the commenters falls outside of the purview of Executive Law §94-c and the jurisdiction of the Office. No change is warranted.

Subsection (i)

Comment

Commenters were concerned that local emergency responders do not have the necessary equipment or training to adequately respond to an emergency and requested that §900-2.19(e) be revised to include an estimate of the incremental costs associated with training and equipment.

Discussion

Local emergency responders will be responsible for identifying equipment, training, or other needs required for project construction and operation. Section 900-2.19(e) specifies that the required cost estimates should be developed after consultation with affected municipalities, public authorities, and utilities. No change is warranted.

Subsections (j)-(k)

No additional discussion is necessary.

§900-2.20 Exhibit 19: Environmental Justice

Comment

Commenters stated that environmental justice (EJ) definitions under current New York law make it unlikely that EJ areas will be identified in rural parts of the state because minority populations in these areas are low.

Discussion

Section 900-2.20(a) specifies that EJ evaluations be conducted consistent with the applicable requirements of 6 NYCRR Part 487.10. Environmental justice areas include both minority and low-income communities. The definition of a minority community provided in the regulations (§900-1.2(aj)) and 6 NYCRR Part 487.3 recognizes that minority populations tend to be lower in rural areas, as follows: "Minority community means a census block group, or contiguous area with multiple census block groups, where the minority population is equal to or greater than 51.1 percent in an urban area or 33.8 percent in a rural area." Similarly, the regulations and 6 NYCRR Part 487.3 define "low-income community" as a "census block group, or contiguous area with multiple census block groups, where 23.59 percent or more of the population have an annual income that is less than the poverty threshold; except that the percentage population and income threshold may be revised to reflect updated demographic data" (§900-1.2(ad)). No change is warranted.

Comment

Commenters requested the requirements in §§900-2.20 (a), (b), (c), and (d) to be triggered only in the event that the project site or its impact study area is located in an environmental justice area. Another commenter specifically requested that the impact study area for EJ be limited to "up to two (2) miles" (see §900-2.20(a)(2)).

Discussion

The impact study area for EJ, as specified in §900-2.20(a), shall at a minimum include a 0.5-mile radius around the facility, and may be extended as needed based on site-specific factors. The Office will determine the sufficiency of the EJ impact study area proposed by an applicant.

If no EJ areas are identified within the impact study area and there is no other potential for disproportionate impacts to minority or low-income populations, then the analyses required by §§900-2.20(b), (c), and (d) will not be needed. No change is warranted.

Subsection (a)

Comment

Commenters stated that regulations should require the EJ analyses to identify the methods and economic data used, the impact areas studied, and the credentials of the evaluator.

Discussion

Section 900-2.20(a) requires that the analysis methods and impact area studied be provided, along with the author and dates of any studies used in the evaluation. This subsection further specifies that an EJ evaluation be conducted consistent with the applicable requirements of 6 NYCRR Part 487.10. No change is warranted.

Comment

One commenter suggested that the EJ evaluation should be required to determine if negative impacts to EJ areas will increase over time. The commenter expressed concern that relying on intermittent wind or solar energy generation will jeopardize the viability of the electricity grid and result in increases in the cost of energy to residents, which could in turn disproportionately affect low-income populations.

Discussion

Section 900-2.20(a) requires the applicant to identify and evaluate any significant and adverse disproportionate environmental impacts from construction and operation of the facility on an EJ area. This analysis should include potential impacts expected to occur over time (both during construction and operation). No change is warranted.

Subsections (b)-(d)

No additional discussion is necessary.

§900-2.21 Exhibit 20: Effect on Communications

Subsection (a)

Comment

Several commenters suggested that the detailed description of the proposed telecommunications interconnection should be provided as a post-permit compliance filing once it is available from the relevant telecommunications provider.

Discussion

Section 900-2.21 requires a detailed description of the telecommunications interconnections, a description of the status of negotiations, or a copy of agreements that have been executed, with companies or individuals providing the communications interconnection, including any restrictions or conditions of approval placed on the facility imposed by the provider; and a description of how the interconnection and any necessary system upgrades will be installed, owned, maintained, and funded. If the detailed description is not available from the relevant telecommunications provider, then the applicant will need to provide a written statement from the telecommunications provider indicating why it is not available. No change is warranted.

Subsections (b)-(d)

No additional discussion is necessary.

Subsection (e)

Comment

Several commenters requested deletion of §900-2.21(e), which requires an analysis demonstrating that there is sufficient capacity available to support the requirements of the facility.

Discussion

The applicant must demonstrate that there will be sufficient capacity to support the requirements of the proposed facility by providing supporting documentation in the application. No change is warranted.

Subsection (f)

Comment

Commenters requested deletion of §900-2.21(f), which requires the applicant to demonstrate that the design configuration of the facility and interconnections will have no adverse effects on communication systems.

Discussion

The applicant must evaluate the design configuration of the proposed facility and interconnection(s) to demonstrate that there would be no adverse impact on communications systems. No change is warranted.

Subsection (g)

Comment

Commenters expressed concerns about the interference of digital broadcast signals on television, cellular tower, and radio signals. It was suggested that this could pose a safety hazard if residents cannot access digital TV for local information.

Discussion

Digital broadcast television signals are much less affected by interference from wind facilities than the earlier analog TV signals (which are no longer broadcast). However, some interference can still occur, especially when a wind facility is located between the transmitter and the receiver. The interference may be reduced by rotating the antenna to point directly at the transmitter. Section 900-2.21(d) requires

applicants to describe the anticipated effects of the facility, as well as the electric interconnection between the facility and the point of interconnection on the communication systems identified in §900-2.21(b), on Doppler/weather radar, television, cellular service, and radio signals. Section 900-2.21(g) also requires applicants to provide a description of post-construction activities that shall be undertaken to identify and mitigate any adverse effects on the various systems identified in §900-2.21(b). No change is warranted.

Subsection (h)

No additional discussion is necessary.

§900-2.22 Exhibit 21: Electric System Effects and Interconnection

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

Several commenters objected to the information requested in §900-2.22 of the regulations, due to conflicts with the timing of the Office's permitting processes and NYISO interconnection approvals. Specifically, commenters stated that the final design of the facility, including proposed electrical interconnections, will not be available until the end of the NYISO Class Year Facilities Study and that the NYISO cannot begin its study without a completeness determination. The commenters suggested revising the regulations such that the information requested in §900-2.22 is based on the completed System Reliability Impact Study (SRIS), and subject to changes that may result from the NYISO Class Year Facilities Study.

Discussion

The Office agrees that the SRIS may take several months to obtain. However, the SRIS can be completed ahead of the project permitting process. Submittal of the SRIS is necessary for the Office to understand how the proposed facility will impact the rest of the power system. The final design and necessary system upgrades identified in the NYSIO Class Year Facility Study is beyond the scope of what is required for permitting, which is why it is not included as part of §900-2.22. No change is warranted.

Subsections (c)-(i)

No additional discussion is necessary.

§900-2.23 Exhibit 22: Electric and Magnetic Fields

Comment

Multiple commenters requested that §900-2.23 be removed because it was unclear how high-voltage transmission lines were relevant to major renewable energy generating facilities.

Discussion

The State of New York has previously adopted acceptable electric and magnetic field standards that apply to all new electric transmission lines constructed within the state. This section is applicable to

the proposed facility, as well as its transmission interconnection and collector system. No change is warranted.

Subsections (a)-(c)

No additional discussion is necessary.

Subsection (d)

Comment

Commenters inquired as to what "interim standards" are being referenced in the regulations, noting that there are no citations in the proposed regulations. A commenter also asked why the most recent information available on the hazards of electromagnetic fields to human health would not be used.

Discussion

Section 900-2.23(d)(7) requires applicants to demonstrate compliance with the NYSPSC's *Statement of Interim Policy on Magnetic Fields of Major Electric Transmission Facilities*, issued and effective September 11, 1990 (Interim Policy), which reflects the most recent standards adopted by the NYSPSC. The Office has added this document to the materials incorporated by reference in §900-15.1(m).

Comment

Commenters were concerned about the potential health effects for those who live near rights-of-way (ROWs), particularly from radiation associated with high megawatt output, relative to setbacks and at non-participating property lines.

Discussion

Section 900-2.23(d)(7) requires applicants to demonstrate compliance with NYSPSC's "Statement of Interim Policy" standards for electromagnetic field levels at the edges of ROWs. No change is warranted.

Comment

Commenters suggested that the Office and applicants should be responsible for notifying adjoining landowners of potential EMF health effects.

Discussion

Section 900-1.3(b) requires that the applicant conduct at least one pre-application meeting for community members who may be adversely impacted by the siting of the facility, and applicants must provide written notice of intent to file and the actual filing of an application to all persons residing within one mile of the proposed solar facility or within five miles of the proposed wind facility.

In addition, for applicable transmission, interconnection, or collector lines between the facility and the existing electric transmission and distribution system having unique EMF characteristics, §900-2.23(d) requires the applicant to include an EMF study for each identified ROW segment cross-section. This includes modeling of electric and magnetic fields out to 500 feet from the edge of the ROW on both sides.

Finally, §900-2.23(d) requires the applicant to provide a demonstration that the facilities, including interconnection transmission lines, will conform with the NYSPSC's Interim Policy EMF levels at the

proposed ROW edges. Application materials will be publicly available and adjoining landowners will have an opportunity to provide comments on the draft siting permit. No change is warranted.

§900-2.24 Exhibit 23: Site Restoration and Decommissioning

Subsection (a)

Comment

Multiple commenters suggested strengthening the regulations by imposing penalties when an applicant abandons a project site (or does not meet standards); and that bonds or deposits be in place to finance decommissioning costs, to dispose of or recycle facility components (batteries from BESS for instance), and if needed, for site remediation.

Discussion

Section 900-6.6 requires permittees to provide financial security in the form of a letter of credit or other approved financial assurance for decommissioning and site restoration activities in accordance with an approved decommissioning plan, which shall remain active until a facility is fully decommissioned. Such a Decommissioning and Site Restoration Plan must be included in the application per §900-2.24(a) and should include a discussion on recycling. In addition, the regulations provide the NYSDPS or the NYSPSC with the authority to monitor, administer, and enforce compliance with all terms and conditions for an Office-issued siting permit, including the Decommissioning and Site Restoration Plan terms and conditions. No change is warranted.

Comment

Commenters expressed that there is no reference in the regulations as to how municipalities can trigger the decommissioning plan in the event of abandonment. The commenters wanted to ensure that a plan was in place, as municipalities may not have the expertise to create one.

Discussion

Section 900-2.24(a) requires the preparation of a Decommissioning and Site Restoration Plan, which should include a discussion of the procedures for triggering the implementation of such plan in the event that a facility is abandoned. The regulations provide the NYSDPS or the NYSPSC with the authority to monitor, administer, and enforce compliance with all terms and conditions for an Office issued siting permit, including the Decommissioning and Site Restoration Plan terms and conditions. No change is warranted.

Subsection (b)

Comment

Commenters noted that the state should be the responsible for, or should agree to finance the entire cost of, remediating land should a property owner or lessee abandon a site or not be held responsible.

Discussion

As noted above, §900-6.6 requires permittees to provide financial security in the form of a letter of credit or other approved financial assurance for decommissioning and site restoration activities, in

accordance with an approved decommissioning plan, which shall remain active until a facility is fully decommissioned. In addition, the applicant must provide, as part of §900-2.24, copies of decommissioning and security agreements between the applicant and landowner, municipality, or other entity responsible for such decommissioning and restoration. The NYSDPS or the NYSPSC will have the authority to monitor, administer, and enforce compliance with all terms and conditions for an Office-issued siting permit, including the Decommissioning and Site Restoration Plan terms and conditions. Moreover, the Office does not have the legal authority to provide the relief requested in the comment. No change is warranted.

Subsection (c)

Comment

Some commenters pointed out that allowing net decommissioning in the regulations presents risks, as there is a big difference between gross and net decommissioning costs. The commenters noted that net decommissioning could create a financial burden on communities in the state if a project were abandoned or if a company were to go bankrupt (i.e., due to the fluctuating value of scrap metal).

Discussion

Per §900-10.2(b)(2), financial assurance statements and copies of agreements between the permittee and the Towns, Cities, and Villages establishing a right for each municipality to draw on the assurance dedicated to its portion of the facility, shall be provided to the Office after one year of facility operation. Certain bankruptcy clauses may be written into the agreements which will be reviewed by the Office. Agreements will be updated every fifth year thereafter, specifying changes (due to inflation or other cost increases) to the structure of the letters of credit (or other financial assurance approved by the Office). If abandoned, the permittee would forfeit its facility equipment (that may be repurposed or salvaged) and host municipalities could use this value to offset decommissioning costs. No change is warranted.

Comment

Some commenters commented on the how applicants may overestimate salvage value and use that value to cover the entire gross cost of decommissioning.

Discussion

Sections 900-2.24(c) and 900-6.6(b) require analyses of projected salvage value (including reference to the salvage value data source); the estimate of this value will be reviewed by the Office to determine the validity of this projected amount as reported in applications. Based on current market values, salvage estimates will be updated as part of the required filing of updated letters of credit (or other approved financial assurance documents) after one year of operation and every fifth year thereafter per §900-10.2(b)(2). No change is warranted.

Comment

Some commenters recommended expanding the 15 percent contingency cost (based on the overall decommissioning and site restoration estimate) to include a 2 percent escalator for the life of the project (to account for inflation) as part of the gross cost estimates. In contrast, other commenters recommended reducing the gross cost estimates to include a 10 percent contingency cost (instead of a 15 percent contingency cost) for the gross and net decommissioning site restoration estimates.

Discussion

Inflation will be reflected in compliance filings (of agreements and letters of credit or other approved financial assurance type submitted after one year of operation and every fifth year thereafter). The Office has determined that a 15% contingency is reasonable based on careful consideration of the best practices for siting renewable energy projects. No change is warranted.

Comment

A commenter also requested that the Decommissioning and Site Restoration Plan include the costs of fields that have been tile drained.

Discussion

The regulations require the Decommissioning and Site Restoration Plan to include the gross and net decommissioning costs for the facility, which would include any such costs related to restoration and potential future uses of the site, including affected agricultural lands, in accordance with restoration agreements with the landowner. The Office may take into account site specific conditions potentially requiring additional restoration activities. No change is warranted.

§900-2.25 Exhibit 24: Local Laws and Ordinances

Comment

One commenter requested that the regulations (specifically, §§900-1.3; 900-2.25; and 900-8.4(d)) clarify whether the Office's exercise of jurisdiction over a major renewable energy facility limits local governments' authority to participating in the hearing process pursuant to §900-8, including filing of the statement of compliance with local laws prescribed in §900-8.4(d).

Discussion

As discussed above, local agencies' participation in the siting process is not limited to participation in the hearing process. Applicants are required to meet with local agencies in advance of filing an application for a siting permit and must include materials related to such meeting(s) in their application. Applicants must provide the Office with a list of all applicable, substantive provisions of local laws and either demonstrate the proposed facility's compliance therewith, or request that the Office waive such requirement because compliance therewith would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility. Local agencies will have the opportunity to submit comments on the draft siting permit and must provide information to ORES regarding the proposed facility's compliance with applicable laws. Local agencies will also have the opportunity propose significant and substantive issues for adjudication, seek party status, and apply for funding from the local agency account to defray the costs associated with the preparation of their comments and the required compliance statement. To the extent a party wishes to challenge a final siting permit, the party may seek judicial review of the Office's final permit decision (i.e., issuance or denial of the final siting permit) as provided in Executive Law §94-c(5)(g). No changes are warranted.

Subsection (a)

Comment

Commenters stated that the regulations do not directly address the issue of new local laws and requested that the regulations clarify in §900-2.25(a) (and in §900-2.9(b)(4)(v) regarding visual impact assessment), that only those laws in effect when an application is filed should be applicable, or need to be the subject of a waiver; and that subsequently enacted local rules (i.e., after the pre-application meeting with municipal officials, or after an application has been filed) should not apply. The commenters requested that the regulations be revised to clarify the list of local ordinances, laws, resolutions, regulations, standards, and other requirements in §900-2.25(a) be enacted prior to the submission of an application.

Discussion

In accordance with Executive Law §94-c(5)(e), the Office may only issue a final siting permit if it makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions, would comply with applicable laws and regulations. In making this determination, the Office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility. The Office requires and encourages applicants to consult with local agencies and community members to identify regulations that may take effect at the time of filing. As to the consideration of local laws or ordinances adopted after the submission of an application, the Office will have to consider that matter on a case-by-case basis and reserves the right to make any such decision in the context of a specific permit application based upon a record containing specific facts and circumstances. No change is warranted.

Subsection (b)

Comment

Commenters requested that §900-2.25(b) be changed to apply only to the placement of electrical collection lines, and not to interconnections.

Discussion

The Office has considered this comment and determined that no change is warranted.

Subsection (c)

Comment

Commenters suggested revising §900-2.25(c) to remove the requirement to demonstrate that reasonable design changes to the facility would obviate the request to waive local laws and ordinances.

Discussion

The Office has considered this comment and determined that no change is warranted as it is necessary for the Office to evaluate the burden imposed by compliance with local laws.

Comment

Multiple commenters stated that the draft regulations do not conform to the standard set forth in Executive Law §94-c(5)(e), as it does not prescribe identical grounds for demonstrating that local

requirements are unreasonably burdensome as those found in the Article 10 regulations (16 NYCRR §1001.31).

Multiple commenters proposed that the rules be revised by deleting text in §900-2.25(c) and replacing it with the language conforming to, or similar to, the wording found in §94-c(5)(e), which grants the Office the authority to elect not to apply, in whole or in part, any local law or ordinance. The commenters also suggested adding a new subsection, §900-2.25(c)(4), that would allow requests grounded in CLCPA targets as a demonstrable need for a waiver.

Discussion

The regulations do not prescribe identical grounds for demonstrating that local requirements are unreasonably burdensome as those found in the Article 10 regulations (16 NYCRR §1001.31). Although the regulations are similar, they are not identical since the statutory requirements under Executive Law §94-c differ from those set forth in Article 10. Under Article 10, the NYS Siting Board may elect not to apply a local substantive requirement if it is "unreasonably burdensome in view of the existing technology, or the needs of, or costs to ratepayers whether located inside or outside of such municipality," whereas under §900-2.25(c), the Office "may elect not to apply local substantive requirements if it finds that, as applied to the facility, such requirements are unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the facility." The Office has revised the text of §900-2.25(c) to conform with the language of Executive Law §94-c(5)(e).

Comment

Multiple commenters objected to the provision in the regulations that authorizes the Office to elect to waive local laws and ordinances, and the provision in the USCs that the permittee shall construct and operate the facility in accordance with the substantive provisions of the applicable local laws (as identified in §900-2.25 of this Part), except for those provisions of local laws that the Office determines to be unreasonably burdensome, as stated in the siting permit.

Discussion

Executive Law §94-c provides that "[a] final siting permit may only be issued if the Office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations," but, as noted above, also provides the Office with the authority to "elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable, if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility."

Section 4(c) of the Act finds that the development of "uniform permit standards and conditions that are applicable to classes and categories of renewable energy facilities, that reflect the environmental benefits of such facilities, and address common conditions necessary to minimize impacts to the surrounding community and environment" serves a public policy purpose. Although the USCs may conflict with particular local laws or ordinances, they fulfill the policy goals of the statute and are designed to be protective of public health and safety and the environment. No change is warranted.

Comment

Multiple commenters requested clarification about the Office's standards to elect to waive local laws. Some commenters objected to the regulations shifting the burden to municipalities to defend their local laws. However, others commented that the municipalities should bear the burden of establishing the need for more stringent standards (should they apply) over those imposed by the uniform standards and conditions.

Additionally, commenters stated that 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. Commenters stated that 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 (LWRPs).

Discussion

The initial burden is on an applicant to identify and evaluate all substantive provisions of applicable local laws, and to justify any request for the Office to elect not to apply any such provision. Municipalities have the right to challenge an applicants' conclusions in their "statement of compliance with local laws and regulations" and may propose to adjudicate issues related to compliance with local laws and regulations (see §900-8.4(d)). Ultimately, pursuant to Executive Law §94-c, the Office may elect not to apply local substantive requirements if it finds that such requirements are unreasonably burdensome in view of the CLCPA targets and environmental benefits of the proposed facility. No changes are warranted.

Comment

One commenter stated that in cases where an applicant deems local regulations unreasonably burdensome in view of the CLCPA (§900-2.25(c)), the Office should still require the application of NYCDEP's watershed regulations.

Discussion

To the extent the commenter is suggesting a particular NYCDEP permit should be required, such procedural requirements are preempted by Executive Law §94-c. Substantive provisions of NYCDEP watershed regulations would only be waived in the event that the Office determined that compliance therewith would be unreasonably burdensome in view of the CLCPA targets and environmental benefits of the proposed facility. No change is warranted.

Subsection (d)

Comment

One commenter suggested that the summary table required in §900-2.25(d) should identify which requirements are protective of public health and safety, and of the Comprehensive Plan. The commenter also wanted to know which New York State agency would be responsible if the requirements are disregarded.

Discussion

The summary table required by §900-2.25(d) will include the substantive provisions of local laws pertaining to health and safety that are applicable to the proposed facility and the degree to which the applicant will comply with those laws. Applicants are required to provide a statement as to whether any applicable local jurisdiction has adopted a Comprehensive Plan applicable to lands on which a proposed facility will be located and provide copies of any applicable Comprehensive Plan as part of their application (§900-2.4(h)). The NYSDPS and NYSPSC are authorized to monitor, administer, and enforce compliance with all permit conditions. No change is warranted.

Subsections (e)-(f)

No additional discussion is necessary.

§900-2.26 Exhibit 25: Other Permits and Approvals

Comment

One commenter requested that §900-2.26 be revised to require the applicant to identify any Indian Nation-delegated permit, consent, approval, or license required for the construction or operation of the facility; as well as a statement of whether the applicant knows of others who have any pending Indian Nation applications or filings which concern the facility, in order to recognize the sovereign regulatory authority of federally/state recognized Indian Nations.

Discussion

The Office has revised §§900-2.26(a) and (b) accordingly. However, the Office does not have jurisdiction over facilities that are not proposed within New York State's boundaries.

Subsection (a)

Comment

Commenters noted that some of the proposed requirements are already addressed by other federal or state agency permitting requirements with which developers must comply, which could cause uncertainty and create unnecessary duplication of efforts.

Discussion

A permit to be issued by the Office will not include any permits, consents, approvals or licenses required under federal laws. Section 900-2.26 requires a comprehensive list of federal or federally delegated permits that will be required for construction and operation of the proposed facility. No change is warranted.

Subsection (b)

Comment

A commenter indicated that there should be a statement as to whether the applicant knows of others who have any pending federal, state, or local applications or filings which concern the facility, with "filings" meaning lawsuits, injunctions, investigations, bankruptcies, or other civil and/or criminal proceedings, as this should concern the public and the elected officials.

Discussion

The Office has revised §900-2.26(b) to clarify that this provision applies to applications or filings for governmental permits or approvals, consistent with §900-2.26(a).

Subpart 900-3 Transfer Applications from PSL Article 10 or alternative permitting proceeding

Comment

A commenter objected to the ability of applicants to transfer from an existing permitting and approval process into the Executive Law §94-c process and questioned how this would expedite siting.

Discussion

Transfers from existing permitting and approval processes into the ORES siting process are specifically authorized by the statute (see Executive Law §§94-c(3)(a) and (4)(f)). No change is warranted.

Comment

A commenter recommended adding specific provisions regarding determinations of incomplete transfer applications, and that applicants should be penalized for such submissions.

Discussion

The Office is directed to deem complete upon filing, any transfer application for a pending Article 10 facility for which an application was deemed complete pursuant to Article 10 (see Executive Law §94-c(4)(f)(i)). The statute does not provide the Office discretion in this regard. All other transfer applications will be reviewed and processed pursuant to §900-4. No change is warranted.

Comment

Multiple commenters asserted that no pre-applications or transfers should be allowed before the regulations are approved.

Discussion

Executive Law §94-c(5)(a) specifically authorizes applications in advance of the promulgation of the implementing regulations, providing that, "[u]ntil the Office establishes (USCs)...and promulgates regulations specifying the content of an application for a siting permit, an application for a siting permit submitted to the office shall conform substantially to the form and content of an application required by section one hundred sixty-four of the public service law." No change is warranted.

§900-3.1 Transfer Applications for Opt-In Renewable Energy Facilities

Subsection (a)

The Office has revised §900-3.1(a)(1) to require an applicant to provide notice to the Office 14 days in advance of filing. In addition, §900-3.1(a)(7) (now §900-3.1(a)(8)) was revised to clarify the purpose of the application fee.

Subsections (b)-(c)

No additional discussion is necessary.

§900-3.2 Transfer Applications for Pending Article 10 Facilities

Subsection (a)

Paragraph (1)

The Office revised §900-3.2(a)(1)(i) to require an applicant provide notice to the Office 14 days in advance of filing. In addition, §900-3.2(a)(1)(viii) was revised to clarify the fact that the ORES fee covers review and processing of an application.

Comment

Commenters requested §900-3.2(a)(1)(vi) (renumbered subsection (vii)) be revised so that the fee to be deposited into the local agency account for projects transferring from Article 10 provide a credit for the remaining balance of intervenor funds already paid under Article 10. Clarification was also requested on whether parties will be required to reapply for funding, and if any Article 10 rulings regarding funding will transfer over to the Executive Law §94-c process. Additional considerations requested were a cap on the fee for the local agency account, and on the Office fee (similar to that in Article 10), and that funds that have not been disbursed under the local agency account (or the Office account) be returned to the applicant upon a final determination on an application.

Discussion

When an applicant withdraws from the Article 10 process, the Article 10 regulations provide that any funds that have not been disbursed will be returned to the applicant. Once an applicant transfers into the Executive Law §94-c process, the applicant will be required to contribute to the local agency account the fee required by Executive Law §94-c, which does not provide a cap on such funding. Potential community intervenors would need to apply for funding pursuant to the Executive Law §94-c regulations. Section 900-5.1 provides that any local agency account funds that have not been disbursed after the expiration of time for final voucher submittals must be returned to the applicant. No change is warranted.

Paragraph (2)

Comment

A commenter requested that the Office require the applicant for a facility transferring into the ORES permitting process to demonstrate which uniform standards and conditions cannot be met and why. The commenter argued that the Executive Law §94-c process should not be allowed to pass a failing project under Article 10 and suggested that §900-3.2(a)(2) be revised to deem applications complete only if an application is in compliance with §94-c and if the transfer requirements are met. The commenter suggested that incomplete transfers should be deemed as a new application.

Another commenter stated that the proposed regulations do not comply with the legislative intent of Executive Law §94-c by allowing pending Article 10 facility site transfers the option to select which of the USCs would apply to a proposed facility. The commenter noted that this would allow an applicant to seek an option less protective of the environment, including in cases where no practical barrier would prevent the applicant from employing a uniform standard or condition.

Discussion

The application materials prepared under Article 10 may not contain all of the information required to demonstrate compliance with the USCs, and therefore, the proposed regulations recognize that the Office may be required to develop site-specific conditions for transferred Article 10 facilities for which a completeness determination has already been issued. Accordingly, the applicant must identify those uniform standards and conditions with which it believes the existing application materials would demonstrate compliance. However, the regulations specifically provide that, "if the Office determines that the applicant has not demonstrated compliance with the USCs set forth in §900-6 of this Part, the Office will develop the necessary site-specific conditions to avoid, minimize and mitigate significant adverse environmental impacts to the maximum extent practicable, including requirements for additional compliance filings beyond those set forth in §900-10 of this Part, as necessary." No change is warranted.

Subsection (b)

The Office revised §900-3.2(b)(1) to require an applicant provide notice to the Office 14 days in advance of filing. In addition, §900-3.2(b)(8) (previously subdivision (7)) was revised to clarify the fact that the ORES fee covers review and processing of an application.

Subsections (c)-(d)

No additional discussion is necessary.

Subpart 900-4 Processing of Applications

§900-4.1 Office of Renewable Energy Siting Action on Applications

Subsections (a)-(b)

No additional discussion is necessary.

Subsection (c)

Comment

Commenters expressed concern that the amount of time to review and comment on applications is not sufficient. Other commenters expressed the opposite, that the 60-day application review period to determine if an application is complete or incomplete is too long and should be shortened to 30 or 21 days. Commenters noted that if an application was deemed incomplete, the Office had another 60 days to review the supplemental materials, resulting in a review period of at least 4 months.

Discussion

Executive Law §94-c requires the Office to make its determination on the completeness of an application within 60 days and directs that an application will be deemed complete if the Office fails to do so. These provisions cannot be modified by the regulations. The Office conferred with the NYSDEC in establishing timeframes for review of pre-application submissions related to NYS threatened and endangered species, wetlands and surface waters; all such submissions must be specifically approved by the Office and will not be subject to automatic approvals. The public will be afforded the opportunity to comment on the draft siting permit; to the extent that a member of the public believes that the application

materials do not support the proposed permit requirements, such comments may be raised in the Office's review of the draft permit. No change is warranted.

Comment

Commenters suggested a "queue" or a waiting list for transfer versus new applications so that the Office can prioritize projects, and to prevent the Office from becoming overwhelmed with an abundance of transfer applications from Article 10.

Discussion

The Office is not authorized to create a queue as it is required to review all applications within 60 days of filing per statute. No change is warranted.

Subsection (d)

Comment

Commenters suggested adding text to the discussion regarding incomplete application notifications, such that the determination of completeness for a resubmitted application must be based solely on the written list of deficiencies provided by the Office following the previous review, unless changes are proposed for the project, there is newly discovered information, or if there is a change in circumstances related to the project.

Discussion

The Office has considered this comment and determined that no change is warranted.

Subsection (e)

Comment

One commenter suggested changing the timeline for a determination of completeness from 60 days to 30 days in §900-4.1(e).

Discussion

As noted above, the timeframe within which the Office must determine the completeness of an application is set by the Executive Law §94-c. The same timeframe has been applied to reviews of responses to a notice of incomplete application. No change is warranted.

Comment

A commenter suggested that a completeness determination be made within 21 days of receipt of a response to a notice of incomplete application.

Discussion

Given the technical nature and potential large scope of supplemental filings, it is not realistic to expect the Office to review the supplemental information in only 21 days. No change is warranted.

Subsection (f)

Paragraph (1)

Comment

One commenter suggested limiting the time that an applicant has to respond to a Notice of Incomplete Application from 3 months to 30 days.

Discussion

The Office has considered this comment and determined that no change is warranted.

Paragraph (2)

No additional discussion is necessary.

Subsection (g)

No additional discussion is necessary.

Subsection (h)

Comment

Multiple commenters expressed concern about the potential inaction of the Office within a specified timeframe leading to "automatic" approvals or completion and requested that the regulations in §900-4.1(h) be revised to indicate that an application can only be deemed complete once a notice is provided to stakeholders.

Discussion

The provision in §900-4.1(h) that an application will be deemed complete if the Office fails to make a completeness determination within 60 days of receipt is set forth explicitly in Executive Law §94-c(5)(b) and cannot be modified by regulation. No change is warranted.

Subsections (i)-(j)

No additional discussion is necessary.

Subpart 900-5

§900-5.1 Local Agency Account

Subsections (a)-(e)

No additional discussion is necessary.

Subsection (f)

Comment

A commenter suggested that §900-5.1(f) should be revised to state that the local agency account may be used to defray the fees, costs, and expenses of attorneys, experts, and expert witnesses.

Discussion

Pursuant to §900-5.1, community members and local agencies may seek funds from the local agency account to defray certain expenses associated with participating as an intervenor in the application review process. No change is warranted.

Comment

One individual stated that additional fees should be levied if an applicant wants to ignore local laws or comprehensive plans, with fees scaled to the number of and significance of the changes being requested.

Discussion

The regulations require applicants to consult with local agencies with jurisdiction to identify, assess, and ensure compliance with the substantive provisions of the applicable local laws, per §§900-1.3(a)(3), (4), and (5). However, applicants may request the Office to make a finding that compliance therewith would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility. If an application fails to sufficiently address local laws and comprehensive plans, then the Office will deem the application incomplete and remand it to the applicant to address deficiencies. Furthermore, the overall amount of intervenor fees that can be imposed has been established statutorily by the State Legislature, not by the Office. The proposed regulations reflect the statutory requirements. No change is warranted.

Subsection (g) Disbursement of funds from the local agency account

Comment

Commenters requested revisions to the regulations in §900-5.1(g)(2) to decrease (to at least 50 percent to ensure equitable distribution to local agencies and community intervenors) or increase (to 100 percent in instances when the proposed project spans more than one host community) the percentage of local agency account funds for each project to be reserved for potential awards to local agencies (compared with at least 75 percent in the regulations).

Discussion

Within the 60-day comment period, the statute provides that any municipality, political subdivision or an agency thereof that has received notice of the filing of an application shall submit a statement indicating whether the proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations, if any, concerning the environment, or public health and safety. The Office determined that 75 percent of local agency account funds for potential awards to local agencies is sufficient to ensure equitable distribution and availability of adequate funds to allow both local agencies and community intervenors to fully participate in the proceeding. No change is warranted.

Subsection (h)

No additional discussion is necessary.

Subpart 900-6 Uniform Standards and Conditions

Comment

Commenters noted that the USCs should be designed and implemented to incentivize developers to choose sites where impacts are avoidable, minimal, can be effectively mitigated, and/or will be consistent with conservation and community goals, to help build public acceptance and support for major renewable energy projects.

Discussion

As discussed above, the uniform standards and conditions were developed in accordance with that statutory mandate "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 major renewable energy facility" and in consultation with other state agencies and authorities that provided both substantive expertise and experience including, NYSDPS, NYSDEC, NYSAGM and OPRHP. The Office considered both existing state regulations, as well as past precedents established under Article 10. The regulations were developed to guide applicants to avoid and minimize siting impacts in the first instance and, when necessary, to specify mitigation to address unavoidable impacts. The pre-application and application processes are designed to allow applicants to design their facilities to achieve compliance with the relevant uniform standards and conditions.

The comprehensive regulations set forth: 1) design requirements, such as height and setback requirements, and compliance shall be demonstrated on applications submitted to the Office; 2) avoidance, minimization, and mitigation requirements, described in the exhibits and compliance filings; and 3) USCs that will be included in siting permits and with which an applicant will need to comply. The USCs include provisions to construct in accordance with the approved drawings, plans, and filings, creating an enforceable obligation on the applicant to comply with the design criteria and avoidance, minimization, and mitigation requirements set forth in the exhibits, compliance filings and/or a specific plan. No change is warranted.

Comment

Many commenters expressed confusion as to the applicability and function of the USCs. For example, some commenters stated that the USCs are incomplete, as they do not include setbacks, lighting, and other standards that are identified in the regulations. Other commenters noted that noise regulations are divided between USCs and other parts of the regulations, noting noise regulations are not included in pre-application procedures. Commenters also suggested including a specific requirement that the facility be constructed and operated in accordance with USCs, except those that the Office determines to be unreasonably burdensome (accounting for CLCPA targets and environmental benefits of the facility), and modeled on the proposed standard for waiver from local law requirements. Other commenters requested an explanation as to how the Office will determine site-specific conditions.

Discussion

The USCs are anticipated to function as a list of permit conditions that will apply to land-based wind and solar facilities, unless the Office determines that compliance with a given USC would be unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the proposed facility. The USCs will limit the need for site specific conditions by addressing in advance issues common to these facilities. However, certain permit terms and conditions are inherently site-specific and not appropriately addressed by the USCs, and the Office retains the authority to issue site-specific conditions

to address impacts unique to a particular facility, taking into account the CLCPA targets and the environmental benefits of the proposed project.

Each siting permit application will undergo an individualized, site-specific review by the Office to ensure avoidance or minimization of adverse environmental impacts, to the maximum extent practicable. A permit will include a mixture of USCs and site-specific conditions, as needed. Note that certain USCs set forth specific design criteria or construction requirements, while others require compliance with specific project drawings and plans that were provided as part of the application exhibits and/or compliance filings. For example, although there are no specific USCs setting forth setbacks or lighting requirements, §900-6.1(a) requires that facilities be constructed in accordance with the approved plans (which will show the setbacks) and §§900-6.4(l)(1) and (2) require implementation of the approved Visual Impact Minimization and Mitigation Plan, which includes the lighting plan for the facility. Accordingly, no change is warranted.

§900-6.1 Facility Authorization

Subsection (a) Compliance

Comment

Commenters suggested revising §900-6.1(a) such that the applicant will be required to comply solely with the permit condition without having to notify the Office immediately for resolution (if there is a discrepancy between an exhibit, or compliance filing and a permit condition).

Discussion

The Office must be notified of any discrepancies as soon as they are identified. No change is warranted.

Comment

A commenter requested that compliance should not include application exhibits and should be limited to avoidance, minimization, and mitigation measures identified in compliance filings and plans as approved by the Office, and permit conditions (consistent with Article 10 which limited compliance to those avoidance, minimization, and mitigation measures described in the Order). Additional reference to the application will only lead to confusion and delays during the compliance and construction phase.

Discussion

A permittee must comply with all conditions of the final siting permit for a project or it will be in violation. In order to avoid unnecessary and time-consuming duplication of extensive application materials, the proposed USCs require adherence to the avoidance, minimization, and mitigation measures included in the application exhibits, unless such measures are otherwise modified in a permit and/or approved compliance filings.

If any discrepancy between an exhibit or compliance filing and a permit condition is identified, the permittee shall comply with the requirements of the permit condition and immediately notify the Office of the discrepancy for resolution. No change is warranted.

Subsection (b) Property Rights

No additional discussion is necessary.

Subsection (c) Eminent Domain

Comment

Multiple commenters requested clarification as to the references to the NYS Eminent Domain Procedure Law (NYS EDPL) in the regulations. Other commenters suggested that the NYS EDPL should not be used to acquire land for major renewable energy facilities.

Discussion

The commenters' concerns about allowing renewable energy companies to obtain land pursuant to the NYS EDPL are noted but misplaced; no condemnation authority is provided by Executive Law §94-c or the regulations.

Under certain circumstances specified in Section 206 of the NYS EDPL, a condemner may be exempt from complying with the requirements of the NYS EDPL. Section 900-6.1 is intended to clarify that issuance of a siting permit by the Office to a merchant generator does not entitle the permittee to the exemption for regulated entities that have obtained a Certificate of Environmental Compatibility and Public Need pursuant to Article VII of the PSL.

In addition, §900-2.5(c) requires an applicant to state if it is registered as a transportation corporation and intends to acquire any property pursuant to the NYS EDPL. A transportation corporation, as defined in NYS Transportation Corporation Law, already has the statutory authority to acquire property necessary for public uses and purposes pursuant to the NYS EDPL.

Renewable energy developers proposing facilities in NYS to date generally have not organized or incorporated as transportation corporations or sought property acquisition through eminent domain procedures. In the event that an applicant is organized as a transportation corporation, it would have to comply with the NYS EDPL procedural and substantive requirements, including a demonstration of need with a specific showing of public use, benefit or purpose for the facility, and the reasons the facility must be located at the specific proposed location, to acquire land through condemnation. No change is warranted.

Subsection (d) Other Permits and Approvals

Paragraph (1)

Comment

Commenters stated that §900-6.1(d)(1) is vague and fails to specify what would constitute a duplicate issue for purposes of review by other bodies. The commenter said it should be revised for NYSPSC to require approvals, consents, permits, other conditions for the construction or operation of the facility under PSL §§ 68, 69, 70, and Article VII.

Discussion

An applicant is required to obtain all other necessary approvals to construct and operate its project, including ancillary features such as electrical line upgrades, that would fall under the NYSPSC's jurisdiction under PSL §§ 68, 69, 70, and Article VII. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Paragraph (3)

Comment

A commenter claimed that wind, solar, and BESS facilities do not fall under the New York State Uniform Fire Prevention and Building Code and suggested that the Office consider the time needed for municipalities to align their local laws and comprehensive plans once the regulations are approved.

Discussion

As discussed above, renewable energy facilities (including BESS components) are covered under the New York State Uniform Fire Prevention and Building Code. Executive Law §94-c specifies that a siting permit may only be issued if the Office makes a finding that the proposed facility, together with any applicable USCs and site-specific permit terms and conditions, would comply with applicable local laws and regulations, unless the Office determines that any provision of such local law or regulation would be unreasonably burdensome, taking into account the CLCPA targets and the environmental benefits of the facility. In response to comments received, the Office clarified this section to reference the pertinent agency.

Comment

The commenter asked the Office to clarify if NYS will take over liability and provide the training/funds to municipalities (noting concerns about potential hazards associated with renewable facilities not covered by the NYS Uniform Fire Prevention and Building Code).

Discussion

The Office will continue to collaborate with municipalities; however, applicants will be required to abide by the applicable rules and regulations of the PSL and 16 NYCRR including those to ensure safety during facility operations. Furthermore, Executive Law § 381 requires every city, town, and village to administer the Uniform Code within its boundaries (with exception of those municipalities and counties that have opted out of administering and enforcement, in which case the State is responsible). Nonetheless, the NYSDPS or the NYSPSC will have the authority to monitor, administer, and enforce compliance with all terms and conditions set forth in the Office-issued siting permit, including but not limited to the authority set forth in Sections 25, 26, and 68 of the PSL and implementing regulations. As discussed above, emergency responder training is required per the Safety Response Plan required to be submitted as part of §900-2.7, requiring that training drills with emergency responders occur at least once per year. No change is warranted.

Comment

A commenter asked to clarify the information required from the applicant to prove continuous insurance/liability throughout the life of the project (planning, construction, operation, and decommissioning).

Discussion

The Safety Response Plan and Decommissioning Site Restoration Plan required as part of the application (§§ 900-2.7 and 900-2.24, respectively), and also discussed in §900-6.6, are required to remain effective for the life of the facility. The Decommissioning and Site Restoration Plan and letters of credit (or other financial assurance approved by the Office) are required to be submitted for review after the first year of operation. In addition, the regulations require the applicant to re-submit the letters of credit (or other financial assurance approved by the Office) every fifth year until decommissioning to reflect changes due to inflation or other costs increases. No change is warranted.

Subsection (e) Water Quality Certification

No additional discussion is necessary.

Subsection (f) Host Community Benefits

Comment

Comments were received stating that payment-in-lieu of taxes (PILOT) agreements are not host community benefits and that §900-6.1(f) should be revised to eliminate the reference to PILOTs.

Discussion

A PILOT agreement is listed as only one type of potential host community benefit available. A host community will be able to benefit financially from a renewable energy project through a PILOT agreement as a new source of revenue, which would otherwise not exist in the community. No change is warranted.

Subsection (g) Notice to Proceed with Construction

Comment

Commenters stated that §900-6.1(g) is not consistent with the current standard under the Article 10 regulations (under 16 NYCRR §1002.2(b)), which does not allow a piecemeal approach. The commenter suggested removing the last two sentences that discuss conditional terms for the issuance of a "Notice to Proceed," specific to clearing and staging, prior to pre-construction compliance and filings.

Discussion

The Office has determined that allowing a conditional Notice to Proceed to support site preparation will facilitate the construction to address potential issues associated with tree clearing restrictions when a permit has been issued and only pre-construction compliance filings are outstanding. No change is warranted.

Comment

Commenters recommended removing "informational" filings from the list of documents that would be filed after site preparation activities have occurred under a conditional notice to proceed.

Discussion

The Office has adopted the recommended change, as no such filings are required by the regulations.

Subsection (h) Expiration

Comment

Commenters requested changing the length of time for a siting permit to expire (due to lack of commencement of commercial operation) from seven years to four or three years, to eliminate uncertainty that can result from projects of this size. Commenters stated that allowing a permit to be valid for seven years was excessive; given that the process is intended to expedite projects and is longer than the five years of permit validity conditioned for similar wind projects under Article 10. The commenters noted that it could prohibit alternative projects/growth of the municipality during that time, and recommended expiration of the siting permit within five years from the date of issuance.

Discussion

The Office has considered this comment and determined that no change is warranted.

Subsection (i) Partial Cancellation

Comment

Commenters requested that the siting permit be revised in the event of partial cancellation to provide a deadline by which the permittee must notify the Office of a decision to not commence construction of any portion of the facility and to require notice of such a change.

Discussion

The permittee is required to provide prompt notification to the Office, and the Office will determine whether the change would constitute a major modification requiring additional public notice and comment. The Office has considered this comment and determined that no change is warranted.

Comment

A commenter suggested adding text regarding submission of hard and electronic copies of as-built plans within six months of commencement of operation, as well as the inclusion of GIS shapefiles of all project components; a collection circuit layout map; as-built plans; and details for component crossings of, and co-located installations of components with, existing pipelines.

Discussion

Section 900-10.3(b) of the proposed regulations require a permittee to file as-built plans as a post-construction compliance filing within nine months of commencement of the commercial operations of the facility, which is a sufficient timeframe for the Office to review and confirm post-construction compliance with approved plans. No change is warranted.

Subsection (j) Deadline Extensions

Comment

An individual requested defining what warrants a "good cause," in reference to §900-6.1(j), allowing the Office to extend deadlines established by the siting permit for good cause.

Discussion

The Office will determine whether to extend the deadlines on a case-by-case basis. No change is warranted.

Subsection (k) Office Authority

Comment

A commenter suggested that §900-6.1(k) should be updated to indicate that all incidents are reported.

Discussion

An applicant must report any emergency resulting from a violation of the siting permit, and as such, NYSDPS may issue a stop work order under its authority. No change is warranted.

§900-6.2 Notifications

Subsection (a) Pre-Construction Notice Methods

Paragraph (1)

Comment

One commenter stated that the proposed regulation does not provide for sufficient notice, and proposed revisions to include all persons who reside on the property, if different from the landowner.

Discussion

The Office has adopted a revision to require notification to "all persons residing" within one mile of a solar facility and five miles of a wind facility to conform to other notice provisions.

Comment

A commenter suggested that the requirements for the pre-construction notice be revised to include continuous updates to the facility contact information during construction, and that fines be incurred for outdated information.

Discussion

Applicants are expected to ensure that contact information filed with the Office is updated if it changes. As part of the pre-construction compliance filings set forth in §900-10.2, applicants must also prepare a Facility Communications Plan that provides additional information and contact information for all personnel responsible for facility oversight. The Office anticipates that the contact information provided in the pre-construction notice and in the Facility Communications Plan will be sufficient to prevent communication errors.

Per §900-12.1, the NYSDPS or NYSPSC shall have the authority to monitor, administer, and enforce compliance with all terms and conditions set forth in a permit issued by the Office, including, but not limited to, the authority set forth in Sections 24, 26 and 28 of the PSL and implementing regulations. Section 25 grants the state authority to assess civil penalties for noncompliance/violations in an amount not exceeding one hundred thousand dollars for each and every offense and, in the case of a continuing violation, each day shall be deemed a separate and distinct offense. No change is warranted.

Paragraph (2)

Comment

A commenter requested that municipalities should receive notification of both "Notice to Proceed with Construction" and "Notice to Proceed with Site Preparation".

Discussion

Notices to Proceed will be made publicly available at the time they are issued by the Office. No change is warranted.

Comment

A commenter requested that notifications to communities should be lengthened to 30 days before commencement of construction, allowing for monthly town board meetings to occur, and allowing municipalities time to do their due diligence.

Discussion

The proposed required 14-day notification prior to construction commencement is reasonable and consistent with previous Article 10 precedents. It is not clear what due diligence would be required by municipalities after a permit is issued and all required compliance filings have been approved by the Office. No change is warranted.

Paragraph (3)

Comment

A commenter proposed that the permittee should be required to publish notice in the local newspaper of largest circulation.

Discussion

The Office has considered this comment and determined that no change is warranted.

Comment

A commenter recommended that applicants be required to post signage on participating properties, particularly in the center of each property line fronting a public or private roadway, or a public right-of-way (in addition to the pre-construction notice methods) until a final action has been taken by the Office on the siting permit.

Discussion

The Office does not believe that there would be any benefit to requiring the proposed signage identifying participating properties. Proposed facility locations will be publicly available in the application materials and subsequent compliance filings. No change is warranted.

Paragraphs (4)-(5)

No additional discussion is necessary.

Subsection (b) Proof of Notice to Office

Comment

Comments were received requesting a reduction or extension of the time required for an applicant to file a proof of notification before starting construction. Some commented that the 14 business days should

be extended to at least 28 or to 30 days (because the permittee has to file an affirmation with the Office that it has provided the notifications required by §900-6.2(a) and include a copy of the notice(s), as well as a distribution list). Other commenters requested that the 14 business days be reduced to ten (10) or seven (7) business days.

Discussion

The proposed required notification of 14 days prior to commencement of construction is reasonable and appropriate. No change is warranted.

Subsection (c) Post-Construction Notice

Comment

Commenters suggested eliminating the construction schedule and transportation routes, as referenced in §900-6.2(d)(3), from the post-construction notice requirements.

Discussion

The Office has revised the text in §900-6.2(c) to clarify that the construction schedule and transportation route should be included in the pre-construction notice only.

Subsection (d) Contents of Notice

Comment

Commenters proposed adding to §900-6.2(d) the name, mailing address, local or toll-free telephone number, and email address of the Project Development Manager, Construction Manager and the appropriate facility contact for development to the contact list.

Discussion

The intent of the regulation is for the applicant to identify "the appropriate facility contact" that is responsible for the development, construction, and operations of the project, regardless of title and which may vary depending on the organization of the permittee, and therefore may not necessarily include a Project Development Manager or Construction Manager. No change is warranted.

Subsection (e) Notice of Completion of Construction and Restoration

No additional discussion is necessary.

§900-6.3 General Requirements

Subsection (a) Local Laws

Comment

One commenter requested that the Notice to Proceed with Site Preparation should only be issued after the applicant has submitted a Stormwater Pollution Prevention Plan (SWPPP) to the local municipal Stormwater Management Officer.

Discussion

Section 900-2.14(c) requires applicants to provide as part of the application a SWPPP in accordance with New York State Pollution Discharge Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity and the New York State Standards and Specifications for Erosion and Sediment Control. The SWPPP filing will be publicly accessible and available to municipalities prior to issuance of a Notice to Proceed. Should a municipality require direct submittal, the Office recommends coordinating filing requirements with the applicant during the pre-application process. No change is warranted.

Subsections (b)-(c)

No additional discussion is necessary.

§900-6.4 Facility Construction and Maintenance

Subsection (a) Construction Hours

Paragraph (1)

Comment

Several commenters objected to the construction and maintenance work hours proposed in the regulations and noted that the construction hours proposed are inconsistent with hours commonly set forth in certificate conditions for previous Article 10 projects.

Discussion

The construction hours of 7 a.m. to 8 p.m. Monday through Saturday and 8 a.m. to 8 p.m. on Sunday and national holidays, with the exception of construction delivery activities and for safety or continuous operation requirements, is sufficient and reasonable to facilitate construction. Any potential issue regarding construction hours will be addressed on a case-by-case basis. No change is warranted.

Paragraph (2)

Comment

One commenter asserted that the extension of construction hours is often abused by companies, and that enforcement (including fines) needs to be stronger.

Discussion

Pursuant to §900-6.4(a)(1), work outside of the construction work hour limits is restricted to vehicles used for transporting construction or maintenance workers, small equipment, and tools used at the facility site for construction or maintenance activities. If work beyond the established work hours is required due to safety or continuous work that requires work outside these hours, the applicant must notify NYSDPS, the Office, landowners, and municipalities at least 24 hours in advance. Facility construction and maintenance work hour requirements will be included in the Office's permit for the renewable energy facility. The regulations provide the NYSDPS or the NYSPSC with the authority to monitor, administer, and enforce compliance with all terms and conditions in an Office-issued siting permit, including the facility construction and maintenance terms and conditions. No change is warranted.

Subsection (b) Environmental and Agricultural Monitoring

Paragraph (1)

Comment

Commenters felt that the monitoring provisions in §900-6.4(b)(1) are duplicative and expensive, as the NYSDPS is already afforded stop work authority under §900-6.1(k), and noted that §900-6.4(d) currently requires applicants to report every two weeks to NYSDPS, the Office, and to host municipalities on the status, schedule, and location of construction activities for the following two weeks. Other comments requested that the regulations clarify the role and responsibilities of the environmental monitor.

Discussion

Per §§900-6.4(b)(1) and (b)(2), the independent, third-party environmental monitor will report directly to NYSDPS for all site inspection, reporting, and compliance and will have stop work authority in consultation with NYSDPS. A third-party environmental monitor is critical to ensuring compliance with the permit conditions through construction. No change is warranted.

Paragraph (2)

Comment

Commenters suggested that reports be submitted within 30 days, rather than upon request, and asked to whom the report must be provided.

Discussion

The independent, third-party environmental monitor will report directly to NYSDPS for all site inspection, reporting, and compliance. The Office considers mandatory submittal of reports to host town(s) on all projects an unnecessary and wasteful expenditure of resources given not all municipalities may desire the reports, and instead defers to each host town(s) to make the request for reports if desired. Reports shall be provided upon request, such that a specified timeframe for submittal is unnecessary. No change is warranted.

Comment

An individual was concerned that environmental monitors required in §900-6.4(b) would not perform their duties and asked that documentation and visual proof of their inspections be provided. The same commenter added that monitoring documentation should be provided in more than one form.

Discussion

The environmental monitor's site inspection and compliance reports will be available to the public via the NYSDPS website. Photographs may be and are often included in monitoring reports. As such, no change is warranted.

Paragraph (3)

Comment

Commenters requested that language be added to the regulations such that the municipality (or NYSDPS staff) have input into the selection of the environmental monitor. Commenters also noted that the

regulations need to make clear what qualifications are required to be an environmental monitor or other designated agent and asked if NYSPSC will be required to evaluate the monitor's qualifications (§900-6.4(b)(4)).

Discussion

Qualifications for the environmental monitor must be provided to the Office to ensure they are qualified for the role. The Office will evaluate the qualifications for this individual before construction activities are approved. No change is warranted.

Comment

One commenter indicated that the NYSAGM should approve third-party environmental monitors to ensure they have the expertise and background in farming and soil health that is necessary to adequately oversee projects on agricultural lands.

Discussion

Pursuant to §900-6.4(b), the permittee is required to hire an independent, third-party environmental monitor. The third-party environmental monitor must be qualified to oversee projects on agricultural lands as detailed in the NYSAGM guidance, including but not limited to expertise and background in farming and soil health. If the environmental monitor is not qualified to assess agricultural lands, a separate agricultural monitor will be required. Qualifications for the environmental monitor must be provided to the Office and NYSDPS, to ensure they are qualified for the role. If the Office, in consultation with the NYSAGM, agrees that the independent third-party monitor is qualified on agricultural issues, one monitor can act as both the general environmental monitor as well as the agricultural-specific environmental monitor. No change is warranted.

Comment

Other comments requested that the environmental monitor be given the authority to approve micro-siting, including the addition of a new subsection (b)(2) that would give the environmental monitor the authority to review and approve micro-siting changes that come about during construction and that the environmental monitor must notify the Office within 3 business days of the change.

Discussion

The Office does not support the notion of allowing an on-site environmental monitor the discretion to approve minor changes to any of the approved compliance plans. The Office will retain control of approving any deviations from the approved plans and compliance filings. The Office and NYSDPS are committed to developing a streamlined approval process which will facilitate evolving conditions and provide the necessary approvals in a timely manner. No change is warranted.

Paragraph (4)

Comment

Commenters stated that the agricultural monitor should be formally empowered to enforce the stipulations in the Agricultural Plan.

Discussion

The independent, third-party agricultural monitor will report directly to NYSDPS for all site inspection, reporting, and compliance. Per §900-6.4(s), the agricultural monitor will oversee compliance with agricultural conditions and requirements, including the approved Agricultural Plan required pursuant to §900-2.16(c). Additionally, the agricultural monitor will have stop work authority in consultation with NYSDPS. No change is warranted.

Comment

Commenters stated that the ability of a project site to be co-utilized for agriculture should be confirmed on an annual basis by the agricultural monitor for the life of the project.

Discussion

The intended role of the independent, third-party environmental and agricultural monitors is to oversee compliance with environmental commitments and siting permit requirements of construction work sites (during construction) and is not intended to continue for the operational life of the project. The regulations provide the NYSDPS with the authority to monitor, administer, and enforce compliance with all terms and conditions in an Office-issued siting permit, including the facility construction and maintenance terms and conditions. An agricultural co-utilization plan included in §900-2.16 should address proposed practices throughout the useful life of the project, which should be consistent with, and in support of, the existing on-farm agricultural production whenever possible. No change is warranted.

Paragraph (5)

No additional discussion is necessary.

Subsection (c) Pre-Construction Meeting

Comment

Commenters suggested that pre-construction meeting(s) should be conducted 30 days prior to construction occurring (instead of 14 days).

Discussion

The Office considered the comment and has determined that no change is warranted.

Subsection (d) Construction Reporting and Inspections

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters stated that the proposed rule does not provide for review of all complaints during monthly inspections. The commenters suggested revising §900-6.4(d)(3)(iii) to add this requirement.

Discussion

The monthly inspection reports are required to include all complaints received and resolutions. No change is warranted.

Paragraph (4)

Comment

A commenter stated that other forms of documentation should be provided in addition to the report (i.e., video or photos) in §900-6.4(d)(4).

Discussion

The inspection reports must include proper written documentation, including the status of compliance with siting permit conditions; field reviews of the facility; actual or planned resolutions of complaints; significant comments; concerns or suggestions made by the public, municipalities or other agencies; and construction schedule and other items the permittee, NYSDPS staff, or the Office staff consider appropriate. Photographs may be and are often included in inspection reports. No change is warranted.

Subsection (e) Flagging

Comment

Commenters stated that flagging should be required outside of the limits of disturbance (LOD) and include resources within 100 feet of the LOD (i.e., wetlands, waterbodies, cultural resources), as well as all resources that would otherwise be covered.

Discussion

Flagging resources outside of the LOD is not necessary, as all work and ground disturbance shall remain inside the LOD. Protection of resources that are outside the LOD will be required as part of the SWPPP and will be accomplished by installing protective measures within the LOD. Additionally, flagging known archaeological sites is a standard request made by OPRHP for projects involving archaeological sites and would be covered under §900-1.3(h)(2). No change is warranted.

Subsection (f) Dig Safely NY

Comment

A commenter requested that the name of the project/permittee be included with documentation related to §900-6.4(f).

Discussion

All documentation must include the name of the project/permittee. No change is warranted.

Subsection (g) Natural Gas Pipeline Cathodic Protection

Comment

One commenter stated that copies of agreements should be filed with the Office, as is currently required under Article 10 certificate conditions, to assure the safety of on-site workers and/or persons on adjacent properties. The commenter suggested that §900-6.4(g) should be revised to require filing copies

of all agreements entered into with the operators regarding protection of these systems, within 30 days of commercial operation.

Discussion

Section 900-10.2(c)(3) requires a permittee to submit to the Office as a pre-construction compliance filing, copies of any agreements entered with the owners/operators of existing high-pressure gas pipelines regarding the protection of those facilities. No change is warranted.

Subsections (h)-(j)

No additional discussion is necessary.

Subsection (k) Construction Noise

Comment

A commenter proposed limits for construction noise at property lines, equivalent to 65 dBA between 7:00 a.m. and 7:00 p.m. and 55 dBA between 7:00 p.m. and 7:00 a.m., as measured by using the fast response L_{AFmax}, as well as limiting noise emissions at schools, as recommended by ANSI/ASA Standard S12.6.

Discussion

Any potential issue regarding construction noise emissions will be addressed on a case-by-case basis. No change is warranted.

Comment

A commenter proposed requiring that the same vibration limits contained in ANSI Standard 2.71-1983 (adopted for operation of the facilities) be applied during construction to minimize discomfort and annoyance, and limits for transient and continuous vibration to prevent potential damage.

Discussion

Vibration levels during construction should not be subject to the same criteria used for operation of the facilities. Construction activities are temporary in nature and of a shorter duration. The regulations require discussion about whether structural damage, settlements, or cracks on adjacent buildings or infrastructure could be caused by construction activities (e.g., blasting, rock hammering, piling). The Office considers that potential structural damage should be evaluated in the application in conjunction with any local laws on vibration limits. The need for permit conditions with vibration limits from construction activities will be evaluated on a case-by-case basis. No change is warranted.

Subsection (l) Visual Mitigation

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3) Screen Planting Plans

Comment

Several commenters requested that applicants be responsible for monitoring plantings used for screening for five years post-installation or for the lifetime of the facility, whereas other commenters requested reducing the monitoring period to one year. Commenters also recommended including an ongoing maintenance requirement for visual mitigation buffers and using native plants with wildlife value.

Discussion

The requirement for the permittee to retain a qualified landscape architect, arborist, or ecologist to inspect screen plantings for two years following installation to inspect the health of the plantings and potentially replace unhealthy plant material is sufficient to ensure the screenings are adequately maintained. Landscaping/vegetation effectiveness is generally dependent upon the warranties provided by the landscaping companies/nurseries that have been hired by the developer. The length of the warranty on vegetation survival rate varies by nursery. Most are generally warrantied over a two-year period. Depending on the type of vegetation utilized in the landscaping, efforts are generally taken by nurseries to ensure growth and survival of saplings (for example, by using protective tubing). Should a municipality require a longer warranty period or maintenance, the Office recommends coordinating directly with applicants regarding this requirement. The inclusion of native plants in revegetation is discussed in §900-2.12. No change is warranted.

Subsection (m) General Environmental Requirements

Paragraphs (1)-(4)

No additional discussion is necessary.

Paragraph (5) Spill Kits

Comment

A commenter requested that spill containment materials and methods be required when work is conducted within 100 feet of protected waters, or within 500 feet of water supply reservoirs.

Discussion

Section 900-6.4(m) of the regulations requires all construction vehicles and equipment to be equipped with a spill kit, regardless of its location. In addition, it requires all equipment to be inspected daily for leaks of petroleum, other fluids, or contaminants. No change is warranted.

Comment

A commenter recommended that the spill reporting requirements in §900-6.4(m)(5) require both written and visual forms of documentation.

Discussion

The NYSDEC Spill Reporting and Initial Notification Requirements Technical Field Guidance is incorporated by reference into §900-15.1(i)(1)(iii), and any additional reporting requirements will be at the discretion of the NYSDEC, based on the nature and volume of the spill, proximity to water resources, and other factors at the discretion of the agency. No change is warranted.

Comment

Commenters expressed concern regarding the potential for oil leaks on landowner properties.

Discussion

Section 900-6.4(m)(5) requires all construction vehicles and equipment to be equipped with a spill kit. In addition, all equipment shall be inspected daily for leaks of petroleum, other fluids, or contaminants; equipment may only enter a stream channel if found to be free of any leakage. Any leaks shall be stopped and cleaned up immediately. No change is warranted.

Paragraph (6) Construction Debris

Comment

Commenters expressed concern regarding the potential for debris on landowner properties. One commenter suggested that §900-6.4(m)(6) should include language that specifically prohibits the burying of construction debris or excess material and that monitors should document this process.

Discussion

Per §900-6.4(m)(6), any debris or excess construction materials shall be removed to a facility duly authorized to receive such material. No burying of construction debris or excess construction materials is allowed. No change is warranted.

Paragraph (7) Clearing Areas

No additional discussion is necessary.

Paragraph (8) Clearing Methods

No additional discussion is necessary.

Paragraph (9) Invasive Insects

No additional discussion is necessary.

Subsection (n) Water Supply Protection

Comment

One commenter recommended that copies of water supply protection reports/studies related to potable wells affected by construction activities be provided to the relevant municipalities within 60 days, rather than upon request.

Discussion

The Office has considered the comment and determined that no change is warranted.

Comment

Commenters stated that the USCs should require that the applicant demonstrate proposed wind and solar facilities will not alter the quantity and quality of the water supply to private and public wells and water supply intakes. Commenters specifically requested that the buffer zones stated in §§900-6.4(n)(1) and (2) be increased to afford additional protection to private and public water wells and water supplies (reservoirs, reservoir stems, and controlled lakes) related to blasting, pre- and post-construction water

quality testing, and the placement of new wells, collection lines, and roads. Conversely, other commenters recommended that third-party testing only be required for horizontal directional drilling (HDD) activities within 100 feet of a potable water well on a non-participating party, as well as deleting §900-6.4(n)(2)(iii)(a) which requires potable water testing of wells for a solar facility within 100 feet of collection lines or roads.

Discussion

The regulations include extensive provisions for the identification and protection of potable public and private water supplies. §900-2.14(a) requires a thorough assessment on drinking water supplies and groundwater quality and quantity. §900-6.4(n) requires permittees to perform pre- and post-construction water quality monitoring for wells on nearby, non-participating properties. If the results of water quality monitoring demonstrate that construction of the facility results in post-construction water samples that fail to meet NYS water potability standards, the permittee will be required to construct a new well, in consultation with the landowner. Further, the proposed USCs require that blasting be designed and controlled to adhere to ground vibration limits established by the United States Bureau of Mines. The proposed buffer zones adhere to applicable NYSDOH requirements as well as Article 10 precedents. No change is warranted.

Subsection (o) Threatened and Endangered Species

Paragraph (1)

Comment

A commenter indicated that the NCBP needs to be further defined and financial statements, requirements, standards, and payments for providing net conservation benefits must be made public. The commenter asserted that the regulations should require publicly accessible supporting information that demonstrates how the NCBP complies with all federal and state laws. Additionally, it was suggested that the NCBP for each project should be reviewed periodically and revised if the monitoring finds that the payment is inadequate. The commenter also asserted that the NCBP should include cumulative impacts to wildlife, including unlisted 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.

Discussion

The contents of and requirements for an NCBP are explained in §900-6.4(o)(1). In addition, the requirements of §900-2.13 expand on avoidance and minimization measures, including the requirement that payments to the mitigation fund are identified, along with an attestation that the applicant has the financial and technical capacity to implement any mitigation they propose in the plan. These materials are all part of a complete application and are part of the public record. No other federal laws require an NCBP, nor do they require assessments of impacts to other species not covered under their respective authorizations. This concern would be addressed in §900-2.12. No change is warranted.

Paragraph (2)

Comment

A commenter requested clarification on the determination of *de minimis* impact to NYS threatened or endangered grassland bird species habitat, if an active nest is discovered, based on the occupation status of habitat (occupied or not occupied), acreage threshold (25 acres), and the timing of active nest discovery (before or after the start of construction), and specifically noted apparent conflicting determinations between §§900-2.13(e)(2) and 900-6.4(o)(2)(i).

Discussion

The Office notes that impacts to an area of any size that is determined to be non-occupied habitat for NYS threatened or endangered grassland bird species is not considered an impact to the species. In addition, impacts to grassland bird habitat that is determined to be occupied habitat would only be considered *de minimis* if less than 25 acres of occupied habitat is impacted. If an active nest is discovered during construction, the permittee will need to coordinate with the Office and NYSDPS to avoid or mitigate impacts. The Office has adopted clarifying revisions in §900-6.4(o)(2)(i) to address the discovery of nests prior to or during construction.

Paragraph (3)

Comment

Commenters questioned why threatened and endangered grassland birds are treated separately from other threatened and endangered species and questioned whether a standard NCBP is required for these species. In addition, the commenters requested that a definition for "*de minimis*" impacts be included in the regulations to ensure consistent compliance with these standards.

Discussion

Although listed separately in §900-6.4(o)(3), for facilities that have more than a *de minimis* impact on NYS threatened or endangered species of grassland birds, the regulations require preparation of an NCBP to ensure a net conservation benefit to the species is achieved. According to §900-2.13(e), the *de minimis* designation is only applicable to grassland bird impacts and is intended to acknowledge that there are certain impacts to grassland habitat that would not result in an adverse impact to the species. For example, if a project avoids greater than 25 acres of impact to occupied habitat and does not have an adverse impact on an active nest, then mitigation is not required. No change is warranted.

Comment

One commenter asserted that the mitigation ratios in the regulations are not likely to result in a net conservation benefit and suggested the compensatory mitigation ratio should be above 1:1 to address the uncertainty of success and desire to achieve a net conservation benefit. Other commenters questioned how mitigation ratios factor in providing sufficient habitat area as replacement. These commenters also stated that the mitigation ratios do not appear to be based on science or consultation with NYSDEC.

Discussion

The Office, in consultation with NYSDEC, has determined that the mitigation requirements will result in a net conservation benefit. The mitigation requirements in §900-6.4(o)(3)(ix) were developed using a base ratio of 2:1 mitigation for breeding habitat impacts and 1:1 for wintering habitat. The published ratio of 1:0.4 for breeding birds and 1:0.2 for wintering birds are based on multiplying impacts by the ratios

described above and dividing impacts by five lifecycles of habitat succession (e.g., a 30-year mitigation project term and 5-year timeframe in which unmanaged grassland would naturally succeed into scrub/shrub habitat, minus one lifecycle to provide a net conservation benefit). This text was added to the regulations to clarify the basis for those ratios and address the comments. No further change is warranted.

Comment

One commenter asked about alternative mitigation measures (for example, whether an alternative project such as mist netting bats could be undertaken rather than a payment to the fund).

Discussion

Applicants have the option to identify a variety of mitigation measures in their NCBP to address impacts to NYS threatened and endangered species. The use of the endangered and threatened species mitigation bank fund, as noted in §900-1.3(g)(7), is one approach that could be included in an NCBP to achieve a net conservation benefit for affected endangered and threatened species. No change is warranted.

Comment

One commenter proposed that the Office consider that the application of several work windows combined could unreasonably prevent the construction and building of major renewable energy facilities.

Discussion

It is unlikely that many proposed facilities would be subject to multiple time-of year restrictions such that only a small work window would be available for construction. If multiple windows are potentially applicable to a proposed facility, this is because an applicant has chosen to site a facility in a project area that is simultaneously: a) forested, with northern long-eared bats present; and/or b) impacting occupied grassland habitat greater than 25 acres in size; and/or c) crossed by a protected stream that hosts both cold and warm water fisheries. Facilities should be designed to avoid these scenarios. No change is warranted.

Comment

Commenters proposed deleting restrictions for construction-related activities and references to equipment/component staging, storage, and transportation in §900-6.4(o)(3)(iii).

Discussion

The conditions regarding construction work windows are standard methods for avoiding some direct effects to NYS threatened and endangered species and minimizing the impact of others. As such, all of the construction related activities identified need to be conducted during the applicable work windows. No change is warranted.

Paragraph (4)

Comment

Commenters suggested requiring each applicant to use BMPs to reduce impacts, including state and federal published guidelines. It was also suggested that agreed-to BMP guidelines should be incorporated into the USCs to avoid and mitigate impacts on wildlife.

Discussion

A description of the proposed facility's potential impacts, BMPs to be implemented by the applicant and proposed BMPs, potential impacts, and mitigation with respect to impact to NYS threatened or endangered species are required in §900-2.13, and, based on the detailed review of an application, site-specific conditions may be required. No change is warranted.

Comment

For §900-6.4(o)(4)(ii), commenters suggested adding text to the regulations to allow a power generating facility to continue operations if a NYS threatened or endangered bat species roost tree is found at a site.

Discussion

If a roost tree is found after construction is completed, the regulations do not require any cessation of power generation from the facility. No change is warranted.

Comment

One commenter pointed out that building and access to many locations in upstate New York between November 1st and March 31st is difficult and dangerous due to the heavy snow, mud, and other harsh winter weather conditions. It was recommended that the Office consider extending the tree clearing work windows for both the northern long-eared bat and the Indiana bat to ensure construction and arborist crews can complete their work safely.

Discussion

Tree clearing work windows for both northern long-eared and Indiana bats are dictated by the USFWS as these are federally protected species. Any modifications to these windows would need to be coordinated with and approved by the USFWS and will be evaluated during the application phase, based on species/habitat presence and potential impacts. The Office does not consider the work windows a safety issue; construction projects throughout the state have complied with these for a number of years. It is anticipated that construction and arborist crews will conduct work when conditions at the facility site are safe and may need to limit the work to manually felling the trees during the winter months. No change is warranted.

Comment

Commenters suggested edits to bat management in §900-6.4(o)(4)(iii)(c) and revising the text such that the seasonal tree clearing should only apply to occupied habitats (and not within the facility site).

Discussion

The requirement will apply to the entire facility site, as written, not just the occupied habitat. However, the Office will consider any modifications to these windows and will evaluate changes, if necessary, during the application phase, based on species/habitat presence and potential impacts, and pending applicant coordination with and approval by the USFWS. No change is warranted.

Comment

One commenter was concerned about the impacts of turbines to birds and bats and provided several excerpts from NYSDEC documentation on ways that impacts could be curtailed, including: raising the cut-

in speed of turbines during the summer and fall; turning off turbines during periods of low winds and during essential migration times; and using electromagnetic signals to deter bats from turbines.

Discussion

Implementation of curtailment protocols will be a standard condition on all wind facilities. Curtailment is a minimization measure that keeps the blades from spinning on nights when bats are most likely to be active and has been demonstrated to reduce bat strikes by at least 80 percent. In addition, standard conditions will restrict facility construction in wooded areas to the time of year when roosting bats are not present. There are also standard conditions to protect eagles, including a restriction on construction within 660 feet of eagle nests and compensatory mitigation if any eagles are taken. Additionally, §900-2.12 requires applicants to acknowledge potential impacts to unlisted species, including other raptor species. It explicitly requires applicants to also identify measures they have implemented to avoid or minimize any impacts to those resources. No change is warranted.

Comment

Other commenters requested various revisions to reduce the seasonal curtailment requirements, including shortening the timeframe from 30 minutes to 10 minutes before sunset and after sunrise (subsection (v)(a)); for flexibility in the review requirements of (v)(b) to use “may” instead of “shall”; and changing modifications that can be proposed or negotiated from those that further decrease mortality to those that result in the same or less mortality at the same or less cost to the operator.

Discussion

The Office finds that seasonal curtailment measures are necessary to avoid and/or minimize impacts to bats from wind facilities. The standard conditions regarding curtailment and buffer distances between project components and confirmed nesting, breeding, hibernating, and roosting locations are all standard methods for avoiding some direct effects to NYS threatened and endangered species and minimizing the impact of others. As the exact time of sunset and sunrise are not tangible in ecological terms, changing the curtailment timing to a 10-minute interval would not serve the intent of the protective measures. Thirty minutes is a typical standard when addressing wildlife activity during these periods of the day. The review of curtailment needs to assess if changes in technology or knowledge of impacts to bats supports modification of the existing curtailment regime; this is not optional. No change is warranted.

Comment

Commenters stated that the curtailment mitigation requirements for bats, allowing applicants to modify their curtailment to decrease bat mortality abdicates the responsibilities of the Office to applicants, is inappropriate and ineffective mitigation.

Discussion

The Office allows applicants the flexibility to propose modifications to the curtailment of facilities to avoid, minimize, and mitigate impacts to NYS threatened and endangered bat species in accordance with the intent of the regulations. No change is warranted.

Paragraph (5)

Comment

A commenter stated that the use of mitigation funding will contribute to the extinction of threatened and endangered species and their habitat as these projects proceed. A commenter suggested that the Office commit to basing all NCBPs on priorities adopted by the state and recognize that offsite activities cannot always mitigate for unavoidable impacts. One commenter requested that the amount of the fee paid into the Threatened and Endangered Species Mitigation Bank Fund and method of the calculation be clarified; while another commenter suggested that funds paid into the Threatened and Endangered Species Mitigation Bank Fund be reinvested locally rather than added to a remote fund. The commenter suggested an in-lieu fee structure that would lead to lower costs for permittees while increasing the habitat value of conservation sites. Another commenter noted supporting requirements that mitigation fees be paid in support of conservation of habitat, of similar or higher quality than the impacted habitat, and requested that regulations be edited to allow for a combination of mitigation payment and habitat conservation.

Discussion

Section 99-hh of the State Finance Law creates the endangered and threatened species mitigation bank fund and directs the NYSDEC to utilize the fund to facilitate a net conservation benefit to endangered and threatened species impacted by major renewable energy facilities. Section 11-0535-C of the NYSECL directs the NYSDEC to manage the endangered and threatened species mitigation fund and promulgate any regulations necessary to do so.

Section 94-c of Article 6 of the Executive Law enables the Office to require payments to the endangered and threatened species mitigation bank fund when offsite mitigation is required to provide a net conservation benefit to species adversely impacted by major renewable energy projects. The endangered and threatened species mitigation bank fund is an alternative mechanism for major renewable energy facilities to achieve a net conservation benefit for affected endangered and threatened species, but it is not the only potentially acceptable mitigation approach. No change is warranted.

Paragraph (6)

Comment

Commenters recommended changing text in §900-6.4(o)(6) to reduce the buffer around any discovered bald eagle roost/nest from a 0.25-mile radius (for nests without a visual buffer) to a 660-foot radius around nests for wind facilities, and a 500-foot radius for solar facilities. Other commenters stated that the regulations present an incomplete procedure for minimizing impacts to bald eagles. They further stated that the regulations omit mitigation measures, including siting turbines away from active nests and outside known flight paths to reduce the likelihood of mortality. The commenters also requested that power generation operations be allowed to continue.

Discussion

The required buffer area around any discovered eagle roost/nest tree is necessary to avoid and minimize impacts to bald eagles and is consistent with both federal and New York State Eagle Management Plans. Section 900-6.4(o)(6)(i) of the USCs does not prohibit the continuation of power generation at an operating facility, and as such, no change is warranted.

Paragraph (7)

Comment

Commenters requested changing the subtitle in §900-6.4 (o)(7)(ii), from "Restoration" to "Observation."

Discussion

The Office notes that restoration refers to the post-construction restoration period. No change is warranted.

Comment

An individual requested both written and visual documentation for reporting activities associated with NYS threatened or endangered species in §900-6.4(o)(7)(i) of the USCs.

Discussion

Visual documentation of NYS threatened and endangered species is not always possible (e.g., bird in flight). Survey reports will include as much data as needed to confirm whether a NYS threatened and endangered species and occupied habitat is present on the site. No change is warranted.

Paragraph (8) Record All Observations of NYS Threatened or Endangered Species

No additional discussion is necessary.

Paragraph (9) Discovery of Nests or Dead or Injured NYS Threatened or Endangered Bird Species

Comment

Commenters proposed changes in §900-6.4(o)(8)(ii) to revise the qualifier for evidence of NYS threatened and endangered bird species, from "discovered" to "identified."

Discussion

The Office has considered this comment and determined that no change is warranted.

Comment

Several commenters suggested that the regulations include a requirement for monitoring bird and bat mortality post-construction and suggested the regulations in §900-6 should be aligned with 6 NYCRR Part 182.

Discussion

The need for mortality monitoring will be addressed in the NCBP as needed. In addition, the practice of sharing the 2016 NYSDEC Guidelines for Conducting Bird and Bat Studies at Commercial Wind Energy Projects with applicants to encourage additional monitoring will continue. No change is warranted.

Comment

Commenters stated that the notification requirements regarding discovery of active nests, and dead or injured NYS threatened and endangered species in §§900-6.4(o)(8)(i) and (ii) are confusing and need to be consistent.

Discussion

The Office has collaborated with the NYSDEC in formulating the regulations and has taken into consideration the differing guidelines between Federal and State agencies in the event an active, dead or injured nest or eggs are identified. The Office will continue to work with the NYSDEC in the implementation of the regulations. No change is warranted.

Paragraph (10)

No additional discussion is necessary.

Subsection (p) Wetlands, Waterbodies, and Streams

Comment

Commenters stated that the USCs should better incorporate best practices to minimize impacts to wetlands, waterbodies and streams, including avoiding installation of any infrastructure or disturbance such resources to the maximum extent practicable.

Discussion

The regulations require applicants to demonstrate avoidance and minimization of impacts to NYS protected wetlands, waterbodies and streams by siting all facility components more than 50 feet from any delineated NYS protected waterbody and 100 feet from wetlands, to the extent practicable. The regulations further indicate if an applicant cannot avoid all impacts to NYS protected waters, an explanation of all efforts made to minimize impacts, including a discussion of all BMPs, is required. No change is warranted.

Comment

Commenters requested that §900-6.4(p) include a BMP that applicants avoid/minimize siting facilities in floodplains, to the extent feasible.

Discussion

The Office encourages applicants to avoid/minimize siting facility components in floodplains or flood hazard areas. There are currently standard practices in the industry to take these hazards into consideration, particularly during facility design and siting, due to the potential and inherent increased risks and liabilities to facility components. No change is warranted.

Paragraph (1) Environmentally Sensitive Area (ESA) Flagging

Comment

Commenters asked that "Environmentally Sensitive Area" be defined.

Discussion

"Environmentally Sensitive Area" is currently defined in §900-6.4(p)(1) as any NYS-regulated wetlands, waterbodies or streams and associated adjacent areas as identified in the delineations approved by the Office pursuant to §§900-1.3(e) and (f). No change is warranted.

Paragraphs (2)-(4)

No additional discussion is necessary.

Paragraph (5) Turbid Water

Comment

Commenters requested clarification of the description of "substantial visual contrast" in §900-6.4(p)(5) in order to facilitate consistent assessment.

Discussion

The language used in §900-6.4(p)(5) is consistent with federal and State (EPA and DEC) criteria for turbidity standards, as described in New York Codes, Rules, and Regulations (6 NYCRR §703.2). No change is warranted.

Paragraph (6) Truck Washing

Comment

A commenter recommended that nematodes and other infestation treatments be addressed in the truck washing section.

Discussion

The Office has considered this comment and determined that no change is warranted.

Paragraph (7) Concrete Washouts

Comment

A commenter suggested changing §900-6.4(p)(7) such that washout locations shall be at 100 feet from any wetland.

Discussion

Section 900-6.4(p)(7) requires a minimum distance of 100 feet between a regulated water resource and a concrete washout station. No change is warranted.

Paragraphs (8)-(11)

No additional discussion is necessary.

Subsection (q) Wetlands

Paragraph (1) Construction in Wetlands and Adjacent Areas

Comment

Commenters recommended deleting §900-6.4(q)(1)(i) in its entirety, which discusses time-of-year restrictions to protect NYS threatened and endangered amphibian species.

Discussion

These requirements are necessary to avoid and minimize any potential significant adverse environmental impacts on wetlands from the siting, design, construction, and operation of the facility. The requirement to limit construction during peak amphibian breeding season only applies to areas with known

breeding of NYS threatened and endangered amphibian species and allows the applicant to propose alternative protective measures that can be approved by the Office. No change is warranted.

Comment

Commenters suggested editing §§900-6.4(q)(1)(viii) and (x) to remove the requirement to place wetland topsoil and subsoils temporarily on textile blankets.

Discussion

The Office finds that requirements are necessary to avoid and minimize impacts on wetlands. No change is warranted.

Comment

One commenter was concerned that the separate requirements for installation of underground collection lines in wetlands could lead to confusion and suggested deleting it so that all wetland work would have the same set of requirements.

Discussion

The Office has considered this comment and determined that no change is warranted.

Paragraphs (2)-(3)

No additional discussion is necessary.

Paragraph (4) Access Roads Through Wetlands

Comment

Commenters stated that the USCs should incorporate BMPs to better minimize impacts to aquatic resources, such as avoiding installation of access roads through wetlands.

Discussion

The USCs include a comprehensive list of BMPs. An applicant may be required to propose additional minimization and mitigation measures to obtain a WQC and/or to address site-specific conditions. Such additional measures will be reflected in the Wetland Restoration and Mitigation Plan, which will be incorporated into the siting permit. No change is warranted.

Paragraph (5) Solar Panel Support Installation

Comment

Commenters indicated that solar arrays should not be installed in wetlands due to impacts from initial site disturbance and from ongoing maintenance activities.

Discussion

Applicants are encouraged to avoid and minimize siting in NYS regulated wetlands and adjacent areas. However, if an applicant cannot avoid all impacts to NYS regulated wetlands, an explanation of all efforts made to minimize impacts, including a discussion of all BMPs, is required. Ongoing maintenance activities required for solar facility components are not anticipated to be extensive and applicants will be

required to restore disturbed areas following construction and during maintenance activities in accordance with §900-6.4(q). No change is warranted.

Comment

One commenter stated that allowing solar arrays within wetlands will increase inundation risk during storms and that the activities contemplated to be allowed under the proposed regulations could harm state-regulated wetlands.

Discussion

If components (e.g., solar arrays) are proposed in wetlands due to design limitations, the applicant must assess the functions and values, including changes in hydrology or vegetation, of the wetlands to be impacted. Upon demonstration of wetland avoidance and minimization, impacts to the functions and values of wetlands are required to be addressed and compensated in the applicant-developed Wetland Restoration and Mitigation Plan. No change is warranted.

Paragraph (6) Tree Clearing

No additional discussion is necessary.

Paragraph (7) Fill Placement

Comment

One commenter stated that the regulations demonstrate a lack of understanding about how wetlands are affected by fill. The commenter added that placing fill in part of a wetland will affect the entire wetland. The commenter also stated that wetland hydrology was not characterized by surface water flow or high flows, nor is it described as "conditions" between wetlands.

Discussion

The provision regarding placement of fill in wetlands is intended to minimize the impacts of such fill. No change is warranted.

Paragraphs (8)-(10)

No additional discussion is necessary.

Subsection (r) Work in NYS-protected waters

Paragraph (1) Dry Conditions

No additional discussion is necessary.

Paragraph (2) In-Water Work Windows

Comment

Commenters suggested changes to §900-6.4(r)(2) exempting in-water work windows if a permittee receives site-specific approval from the Office or the deviation is approved on-site by a regional NYSDEC biologist.

Discussion

Any site-specific approvals for in-stream work waivers will be determined by the Office in consultation with NYSDEC. No change is warranted.

Comment

Commenters noted that construction work should not be allowed in trout streams during the timeframes listed in §900-6.4(r)(2) unless NYSDEC issues a waiver.

Discussion

The Office has collaborated and will continue to collaborate with the NYSDEC to assess if an exemption of construction work during the seasonal timing restrictions is warranted on a case-by-case basis. No change is warranted.

Paragraphs (3)-(5)

No additional discussion is necessary.

Paragraph (6) Access Road Crossings of Streams

Comment

Several commenters expressed concerns about the sizes of newly installed culverts and their capacity to convey increased stormwater flows associated with potential effects of climate change, such as the increase in 100-year storms and the vulnerabilities it poses to flooding on-site and downstream.

Discussion

The regulations require new culvert pipes to be designed to safely pass the one-percent annual chance storm event. The one-percent annual chance flood is also referred to as a 100-year flood. No change is warranted.

Paragraphs (7)-(11)

No additional discussion is necessary.

Subsections (s)-(u)

No additional discussion is necessary.

§900-6.5 Facility Operation

Subsection (a) Noise Limits for Wind Facilities

Comment

A commenter suggested modifying the proposed language in §900-6.5 to clarify that the noise standard applies only to project components, and not to other facilities outside of the permittee's control.

Discussion

The Office recognizes the challenges and ramifications to distribute the noise "budget" between competing facilities, and the challenges associated with performing a post-construction survey at locations exposed to noise levels from different adjoining facilities, particularly if cumulative noise levels exceed

any noise limit and the other facility(ies) are not operated by the same permittee. As discussed in §900-2.8, the Office clarified that computer noise modeling should be conducted with and without the interaction of components of any existing or proposed facilities in the radius of evaluation. For projects where the cumulative noise impacts exceed any design goal or may exceed a cumulative sound limit during operation, a decision on whether the facility should conform with design goals and sound limits on a cumulative basis will be made on a case-by-case basis. No further change is warranted.

Paragraph (1)

Clarifying changes conforming to the changes described above for §§900-2.8(b)(1)(ii) and (b)(2)(iii) have been made to §900-6.5(a)(1)(ii).

Paragraph (2) Post-Construction Noise Compliance and Monitoring for Wind Facilities.

Comment

Commenters recommended revising §900-6.5(a)(2) to require only one post-construction sound compliance test during leaf-off conditions (eliminating the "leaf-on" study), and revising §900-6.5(a)(2)(iv) to require a second study only at the discretion of the Office if the single study is determined insufficient. The commenters pointed out that the "leaf off" season has the best signal-to-noise ratio among the two seasons in §900-6.5(a)(2)(ii). The commenters also suggested that the compliance testing timeframes should be changed to complete the single test within thirteen months instead of seven, and to file a report from eight to fourteen months, after the commencement of commercial operation. Further, the commenters recommended eliminating violation tests and any other tests from §900-6.5(a)(3). Conversely, concerns were expressed about residents being subjected to elevated (and possibly out of compliance) noise levels for a long period of time according to the current schedule.

Discussion

The timeframes allow for properly planning and executing post-construction testing during the seasons of interest. Propagation parameters such as air temperature, relative humidity, vegetation, wind potential and direction between the seasons may differ. Therefore, the intent is to at least test the sound levels at the wind facilities at two different seasons during the first year only. If the leaf-on season is eliminated, and the facility starts operations at the end of the leaf-off season, for instance, no testing could be conducted during a long period of time until the next leaf-off season arrives. In addition, the time associated with preparing, conducting, and reporting results of the survey would potentially result in exposing residents to multiple adverse effects (such as excessive audible noise, low-frequency or infrasound levels, vibrations, tones and/or excessive amplitude modulation) for a long period of time. In addition, if a non-compliance situation is found, additional time will be needed to investigate, conclude, present and implement mitigation. Increasing the time frame to complete the first test from seven to thirteen months and to file the first report from eight to fourteen months is not reasonable. No change is warranted.

Paragraph (3) Noise Exceedances from Wind Facilities

Comment

Commenters recommended changes regarding how to address noise limit exceedances from facility operation in §900-6.5(a)(3), consisting of eliminating §§900-6.5(a)(3)(i) through (v) and replacing them with two subsections.

Discussion

The implementation of the noise limits prescribed in the proposed regulations were carefully chosen to prevent adverse noise impacts at sensitive receptors. A finding of non-compliance will be addressed on an expedited basis. The regulations contain provisions to present operational and/or physical minimization options to the NYSDPS and the Office, implement them after approval and retest for compliance with permit conditions. In addition, the permittee is required to cease operation of the turbines that caused the exceedances until the minimization measures are implemented and not to operate the facility without the mitigation measures approved. No change is warranted.

Paragraph (4) Noise and Vibration Complaints from Wind Facilities

Comment

Commenters suggest eliminating the language from §900-6.5(a)(4)(iii) that requires reporting the type of complaints received among other details to the Office. Furthermore, the commenters recommended eliminating entirely the follow-up provisions for investigating, evaluating, and addressing complaints from amplitude modulation included in §900-6.5(a)(4)(iv), as well as the 5 dB penalty if excessive amplitude modulation occurs, until a thorough discussion occurs because evidence documenting substantial amplitude modulation is lacking and the implementation challenges are unknown.

Discussion

A complaint management system can only be effective if every complaint is received, processed, and reported in a consistent manner; therefore, all complaints received should be reported. Based on past precedents for Article 10 cases, excessive amplitude modulation attributed to wind facilities can result in annoyance at sensitive receptors. Amplitude modulation must be investigated and evaluated in a specific way, which is why §900-6.5(a)(4)(iv) is prescriptive. All complaints will be reviewed and addressed as appropriate, including those involving amplitude modulation. No change is warranted.

Comment

Commenters expressed concern with the noise complaint resolution process. Given that noise complaints are reported through the applicant, commenters were concerned that complaints would not be accurately conveyed.

Discussion

The Office notes that provisions and procedures to handle and resolve complaints are expected to be included in the Complaint Resolution Protocol prescribed in §900-6.5(a)(4)(v). The Office will have the opportunity to establish that the Protocol is adequate and sufficient. No change is warranted.

Paragraph (5) Facility Logs for Wind Facilities

No additional discussion is necessary.

Subsections (b)-(f)

No additional discussion is necessary.

Subsection (g) Facility Transmission Interconnection Related Incidents

Paragraph (1)

Comment

Commenters suggested adding a subsection to §900-6.5(g), requiring the permittee to work cooperatively with the serving utility, NYISO, the New York State Reliability Council (NYSRC), the North American Electric Reliability Corporation (NERC) and the Northeast Power Coordinating Council (NPCC) to prevent any future occurrences.

Discussion

Although the Office has the authority to issue permits for the construction and operation of applicable transmission interconnection facilities associated with the proposed generation facility, safety and reliability of the electric transmission system is under the jurisdiction of the NYSDPS and the NYSPSC. The Office will receive notice of such transmission incidents, however, NYSDPS will determine the appropriate response to and resolution of such incidents. The requirement that the permittee shall contact the NYSDPS and the Office in response to any transmission- related incidents does not preclude the permittee from following any and all other applicable reporting requirements to other entities such as the NYISO, NYSRC, NPCC, and NERC. No change is warranted.

Paragraph (2)

No additional discussion is necessary.

Subsection (h) Facility Malfunction

Comment

Commenters indicated that permittees should be required to notify federal and local authorities in the event of an incident, so that local emergency response departments can activate responses. It was also requested that an action plan for malfunctions be submitted and reviewed by federal, state, and local agencies and municipalities prior to an incident.

Discussion

The facility's Safety Response Plan (required by §900-2.7) will be reviewed by local and state emergency officials and will detail the notification requirements in the event of an emergency. No change is warranted.

Comment

A commenter requested that the text in §900-6.5(h)(2) be revised to require notification of any malfunction reducing generation capability, rather than just for incidents that occur for an extended duration.

Discussion

There may be instances where malfunctions of the facility or facility components may cause a reduction in generation capability for short duration events, which would not be required to be reported to the NYSDPS. This reporting requirement condition does not relieve the permittee of its obligations pursuant to any and all other applicable reporting requirements to other entities such as the NYISO, NYSRC, NPCC, and NERC. No change is warranted.

§900-6.6 Decommissioning

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

Commenters requested revising §900-6.6 to split the financial security or bond requirements into two installments, such that the first 50 percent of the financial security or bond is due prior to construction (based on the results of the initial decommissioning study), and that the second installment of 50 percent is due in year 10, contingent upon an updated decommissioning plan to ensure that salvage and removal costs are accurate.

Discussion

The Office has considered the comment and determined that no change is warranted.

Subpart 900-7

§900-7.1 Amendment of an Application

Subsection (a)

Comment

One commenter asked when amendments to an application would be required and others asked what process would be followed in the event an amendment was proposed for an application.

Discussion

Requests to amend an application are required when an applicant wishes to change any of the information included therein. The Office will review the request to determine whether the proposed changes result in a minor amendment that can be handled on an administrative basis or a major amendment that would require additional public notice and the re-commencement of the application review process. All such requests must be made prior to the Office determining an application to be complete, as the Office has only 60 days from the date of such determination to issue a draft siting permit. After issuing a completeness determination, the Office does not have the statutory authority to stop the permit process in order to consider application amendments. No change is warranted.

Subsection (b) Requests for Permission to Submit an Amendment

No additional discussion is necessary.

Subsection (c) Submission of a Major Amendment to an Application

Comment

Some commenters requested that the regulations allow an applicant to make changes in response to concerns of the Office or stakeholders and included a specific recommendation that the regulations be revised to allow the submission of supplemental filings within 30 days of a determination that there are no adjudicable issues requiring a hearing, or if an adjudicatory hearing is required, prior to the issuance of the ALJ's recommended decision.

Discussion

Applicants will only be permitted to amend their application prior to the issuance of a notice of complete application. If the applicant decides that it must make changes to the proposed facility after such date, it may withdraw its application and resubmit. To the extent that the Office determines that changes are required based on comments on the draft siting permit or the ALJ recommendation suggests certain changes, these would be reflected in the final siting permit. If the Office determines that significant changes to the design of the proposed facility would be required in order to issue a final permit, it may deny the permit. No change is warranted.

Subsections (d)-(e)

No additional discussion is necessary.

Subpart 900-8 Hearing Process

§900-8.1. Publication of Draft Siting Permit

Subsection (a)

Comment

Substantial edits to this section were proposed, including removing the requirement for agency consultation, and changing text on what will be published on the website for public comment.

Discussion

Executive Law §94-c(5)(c)(i) requires the Office to consult with any relevant state agency or authority, and to "publish for public comment" the draft permit conditions for a proposed project. It is the Office's view that the most effective way to "publish" a draft permit for public comment is to post the draft permit on the Office's website. No change is warranted.

Comment

Other commenters expressed concern that the failure to consult with relevant state agencies or authorities could be used as a rationale to delay issuance of the draft permit to more than 60 days following the application completeness determination date.

Discussion

The requirement that a draft permit be issued no later than 60 days following the date an application is deemed complete is established by Executive Law §94-c(5)(c)(i) and cannot be extended as a result of

failing to consult with any relevant state agency or authority. The expectation is that agency consultations will occur before the 60-day period expires. No change is warranted.

Subsection (b)

Comment

Substantial edits to this section were proposed, including striking subsection (b) regarding the required contents of the hearing notice in its entirety. Commenters stated that the regulations do not clearly identify what information will be available to the public and expressed that the draft regulations should provide for a centralized website for all documents, including pre-application documents, application documents, required plans, permits, maps, exhibits, revisions, state agency comments and documents, and public and municipal comments. Other commenters stated that all notices should be in one section such that §900-8.1(b) should either be consolidated or moved to §900-8.2.

Discussion

The regulations concerning the combined notice are consistent with statutory requirements and time frames for review and decision-making on a siting permit application pursuant to Executive Law §94-c. Section 900-8.1(b) requires that the combined notice defined in §900-8.2(d) shall be published on the ORES website. Additional notice is required to the applicant and persons who have made a request to participate, and the applicant shall provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located, together with any additional notice required by the ALJ under §900-8.2(a). It is anticipated that all notices and non-confidential documents related to applications submitted to the Office will also be made publicly available on the Office's website and at local libraries as discussed elsewhere herein. The Office finds no need to strike this entire subsection or to consolidate the notice requirements in §900-8.2. No change is warranted.

§900-8.2 Notice of Hearing

Subsection (a) When notice is required

Comment

Commenters suggested edits to the regulations including removing the requirement for publishing notice of adjudicatory hearings and removing references to §900-8.1(b) in §900-8.2(a).

Discussion

Executive Law §94-c(5)(c)(i) requires that public notices be posted on the Office's website. References to §900-8.1(b) in §900-8.2(a) are intentional to demonstrate applicability of notices in §900-8.1(b); therefore, no change is warranted.

Subsection (b) Required contents of notice

Comment

Comments were received regarding the hearing process set forth in Subpart 900-8, including requests for clarification or procedural changes.

Discussion

The Office considered the comments and determined that no changes were warranted.

Subsection (c) Optional contents

Comment

Commenters questioned whether it would be possible to specify the issues of concern if the issues determination hearing has not occurred and issues have not been submitted. They qualified their statement by questioning if §900-8.2(c) is only referring to the adjudicatory hearing notice and not the public comment period notice.

Discussion

Section 900-8.2(c) applies to any notice issued pursuant to Subpart 900-8 and provides ORES with the option of specifying the issues of concern to ORES and the public. The commenter is correct that early in the hearing process, issues of concern by the public may not be known. Nevertheless, §900-8.2(c) gives ORES the discretion to specify issues of concern to the public if they are known at the time. No change is warranted.

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

Comment

One commenter recommended that the applicant or the Office should be required to serve the combined notice of availability of draft permit conditions or statement of intent to deny, public comment period and public comment hearing, and issues determination (combined notice), at the same time it is published on the Office's website.

Discussion

Pursuant to §900-8.2(e), the combined notice must be served no less than 21 days prior to the hearing date. The ALJ has the discretion to require that notice be given further in advance of the hearing. As a matter of practice, the ALJ will likely require service of the combined notice at or around the time the notice is published on the Office's website. No change is warranted.

Comment

Commenters questioned the applicability of the open meetings laws.

Discussion

The requirements of the Open Meetings Law do not apply to proceedings under Executive Law §94-c. No change is warranted.

Comment

One commenter suggested clarifying the methods for submission of comments on a draft siting permit and allowing members of the public to request extensions of time to file such comments.

Discussion

The regulations require that the notice include instructions for filing comments. The details requested will be provided in the notice itself and need not be set forth in this regulatory provision. Nothing in the regulations prevents an interested party from requesting an extension of the time to submit comments. No change is warranted.

Comment

Commenters suggested changing §900-8.2(d)(1) such that the period for filing public comments shall be a maximum of 60 days, rather than a minimum, from the date of issuance of the combined notice.

Discussion

The 60-day minimum is required under Executive Law §94-c, and the ALJ and Executive Director have discretion to extend the 60-day comment period if circumstances warrant. No change is warranted.

Comment

One commenter requested that ORES revise the regulations to clarify when issue determination papers should be filed.

Discussion

The combined notice will provide a specific date, which will be no less than 60 days from the date of issuance of the combined notice. No change is warranted.

Subsection (e) Service on specific persons

Comment

A commenter asked how the Office will determine which "other persons" might have an interest in an application (under §900-8.2(e)) and suggested that municipalities should be required to publicize hearing information and solicit contact information from interested parties.

Discussion

The Office will determine which "other persons" might have an interest in an application on a case-by-case basis. Parties wishing to receive notifications directly can contact the Office and/or the applicant. The applicant is required to publish all notices related to their permit applications; municipalities are free to provide information about upcoming hearings to their residents, but the Office believes this responsibility is appropriately imposed on the applicant. No change is warranted.

Comment

A commenter also suggested adding exceptions for natural disasters, pandemics, emergencies, and dangerous weather conditions from the requirement to obtain applicant consent for delay of the commencement of a public hearing.

Discussion

The Office has considered the comment and determined that no change is warranted.

§900-8.3 Public Comment Hearing and Issues Determination

Comment

Several comments were received requesting clarifications to the regulatory provisions regarding public comment hearings, issues determinations, and adjudicable issues.

Discussion

The Office considered and determined many of these comments unnecessary or based on an incorrect reading of the regulations. No change is warranted.

Comment

Other commenters requested additional time for municipalities and others to prepare for, and participate meaningfully in, public hearings, additional time for public review of the project materials, and extended deadlines for public comment. Additional concerns were received related to the timing of ORES to respond to public questions. Commenters requested that questions and issues raised in comments be addressed as promptly as possible.

Discussion

The timeframes set in the regulations were determined to be necessary to meet the deadlines imposed by Executive Law §94-c. The applicant is required to file and serve responses to public comments within 15 days of the close of the public comment period, the filing of petitions for party status, or the filing of a statement of compliance with local laws and regulations, whichever event occurs later. Given the requirement that the Office make a final determination on the project within six months or one year from the completeness determination, and the time needed to complete an adjudicatory process, if one is required, any parties interested in participating in the hearing process must promptly inform the Office of their potential issues after the 60 day public comment period expires. No change is warranted.

Subsection (a) Public comment hearing

Comment

A commenter questioned whether a public comment hearing will be required for all projects. The commenters noted that Executive Law §94-c(5)(c)(ii) only requires a public comment hearing if a municipality has provided a statement that a project will not comply with local laws or regulations and the Office determines not to hold an adjudicatory hearing.

Discussion

Given the statutory deadlines for final permitting decisions, the Office concluded that it could not wait until after the issues determination portion of the process to determine whether a public comment hearing was required by Executive Law §94-c(5)(c)(ii). Accordingly, because the statute does not prohibit conducting a public comment hearing on every application, the Office determined that it was prudent to do so. If the issues determination portion of the process results in the determination that an adjudicatory hearing will not be held, the public comment hearing required by Executive Law §94-c(5)(c)(ii) will have already been held, and the Office will be able to proceed to a decision on the permit without further delay. No change is warranted.

Comment

Commenters noted that transcripts of public statements at a public comment hearing should be made available on the Office website without having to file a FOIL request.

Discussion

It is anticipated that all transcripts of public comments made at the public comment hearings on an application will be made publicly available on the Office website. No change is warranted.

Subsection (b) Issues determination

Comment

Several commenters proposed editing §900-8.3 to limit the reason an ALJ may reopen the issues determination to the availability of new information raising significant and substantive issues. Specifically, commenters requested that if it is demonstrated that such information raises a new significant and substantial issue that must be adjudicated, and if the public review period for the application prior to the issues determination was insufficient to allow prospective parties to adequately prepare for the issues determination procedure, the ALJ may adjourn the issues determination, extend the time for written submittals, or make some other fair and equitable provision to protect the rights of the prospective parties.

Discussion

The ALJ will consider whether the new information raises an adjudicable issue by applying the appropriate standards under §900-8.3(c). The proposed rules mirror closely the adjudicatory process utilized in 6 NYCRR Part 624. Those procedures have been in place for some time and provide ample flexibility for an ALJ to respond to project specific matters raised by the parties. No change is warranted.

Comment

One commenter was confused about the process for submitting issues.

Discussion

Potential parties will submit their issues in their party status petitions. The applicant will submit its issues in a statement of issues as provided for in §900-8.4(b)(1). Petitions for party status and the applicant's statement of issues will be due at the same, as established by the ALJ, and will generally be due on the same date on which the public comment period ends. No change is warranted.

Comment

Commenters also suggested changing the term "prospective parties" to "potential parties" and modifying §900-8.3(b)(4) to add text before the discussion terminates with the close of the comment period.

Discussion

The Office adopts the suggestion to change the term "prospective parties" to "potential parties" throughout §900-8.3(b)(1) to bring the paragraph into conformity with the rest of the section and in §900-8.4(c)(5) for consistency.

Subsection (c) Standards for adjudicable issues

Paragraph (1) Generally applicable rules

Comment

One commenter recommended adding to §900-8.3(c)(1) that an issue is adjudicable if it is contradictory to the local Comprehensive Plan or local law.

Discussion

Absent a dispute between the Office and an applicant regarding local law compliance or an applicant's request for a waiver of local laws, issues regarding local law compliance will be joined for adjudication if a party status petitioner, such as a municipality, raises a substantive and significant issue pursuant to the standards set forth under §900-8.3(c). No change is warranted.

Paragraph (2)

Comment

Commenters recommended modifying the definition of a "substantive" issue under the regulations to include, "if there are environmental, safety, health or economic issues not adequately addressed". This is in addition to the current draft language that states 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 inquiry."

Discussion

The additional language is not required. Before issuing a siting permit, ORES is required to find that a proposed project would comply with applicable law and regulations (see Executive Law §94-c(5)(e)). Among the regulatory requirements a proposed project will have to comply with are the standards and conditions contained in Part 900, which are designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental, public health or safety impacts related to the siting, design, construction and operation of a facility (see Executive Law § 94-c(3)(c)). Accordingly, relevant environmental, public health and safety issues are addressed by the regulatory criteria applicable to proposed project, and a catch-all phrase is not needed in the definition of "substantive" issues. No change is warranted.

Paragraph (3)

No additional discussion is necessary.

Paragraph (4)

Comment

Commenters requested removal of §900-8.3(c)(4) as it places substantial resource and financial burdens on municipalities and citizens. Commenters added that reliance on a generic permit appears to mean that the Office would always find that the project meets the requirements of statute and regulation. For this reason, commenters added that the moving party will always have a very high, even practically impossible burden of persuasion. The commenters felt this was a greater burden for municipalities and citizens, than for deep-pocketed applicants, and harms the ability of municipalities and citizens to review project proposals. It was stated that parties should be encouraged to raise issues, and reasonable issues should be given a hearing.

Discussion

The Office recognizes that raising an issue for adjudication regarding a draft permit may be a high burden. However, as noted, Executive Law §94-c expressly limits adjudicatory hearings to substantive and significant issues regarding the draft permit. Moreover, the regulations provide that 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 inquire further. Accordingly, the "reasonable" issue standard the commenter is advocating for is incorporated into the regulatory definition of substantive and significant. With respect to the financial burden associated with participating in hearings under Part 900, the local agency account is intended to offset those costs. No change is warranted.

Comment

Commenters suggested adding text to the beginning of §900-8.3(b)(4) such that parties would have 30 days from the Notice of Draft Permit to submit their issues statement and the applicant would have 15 days to submit their responses to filed issues statements. The requested addition would also require that the ALJs make an issues determination no later than 30 days after the public comment hearing.

Discussion

The Office has considered the comment and determined no change is warranted.

Paragraph (5)

Comment

Some commenters suggested that there be adjudicatory hearings held to discuss any local siting issues that are deemed substantive and significant, or to determine whether a local law is unreasonably burdensome.

Discussion

Adjudicatory hearings will be held on any local siting issues and applicant requests to waive unduly burdensome local laws if the ALJ determines in the issues ruling that those issues are substantive and significant. The completeness of an application, as defined in this Part, shall not be an issue for adjudication. No change is warranted.

Comment

Several commenters suggested that local agencies should have an opportunity to comment on the completeness of an application, including the relative fairness or degree of burden imposed by their local land use regulations, as with SEQRA (which allows public comment at every stage of project review). In addition, the commenters recommended allowing 60 days to devote to completeness comments.

Discussion

Section 900-8.3(c)(6) is based upon a similar provision in the NYSDEC's Permit Hearing Procedures at 6 NYCRR Part 624 and is included in these regulations for the same reasons. As is the case under NYSDEC's Uniform Procedures Act (UPA), an application may be denied if it is missing information necessary for decision-making. Whether an application is missing such information can be subject to an adjudicatory hearing if the question otherwise meets the standards for adjudication. On the other hand, the

determination of completeness under Executive Law §94-c is intended as a starting point, both for public review of an application, and for commencing the permit review deadlines established by Executive Law §94-c. Although ideally only applications with adequate information would be determined complete, Executive Law §94-c also provides for applications to be deemed complete by default if ORES fails to act within the prescribed time. This demonstrates the Legislature's intent that the completeness determination is not to be revisited. If additional information is needed, it should be handled through the hearing process. No change is warranted.

Paragraph (6)

No additional discussion is necessary.

Paragraph (7) ORES-initiated modifications.

Comment

One commenter stated that because §900-8.3(c)(7) applies only to the Office-initiated post-permit modifications, it should be moved to §900-11.4.

Discussion

Section 900-8.3(c)(7) is appropriately included in §900-8.3(c), which establishes the standards for adjudicable issues for all hearings conducted pursuant to subpart §900-8. No change is warranted.

§900-8.4 Hearing Participation

Subsection (a)

Comment

General clarification comments were made, questioning the need and legal basis for requiring individuals to make a written request to participate in public hearings. The commenter also requested an explanation of the process for attending and speaking at the hearing.

Discussion

Participants in a public comment hearing will be asked to register in order to speak so that the ALJ can maintain order and ensure that all interested parties are afforded an opportunity to participate. Parties interested in participating in an adjudicatory hearing must petition for party status in accordance with §900-8.4. No change is warranted.

Subsection (b) Mandatory parties

Comment

A commenter requested that Indian Nations should be added to the mandatory parties identified in §900-8.4(b).

Discussion

State and local agencies are made mandatory parties to a proceeding if they were consulted during the pre-application or application process, or where issues related to the jurisdiction or authority of those agencies are joined for adjudication, to avoid the need for parties to go to court and obtain a subpoena duces

tecum pursuant to CPLR 2307 to obtain disclosure from those agencies. Indian Nations are not subject to CPLR 2307 and parties may subpoena Indian Nations without the need for a court order. Accordingly, it is not necessary to make Indian Nations full parties for this purpose. No change is warranted.

Comment

One commenter requested clarification on party status and asked who must apply for it. The commenter noted that a municipality is defined as a mandatory party; however, if a municipality seeks to raise an issue regarding a facility's compliance with local laws, a petition for party status must be filed.

Discussion

A municipality is a mandatory party in the adjudicatory hearing only if it was consulted during the pre-application or application process or if issues related to local jurisdiction are joined for adjudication in the issues ruling. The purpose of mandatory party status in this context is to allow for disclosure from the municipality without the requirement of a court-issued subpoeana pursuant to CPLR 2307. Whether or not a municipality qualifies as a mandatory party, however, any municipality seeking to litigate local law compliance is required to file a petition for party status so that the ALJ can determine whether any adjudicable issues regarding local law compliance are presented. No change is warranted.

Subsection (c) Other parties

Comment

Commenters proposed the addition of a new subsection to §900-8.4(c)(1) requiring that the individuals demonstrate that they are a resident of the community in which the proposed facility will be located or non-profit organizations have a concrete and localized interest that may be affected by the proposed facility.

Discussion

The standards applicable to the granting of full party status already require a proposed intervenor to demonstrate an adequate interest related to the standards and conditions established by the Office for the siting, design, operation, and construction of the project, among other things. The standards applicable to the granting of amicus party status similarly require a demonstration that the petitioner has a sufficient interest in the resolution of the legal and policy issues to be resolved in the matter. These standards encompass the considerations raised by the commenters and will be considered by the ALJ when determining party status. No change is warranted.

Subsection (d) Statement of compliance with local laws and regulations

Comment

Commenters recommended adding text to the end of §900-8.4(d) stating that the burden of establishing the need for a more stringent standard is borne by the party raising the issue when a municipality, political subdivision, or agency proposes to adjudicate an issue regarding compliance with a local law or regulation that is addressed by a uniform standard and condition.

Discussion

Section 900-8.3(c)(3) already places that burden on the municipality where the Office staff has determined that a project complies with all applicable local laws or regulations. In circumstances in which the Office staff and the applicant disagree regarding local law compliance, the issue will already be joined for adjudication. Accordingly, the proposed revision is unnecessary. It should be noted, however, that if a municipality carries its burden of persuasion at the issues determination stage and an issue of local law compliance is joined for adjudication, the ultimate burden of proof regarding compliance with local laws or an applicant's request for waiver of those laws rests with the applicant (see §900-8.8(b)(1)). No change is warranted.

Subsection (e) Late filed petitions for party status

No additional discussion is necessary.

Subsection (f) Rulings on party status

Paragraph (1) Full Party Status

Comment

Commenters proposed including a new subsection (f)(1) such that the ALJ's ruling of entitlement to full party status shall be based upon a finding that the petitioner has a sufficient local nexus to the proposed facility, resides within one mile of a proposed solar facility or five miles of a proposed wind facility, or represents individuals who reside within one mile of a proposed solar facility or five miles of a proposed wind facility.

Discussion

The geographic limitations applicable to community intervenors are based upon statutory language limiting the disbursement of funds to "community intervenors" and are intended to assure that local agency funds are limited to residents in the immediate vicinity of a proposed project. In contrast, the statute requires the scheduling of an adjudicatory hearing where "members of the public raise a substantive and significant issue" without any reference to geographic proximity (Executive Law §94-c(5)(d)). Accordingly, no statutory basis exists for excluding a member of the public from participating in a hearing who resides outside the immediate vicinity of a project, but nonetheless raises a substantial and significant issue regarding project impacts that may impact that individual. No change is warranted.

Paragraph (2) Amicus status

No additional discussion is necessary.

Subsections (g)-(h)

No additional discussion is necessary.

§900-8.5 General Rules of Practice

Subsection (a) Service

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

Commenters recommended making electronic documents the primary delivery method for service, rather than mailed copies, in §900-8.5(a)(3), with the exception of paper delivery for those without electronic access or capability.

Discussion

The provisions for service of papers relies on the standard methods provided for in CPLR 2103. However, the regulations also provide for service by electronic means, either as agreed to in advance by the parties or authorized by the ALJ. In practice, the ALJ will likely approve service by electronic means in the combined notice issued pursuant to §900-8.2(d). Similarly, the ALJ will likely waive the requirement for the mailing of a conforming hard copy upon the establishment of a reliable electronic document management system for the Office. No change is warranted.

Subsection (b) Computation of time limits

No additional discussion is necessary.

Subsection (c) Motion practice

Comment

Commenters stated that that the timeframes for motion practice in §900-8.5(c) should be doubled to 10 days to give parties time to adequately respond to motions.

Discussion

Pursuant to §900-8.5(b)(2)(i), if a motion is served by first class mail, which is the most common method of serving a motion, five days are added to the five-day response time. Moreover, pursuant to §900-8.5(g), both the ALJ and the Executive Director have the discretion to modify the time for responses, if needed. No change is warranted.

Paragraph (1) Motions and requests

Comment

Commenters recommended specifying in §900-8.5(c)(1) that electronic documents will be the primary delivery method, rather than mailed copies.

Discussion

The provisions for service of papers relies on the standard methods provided for in CPLR 2103. However, the regulations also provide for service by electronic means, either as agreed to in advance by the parties or authorized by the ALJ. In practice, the ALJ will likely approve service by electronic means in the combined notice issued pursuant to §900-8.2(d). Similarly, the ALJ will likely waive the requirement for the mailing of a conforming hard copy upon the establishment of a reliable electronic document management system for the Office. No change is warranted.

Paragraphs (2)-(5)

No additional discussion is necessary.

Subsection (d) Office of Hearings

No additional discussion is necessary.

Subsection (e) Expedited Appeals

Comment

Commenters suggested striking §900-8.5(e) in its entirety.

Discussion

Section 900-8.5(e) provides the procedures for filing and responding to expedited appeals and motions for permission to appeal pursuant to §900-8.7(d)(2) and, therefore, must be retained. No change is warranted.

Subsection (f)

Comment

Commenters proposed striking §900-8.5(f), which prohibits video recording and rebroadcasting, noting that the COVID-19 pandemic has forced local governments to conduct official business virtually or telephonically.

Discussion

The prohibition against video recording or televising the adjudicatory hearing for rebroadcast is based upon Civil Rights Law §52, which makes the violation of the prohibition a misdemeanor. It should be noted, however, that the prohibition only applies to the evidentiary portion of an adjudicatory hearing during which witness testimony is taken. The prohibition does not apply during other portions of the proceeding, such as during the public comment hearing or during oral argument, if any, at the issues determination stage. In addition, the prohibition does not prevent the Office from broadcasting a hearing to the public through a closed-circuit system. No change is warranted.

Subsection (g)

Comment

Commenters suggested that the ALJ and Executive Director should only have the authority to grant extensions of timeframes in §900-8.5(g).

Discussion

Pursuant to §900-8.5(g), both the ALJ and the Executive Director have the discretion to modify the time for responses, if needed. With respect to §900-8.5(g), the section applies to all timeframes in Subpart 900-8. There may be circumstances where a timeframe not otherwise required by the regulations may need to be shortened by the ALJ or Executive Director, particularly when doing so is necessary to meet the statutory deadlines for decision. No change is warranted.

§900-8.6 Disclosure

Subsection (a) Prior to the issues determination

Comment

A commenter suggested that interested parties should be able to conduct discovery in advance of the public hearing in order to inform petitions for party status or to identify issues for adjudication.

Discussion

The limitation on discovery prior to the issues determination is based upon a similar provision in NYSDEC's permit hearing regulations at 6 NYCRR Part 624 and is included here for similar reasons. The review of an application by the Office staff in making its determination whether to grant or deny a permit is based upon records that are before the agency and, thus, subject to release pursuant to FOIL. The Office views the application documents as normally being sufficient to alert any intervenors to matters that could potentially be an adjudicable issue. Limiting disclosure to the documents that are the subject of the Office's review also prevents "fishing expeditions" and focuses the process on the substantive and significant issues determined at the issues determination phase of the process. Furthermore, if an intervenor can demonstrate a legitimate need for further discovery, the ALJ has the discretion to authorize such additional disclosure. No change is warranted.

Comment

Comments were received stating that the reference to the Freedom of Information Law (FOIL) in §900-8.6(a) is confusing and that the Office should be required to promptly respond to all public record requests without using FOIL procedures.

Discussion

The reference to FOIL in §900-8.6(a) is intended only to make clear that disclosure prior to the identification of issues for adjudication is limited to the documents that would be releasable under FOIL, not that the FOIL regulations must be followed for such disclosure. It is anticipated that all publicly releasable documents related to applications before the Office will be made available on the Office website. No change is warranted.

Comment

A comment was received stating that access to and inspections of private property are more appropriate in civil litigation, and the applicant should not be required to arrange access to leased property in a project for members of the public challenging the projects.

Discussion

Access to property for inspections would have to be in furtherance of obtaining material and necessary evidence relevant to an issue identified for adjudication. Moreover, access to property for purposes of sampling or testing requires prior approval from the ALJ, and the applicant may seek a protective order to deny, limit, condition, or regulate such inspections to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice associated with such inspections. The Office considers these measures to provide sufficient protection against the abuse of the referenced disclosure device. No change is warranted.

Subsection (b) Without permission of the ALJ

Comment

Commenters requested revising subsection (b) to add that any party has the right to serve a disclosure demand for any adjudicable issue. The commenters also requested adding to the beginning of subsections (b)(3) and (b)(6) that an inspection of property and electronically stored information, respectively, may be demanded upon a showing of need.

Discussion

The regulations make it clear that disclosure is limited to issues joined for adjudication by the ALJ. Furthermore, the requirement that a party obtain prior approval from the ALJ to gain access to property for purposes of sampling and testing as well as the availability of protective orders provides sufficient safeguards against any potential abuse of discovery devices. Therefore, the proposed changes for post-issues determinations disclosure are unnecessary. No change is warranted.

Comment

A general comment was made that the provision in §900-8.6(b)(6) for the disclosure of electronically stored information (ESI) is burdensome.

Discussion

The intent behind the provisions on ESI is to reduce the burden associated with the disclosure of ESI. The provision limits disclosure of ESI to information that is immediately available in the normal course of business. Any further disclosure requires approval by the ALJ based on a demonstration of substantial prejudice. No change is warranted.

Subsection (c) By permission

Comment

One commenter stated that this requirement for access to sample by permission of the ALJ seemed unreasonable, especially given the time periods for decisions and hearings and the issues with the requirement in §900-8.6(b)(3) which places an impractical burden on developers to provide an inspection of the property within 10 days of service of final designation of an issue.

Discussion

Executive Law §94-c(5)(d) limits adjudicatory hearings to substantive and significant issues raised regarding the draft permit conditions issued by ORES. Executive Law §94-c also provides for detailed application review by ORES staff prior to any hearings and charges ORES staff with issuing a draft permit that would ensure that a proposed project meets applicable statutory and regulatory requirements. Section 900-8.3(c)(4) recognizes ORES staff's expertise in permit application review and appropriately places the burden of persuasion on parties that challenge the sufficiency of the draft siting permit conditions to raise an issue for adjudication. It should be noted, however, that once a substantive and significant issue is joined for adjudicatory, the ultimate burden of proving a proposed project would comply with all applicable laws and regulations remains with the applicant.

The Office revised §900-8.6(c)(1) to refer to the issues determination to be consistent with other provisions. No further change is warranted.

Subsection (d) Protective order and motion to compel

No additional discussion is necessary.

Subsection (e) Pre-filed testimony

Comment

One commenter recommended limiting the amount of time a party has to submit a pre-filed testimony to within 10 days' notice (including making available all materials that support the testimony).

Discussion

The referenced provision concerns the amount of time a party submitting pre-filed written testimony has to make available all raw data, laboratory notes, all items on a bibliography relied upon, and other basic materials that support the testimony. Circumstances may arise wherein disclosing such information to support testimony in less than 10 days may be needed and meeting a shortened deadline will not impose an undue burden on the disclosing party. Accordingly, no change is warranted.

Comment

In regard to "pre-filed testimony" in subsection (e), commenters recommend adding an additional sentence to the end of the text stating that the ALJ is permitted to allow the filing of rebuttal testimony at his or her discretion.

Discussion

The reference to pre-filed testimony is broad enough to encompass both direct and rebuttal testimony and, accordingly, the suggested additional language is unnecessary. No change is warranted.

Subsection (f) Subpoenas

Comment

Multiple commenters recommended removing subsection (f), regarding submission of subpoenas, from the document entirely.

Discussion

Section 900-8.6(f), which is derived from SAPA §304(2), provides the procedures for parties not represented by attorneys to obtain a subpoena, if needed, from the ALJ. The commenters are correct that in permit proceedings, expert witnesses will generally provide testimony without the need for a subpoena. However, on occasion, a subpoena is required for some witnesses under certain circumstances and the provision should be retained to cover such an eventuality. Accordingly, no change is warranted.

§900-8.7 Conduct of the Adjudicatory Hearing

Subsections (a)-(c)

No additional discussion is necessary.

Subsection (d) Appeals of ALJ rulings

Comment

One commenter suggested that an ALJ should be assigned to every application as soon as an application is filed, to handle all party status and local agency funding requests, determinations of issues, conduct of hearings, and review of all evidence, as well as to make recommended findings.

Discussion

The proposed regulations contemplate that an ALJ will be assigned to every application as soon as a notice of an application is filed. No change is warranted.

Comment

Another commenter stated that the appeals process to the Executive Director of the ALJ's rulings does not create enough separation, as the ALJ was appointed by the Executive Director of the Office. The commenters asserted that an appeal of the ALJ's rulings should utilize CPLR Article 78 instead.

Discussion

Hearing officer independence and impartiality are governed by Article 3 of SAPA, the Public Officers Law Article 4, Executive Order No. 131, judicial case law, and codes of judicial conduct applicable to state ALJs such as the New York State Bar Association's Model Code of Judicial Conduct for State Administrative Law Judges. In addition, provisions in §900-8 such as the *ex parte* communication rule and provisions for disqualification of an ALJ are included to further assure ALJ impartiality and independence. The mere circumstance that an ALJ is appointed by the Executive Director provides no basis for concluding that the ALJ will be unable to discharge the judge's duties in a matter befitting the office. Replacing the administrative appeal process with CPLR article 78 procedures is unworkable and would lead to significant administrative delay. No change is warranted.

Comment

Commenters stated that the five-day appeal period is insufficient and that the regulations should allow at least 30 days to file appeals.

Discussion

If notification of the disputed ruling is made by first class mail, which is the usual method of notification, five days are added to the time to file that appeal. Moreover, the time to file an appeal provided for by the regulation is only a minimum and may be extended at the discretion of the ALJ or Executive Director. No change is warranted.

Comment

Another commenter recommended removing the submission of briefs and reply briefs from the list of documents that must be received prior to considering the hearing record officially closed.

Discussion

The purpose of specifying when the hearing record closes is to provide a starting point for issuance of a decision by the ALJ and the Executive Director pursuant to §900-8.12(a). The close of the hearing

record occurs when all the documents necessary for decision making are received by the ALJ. This includes any briefs authorized by the ALJ. Accordingly, §900-8.7(a)(5) provides for closure of the hearing record upon the ALJ's receipt of authorized briefs if those are the last documents filed. No change is warranted.

§900-8.8 Evidence, Burden of Proof and Standard of Proof

Subsections (a)-(b)

No additional discussion is necessary.

Subsection (c) Standard of proof

Comment

Commenters stated that the rule is overly restrictive, fails to comply with SAPA, and deviates from the evidentiary rules applied by the NYS Siting Board in analogous PSL Article 10 siting proceedings. The commenters stated that the regulations should be drafted in a manner that welcomes all potentially relevant evidence, even if such evidence would not normally be permissible in proceedings before a court. It was also stated that this rule violates SAPA and attempts to improperly limit the introduction of hearsay evidence in administrative proceedings by applying more stringent rules of evidence normally only applicable to court proceedings.

Discussion

Section 900-8.8(a) is entirely consistent with SAPA §306 and the analogous PSL Article 10 regulations regarding the admissibility of hearsay evidence in adjudicatory proceedings. Just as is stated in SAPA §306, §900-8.8(a) expressly provides that, other than the rules of privilege, "other rules of evidence need not be strictly applied." Furthermore, §900-8.8(a) allows the admission of any hearsay evidence if it falls within one or more of the exceptions provided by CPLR Article 45 or other law, "or is shown to be reasonably reliable, *relevant* and probative" (emphasis added). Section 900-8.8(a) includes expansive rules of admissibility and cannot be fairly read to exclude any potentially relevant evidence from an adjudicatory hearing under §900-8. No change is warranted.

Comment

Other comments recommended changes to the wording of this section to clarify admissible hearsay evidence, suggesting changes that would put the burden of establishing an exception upon the proponent of the statement.

Discussion

The last statement of §900-8.8(a)(1) should be retained as a catchall provision to cover hearsay evidence not otherwise addressed in CPLR Article 45. In addition, under standard legal practice, the proponent of evidence has the burden of establishing its admissibility. The principle does not need to be stated in the regulation. No change is warranted.

§900-8.9 *Ex Parte* Rule

Subsections (a)-(c)

No additional discussion is necessary.

Subsection (d)

Comment

A commenter stated that the rule only limits *ex parte* communications with ALJs, which may not be assigned in every proceeding, and recommended that the rule should be modified to also govern *ex parte* communications with the Executive Director, Director, or any staff or agents of the Executive Director.

Discussion

The commenter is correct that the *ex parte* rules in §900-8.9(a) through (c) apply only to the communications with the ALJ. Communications with the Executive Director or designee are governed by SAPA §307(2). The policy considerations underlying SAPA §307(2) counsel against imposing on the Executive Director the stricter limits imposed on the ALJ under §900-8.9. In addition, §900-8.9(d), which applies to communications by the parties or their representatives, applies to communications with both the ALJ and the Executive Director. No change is warranted.

§900-8.10 Payment of Hearing Costs

No additional discussion is necessary.

§900-8.11 Record of the Hearing

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

Comments were received stating that provisions regarding the record of the hearing should clearly distinguish between the evidentiary record and the entire record, which includes all the documents listed in §900-8.11(b).

Discussion

Section 900-8.11(b), which is derived from SAPA §302(1), is sufficiently clear. It is a well-settled principle of administrative law that factual issues should only be determined based on the evidentiary record before the agency, and the principle need not be restated in the regulation. No change is warranted.

Subsection (c)

Comment

One commenter recommended the Office use an online docket similar to the NYS Siting Board's Article 10 Document and Matter Management system and to ensure all documents related to any application are publicly available online and updated in real time.

Discussion

It is anticipated that all documents relevant to an application before the Office, including the entire hearing record, will be publicly available on the Office website. No change is warranted.

§900-8.12 Final Decision

Comment

A commenter expressed that §900-8.12 does not provide detail or specificity about the contents of any recommended decision, hearing report, or final decision on the Office's proceedings.

Discussion

Section 900-8.12 expressly provides that the recommended decision and hearing report will contain the ALJ's findings of fact, conclusions of law, and recommendations on all issues. The contents of the Executive Director's final decision are governed by, and will comply with, SAPA §307(1). Executive Law §94-c further requires that the Executive Director's final decision include a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions, would comply with applicable local law and regulations, unless it makes a finding that compliance with a particular provision of local law is unreasonably burdensome in light of the CLCPA targets and the environmental benefits of the proposed facility. No further detail or specificity is required or advisable. No change is warranted.

Subsection (a) Recommended decision and hearing report

Paragraph (1)

Comment

A commenter stated that the timeline for an ALJ to make a recommended decision after the close of the record should be expanded to 90 days. Similarly, the commenter stated that the 14-day timeline for parties to file comments after a recommended decision is issued is too short and should be extended to 30 days for parties to file comments.

Discussion

The timeframes are minimums and may be adjusted by the ALJ or Executive Director in the exercise of discretion (see §900-8.5(g)). However, when adjusting any timeframes under §900-8, the ALJ and Executive Director will have to be mindful of the statutory deadlines for final permitting decision, which can only be extended by thirty days with the consent of the applicant. No change is warranted.

Paragraphs (2)-(3)

No additional discussion is necessary.

Subsections (b)-(d)

No additional discussion is necessary.

Subpart 900-9

§900-9.1 Final Determination on Applications

Subsection (a)

Comment

Commenters suggested that the regulations be revised to reduce the application review process to make a final determination to 12 months or less, while others suggested deleting the timeframe in full. Another commenter suggested that the regulations should require the Office to issue its final determination on a permit within eight months of determining an application is complete, as long as no adjudicatory hearing is held and if all permit conditions have been agreed to by the applicant.

Discussion

The deadlines provided for in §900-9.1 are established by Executive Law §94-c(5)(f) and cannot be modified by the regulations. As stated in §900-9.1(b), these timeframes may be extended by up to 30 days upon mutual consent of the applicant and the Office. No change is warranted.

Comment

Several commenters were concerned about automatic approvals, and that the timelines associated with threatened and endangered species review would lead to the automatic approval of projects that deserve stricter scrutiny. Commenters asserted that automatic approval of projects after one year of threatened and endangered species consultation may result in harm to species and suggested that this timeline be flexible.

Discussion

Executive Law §94-c specifies that if the Office fails to make a final determination within the required time frame, then the draft siting permit will become final. The draft siting permit will include the relevant uniform standards and conditions and any required site-specific conditions necessary to achieve a net conservation benefit to any impacted endangered or threatened species and a provision requiring the permittee to provide a host community benefit. No change is warranted.

Subsection (b)

No additional discussion is necessary.

Subpart 900-10 Compliance Filings

§900-10.1 Office Decisions on Compliance Filings

Subsection (a)

Comment

Comments were received stating that the compliance filing review period of 60 days should be reduced to 30 days to expedite commencement of construction, and that the review period for revised filings be reduced from 60 days to 15 days. Commenters added that reducing the Office's response time for compliance filings would ultimately reduce the risk for delays between siting permit issuance and the commencement of construction.

Discussion

Given the technical nature and large scope of most compliance filings, it is not realistic to expect the Office or NYSDPS to review the filings in only 15 days. The 60-day timeframe provided is already ambitious; it has been set in the interest of processing compliance filings as efficiently as possible. Although

every attempt will be made to act efficiently, the timeframes are already minimal and need to be maintained to be realistic. No change is warranted.

Comment

Multiple commenters recommended streamlining the submission of pre-construction compliance filings earlier in the process for the Office review, either upon initial application or at the publication of the draft permit stage to reduce compliance filings.

Discussion

The Office will not unreasonably withhold the Notice to Proceed with Construction. Nothing in the regulations prohibits applicants from voluntarily discussing and submitting pre-construction compliance filings earlier in the process. As stated in §900-6.1(g), the Office may issue a conditional Notice to Proceed with Site Preparation for the removal of trees, stumps, shrubs and vegetation from the facility site as indicated on Office-approved site clearing plans to clear the facility site for construction, as well as setting up and staging of the laydown yard(s), including bringing in equipment, prior to the submission of all pre-construction compliance filings. No change is warranted.

Subsection (b)

No additional discussion is necessary.

§900-10.2 Pre-Construction Compliance Filings

Subsection (a)

Comment

Suggestions were received to remove the term "operation" from subsection (a), thus requiring submittals of federal and federally delegated permits and approvals required for construction only.

Discussion

The Office finds inclusion of "operation" in subsection (a) necessary. No change is warranted.

Subsection (b) Final Decommissioning

Paragraph (1)

Comment

Some commenters requested that the applicant be required to demonstrate that it will have ample monitoring personnel in the Environmental Monitoring Plan and Complaint Management Plan.

Discussion

The Office will not approve a required plan if the applicant has not demonstrated its ability to implement it. No change is warranted.

Paragraph (2)

Comment

Several commenters recommended that a "Letter of Credit" must be received before the start of the project, not after. One commenter stated that it would be better for the state and communities to require a fully funded bond in the estimation of decommissioning costs by an AAA-rated insurance company, instead of a Letter of Credit.

Discussion

Prior to construction, as part of §§900-10.2(b)(1) and (2), the permittee shall be required to file as compliance filings proof that letters of credit (or other approved financial assurance) have been obtained. These will then need to be updated after one year of operation and every fifth year thereafter. No change is warranted.

Subsection (c) Plans, Profiles, and Detail Drawings

No additional discussion is necessary.

Subsection (d) Wind Turbine Certifications

Comment

A commenter suggested draft regulation §900-10.2(d) should stipulate that design certifications be set to standards required by the International Electrotechnical Commission (IEC) to be consistent with standards set in Article 10 Appendix 1001.6(c). The commenter suggested that design certifications should also include a qualified third-party reviewer.

Discussion

The Office has considered this comment and determined that no change is warranted.

Subsection (e) Construction Management

Paragraphs (1)-(2)

No additional discussion is necessary.

Paragraph (3)

Comment

A commenter requested the removal of subsection (e)(3), detailing a Facility Maintenance and Management Plan.

Discussion

The pre-construction compliance filings document the applicant's avoidance and minimization of various environmental impacts, as well as mitigation measures, if necessary. No change is warranted.

Paragraph (4)

Comment

A commenter requested the removal of subsection (e)(4), detailing a Vegetation Management Plan.

Discussion

The pre-construction compliance filings document the applicant's avoidance and minimization of various environmental impacts, as well as mitigation measures, if necessary. No change is warranted.

Comment

Commenters stated that the regulations lack guidance on herbicide use for site maintenance during and after construction, which should be avoided and minimized (particularly along wetlands and waterbodies), and that only specific herbicides should be allowed (i.e., those proven not to be harmful to aquatic resources and their ecosystems).

Discussion

Herbicide use is expected to be addressed in the Vegetation Management Plan required as a pre-construction filing in §900-10.2(e)(4)(v), which will be reviewed and approved by the Office prior to issuing a Notice to Proceed with Construction. No change is warranted.

Paragraphs (5)-(6)

No additional discussion is necessary.

Paragraph (7)

Comment

Commenters suggested that the NYSDPS consumer dispute resolution process should be used instead of the Complaint Management Plan stipulation for a third-party mediator.

Discussion

The Complaint Management Plan submitted by the applicant may include use of the NYSDPS existing dispute resolution process or may provide an alternate dispute resolution process using third-party mediators. No change is warranted.

Comment

Commenters recommended that the Office require that the Complaint Management Plan include additional content, including a time limit for the permittee/operator to respond to complaints or threats (i.e., updates within three days); logging and tracking of all complaints; details on the response action taken to resolve a complaint; and a new section titled "Construction Complaint Management" requiring that complaints be responded to immediately, and that threats to public health be reported immediately to the Office.

Discussion

Section 900-10.2 already requires that complaints be logged and tracked, including information as to how the complaint was resolved. In addition, the regulations require an immediate response, as the permittee must report to the Office and NYSDPS any complaints not resolved within 30 days. The applicant is required to submit a Safety Response Plan as part of its application, which will set forth how public health emergencies would be communicated and addressed. No change is warranted.

Comment

Commenters suggested that reports tracking complaints and resolutions should be filed quarterly to keep the Office and NYSDPS apprised of problems at facilities.

Discussion

Although the Complaint Management Plan must require annual reporting, §900-6.4(d)(3) requires an applicant to allow NYSDPS to review any actual or planned resolution of complaints during construction inspections. No change is warranted.

Paragraph (8)

No additional discussion is necessary.

Subsection (f) Environmental

As discussed in the comment to §900-2.11(a)(4), the Office added §900-10.2(f)(6).

Subsection (g) Cultural Resources Avoidance, Minimization and Mitigation Plan

Paragraph (1)

No additional discussion is necessary.

Paragraph (2)

Comment

One commenter suggested revising the requirements of the Cultural Resources Mitigation and Offset Plan to include consultation with the Tribal Historic Preservation Officer (THPO) for the Indian Nation with rights to the cultural resources impacted by the proposed facility.

Discussion

Only three Indian Nations within New York State have THPOs (the Stockbridge-Munsee Community, the St. Regis Mohawk, and the Seneca Nation). The formal role of the THPOs occurs only when Section 106 of the NHPA is triggered by a federal action on tribal lands. Per 9 NYCRR Part 428.2(a), if a project involves a federal agency and Section 106 of the NHPA, it supersedes the NYS Historic Preservation Act Review (Section 14.09). Under Section 106 of the NHPA, all federally recognized Nations are consulting parties. Any mitigation plan dealing with Native American sites or materials will be provided to the Nations for comment, as required by Section 106 of the NHPA. The Office has amended §900-10.2(g)(2) to differentiate between Federal and NYS-only activities.

Subsection (h) Real Property Rights

Comment

A commenter proposed that the regulations add that an application shall be considered forfeited if documentation of property interests are not provided.

Discussion

Pursuant to §900-10.1(a), if the applicant cannot provide the required documentation evidencing rights and privileges to the real properties necessary to construct the facility and interconnections, the Office

will not approve the compliance filing and will issue a notice of deficiency so that the applicant can make efforts to address the deficiencies. No change is warranted.

Subsections (i)-(j)

No additional discussion is necessary.

§900-10.3 Post-Construction Compliance Filings

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

One commenter stated that all submissions should be publicly available online until 18 months past the date of operation or as extended by the Office if the project becomes nonoperational.

Discussion

A copy of all compliance filings will be available on the NYSDPS website. No change is warranted.

Subpart 900-11 Modifying, Transferring or Relinquishing Permits

§900-11.1 Permit Modifications Requested by Permittee

Comment

A commenter indicated that the regulations should describe what changes would constitute a minor amendment when compared to a major amendment.

Discussion

The Office will assess each proposed amendment to an application or draft permit condition on a case-by-case basis and make a determination whether it represents a "minor" or "major" amendment. No change is warranted.

Subsection (a)

Comment

A commenter requested that the public receive notification of a request for permit modification and be able to comment on the decision of whether a requested permit modification is minor or major.

Discussion

The Office will determine whether a proposed modification is a major modification on a case-by-case basis, requiring additional public review and comment. No change is warranted.

Subsection (b)

Comment

Comments were received recommending a separate process for in-field design changes during construction, including allowing approval by the environmental monitor or construction supervisor.

Discussion

The Office is committed to developing a streamlined review and approval process, which will facilitate evolving field conditions and provide the necessary approvals in a timely manner; however, the Office does not support allowing an on-site environmental monitor to approve minor changes to approved compliance plans. As the authority issuing the permit to construct a major renewable energy facility, the Office shall approve deviations from the approved plans and compliance filings. No change is warranted.

Subsection (c) Major Modifications

Comment

A commenter suggested that any major modification should include a fee, not less than that of the application, or as determined by the Office.

Discussion

The Office has considered this comment and determined that no change is warranted.

§900-11.2 Transfers of Permit and Pending Applications

Subsection (a)

No additional discussion is necessary.

Subsection (b)

Comment

Comments were received requesting that the Office notify and/or send elected officials in a County, Town, and Village; as well as local municipalities; any permit transfers, pending permits to a different permittee, or any name changes.

Discussion

Copies of permit transfers will be available electronically on the Office website. No change is warranted.

Subsections (c)-(f)

No additional discussion is necessary.

Subsection (g)

Comment

A commenter stated that any noncompliance by the existing permittee that is associated with a permit proposed to be transferred should be resolved to the satisfaction of the Office and the local municipalities prior to the permit transfer. Another commenter recommended the addition of subsection (h) to the end of §900-11.2 requiring the applicant to show compliance with other federal, state, and local

agency requirements (e.g., NYSDPS Certificate of Public Convenience and Necessity, NYISO interconnection, NYSDOH).

Discussion

The regulations require that any outstanding permit noncompliance (by the existing permittee) be resolved to the Office's satisfaction before transfer of the permit under §900-11.2(g). Executive Law §94-c specifies that the NYSDPS monitor, enforce, and administer compliance with the terms and conditions of a permit. The Office does not have the authority to enforce compliance with permits or approvals issued by other agencies. No change is warranted.

§900-11.3 Relinquishments

No additional discussion is necessary.

§900-11.4 Permit Modifications by the Office

Comment

A commenter recommended adding provisions related to permit termination to §900-11.4.

Discussion

The Office has revised §900-11.4 to address permit termination.

Subsections (a)-(g)

No additional discussion is necessary.

Subpart 900-12

§900-12.1 Enforcement

Subsections (a)-(c)

No additional discussion is necessary.

Subsection (d)

Comment

A commenter requested clarification as to why a stop work order would expire within 24 hours without resolution of the underlying issue.

Discussion

The regulations require that any stop work order issued by the Office or NYSDPS staff must be "confirmed by the Executive Director of the Office or the Commissioner of the [NYS]PSC" for it to extend beyond 24 hours. This is intended to prompt a decision by the Executive Director or Commissioner of whether continuation of a stop work order is warranted and complies with the criteria for issuance in §§900-12.1(b), (f), and (h). No change is warranted.

Subsections (e)-(h)

No additional discussion is necessary.

Subpart 900-13

§900-13.1 Severability

No additional discussion is necessary.

Subpart 900-14

§900-14.1 Effective Date

No additional discussion is necessary.

Subpart 900-15

§900-15.1 Material Incorporated by Reference

The Office received limited comments on the various references included in the draft regulations. References for which no comments were received are omitted from this discussion. In addition, the Office has removed certain references and added others, as indicated below.

Comment

Commenters requested that additional documents from the NYSDEC, USFWS, and USACE be incorporated by reference in §900-15.1.

Discussion

The Office has clarified the materials incorporated by reference and determined that the references to materials from the following entities were not necessary in this section: NYSDOH, NYISO and NYAC. In addition, the Office added references to materials from the NYSPSC (new §900-15.1(m)). Finally, the Office made several non-substantive clarifications to existing references and added websites where applicable.

Subsections (a)-(o)

No additional discussion is necessary.

§900-15.2 Office Address

This former subsection (p) has been moved to a new §900-15.2.