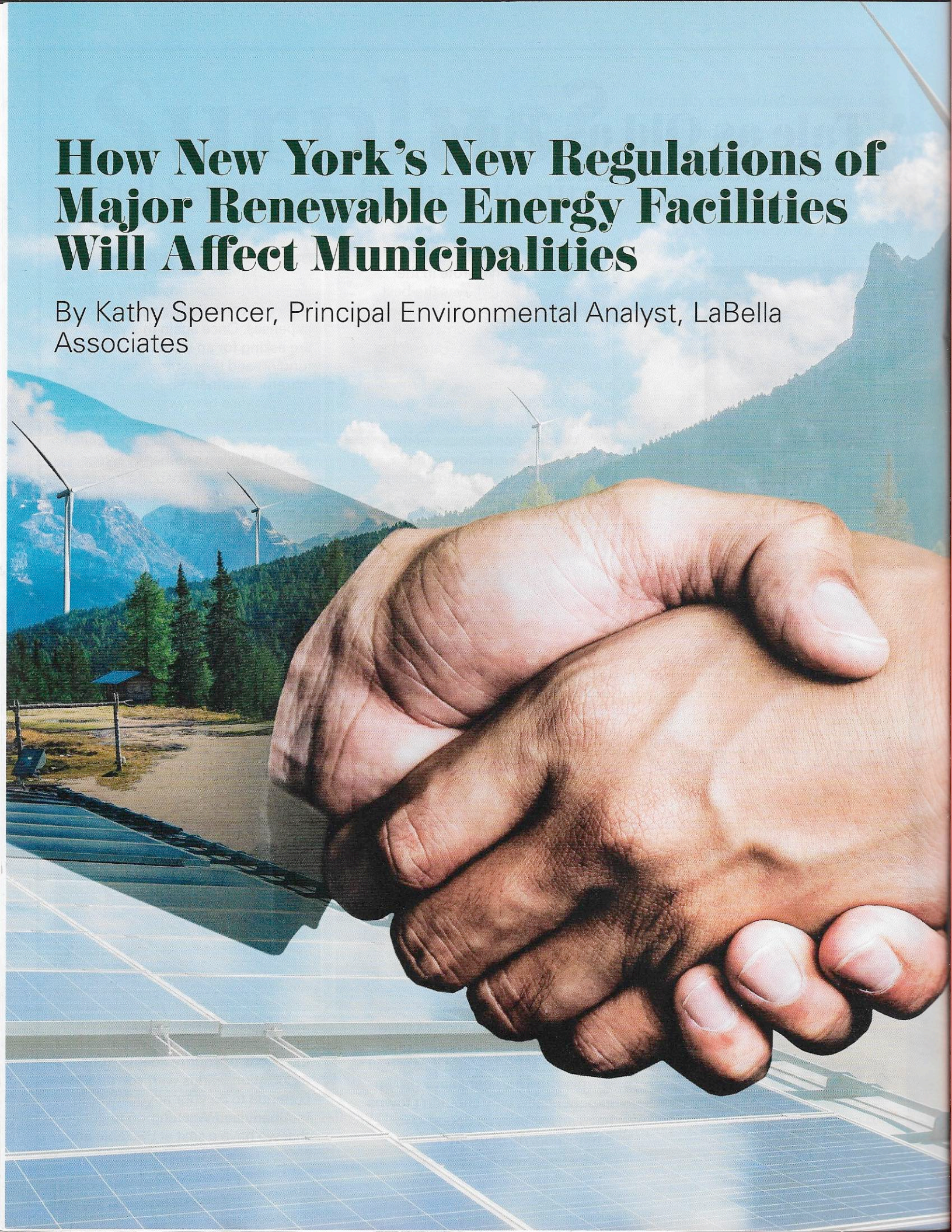


How New York's New Regulations of Major Renewable Energy Facilities Will Affect Municipalities

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(Editor's Note: On Wednesday March 3, 2021, ORES released the final regulations under the new renewable energy siting law that was adopted last year and that are discussed in detail in the following article. More details will be forthcoming as AOT staff reviews the new regs. In November 2020, AOT submitted joint comments with NYCOM and NYSAC on the then-draft regulations to offer suggestions on how to improve them for local governments.)

This past fall, New York State took the next step in rolling out its new "Section 94-c" renewable energy siting process. Draft regulations were released that specify how the provisions of the April 2020 "Accelerated Renewable Energy Growth and Community Benefit Act (AREGCBA)" will be implemented. Also released was a first draft of the Uniform Standards and Conditions (USCs) applicable to all new large-scale renewable energy projects (20-25 MW and above) in the state. The draft regulations and USCs provide details not available within the law itself as to how the new siting and approval process will play out and allow a better understanding of the implications for municipalities.

The regulations and USCs, once finalized, have been crafted by ORES to apply to all new large-scale renewable energy projects, statewide. These provisions represent the base level to which all projects must adhere. And here is where it gets interesting: the Section 94-c process allows for the addition of more site-specific conditions on top of the USCs, but it does not include a waiver or appeals process. In other words, ORES can add more conditions or protections to a project under review, but cannot take away or provide relief from any requirements included in the final regulations and USCs.

Looking at the regulations and USCs through this lens allows one to see what provisions are most important to ORES and therefore made unchangeable. However, if one does not see a provision that might have been expected, it could still be added later as part of *Site-Specific Conditions*. When reviewing these changes, it will not be possible to distinguish if an anticipated requirement has been omitted because the ORES rejected it or merely because the ORES anticipates applying it to *some* projects as *site specific terms and conditions* rather than making them applicable to *all* projects.

So what does this mean for your town? LaBella's dedicated team of environmental and renewable energy professionals have done a deep-dive into the new siting process and how it will impact renewable energy projects going forward.

For the benefit of our municipal partners, we share our most important findings to date.

- The regulations now define to 25 exhibits (chapters) to be included in a Section 94-c application. Under the previous Article 10 siting and approval regulations, 41 exhibits were required. As most of the key exhibits remain, we believe that the list of proposed 94-c exhibits represents primarily a reorganization and refocusing of requirements rather than a wholesale change. Where changes occur, they likely indicate areas of greater emphasis under 94-c. The newly defined separate exhibits under Section 94-c are: *Agricultural Resources, NYS Threatened or Endangered Species, and Other Permits and Approvals.*

- LaBella identified remarkably little emphasis on Battery Energy Storage Systems (BESS) in the new regulations and USCs. This is surprising because fire and safety issues associated with battery storage often rise to the top of a municipality's list of concerns when reviewing solar projects.
- The draft regulations currently require that "salvage value" must be taken into account when determining the amount of the decommissioning fund that a developer must provide in a bond for the lifetime of the project. This represents a complete reversal of the Article 10 expectations and requirements. It means that the estimated decommissioning cost is discounted by the amount that could potentially be realized by recycling components of the project at the time it is dismantled. This is alarming because this change could severely reduce the funds available to a community for decommissioning if a wind or solar facility is abandoned.
- Under Article 10, there is a fairly standard set of noise thresholds that have been adopted (almost) consistently by the Siting Board. The 94-c set of noise thresholds match those under Article 10, with one exception – there is no nighttime noise standard. Generally, nighttime hours are when excessive noise is of most concern.
- In addition, the requirements for noise studies, primarily a concern for wind energy projects, have changed. Instead of conducting noise studies over several months to assess the existing noise conditions of an area, pre-construction sound surveys are only required under the Section 94-c regulations during a minimum seven-day period for wind projects and four-day period for solar projects.
- The USCs contain required setbacks for solar and wind projects, always an area of interest for municipalities. These Section 94-c uniform setbacks could override those in a local municipality's ordinance. A few examples:
 - Wind projects:
 - 2 times total wind turbine height from non-participating residences
 - 1.5 times total wind turbine height for participating residences
 - Solar projects:
 - 250 feet from non-participating residences
 - 100 lf from participating

residences

- Specific agricultural protections are included, aimed mostly at solar projects. "Active agricultural lands" are defined, and the most important agricultural soils are specified. For projects that impact active agricultural lands with important soils, the project will have to comply with stringent guidelines of the NYS Department of Agriculture & Markets with regard to construction, preservation, restoration and monitoring.
- Within a few months of an application being deemed complete, municipalities will need to prepare a statement as to how the project complies with the substance of its local laws. However, these local laws can be overridden under the Section 94-c process, and it will be easier to demonstrate that local laws are "overly burdensome" than it was under Article 10.

Perhaps the most important take-away for municipalities after the release of Section 94-c regulations remains the same as it was after the release of the law itself: review, update and strengthen the local ordinances that regulate wind, solar, battery storage or other renewable energy facilities in your municipality. Comprehensive plans, agricultural preservation plans, and open space plans do not carry the same weight as your renewable energy laws under Section 94-c, so upgrading your zoning ordinance is the critical step for consideration at this time.

The draft regulations and Uniform Standards & Conditions have yet to be finalized.

For questions about New York State's renewable energy efforts, you may contact LaBella's Renewable Energy Team at renewables@labellapc.com. □

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