

Embracing the New Paradigm

Ensuring Procedural Justice with Renewable Energy Development

**Critical Perspectives and Recommendations on the New York
State Article 10 Siting Process**

March 2019 v.2



Contents

Current Situation	3
River RATs and the Horse Creek Wind Project	4
The Building Blocks to Move Forward	5
<ul style="list-style-type: none">• Social License• Procedural Justice• Resource Localism	
Current Perspectives on Article 10	6
Proposed Article 10 Changes	11
<ul style="list-style-type: none">• Review Process• Application Content	
Embracing the New Paradigm	18
Summary of Proposed Changes	19
Endnotes	22

Current Situation

As renewable energy development has expanded across New York State, so has conflict related to the project siting process; especially for large-scale wind projects. Unsurprisingly, the current regulatory process for 25 MW or greater projects, administered by the Public Service Commission (PSC) under Article 10, is increasingly scrutinized by stakeholders who identify different issues:

- Developers and pressure groups say Article 10 is time consuming and uncertain.
- Policymakers say the current process is not advancing state renewable energy goals quickly enough.
- Many host communities say they are ignored and unfairly treated by a political and procedural bureaucracy designed to dismiss local concerns and the longstanding New York State tradition of “home rule.”

In late 2018, the PSC began to publicly comment that the siting process needs reworking. As a result, various industry and public policy groups have highlighted Article 10 as a legislative and policy priority in 2019.

To this public policy discussion River RATs adds our voice.

Presented on the following pages are a series of specific recommendations on how Article 10 should be amended to address current deficiencies in both process and application content. While the observations and recommendations presented on the following pages are based on large-scale wind development, we believe the proposed changes apply to all large-scale renewables.

From our perspective, Article 10 must be restructured in a new paradigm that incorporates three internationally-endorsed sustainability principles associated with renewable energy development and large-scale project siting:

- **Social License**
- **Procedural Justice**
- **Resource Localism**

Until these principles are fully embraced and incorporated into Article 10, conflict and slow progress will continue for industrial wind proposals across New York State.

River RATs and the Horse Creek Wind Project

River Residents Against Turbines (River RATs) is an inclusive community voice that assembled to oppose a single improperly-sited industrial wind project, the Horse Creek Wind Project (Horse Creek), located in the 1000 Islands region of Jefferson County, New York. Over the last three years, we have identified and communicated through direct community interaction and social media the many issues and concerns associated with Horse Creek.

In addition to significant opposition from local, regional, and state-level governmental and environmental stakeholders, the project gained international notoriety as the first wind project in New York State to be listed by the European Research Commission-funded EJ Atlas, which maps significant global environmental conflicts.¹

Horse Creek was first proposed in 2006. Since then, local communities have been subjected to multiple project starts and stops, scope changes, and developers. The most recent reactivation was in 2016, by Iberdrola S.A. subsidiary Atlantic Wind LLC, and included early steps of the Article 10 pre-application process. This also included the Public Involvement Program (PIP) as well as expensive legal action against the Town of Clayton that forced municipal zoning approval for meteorological test tower construction permits, which, as it turns out, were never built.

In the last two years, the project has gone dormant, but due to the lack of sunset provisions in Article 10, Horse Creek retains the threat of immediate reactivation into the Preliminary Scoping Statement (PSS) phase, generating continued uncertainty in the local community.

The discussion presented here is based on our experiences with Horse Creek and our observation of other Article 10 wind projects across New York State. Our comments and recommendations will be familiar to those who attend River RATs community meetings, visit our webpage, or follow us on social media.

The Building Blocks to Move Forward - Social License, Procedural Justice, and Resource Localism

Anyone familiar with River RATs has heard about the need to earn and keep a Social License. When discussing changes to Article 10 we introduce the interdependent concepts of Procedural Justice and Resource Localism.

Social License or Social License to Operate (SLO) - *“SLO can be defined as an ongoing and fluid level of acceptance by stakeholders, at multiple levels, which may be revoked at any stage of the project lifecycle based on changes in perceptions and reflective of the relationships between a company and its external stakeholders.”*²

The need for Social License is widely recognized across various natural resources industries, including industrial wind. The Article 10 process would be less contested if developers earned and maintained a Social License for their projects.

Procedural Justice - *“The ability of the people and communities whose environment and health stand to be affected by a siting decision (or other environmental policy action) to participate as equals in the decision-making process (Schlosberg, 2007).”*³

For New Yorkers, this also translates into a discussion about “home rule”, local self-determination, and concerns that Article 10 allows the PSC to waive local laws that are deemed “unreasonably burdensome.” If local residents exercise home rule by electing town boards that are opposed to large-scale renewable development, and approve local laws that are not compatible with large-scale renewable projects, then developers should respect the civic process and seek out alternative project areas with supportive communities.

Resource Localism - *“The key to success is adopting a local view of resource development, and being prepared to invest time and effort up-front, arguably before the engineering and technical work starts (C. Wall, 2016).”*⁴

Communities - involved with wind, solar, or other resources - now have the communication and political tools and strategies to affect project outcomes including the ability to delay or even stop projects. Local stakeholders are demanding participation in project development. Resource Localism is a shift away from traditional developer perspectives on simply moving (or forcing) projects forward, with a new appreciation of local stakeholder perspectives.

We believe that both process and application content requirements of Article 10 should be strengthened to truly encourage local community involvement and support. Going forward, simply ticking off minimum process requirements will not lead to successful projects. As long as Social License, Procedural Justice, and Resource Localism are not incorporated into the renewable development process, Article 10 will be criticized. It will not be “frictionless.” Project opposition and delays will continue across New York State.

Current Perspectives on Article 10

State Policymakers

A familiar public policy statement, first articulated in October 2018 at the Alliance for Clean Energy New York (ACE NY) Fall Conference by Department of Public Service (DPS) Director of Policy and Implementation, Sara Osgood, is that Article 10 could be made “**frictionless.**”⁵ Repeated at subsequent public forums across New York State, it is a phrase that needs a clear definition.

River RATs Response: **What does frictionless really mean?** If frictionless means an objective review process that includes an Article 10 application that satisfies environmental, cultural, and economic criteria, and has solid community support, then River RATs, and many other community stakeholder groups, would likely support a frictionless process. However, if frictionless is simply a policy euphemism for changing Article 10 to grease procedural skids to the advantage of developers, policy officials should expect increased opposition.

Industry Lobbyists and Developers

In early 2019, the New York League of Conservation Voters Education Fund published a background paper entitled *Breaking Down the Barriers to Siting Renewable Energy in New York State (Breaking Down the Barriers)*.⁶ The document offers insight into widely-held perspectives that River RATs believes misdiagnose many of the real points of conflict and fixes needed to improve the Article 10 process.

Breaking Down the Barriers states that its recommendations are “consistent with those made by the Alliance for Clean Energy New York and The Nature Conservancy in an October 2017 report entitled *Accelerating Large-Scale Wind and Solar Energy in New York.*” ACE NY also promotes the release of *Breaking Down the Barriers* on its web blog.

Taken from *Breaking Down the Barriers* are the following five policy areas:

1. ***“From a developer and intervenor perspective, the Article 10 process is time-consuming and involves a high degree of uncertainty.”***

River RATs Response: River RATs disagrees. If anything, with the exception of the specified 12-month filed application review period, the developer largely controls the length of the process. In fact, Article 10 is remarkably silent - to the advantage of the developer - on many timelines and performance mandates typical of state permitting with other industries. In many instances, developers slow the pace of the process or fail to submit adequate (or correct) information in their submission materials. These self-induced pauses, restarts, and legal actions are a primary cause of lengthy projects.

Strikingly absent from the above policy area is consideration and concern for local residents. Quite simply, proposing a well-designed, properly-sited, and community-supported project would remove a great deal of the uncertainty. Forcing a poorly-sited and unsupported project on a community does not. This includes impacted stakeholders who have or will live with intermittent proposals and the possibility of project restarts hanging over their communities for years.

2. ***“Most communities lack the necessary resources to properly evaluate and incorporate large-scale renewable development into their land-use decisions.”***

River RATs Response: River RATS disagrees. While comprehensive planning should be encouraged, and will vary between communities, the characterization that “most communities lack the necessary resources to properly evaluate” dismisses the dedicated time and efforts communities have taken to fully educate themselves on renewable development and translate that education into local planning policy. Absent in Article 10 is a requirement for developers to respect the wishes of communities who have and do establish local comprehensive plans and zoning considerations for large-scale renewable development.

3. ***“Local opposition can be a significant barrier to siting large-scale renewables. While community engagement can be a time-intensive process and does not guarantee that the community will eventually support the project, below are suggestions that are likely to lead to increased stakeholder participation and may improve the likelihood of community support.”***

River RATs Response: River RATs could not agree more. Community engagement and support is critical when siting renewable energy projects, just as it is with any other

industrial-scale land use. Stakeholder interaction is a cornerstone of a developer's attempt to earn and keep a Social License.

- 4. “State and local officials should identify public education opportunities that explain the local and regional benefits of renewable energy, including economic opportunities, to increase community support - and answer points raised by community opposition - for siting renewables projects.”**

River RATs Response: River RATs agrees, although Article 10 already requires a specific, state-monitored Public Involvement Program (PIP) that is designed to encourage public education. In our view, a comprehensive, well-documented, and transparent PIP should be a centerpiece of an Article 10 review. We trust it is not the intent to suggest that local municipalities and stakeholders do not take the time or effort to become familiar with all aspects of a renewable project – both pro and con – or lack the ability to do so.

- 5. “Encourage developers and localities to explore and agree on appropriate revenue-sharing.”**

River RATs Response: River RATs agrees with the concept but notes how this differs from the current practices employed by developers. The standard financial business model developers use, requiring a payment in lieu of taxes (PILOT) agreement and other tax avoidance mechanisms, has the opposite effect and reduces financial revenues to local communities. Current practice includes examples of lowballing tax incentives per megawatt or unfairly categorizing or depreciating installed turbine components to avoid local taxes. These may be better first steps for developers to consider.

Again, earning and keeping a Social License while ensuring Procedural Justice means the project is a good match for the community based on environmental, cultural, historical, and all other relevant criteria. Community acceptance must be more than a monetary relationship.

River RATs Perspectives – *What Is Happening on the Ground*

- ❖ Article 10's absence of process timeframes allows developers to hold local communities procedurally hostage.**

It is imperative to establish sunset provisions in Article 10 which specify timeframes after which an inactive pre-application or application will be dismissed by the Siting Board. It is inherently unfair to expect local communities – especially rural communities

safeguarding limited financial resources – to set aside resources in the event a dormant project suddenly reactivates.

While Article 10 mandates some minimum timeframes between stages, unfortunately maximum timeframes are not included, creating unfair procedural advantages for the developer. For example, in August of 2017, a local citizen wrote to the PSC requesting a dismissal of the Horse Creek pre-application, as a year of inactivity had passed since submission of the PIP, with no subsequent movement to the Preliminary Scoping Statement (PSS) phase. As the local citizen noted:

“The developer has skillfully used the provisions of Article 10 to protect its claim on four towns without furthering the mission of energy development in New York State. Like a loaded gun aimed at the towns, ready to go off at any moment, the towns are held hostage by the continued threat of a project that appears to never get anywhere. They know that they will only have 21 days to respond, should the developer file the PSS.”⁷

To which the developer’s counsel responded:

“Article 10 does not provide for the general dismissal or "termination" of a proceeding. While Article 10 offers one avenue for dismissal of an Application where it is undisputed that the statutory requirements cannot be met (16 NYCRR § 1000.14), no such avenue exists to terminate a proceeding during the pre-application phase. Furthermore, the Article 10 law and regulations do not establish specific deadlines or mandatory timing requirements during this pre-application stage.”⁸

Clearly, Procedural Justice calls for this timeframe oversight to be corrected in any future modification of Article 10.

As to why developers maintain poorly-sited and inactive projects like Horse Creek, we wonder if the intent is simply investor relations - to inflate development pipelines and marketing materials - at the expense of local communities.

❖ It is extremely disheartening that developers only seem interested in fulfilling procedural mandates instead of interacting authentically with stakeholder communities. This is unfair to communities and damaging to the perception of renewable energy development in New York State.

With Horse Creek, both primary project area towns, Clayton and Orleans, have written to the PSC expressing deep dissatisfaction with the developer’s public outreach efforts. These actions solidified an unrecoverable public opinion against the project, and reveal

an outdated developer-community relationship model. For example, in response to project marketing materials submitted by the developer at community open houses, the Town of Clayton wrote to the PSC:

“...the statistics presented on Page 2 are dubious at best, and show a total lack of transparency on the part of Avangrid Renewables and Iberdrola... these omissions and lack of transparency suggest a knowingly fraudulent misrepresentation regarding the true level of public opposition to the Horse Creek Project.”⁹

Additionally, River RATs is disappointed that industry lobbyists and pressure groups want to start *“Breaking Down the Barriers”* while the developer has not submitted bi-monthly Public Involvement Program tracking logs as promised two and a half years ago.¹⁰ That developers lack attention and respect for the process and local stakeholders illustrates just how important is to integrate internationally-endorsed sustainability principles into Article 10.

❖ Certain geographic areas of New York State, such as the 1000 Islands region, are simply incompatible with large-scale wind development. Forcing poorly-sited and unworkable projects on communities only damages the industry’s reputation, wasting time and development resources that could be used on potentially-suitable project areas.

Horse Creek presents a well-documented series of diverse risk factors that collectively make the area among the absolute worst places for industrial wind in New York State. The New York State Energy Research and Development Authority (NYSERDA) has characterized the project area as among the worst possible in terms of return on investment for wind development within the context of biodiversity, while also identifying Horse Creek as a primary location and travel zone for the endangered Indiana bat.¹¹ The project area itself is surrounded by numerous Wildlife Management Areas, is home to a number of bald eagles, and is categorized as an Important Bird Area (IBA) by the National Audubon Society and BirdLife International.¹²

The project is also located on a globally-rare and fragile limestone pavement terrain, known as alvar. The project was even expanded to directly adjoin The Nature Conservancy’s protected Chaumont Barrens Preserve, which the New York State Department of Environmental Conservation (NYSDEC) considers *“one of the finest examples of alvar grassland in the world.”*¹³ Horse Creek’s karst geology also presents serious groundwater pollution and hydrological risks, including underground drainage systems, sinkholes and disappearing streams.

In terms of cultural resources, Horse Creek is wedged between the Depauville Native American Mortuary Complex and the Perch Lake Mounds, a unique Native American Ceremonial Landscape.¹⁴ This is one reason why River RATs advocates that cultural resources in and around Horse Creek can only be fully addressed and assessed via complete, prior consultation with sovereign Tribal Nations with historic ties to the region, including the Oneida, Onondaga and Mohawk Nations.

Horse Creek is also less than five miles from the Watertown International Airport (WIA) and less than 10 miles from Fort Drum, the largest single-site employer in New York State. Per the 2018 Fort Drum Joint Land Use Study (JLUS), Horse Creek could cause additional interference with aviation surveillance at Fort Drum, and the critical KTWX weather radar station in Montague that is key in monitoring lake effect snowfall.¹⁵ Beyond these concerns, of the 521 public comments submitted to the PSC, 520 comments oppose Horse Creek.¹⁶

Certain geographic areas are simply incompatible with large-scale wind development. Horse Creek is one of them. Currently Article 10, with its lack of Procedural Justice, has allowed this wasteful project to limp along for far too long at the expense and burden of local communities.

Proposed Article 10 Changes

We propose modifying the current process and application format to one that emphasizes advance project planning and community interaction prior to beginning any procedural steps of Article 10. Afterwards, when a formal application is filed, the process should be well defined and promote procedural equity for all impacted stakeholders. **Quite simply, the Article 10 process should be the certification of a properly-sited and community supported project - well hashed out in advance - and not the bureaucratic and legal battlefield between developers and communities that all too often defines the process today.** Our recommendations address both the Review Process and the Application Content:

The Review Process

- a. Timelines and Project Abandonment
- b. Filing Fees and Performance Bonds
- c. Community Referendums
- d. Respect for Community Comprehensive Plans Related to Renewable Energy
- e. Increase Developer Intervenor Funding
- f. Compliance Reporting

The Application Content

- g. Specific Project Definitions
- h. Enhanced Public Involvement Program
- i. Eagle Protection

Proposed Changes to the Review Process

a. Timelines and Project Abandonment

- Article 10 applicants shall file a Letter of Intent, which includes a project summary, with the DPS and impacted municipalities 30 days prior to filing a Public Involvement Program.
- An Article 10 application must be filed within 365 days of the Public Involvement Program filing or the project shall be deemed abandoned.
- Any Article 10 application withdrawn by the developer or dismissed by the DPS during evidentiary review will be deemed abandoned.
- Any withdrawn, abandoned, or dismissed application – defined by project area not applicant - must wait three years before reapplying under Article 10.

Procedural Justice calls for equal protection for all participants in the Article 10 process. Currently, limited Article 10 pre-application procedures offer little protection for local communities and no penalties for developers. As a result, developers are free to start, stop, go silent, restart, or delay activity at any time. Absent process timelines, inappropriately-sited industrial wind projects that should be abandoned can be held over communities and stakeholders for years.

Horse Creek is a prime example. After 13 years, with most recent applicant activity in 2017, this poorly-sited project has gone silent. Local permits, which were sued for, have expired. So, is Horse Creek still active in Iberdrola's portfolio and does it remain a threat to the 1000 Islands? Apparently yes, as it is featured on the ACE NY website.

b. Filing Fees and Performance Bonds

- Article 10 applicants shall pay a non-refundable filing fee, payable to the DPS, as part of the Public Involvement Program.

- Article 10 applicants shall post a project performance bond, payable to the service area municipalities, as part of the Public Involvement Program.
- Any abandoned, withdrawn, or dismissed Article 10 application will trigger payment of the performance bond to the local municipalities.

Procedural Justice calls for equal protection for all participants. Currently, limited Article 10 pre-application procedures offer little protection for local communities and no penalties for developers. As a result, developers are free to start, stop, go silent, restart, or delay activity at any time.

River RATs proposes an application filing fee, paid to the DPS, and a performance bond, payable to local municipalities. The amounts, not proposed here, must be established based on fairness and Procedural Justice.

A filing fee, consistent with other industry and states regulatory permitting, will help the DPS with the expense of Article 10 reviews and will also relieve pipeline congestion by discouraging frivolous projects, only used to enhance developers' investor portfolios.

The performance bond, more directly, will create a financial incentive for applicants to work with local communities in advance, propose properly-sited and supported projects, and then proceed to the review process.

c. Community Referendums

- Community referendums should be a Procedural Justice requirement in Article 10.

The current Article 10 process provides for stakeholder input via online commenting and public hearings. While these mechanisms are important, they fall short of providing a direct expression of the local community voice. This could be remedied by incorporating a referendum process prior to formal application submission.

Held prior to formal Article 10 application submission, this step would empower local stakeholders (year-round and seasonal) to actually have a role in the decision-making process. It would also likely reduce the number of unsupported and unworkable projects in the Article 10 pipeline - thus reducing the burden on PSC staff who are faced with an increasing number of submitted applications.

New York State renewables leaders are familiar with public referendums. In 2015, Iberdrola’s project manager – who also unsuccessfully attempted to develop Horse Creek, and is now ACE NY’s Chairperson of the Board - offered the residents of Grafton and Windham, Vermont, a community vote over a contentious 24 turbine project.¹⁷ In a 259/416 decision, both communities voted down the wind project. Iberdrola abandoned the project.¹⁸

While proposed host communities may or may not include Indigenous People, a properly and transparently executed community referendum would incorporate the spirit of the existing United Nations framework regarding Free, Prior, and Informed Consent (FPIC) which is currently used in similar decision making situations involving Indigenous Peoples.¹⁹

d. Respect for Community Comprehensive Plans Related to Renewable Energy

- Local comprehensive plans, including provisions for renewable energy development, should be adhered to and respected in Article 10 by both developers and the PSC.
- The Siting Board should respect local comprehensive plans and zoning regulations and remove any potential of waiving “unreasonably burdensome” local laws.

Article 10 should review community comprehensive planning as a first-pass baseline requirement for acceptance of an Article 10 application. If a community’s comprehensive plan does not allow for large-scale renewable development the PSC should reject the application.

e. Increase Developer Intervenor Funding

- The PSC should increase the amount of intervenor funding by project applicants to ensure a fair and thorough stipulation and hearing processes for all parties.

Changes to Article 10 that promote Social License, Procedural Justice, and Resource Localism will result in better-sited and community-supported projects. However, as we have seen in projects to date, Article 10 is a complex and evolving adversarial process. Legal representation and commissioning expert studies is expensive. During the stipulation process and evidentiary hearing, communities and other local stakeholders are at a financial disadvantage to large industrial companies. River RATs proposes that

the intervenor funding be increased to allow for a more fair and equitable Article 10 proceeding.

f. Compliance Reporting

- Post-approval compliance reporting should be required and include operational, environmental, and safety data, including avian and bat mortality. This information should be made publically available.

Building a database with actual operational project performance numbers will educate and help guide the future growth of renewable energy projects in New York State. To insure consistency and transparency, reporting should be conducted by independent, third-parties.

Proposed Changes to the Application Content

g. Specific Project Definitions

- Applications should include a specific project description that is only subject to minor modification as the project progresses through Article 10.
- A project definition that includes, at a minimum, the specific number of turbines, specific turbine locations, turbine model and height, implementation plan, and decommissioning plan should be documented as part of the PIP.
- Any modifications made to the project definition between the PIP and filing a formal Article 10 application shall make the project repeat the PIP process.
- Any changes to the project definition identified during the evidentiary phase of the Article 10 review that were not disclosed during the PIP shall cause that application to be dismissed by the PSC.

Wind projects are often a moving target. Community presentations (PIP and other) are filled with developer commentary and literature about proposed projects, but often lack critical project information needed by local communities to make an informed decision. Basic information and details such as the exact locations, total number, height, and model of turbines, is presented as preliminary - and always subject to change. When asked why, developer responses often include stock answers about ongoing engineering studies, interconnection analysis, changing technology, and other modifiers. As a result, it is little wonder why stakeholders are suspicious about both projects and developers.

Engineering studies and advancing technology are credible reasons to modify an industrial project. However, this is the type of advance planning that should be completed prior to entering any formal stage of the Article 10 process by the developer. The current process that allows such project changes is unfair to stakeholders and builds uncertainty and mistrust between local communities and developers.

h. Enhanced Public Involvement Program

- The Public Involvement Program (PIP) should be a fundamental element of any Article 10 application.
- In addition to the current initial PSC approval for comprehensiveness, the PIP shall be reviewed upon completion to verify a good faith attempt with the principles of Procedural Justice. A project with a completed PIP that the PSC deems inaccurate, vague, or inconsistent shall not proceed to the next application phase.
- The PIP should be presented and supported by local community witness testimony during the evidentiary review phase of the application.

Community involvement is a fundamental element of Procedural Justice. The PIP shall describe and document all stakeholder and community interactions including referendums or other form of civic discussion and involvement. The PIP should also document when the developer has not conducted planned outreach to the local community and why it has not done so. The PIP should include all local stakeholders including Indigenous Peoples, either located in or having historical and cultural relationships to the project area.

i. Eagle Protection

- Article 10 applications should include any and all data related to the possible harm to, or killing of, bald or golden eagles.
- Article 10 applications should include all data and correspondence related to Federal Eagle Incidental Take Permits.
- The developer/owner should be required for the life of the project to routinely collect and submit to the PSC for public release, any eagle mortality or injury-related data. This data should be validated by independent third-parties and include all information submitted to the Nation Eagle Repository.

Eagle protection is a significant Article 10 concern brought to the forefront with the recently withdrawn Galloo Island Wind Project application (also located in Jefferson County). In the fall of 2018, it was revealed that the developer had failed to acknowledge the presence of a bald eagle nest in the project area. This resulted in ethical and legal challenges to the applicant, including the possibility of having the application dismissed from the process all together. Apex Clean Energy, the applicant, withdrew the project in February 2019.

During Galloo's legal exchanges, there was a request that the developer include their previously submitted Federal Eagle Incidental Take Permit (i.e., how many eagles they tell federal officials the project will kill) to corroborate the eagle population data presented in the Article 10 application. This request was opposed by their lawyers – the same firm that represents Iberdrola in Horse Creek and many other projects in New York State - arguing that an applicant's Federal Eagle Incidental Take Permit is not relevant and is outside the bounds of Article 10. We disagree. All available data to corroborate eagle populations in a project area are relevant and should be part of Article 10.

Embracing the New Paradigm

While there may be other suggested changes to Article 10 that could be discussed (such as project financial transparency) River RATs offers the above recommendations as a starting point for all involved stakeholders.

This discussion and set of recommendations is based on the real life experiences of Horse Creek and other projects across New York State. Horse Creek, a very poorly-sited and unwanted project with multiple environmental, cultural, historic and economic negatives, has been hanging over local communities for over 13 years. Failed, community-opposed projects like Horse Creek should not be the legacy of New York State renewable policymakers. A serious review and restructuring of Article 10 to correct the numerous Procedural Justice issues discussed above is needed.

It is important to note that industry-backed recommendations, such as *Breaking Down the Barriers*, demonstrate how industry promoters and developers fail to self-examine their own project development methods and procedures, and simply find fault with Article 10.

Making Article 10 “frictionless” does not mean removing barriers to simply make it easier for developers to force unwanted and poorly-sited projects on unwilling communities. At the same time, nothing could be more “unreasonably burdensome” than holding small towns procedurally hostage.

Revising Article 10 should be about empowering all stakeholders by incorporating the globally-accepted sustainable development concepts of Social License, Procedural Justice, and Resource Localism. To date, these concepts have been overlooked in New York State’s large-scale renewable energy siting process.

Until this new paradigm is embraced by all stakeholders, and incorporated in Article 10, it is inevitable that conflicts will remain.

Summary of Proposed Changes

a. Timelines and Project Abandonment

- Article 10 applicants shall file a Letter of Intent, which includes a project summary, with the DPS and impacted municipalities 30 days prior to filing a Public Involvement Program.
- An Article 10 application must be filed within 365 days of the Public Involvement Program filing or the project shall be deemed abandoned.
- Any Article 10 application withdrawn by the developer or dismissed by the DPS during evidentiary review will be deemed abandoned.
- Any withdrawn, abandoned, or dismissed application – defined by project area not applicant - must wait three years before reapplying under Article 10.

b. Filing Fees and Performance Bonds

- Article 10 applicants shall pay a non-refundable filing fee, payable to the DPS, as part of the Public Involvement Program.
- Article 10 applicants shall post a project performance bond, payable to the service area municipalities, as part of the Public Involvement Program.
- Any abandoned, withdrawn, or dismissed Article 10 application will trigger payment of the performance bond to the local municipalities.

c. Community Referendums

- Community referendums should be a Procedural Justice requirement in Article 10.

d. Respect for Community Comprehensive Plans Related to Renewable Energy

- Local comprehensive plans, including provisions for renewable energy development, should be adhered to and respected in the by both developers and the PSC.

- The Siting Board should respect local comprehensive plans and zoning regulations and remove any potential of waiving “unreasonably burdensome” local laws.

e. Increase Developer Intervenor Funding

- The PSC should increase the amount of intervenor funding by project applicants to ensure a fair and thorough stipulation and hearing process for all parties.

f. Compliance Reporting

- Post-approval compliance reporting should be required and include operational, environmental, and safety data, including avian and bat mortality. This information should be made publically available.

g. Specific Project Definitions

- Applications should include a specific project description that is only subject to minor modification as the project progresses through Article 10.
- A project definition that includes at a minimum the specific number of turbines, specific turbine locations, turbine model and height, implementation plan, and decommissioning plan should be documented as part of the PIP.
- Any modifications made to the project definition between the PIP and filing a formal Article 10 application shall make the project repeat the PIP process.
- Any changes to the project definition identified during the evidentiary phase of the Article 10 review that were not disclosed during the PIP shall cause that application to be dismissed by the PSC.

h. Enhanced Public Involvement Program

- The Public Involvement Program (PIP) should be a fundamental element of an Article 10 application.
- In addition to the current PSC approval for initial design and comprehensiveness, the PIP shall be reviewed upon completion to verify a good faith attempt with the principles of Procedural Justice. A project with a

completed PIP that the PSC deems inaccurate, vague, or inconsistent shall not proceed to the next application phase.

- The PIP should be presented and supported by local community witness testimony during the evidentiary review phase of the application.

i. Eagle Protection

- Article 10 applications should include all data related to the possible harm or killing of bald or golden eagles.
- Article 10 applications should include any and all data and correspondence related to Federal Eagle Incidental Take Permits.
- The developer/owner should be required for the life of the project to routinely collect and submit to the PSC for public release, any and all eagle mortality or injury related data. This data should be verified by independent third-parties and include all information submitted to the Nation Eagle Repository.

Endnotes

- ¹ <https://ejatlas.org/conflict/decade-long-opposition-to-the-iberdrola-horse-creek-wind-project>
- ² Mercer-Mapstone, L., Rifkin, W., Louis, W., & Moffat, K. (2017). Meaningful dialogue outcomes contribute to laying a foundation for social license to operate. *Resources Policy*, 53, 347-355. <https://www.sciencedirect.com/science/article/pii/S0301420717302453>
- ³ Ottinger, G., et al., Procedural justice in wind facility siting: Recommendations for state-led siting processes. *Energy Policy* (2013), <http://dx.doi.org/10.1016/j.enpol.2013.09.066>
- ⁴ Wall, C. (2016). Resource Localism How Globalisation is Driving Resource Companies to Deliver Sustainable Benefits and Manage Risks Locally. <https://www.erm.com/globalassets/documents/articles/resource-localism.pdf>
- ⁵ State shifts on Article 10. (2018, October 11). <https://www.politico.com/states/new-york/newsletters/politico-new-york-energy/2018/10/11/state-shifts-on-article-10-121067>
- ⁶ Breaking Down the Barriers to Siting Renewable Energy in New York State. <https://nylcvef.org/wp-content/uploads/2019/02/renewable-siting-whitepaper.pdf>
- ⁷ Schaller, G. A. (n.d.). Letter to the PSC motion to dismiss [Letter written August 30, 2017 to Public Service Commission]. <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-F-0575>
- ⁸ Muscato, J. A., II. (n.d.). Response and Opposition to Purported "Motion" to Dismiss or "Terminate" Case 12-F-0575, Application by Horse Creek Wind Farm, LLC, for a Certificate of Environmental Compatibility and Public Need Pursuant to PSL Article 10 [Letter written September 8, 2017 to Hon, Kathleen H. Burgess]. <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-F-0575>
- ⁹ Storandt, D. M., Jr. (n.d.). Town of Clayton submits concerns about marketing material recently circulated by Avangrid/Iberdrola [Letter written September 20, 2016 to Hon. Kathleen H. Burgess,]. <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-F-0575>
- ¹⁰ Muscato, J. A., Jr., & Bomyea, L. K. (n.d.). Response to DPS Comments on Horse Creek PIP [Letter written August 22, 2016 to Hon. Kathleen H. Burgess]. <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-F-0575>
- ¹¹ New York State Energy Research and Development Authority (NYSERDA) 2014. "Wind Power and Biodiversity in New York: Tools For Siting Assessment and Scenario Planning at the Landscape Scale," NYSERDA Report 14-46. Prepared by The Nature Conservancy and New York Natural Heritage Program. www.nyserdera.ny.gov/publications

"Jefferson County, for example, showed a large decrease from the amount of suitable landscape for turbine development to the amount of landscape within a favorable ROI. The primary drivers in decreasing the suitability for this area are the rare species components of the biodiversity layers. Specifically, the high values for state-listed species and the presence of Indiana bat".

-
- ¹² <https://www.audubon.org/important-bird-areas/perch-river-complex>
- ¹³ <https://www.dec.ny.gov/outdoor/84700.html>
- ¹⁴ <http://www.nysm.nysed.gov/research-collections/archaeology/geoarchaeology/research/annular-mounds-perch-lake>
- ¹⁵ <https://evogov.s3.amazonaws.com/media/159/media/116418.pdf>
- ¹⁶ <http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterCaseNo=12-F-0575>
- ¹⁷ http://mediad.publicbroadcasting.net/p/vpr/files/201511/iberdrola_letter-vpr-20151202.pdf
- ¹⁸ <https://www.vpr.org/post/windham-and-grafton-reject-controversial-wind-project#stream/0>
- ¹⁹ <https://www.un.org/development/desa/indigenouspeoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao/>



River Residents Against Turbines – River RATs

PO Box 552
Clayton, NY 13624

www.RiverResidentsAgainstTurbines.com

[@RiverResidentsAgainstTurbines](https://www.instagram.com/RiverResidentsAgainstTurbines)

RiverResidentsAgainstTurbines@gmail.com