

UPDATED RENEWABLE ENERGY CONSTRUCTION AND CONTRACTS GUIDANCE IN THE FACE OF COVID-19

Hodgson Russ Renewable Energy Alert
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As the State of New York continues to react to the COVID-19 pandemic, it has or is expected to take at least three significant actions with respect to renewable energy development and construction activities.

First, on March 31, after a good deal of uncertainty in the industry in the preceding days, both the New York State Empire State Development Corporation (ESD) and New York State Energy Research and Development Authority (NYSERDA) issued updated guidance [1] regarding what kinds of construction activities related to renewable energy projects may continue. ESD made clear in its document that – with certain exceptions including construction related to an “emergency” and of large-scale projects expected to be in service before September 1, 2020 – renewable energy new project construction activities may *not* go forward. This guidance reverses previous guidance that such construction activities were deemed “essential” under Governor Cuomo’s relevant Executive Orders. NYSERDA further stated that “all program activity requiring in-person presence at a project site that is not defined as either essential or emergency-related shall pause until April 15, unless extended by further Executive Orders.”

Second, the Public Service Commission (PSC) is expected to toll certain deadlines in the state’s Standard Interconnection Requirements (SIR) related to payment to utilities of security for system upgrades.

And third, the New York State Energy Research and Development Authority (NYSERDA) paused all field inspections and is expected to waive certain project completion deadlines under its program contracts.

I. Empire State Development and NYSERDA Construction Guidance

On March 31, ESD clarified that the construction of new renewable energy projects is generally not considered essential, with certain exceptions. Accordingly, most non-emergency construction must stop or face the potential of \$2,000 fines per violation. The guidance from ESD lays out which aspects of the energy industry are considered essential:

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Following ESD's release of this guidance, NYSERDA issued its own guidance, which stated "[A]s set forth in Executive Order 202.13 and the Essential Construction Guidance, all program activity requiring in-person presence at a project site that is not defined as either essential or emergency-related shall pause until April 15, unless extended by future Executive Orders." Acknowledging the difficulty these pause orders may cause, NYSERDA also offered flexibility with respect to various contract deadlines and milestones.

Prior guidance from ESD issued on March 20, 2020 deemed both energy generation and construction as "essential" businesses. The exemption for construction activities applied not just to general construction firms, but also to "other related construction firms and professionals for essential infrastructure or for emergency safety and repair." On March 27, 2020, ESD issued further guidance stating that "all non-essential construction must shut down except emergency construction."

While the initial March 27 ESD guidance did not specify whether renewable energy project construction would continue to be deemed essential, the March 31 guidance clarifies that construction of renewable energy is *not* essential construction.

ESD's March 27 guidance further noted that "For the purpose of this section construction work does not include a single worker, who is the sole employee/worker on a job site."

On March 29, 2020, Governor Cuomo issued Executive Order No. 202.13, which modified the treatment of construction-related activities under prior Executive Orders. This Executive Order clarified that "construction which was an essential service not subject to the in-person work restrictions is modified to provide only **certain** construction is considered exempt from the in-person restrictions as of March 28, 2020." The Order further acknowledged ESD's authorization to determine which construction projects are essential and thus exempt from the in-person workforce prohibition.

Notably for the solar industry, ESD has also clarified the status of construction projects conducted by local government entities. [2] Local governments are deemed essential under the Governor's PAUSE Order; however, ESD directed that, "to the greatest extent possible, local governments should postpone any non-essential projects and only proceed with essential projects when they can implement appropriate social distancing and cleaning/disinfecting protocols." Construction work qualifies as "essential" if it (a) has a nexus to health and safety, (b) is in response to the COVID-19 crisis or (c) supports the "broader essential services required to fulfill critical operations." Based on this nexus requirement, most solar projects under construction on land leased by a municipality or school district should not be considered subject to the municipality exemption, and construction activities for such projects likely must also cease.

II. Utility Interconnection Deadlines

According to the New York Solar Energy Industry Association (NYSEIA), utilities are continuing to process interconnection applications remotely. Distributed generation field work that was previously underway must cease as a result of ESD's March 31 guidance. As such, developers should anticipate delays in their construction timelines.

The solar industry continues to work directly with the Department of Public Service (DPS) and others in state government with respect to a temporary hold on certain interconnection payment deadlines. NYSEIA reports that it expects an Order from the Commission regarding a tolling of the Standard Interconnection Requirement deadline for developers to provide

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to the utility a 75% security payment for any upgrades required for the facility. Such a delay is meant to, among other things, ensure that certain developers can maintain cash flow to preserve jobs during this time.

III. Contract Deadlines

NYSERDA Contracts

NYSERDA issued a notice to all contractors that, in accordance with Governor Cuomo's PAUSE Executive Order, it is placing all on-premises work by contractors in the residential, commercial, and industrial clean energy programs on hold until April 19, 2020. The temporary program pause is relevant *only* to energy efficiency businesses and does *not* include contractors working under the NY-Sun, Large Scale Renewables, Offshore Wind, Energy Storage, Electric Vehicle Infrastructure, or NY Green Bank Programs.

According to the notice, NYSERDA is expected to provide flexibility on certain contract timelines, extensions, and partial payments for work completed to date. NYSERDA is continuing to accept project applications and deliverables, and will continue to make funding available for completed work.

NYSERDA is also planning to waive certain project completion deadlines to ensure that projects already underway will not lose their incentives for failure to complete their in-service deadlines. For retail battery storage projects, the NYSERDA contracts typically require that the systems be complete two years from contract award. NYSERDA intends to issue further guidance on how contractors can ensure that they proceed with the requirements of their NYSERDA contracts without missing milestone payments or the entirety of their incentives.

To learn more about renewable energy construction contracts and how it may affect your business, please contact Noah Shaw (518.736.2924) or Dan Spitzer (716.848.1420).

Please check our Coronavirus Resource Center to view many other alerts our attorneys in various practice areas have published on topics related to the pandemic.

If you received this alert from a third party or from visiting our website, and would like to be added to our Renewable Energy mailing list, or any other mailing list, please visit us at: <https://forms.hodgsonruss.net/sign-up-for-email-and-other-communications..html>

[1] The updated guidance can be found here: https://esd.ny.gov/sites/default/files/ESD_EssentialEmployerFAQ_033120.pdf

[2] We have issued client alerts specific to local governments which can be found here.