

1 12-7-2022 - Siting Board Meeting - 17-F-0598

2 NEW YORK STATE BOARD ON
3 ELECTRIC GENERATION SITING AND
4 THE ENVIRONMENT

5 CASE 17-F-0598 - Application of North Side Energy Center,
6 LLC for a Certificate of Environmental Compatibility and
7 Public Need Pursuant to Article 10 of the Public Service
8 Law for Construction and Operation of a Solar Electric
9 Generating Facility Located in the Towns of Brasher,
10 Massena, and Norfolk, St. Lawrence County.

11 Siting Board Meeting

12 Date: Wednesday, December 7, 2022, at 10:30 am

13 TAMMY MITCHELL, Alternate for Rory M. Christian, Chair of
14 the New York State Public Service Commission

15 LOUIS ALEXANDER, Alternate for Basil Seggos, Commissioner,
16 New York State Department of Environmental Conservation

17 DR. ELIZABETH LEWIS-MICHL, Alternate for Mary T. Bassett,
18 M.D., M.P.H., Commissioner, New York State Department of
19 Health

20 IAN WELLS, Alternate for Hope Knight, Commissioner, New
21 York State Department of Economic Development

22 JOHN WILLIAMS, Alternate for Richard L. Kauffman, Chair,
23 New York State Energy Research and Development Authority

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2 (The meeting commenced at 10:30 a.m.)
3 CHAIR MITCHELL: Good morning. My
4 name is Tammy Mitchell. I'm the director of the
5 Office of Electric Gas and Water at the New York
6 State Department of Public Service. I have been
7 designated to serve as the alternate representing the
8 chair of the New York State's Board on Electric
9 Generation Siting and the Environment or as it is
10 also known The Siting Board. I call this meeting of
11 the siting board to order.

12 Before moving to the agenda, I would
13 like to introduce the alternates representing the
14 permanent members of the siting board. Louis
15 Alexander, alternate representing the Commissioner of
16 the Department of Environmental Conservation, Dr.
17 Elizabeth Lewis-Michl, alternate representing the
18 Commissioner of the Department of Health, Ian Wells,
19 alternate representing the Commissioner of the New
20 York State Department of Economic Development and
21 John Williams, alternate representing the Chair of
22 the New York State Energy Research and Development
23 Authority.

24 Secretary Phillips, are there any
25 changes to the agenda?

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2 SECRETARY PHILLIPS: There are no
3 changes, but I did want to ask for one clarification
4 regarding the document in front of you. Currently
5 Ordering Clause 2 indicates that the proceeding would
6 be continued. I want to ask whether that should
7 instead say that it's denied and the proceeding is
8 terminated and closed as this change would be
9 consistent with the previous order that was issued in
10 this case.

11 A.L.J. LEARY: Chair Mitchell and
12 Secretary Phillips that is certainly the more
13 appropriate relief to be requested. Public Service
14 Law Section 170 does provide additional process for
15 the aggrieved party to pursue which may be why it was
16 included rather than a termination before the agency.
17 But I think, you know, conferring with General
18 Counsel Rosenthal we believe that that is the more
19 appropriate form of relief to be included in the
20 order, and we will revise it accordingly.

21 CHAIR MITCHELL: Thank you, Judge
22 Leary.

23 SECRETARY PHILLIPS: Okay. Thank you.
24 With that clarification I hope it's understood by all
25 of the members that that is what you were voting on.

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2 Thank you.

3 CHAIR MITCHELL: Thank you. We will
4 begin with Case 17-F-0598 Application of North Side
5 Energy Center, L.L.C. for a certificate of
6 environmental compatibility and public need pursuant
7 to Article 10 of the Public Service Law for
8 construction and operation of a solar electric
9 generating facility located in the Towns of Brasher,
10 Massena and Norfolk, St. Lawrence County presented by
11 Maureen Leary, administrative law judge, Department
12 of Public Service.

13 Richard Sherman, administration law
14 judge, Department of Environmental Conservation,
15 Dakin Lecakes, chief administrative law judge,
16 Department of Public Service, Jason Zehr, chief of
17 environmental certification and compliance, Office of
18 Electric Gas and Water, Department of Public Service
19 and Robert Rosenthal, general counsel are available
20 for questions. Judge Leary, please begin.

21 A.L.J. LEARY: Thank you. Good
22 morning, Chair Mitchell and members of the siting
23 board. Before you today is a proposed order on
24 rehearing that addresses North Side Energy Center's
25 petition for rehearing of the siting board's August

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2 9th, 2022 order that denied a certificate of
3 environmental compatibility and public need for a
4 major solar facility. The proposed order before you
5 finds that North Side's rehearing petition does not
6 meet the criteria in Public Service Law Section 170
7 and the implementing regulations in 16 N.Y.C.R.R.
8 Section 3.7.

9 Thus the rehearing petition does not
10 qualify for the siting board to grant rehearing.
11 Nevertheless, the proposed order otherwise addresses
12 and denies North Side's assertions of errors of law
13 and fact, and its request for reversal of the siting
14 board's denial order. The proposed order also denies
15 North Side's alternative request to reopen the record
16 based on new circumstances.

17 Essentially, North Side's rehearing
18 petition reiterates the position it advanced before
19 this siting board previously. It challenges the
20 siting board's denial order which found that North
21 Side failed to demonstrate on the record first that
22 the project minimizes and avoided -- and avoids
23 adverse environmental impacts to the maximum extent
24 practicable including impacts to fresh water wetlands
25 and threatened and endangered species.

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2 These minimization and avoidance
3 requirements are set forth in Public Service Law
4 Section 168(3)(c). Second, North Side failed to
5 demonstrate that the project as designed complies
6 with applicable substantive requirements of state
7 environmental laws and regulations including
8 Environmental Conservation Law Article 24 which
9 governs the protection of freshwater wetlands and
10 Environmental Conservation Law Article 11 which
11 governs the protection of threatened and endangered
12 species and their habitat.

13 Again, this is a required showing by
14 Public Service Law 168(3)(e). And finally, North
15 Side -- the denial order finds that North Side
16 failed to demonstrate that the project is in the
17 public interest as required by Public Service Law
18 Section 168(3)(b). As the denial order and the
19 proposed order before you indicate, these are
20 mandatory findings under Article 10 that the siting
21 board must make before a certificate may issue.

22 The siting board's denial order was
23 based upon an extensive and complex evidentiary
24 record and this record was -- reflects North Side's
25 opportunity for a full and fair hearing to meet

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2 Article 10's standards. The proposed order before
3 you is based on the record as well, relying on the
4 analysis and rationale contained in the denial order.
5 A detailed description of the project and its
6 environmental impacts are set forth in the denial
7 order and I will not repeat them in full here. But
8 in summary, the following facts are not in dispute
9 and are recited in the proposed order before you.

10 North Side's application sought
11 approval to construct and operate a 180 megawatt
12 commercial scale solar electric generating facility
13 located in the Towns of Brasher, Massena and Norfolk
14 in St. Lawrence County, New York. The project area
15 consists of approximately 2,240 acres of which
16 approximately 1,504 acres or 67% of the entire
17 project area included freshwater wetlands
18 approximately 37 in total.

19 These wetlands were also considered
20 part of wetland complexes. Some of these wetlands
21 appear on the state's officially promulgated
22 freshwater wetlands maps pursuant to Environmental
23 Conservation Law Article 24. Numerous protected
24 streams are also in the project area as well as seven
25 threatened and endangered species, and two species of

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2 special concern. These include the endangered short
3 ear owl, the endangered golden eagle, the threatened
4 Blanding's turtle, Northern Harrier, Sedge wrens,
5 Upland sandpipers and Bald eagles. And finally the
6 Vesper sparrow and the Grasshopper sparrow are in the
7 project area. Those are species of special concern.

8 Some of these protected species were
9 identified in North Side's application as well as by
10 the Department of Environmental Conservation experts
11 and recognized by the Department of Public Service
12 staff. These species exhibited essential behavior in
13 the project area. That is, they were living,
14 nesting, feeding, roosting, foraging and reproducing.
15 Under D.E.C.'s wetland regulations this behavior
16 means that the project area should be characterized
17 as, quote, occupied habitat for the protected species
18 and given a wetlands classification affording the
19 highest protection, specifically Class 1. I mention
20 this because this is, in fact, one of the challenges
21 that North Side advances which will -- I will address
22 later in my presentation.

23 The main dispute in this proceeding
24 and in North Side's rehearing petition, involves its
25 legal interpretation of Article 24 of the

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2 Environmental Conservation Law. That is that
3 unmapped but delineated wetlands that do not appear
4 on the state's official freshwater wetlands maps are
5 not entitled to protection under E.C.L. Article 24
6 and by extension to the siting board's protection
7 under Article 10. The record confirms that although
8 some wetlands in the project area are not mapped,
9 they were, in fact, identified and delineated by
10 North Side's own expert consultants. They were
11 verified by the Department of Environmental
12 Conservation along with D.P.S. staff, and many are
13 contiguous or adjacent to mapped wetlands and
14 therefore part of the same wetlands complex.

15 Based on the siting board's prior
16 denial order, the proposed order before you on
17 rehearing again rejects North -- North Side's attempt
18 to limit the protection afforded to unmapped
19 wetlands. And it finds, based on the record, that
20 all of the project's environmental impacts have not
21 been minimized or avoided to the maximum extent
22 practicable. As a result the proposed order affirms
23 that the siting board cannot make the required
24 findings under Public Service Law Section 168(3)(c),
25 in order to issue a certificate. In addition, the

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2 proposed order reiterates the denial order's finding
3 that the record is deficient regarding impacts to
4 threatened and endangered species and their habitat
5 resulting in the same finding or absence a finding.

6 North Side's rehearing petition
7 asserts that the siting board committed several
8 errors of law and fact and therefore warrants
9 reversal. With respect to wetlands, the rehearing
10 petition asserts that unmapped wetlands, again, are
11 not subject to protection. North Side also asserts,
12 as a factual matter, that it sufficiently addressed
13 the project's wetland impacts but that due to a,
14 quote, multitude of siting constraints, end quote,
15 the project's layout could not be reconfigured to
16 fully minimize or avoid impacts and yet still
17 generate 180 megawatts of electricity.

18 The rehearing petition further asserts
19 that the Article 24 wetland regulations do not apply,
20 but alternatively that the siting board did not apply
21 the so called weighting standards in those
22 regulations. Citing the denial order, the proposed
23 order on rehearing notes that the siting board relies
24 on its own separate and broader authority under
25 Article 10 defined that unmapped wetland impacts had

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2 not been sufficiently minimized or avoided.

3 The proposed order also notes that the
4 siting board's authority in this regard is not
5 constrained by Environmental Conservation Law Article
6 24. Relying on the denial order, the proposed order
7 recites record evidence of North Side's failure to
8 properly address wetland impacts.

9 The proposed order rejects North
10 Side's narrow reading of Article 24 and further finds
11 that -- that legislative amendments passed in April
12 2022, which was before the siting board's final
13 denial order, and amended Article 24 to eliminate
14 certain references to the mapping system, the siting
15 board in the proposed order finds that that -- those
16 legal amendments do not define or limit D.E.C.'s
17 prior authority with respect to unmapped wetlands.
18 Moreover, the proposed order finds that those
19 legislative amendments do not define or limit the
20 siting board's Article 10 authority.

21 The rehearing petition also challenges
22 the siting board's failure to apply the so called
23 weighting standards, as I referenced before, and the
24 proposed order confirms that the issue of the
25 weighting standards need not be reached in light of

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2 North Side's failure to meet its Article 10 burden to
3 demonstrate in the first instance minimization and
4 avoidance of wetland impacts to the maximum extent
5 practicable.

6 The rehearing petition also challenges
7 the siting board's treatment of this project when
8 compared with other Article 10 projects. Like the
9 denial order, the proposed order notes the difference
10 in the extent of the wetlands impacted by this
11 project which are estimated to be as much as 757
12 acres. The denial order found the project's impacts,
13 quote, unprecedented when compared with the number of
14 acres of impacted wetlands in cases cited by North
15 Side including the Trelina, Excelsior and East Point
16 cases.

17 Just by way of comparison to the 757
18 acres potentially impacted here, the Excelsior
19 project had impacts on a total of .31 acres of
20 adjacent areas that is within 100 feet. The Trelina
21 case identified impacts again to only adjacent areas
22 of 4.8 acres. And in East Point the wetland impacts
23 also limited to adjacent areas totaled .34 acres.
24 Thus, the proposed order confirms that both
25 qualitatively and quantitatively the extent of

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2 wetland impacts in this proceeding are far different
3 than the impacts evident in those cases.

4 North Side's rehearing petition next
5 asserts that, quote, because of the multitude of
6 siting constraints -- in light of the multitude of
7 siting constraints, the siting board erroneously
8 assigned North Side a -- an impracticable burden of
9 proof. And the siting board failed to identify the
10 minimization and avoidance measures that would be
11 necessary for the project. Like it did previously,
12 North Side also asserts that D.P.S. staff and D.E.C.
13 staff did not propose an alternate layout for
14 minimization and avoidance purposes.

15 The proposed order before you rejects
16 this argument as well as North Side's attempt to
17 shift the burden to either the siting board or the
18 agencies. It cites the Article 10 regulations that
19 place the burden of proof squarely on North Side.
20 The proposed order also recites that North Side alone
21 chose the proposed location for the project amid
22 1,504 acres of wetlands. Citing the denial order,
23 the proposed order notes North Side's failure to
24 include with its application a wetlands mitigation
25 plan, which could have provided evidence of more

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2 specific minimization, avoidance and compensatory
3 mitigation measures that would have addressed wetland
4 impacts.

5 The proposed order affirms the denial
6 order's rejection of North Side's assertion that the
7 project will actually restore the functions and
8 benefits of certain wetlands in the project area that
9 had been previously disturbed by agricultural and
10 other activities. The proposed order finds that
11 North Side failed to support this assertion on the
12 record and that its own wetlands delineation report
13 and wetlands functions and benefits assessment do not
14 support the assertion.

15 Turning to the proposed order's
16 treatment of the rehearing petition's challenges with
17 respect to threatened and endangered species, North
18 Side asserts that the protected species were
19 protected under a proposed certificate condition. I
20 believe it was Certificate Condition 99 that required
21 the submission of a net conservation benefit plan.
22 North Side asserts that this was sufficient
23 minimization and avoid -- avoidance of impacts to the
24 protected species. North Side claims that the
25 project therefore complies with D.E.C.'s threatened

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2 and endangered species regulations set forth in 6
3 N.Y.C.R.R. Part 182.

4 The proposed order before you recites
5 record evidence that the project's wetlands were
6 occupied habitat for threatened and endangered
7 species and refers to North Side's proposed reliance
8 on, quote, best management practices and ad hoc
9 measures in the field by construction personnel
10 rather than relying on a detailed and methodical plan
11 to protect the species in the project area during
12 construction and operation.

13 The proposed order before you rejects
14 North Side's challenge in this regard and affirms the
15 denial order's finding that the record lacks
16 sufficient evidence to support a finding that impacts
17 to protected species and their habitat had been
18 minimized and avoided to the maximum extent
19 practicable. This is particularly true given North
20 Side's position on the protection or lack of
21 protection afforded to unmapped wetlands. Thus the
22 proposed order finds that nothing in the rehearing
23 petition reflects an error of law or fact with
24 respect to threatened and endangered species that
25 would justify the siting board revisiting its

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2 findings in the denial order.

3 Turning to North Side's alternative
4 request to reopen the record based on new
5 information, the rehearing petition requests that the
6 siting board reopen the record and consider potential
7 additional minimization avoidance and compensatory
8 mitigation measures. The rehearing petition
9 generally refers to the possible use of nine
10 additional parcels and a D.E.C. reforestation area as
11 potential opportunities to implement such measures.
12 This is too little too late.

13 The proposed order before you first
14 recites the multiple opportunities North Side was
15 afforded during the proceeding to present such
16 information including in its application and the
17 multiple application supplements and updates filed
18 with the secretary. In addition, the proposed order
19 recites that there was a period, a six week period
20 that delayed at the request -- at North Side's
21 request the siting board's initially scheduled June
22 30th, 2022 meeting.

23 The secretary granted that meeting
24 based upon North Side's request that it sought to
25 pursue additional opportunities that were not

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2 identified in its letter. The proposed order before
3 you relies on principles of administrative finality
4 and the preservation of state agency resources as the
5 basis for denying North Side's request to reopen the
6 record. This relief is within the sole discretion of
7 the siting board, and the order before you notes the
8 siting board's refusal to exercise that discretion
9 based on the totality of the circumstances evident in
10 this proceeding.

11 Furthermore, the proposed order notes
12 that North Side's general and belated proposal of
13 additional minimization and avoidance measures lack
14 sufficient detail and any demonstration of
15 feasibility in order to be seriously considered at
16 this point. The proposed order also notes that North
17 Side's proposal does not comply with D.E.C.'s
18 guidelines for wetlands mitigation.

19 Thus, the proposed order on rehearing
20 entirely affirms the denial order's determination
21 that North Side very -- failed to carry its burden
22 and demonstrate that the project's adverse
23 environmental impacts to wetlands and threatened and
24 endangered species have been minimized or avoided to
25 the maximum extent practicable. That the project as

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2 designed will comply with applicable environmental
3 laws and that the project is in the public interest.
4 As previously noted, these are mandatory -- mandatory
5 findings that the siting board must make under Public
6 Service Law Sections 168(3)(b), 168(3)(c), and
7 168(3)(e). A further notice that the order before
8 you makes the requisite finding under Section 72 of
9 the Community Leadership and Climate Protection Act
10 or C.L.C.P.A. that the siting board's denial of the
11 certificate for this renewable energy project remains
12 consistent with the emission reduction objection --
13 objectives of the state.

14 As the siting board is aware, the
15 state is on course to achieve its renewable energy
16 and greenhouse gas reduction objectives, but as the
17 denial order notes and the proposed order before you
18 repeats, Article 10 requires both environmental
19 compatibility and public need in order to support the
20 issuance of a certificate.

21 In conclusion we -- we recommend the
22 siting board's adoption of the proposed order before
23 you and its affirmance of the August 9th, 2022 denial
24 order. This concludes my presentation. We are of
25 course available to respond to any questions that the

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2 siting board members may have. Thank you.

3 CHAIR MITCHELL: Thank you, Judge
4 Leary for your comprehensive summary of the item
5 before us. I believe the proposed draft order
6 denying North Side's rehearing petition is
7 appropriate in that North Side did not meet the
8 standard for rehearing, and I will be supporting this
9 item. Let me turn to my fellow board members for any
10 comments or questions. Mr. Alexander?

11 MR. ALEXANDER: Thank you, Chair
12 Mitchell. I have considered the issues raised in
13 North Side Energy Center's petition for rehearing as
14 well as the responses submitted by the staff of the
15 Department of Environmental Conservation and the
16 staff of the Department of Public Service. In my
17 judgement the proposed order before us today clearly
18 and thoroughly examines the matters at issue, the
19 order's discussion of wetland and wetland related
20 considerations as well as threatened and endangered
21 species and their habitat provides a careful and
22 thoughtful analysis.

23 Based upon my review, this proposed
24 order reaches the correct decision as to the denial
25 of the petition for rehearing. I would like to thank

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2 Administrative Law Judge Maureen Leary for her
3 excellent presentation today. I would also like to
4 take this opportunity to thank Judge Leary and her
5 fellow Administrative Law Judge Richard Sherman for
6 their attentive management of this case which ensured
7 a full review of the issues raised. I have no
8 further comments or questions. Thank you.

9 CHAIR MITCHELL: Thank you, Mr.
10 Alexander. Dr. Lewis-Michl.

11 DR. LEWIS-MICHL: No questions or
12 comments.

13 CHAIR MITCHELL: Mr. Wells?

14 MR. WELLS: No comments or questions.

15 CHAIR MITCHELL: Mr. Williams?

16 MR. WILLIAMS: No comments or
17 questions.

18 CHAIR MITCHELL: I will now call for a
19 vote. My own vote is in favor of the recommendation
20 as described. Mr. Alexander, how do you vote?

21 MR. ALEXANDER: I vote in favor.

22 CHAIR MITCHELL: Dr. Lewis-Michl?

23 DR. LEWIS-MICHL: In favor.

24 CHAIR MITCHELL: Mr. Wells?

25 MR. WELLS: In favor.

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2 CHAIR MITCHELL: Mr. Williams?

3 MR. WILLIAMS: In favor.

4 CHAIR MITCHELL: The order is approved

5 and the recommendation is adopted. Secretary

6 Phillips, is there anything further to come before us

7 today?

8 SECRETARY PHILLIPS: There's nothing

9 further.

10 CHAIR MITCHELL: Thank you. We are

11 adjourned.

12 (Off the record)

13 (The meeting concluded at 10:57 a.m.)

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2 STATE OF NEW YORK
3 I, MONIQUE HINES, do hereby certify that the foregoing was
4 reported by me, in the cause, at the time and place, as
5 stated in the caption hereto, at Page 1 hereof; that the
6 foregoing typewritten transcription consisting of pages 1
7 through 21, is a true record of all proceedings had at the
8 hearing.

9 IN WITNESS WHEREOF, I have hereunto
10 subscribed my name, this the 9th day of December, 2022.

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13 MONIQUE HINES, Reporter
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