

Solar Update

Administrative Law Judges (ALJs) from the NYS Department of Public Service, Office of Renewable Energy Siting and Electrical Transmission (ORES), will convene an “adjudicatory hearing” beginning at 10am on Monday, September 14 at Copake Town Hall. The public may attend, but no participation is allowed. We have been informed that if anyone disrupts the proceedings, they will be removed from the hearing room.

Two issues will be addressed by experts from Hecate Energy, ORES staff, and the Town of Copake. Here are the issues, and how we got here:

On August 13, ORES Interim Executive Director (ED) Jason Zehr issued a decision that overruled the ALJs’ June 25 decision, which granted Copake “limited party status,” ruling that our Issues Statement raised “significant” issues, but that those were legal in nature, rather than fact issues. The ALJs thus concluded that they could resolve the issues without need for a hearing, and that identified gaps in the record could be remedied by Hecate **after** it received a final siting permit.

The ED disagreed. He ruled that the two “significant” issues we raised were indeed factual, and that a hearing was required before he could determine whether Hecate would receive a final siting permit for Shepherd’s Run. The two issues are: (1) whether Hecate has demonstrated on the record that it complies with Chapter 135 of the Copake Town Code and, if not, whether it must seek a permit from the Town to construct portions of its proposed solar facility in the floodplain; and, (2) whether Hecate’s 2020 and 2021 wetlands delineations accurately identify all of the wetlands within the proposed Shepherd’s Run site.

Copake Town Code – Chapter 135

The ED wrote that, “While the Applicant asserts that the record demonstrates compliance with Chapter 135’s substantive components, the affidavit of the Town’s expert, Johanna Duffy, asserts material factual omissions precluding a finding of compliance,” and that “the Applicant’s evidence shows that several solar panels, associated project components, access roads, and limits of disturbance to be in a FEMA-designated special flood hazard area near the Taghkanic Creek contradicting the Applicant’s expert affidavits assertions of compliance...”

Hecate argues that Chapter 135 can be overridden by the state as being “unduly burdensome,” just as ORES has decided to override many of Copake’s local laws. ORES’ position has been that Chapter 135 cannot be overridden because Copake needs to maintain it to remain eligible for federal flood insurance programs.

Wetlands

The law under which ORES operates requires a finding that a final siting permit ensures that a project will comply with all applicable laws and regulations, and that the burden of proof that the project will comply is on the Applicant (Hecate).

The ED noted that the ALJs had found that the town raised the question of whether the record contains sufficient information about the extent of Hecate’s wetlands mapping (the question of whether its delineations are so old as to be unreliable, and may no longer show current, accurate locations of wetlands, which may move over time), and that Hecate didn’t identify or delineate

“wetlands of unusual importance.” He then concluded that the ALJs erred when they wrote that deficiencies in the record could be cured after-the-fact, by a “post permit compliance filing” because such filing might show that the decision to have issued a final permit was “legally erroneous.” The ED wrote, “As the Town correctly observes in its appeal, site-specific conditions are imposed where a complete evidentiary record demonstrates that the uniform conditions are inadequate, *“not as a mechanism to complete the evidentiary record post-issuance of a permit.”* He continues, “(t)he hearing should look at the Town’s evidence, as well as any additional evidence the Applicant provides, to determine whether all wetlands have been or need to be properly delineated such that an evaluation of the draft permit conditions can be made prior to permit issuance.” The ED concludes, “Although I am not making any final determination here, *I note that without such further record development a question exists as to whether permit issuance should occur in this matter.*” (Emphasis added.)

The adjudicatory hearing

On Sept. 14, the adjudicatory hearing for the proposed Shepherd’s Run solar project began at 10am and ended at 8:15pm, with a 50-minute lunch break. Over 100 people attended the marathon event.

Site visit and ALJ ruling

On Sept. 13, I joined Copake’s wetlands and floodplain expert, Ms Duffy, for a visit to the proposed site of the Shepherd’s Run facility. Hecate and ORES representatives attended as well.

Earlier this month, ALJ Leary ruled that conditions Hecate sought to impose on the visit were unacceptable. She wrote that Hecate could not limit us to areas “within or immediately adjacent to delineated wetlands...and... regulated floodplains,” noting that the issues for the hearing are whether the delineations comply with State law and whether the Project complies with Chapter 135.” Judge Leary concluded, “Full access to the project site to fully explore both issues is required...”

Whether ORES grants Hecate a final siting permit must be decided no later than October 19.

Richard Wolf