

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>

MODEL STATUTE EXPEDITING THE SITING OF UTILITY-SCALE RENEWABLE ENERGY GENERATING FACILITIES

Bill No. [Number]

Sponsored by [Sponsor]

AN ACT OF THE [LEGISLATIVE BODY] OF [STATE]

In relation to the rapid and efficient siting of utility-scale facilities for the generation of renewable electricity and energy storage systems

Section 1. Legislative findings and policy.

a. The Legislature finds that climate change, which is primarily the result of Greenhouse Gas emissions through, among other things, the burning of fossil fuels for the purpose of generating electricity, poses a substantial threat to the natural resources of the State, as well as the health and wellbeing of the people of the State.

b. The Legislature finds that, in order to prevent the most catastrophic effects of climate change, the United States, as one of the world's largest emitters of Greenhouse Gases, must significantly reduce its reliance on fossil fuel-generated electricity to achieve emissions reductions

capable of meeting global targets such as those set forth in the United Nations Framework Convention on Climate Change, the Paris Agreement, and other international conventions.

c. *[Option #1- Where the state has an established emissions reduction goal]* The Legislature finds that, in order to achieve the carbon emission goals established in [cite statute], and to maximize its contribution to the United States' reductions of such emissions, the State must significantly reduce its Greenhouse Gas emissions from electricity generation by [insert year used in statute setting goal].

[Option #2- Where the state does not have an established emissions reduction goal] The Legislature finds that, to maximize its contribution to the United States' reductions of such emissions, the State must significantly reduce its Greenhouse Gas emissions from electricity generation by the year 2040.

d. The Legislature finds the development of utility-scale electricity generation from renewable sources and short-term energy storage facilities, such as pumped storage, large-scale battery storage, and other such technologies, are necessary to significantly reduce Greenhouse Gas emissions from electricity generation by the year 2040.

e. It is therefore the policy of the State that utility-scale facilities for the generation and storage of renewable energy be constructed within the State in the most rapid and efficient manner possible.

Section 2. Definitions.

a. The term "Applicant" shall mean a person who submits a Siting Application, as defined herein.

b. The term “Renewable Energy Source” shall mean a source of energy capable of being utilized to generate renewable electricity. The term shall include solar, wind, and any other source designated by the Board pursuant to Section 4(e).

c. The term “Greenhouse Gas” shall mean any gas capable of trapping sunlight and heat within the Earth’s atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, ozone, chlorofluorocarbons, and hydrofluorocarbons.

d. The term “Municipality” shall mean any county, town, village, city, or other subdivision of [State] that has the authority to promulgate zoning ordinances under [State]’s Zoning Enabling Statute.

e. The term “Renewable Generation Facility” shall mean, collectively or individually, (1) any structure, installation, or other facility that is constructed in [State] for the purpose of generating electricity from any Renewable Energy Source, (2) any structure, installation, or other facility that is constructed in [State] for the utility-scale storage of electricity generated from one of the foregoing sources for the purpose of later redeployment into the grid, and (3) any new transmission facilities that must be constructed to connect electricity generated from one of the foregoing sources to the State’s high-voltage transmission grid.

f. The term “Siting Application” shall mean an application for the siting of a Renewable Generation Facility, as further provided in Section 5(b).

g. The term “Utility Scale Renewable Generation Facility” shall mean a Renewable Generation Facility that has a generating capacity of 25 megawatts or more.

Section 3. The Renewable Energy Siting Board.

[Subsections a through d only applicable if the state does not currently have an agency responsible for siting renewable energy]

a. There is hereby created within the [State energy department] a Renewable Energy Siting Board (the “Board”).

b. The Board shall consist of seven members each serving for staggered four-year terms. The members of the Board shall consist of: (1) the State Secretary of Energy, (2) the State Secretary of [the Interior/Land Use], (3) *[Option #1- If the state has a council/body responsible for meeting the state’s climate goals]* the Chairperson of the State’s Climate Council *[Option #2- If the state has no such body]* the State Secretary of Environmental Protection, (4) the Chairperson of the State Public Utilities Commission, and three individuals appointed by the Governor.

c. All decisions made by the Board pursuant to this Act shall be made by a majority of the Board members present, with four Board members necessary to form a quorum.

d. When considering a Siting Application for a Utility-Scale Renewable Generation Facility pursuant to Section 6, the Board shall have the discretion to appoint a three-person panel consisting of two members of the Board and one representative of the Municipality in which all or most of the facility is to be located to consider the Application and make a recommendation to the Board. The recommendation made to the Board shall be supported by a majority of the panel, and will then be subject to a decision of the full Board as set forth in Subsection c.

e. The Legislature shall appropriate to the Board on an annual basis those funds necessary for the compensation of the three Board members appointed by the Governor, and for the functions of the Board set forth in this Act, including the hiring of staff.

Section 4. Authority of the Board.

a. The Board shall have the authority to consider Siting Applications for Utility-Scale Renewable Generation Facilities generating up to 75 megawatts of electricity, upon the election of the Applicant, and shall have the exclusive authority to consider Siting Applications for Utility-Scale Renewable Generation Facilities generating 75 megawatts or more of electricity. The Board shall also have the exclusive authority to consider Siting Applications for Renewable Generation Facilities located entirely on State-owned or leased lands, even if the interconnection equipment disclosed pursuant to Section 5(b)(iv) and facilities connecting such a Renewable Generating Facility to the high-voltage transmission system are not located on State-owned or leased lands.

b. Within one year of the enactment of this act, the Board shall designate priority areas for the siting of Utility-Scale Renewable Generation Facilities (“Priority Areas”). All final determinations regarding the designation of Priority Areas shall be published in the State Register. The Priority Areas shall be selected based on substantial evidence in the record, and shall be selected based on the following factors:

- i. The Renewable Energy Source or Sources suitable for the putative Priority Area;
- ii. The amount of land necessary to accommodate the siting of one or more Utility-Scale Renewable Generation Facilities, as defined in Section 2(g);
- iii. The current predominant uses of the putative Priority Area, and whether the form or forms of renewable generation identified in Subsection i will allow for the continued use of the putative Priority Area for its current predominant use;
- iv. The economic and social profile of persons living in and within five miles of the putative Priority Area, and whether the designation of the Priority Area would raise substantial environmental, racial, or socioeconomic justice concerns;

v. The critical habitats within the putative Priority Area, if any, of any endangered and/or threatened species as designated under federal law, State law, or any treaty obligation of the United States and any significant impact on the species of siting one or more Utility-Scale Renewable Generation Facilities in the putative Priority Area.

vi. The historical, and/or cultural value of the putative Priority Area;

vii. Any applicable tribal or federal consultation requirements;

viii. Any military, air traffic, or other established federal uses of the putative Priority Area.

c. [*Option #1- If the State has a current renewable energy goal*]- The total area of land designated pursuant to Subsection (b) shall be capable of accommodating sufficient Utility-Scale Renewable Generation Facilities to generate at least 85% of the State's renewable energy goal. The Board shall base its calculation of the electricity that can be generated from the designated Priority Areas on the best available information and shall publish its calculation in the State Register. Prior to making that calculation, the Board shall consult with the State departments of [the Interior/Land Use], Environmental Protection, and the State Public Service Commission, to obtain the best available information.

[*Option #2- If the State does not have a current renewable energy goal*]- The total area of land designated pursuant to Subsection (b) shall be capable of accommodating sufficient Utility-Scale Renewable Generation Facilities to generate at least 85% of the State's projected energy usage by the year 2040. The Board shall base its calculation of the electricity that can be generated from the designated Priority Areas on the best available information and shall publish its calculation in the State Register. Prior to making that calculation, the Board shall consult with the

State departments of [the Interior/Land Use], Environmental Protection, and the State Public Service Commission, to obtain the best available information.

d. The Board shall have the authority to promulgate rules and regulations necessary to implement this act. Such rules and regulations shall be consistent with the State's policy of advancing the rapid adoption of renewable energy, and shall not create unreasonable barriers to the rapid siting of Utility Scale Renewable Generation Facilities.

e. The Board shall have the authority to identify additional Renewable Energy Sources as defined in Section 2(b) if the Board finds, upon the best available information, that (i) the energy source may be used to generate electricity without emitting Greenhouse Gases, (ii) the energy source may be utilized and/or extracted with minimal impact on the State's natural resources, and (iii) the energy source is capable of being utilized in the State to generate at least 25 megawatts of electricity using that energy source. The Board shall also identify any storage and/or transmission facilities that would be necessary to make at least 25 megawatts of electricity from the energy source available for consumption within the State.

Section 5. Siting Application Requirements

a. The Board and any Municipality pursuant to Section 7(a) shall exclusively consider Siting Applications as defined in this Section.

b. Pursuant to Section 2(f), a completed Siting Application shall include:

i. The identity and contact information of the Applicant, along with any known contractors, subcontractors, or financing institutions.

ii. A description of the proposed Renewable Generation Facility, including:

A. The proposed location of the Renewable Generation Facility;

B. The type of Renewable Energy Source to be utilized at the Renewable Generation Facility;

C. The estimated generating capacity of the proposed Renewable Generation Facility;

D. The projected date that the Renewable Generation Facility will enter into service.

iii. If the proposed location of the Renewable Generation Facility is not in a Priority Area as designated pursuant to Section 4(b), a land impact statement addressing all the factors set forth in Section 4(b).

iv. A statement of the Applicant's plans for connecting the proposed Renewable Generation Facility to the transmission grid, including any interconnection agreements the Applicant anticipates entering.

v. A statement of the Applicant's technical ability to construct and operate the proposed Renewable Generation Facility, including the Applicant's experience constructing and operating similar facilities.

vi. The estimated cost of completing the proposed Renewable Generation Facility.

vii. A statement of the Applicant's ability to obtain financing adequate to meet the costs set out in Subsection (vi).

viii. The Applicant's plans for the decommissioning of the proposed Renewable Generation Facility, including an estimate of when the Applicant expects to decommission the facility and a statement of any anticipated impacts on the environment of the proposed site and public health of decommissioning the facility, if applicable.

Section 6. Siting Application Approval Procedures

a. When the Board receives a Siting Application, the Application shall be considered complete when it satisfactorily includes all of the elements set out in Section 2(d). If the Board receives an incomplete Siting Application, the Board shall notify the Applicant in writing within 14 days of receipt of the incomplete Siting Application, with specific instructions as to what steps the Applicant shall take for the Siting Application to be deemed complete. The Applicant shall then have 14 days from receipt of the notice to complete the Siting Application, after which time the Siting Application shall be rejected without prejudice. The Board shall notify the Applicant in writing that its Siting Application has been deemed complete within 7 days of the Board's determination that the Siting Application is complete.

b. Following notification that a Siting Application has been deemed complete, the Board shall solicit written comments regarding the Siting Application and hold at least one public hearing in the Municipality where the proposed Utility-Scale Renewable Generation Facility is to be constructed. The Board shall provide public notice of an opportunity to comment and notice of a public hearing within 14 days after notification of a complete Siting Application. All comments shall be submitted to the Board and all hearings held within 90 days after notification of a complete Siting Application.

c. The Board shall issue a written decision regarding a Siting Application no more than 180 days after notification that the Siting Application is complete per Subsection (a). The written decision shall be provided to the Applicant, as well as all other persons who have requested a copy of the decision in writing, and shall be published in the State Register.

d. The Board shall make its decisions regarding the approval of a completed Siting Application based on substantial evidence in the record. The Board shall approve the Siting Application unless there is clear and convincing evidence that the State's policy of promoting rapid adoption of utility-scale renewable generation is outweighed by one or more of the following considerations:

i. Specific, identified harms to the soil, water, air, plants, or wildlife in the affected area that are substantially likely to result from the construction of the proposed Utility-Scale Renewable Generation Facility, and which cannot be prevented through reasonable mitigation measures;

ii. Specific, identified harms to the unique historical or cultural value of the affected area that are substantially likely to result from the construction of the proposed Utility-Scale Renewable Generation Facility, and which cannot be prevented through reasonable mitigation measures;

iii. Specific, identified harms that are substantially likely to disproportionately affect racial or socioeconomic minorities and/or tribal communities in the affected area, and which cannot be prevented through reasonable mitigation measures;

iv. Specific, identified conflicts with military, air traffic, or other established federal uses for the affected area, and which cannot be prevented through reasonable mitigation measures; or

e. If a Siting Application proposes the construction of a Utility-Scale Renewable Generation Facility entirely within a Priority Area designated pursuant to Section 4(b), the Board may only reject the Siting Application if there is clear and convincing evidence that the State's policy of promoting rapid adoption of utility-scale renewable generation is outweighed by one or

more of the considerations set forth in Subsection (d) arising from facts that could not reasonably have been raised when the Priority Area was designated. If the Utility-Scale Renewable Generation is partially within a Priority Area, then for any portion of the facility within the Priority Area the same limitation applies. For purposes of this Subsection, a Utility-Scale Renewable Generation Facility is entirely within a Priority Area even if even if the interconnection equipment disclosed pursuant to Section 5(b)(iv) and facilities connecting such a Renewable Generating Facility to the high-voltage transmission system are not located within the Priority Area.

f. As used in Subsection (d) above, the “affected area” with regard to any Siting Application shall be:

(i) For a proposed Utility-Scale Renewable Generation Facility within a Priority Area, the site of the proposed Utility-Scale Renewable Generation Facility, and the area within five miles of the Utility-Scale Renewable Generation Facility;

(ii) For a proposed Utility-Scale Renewable Generation Facility not within a Priority Area, any area where the development of the Facility would have a reasonably foreseeable detrimental effect on the environment, social, historical, or economic characteristics of the area.

For purposes of this Subsection, a Utility-Scale Renewable Generation Facility is entirely within a Priority Area even if the interconnection equipment identified pursuant to Section 5(b)(iv) and the facilities connecting such a Renewable Generating Facility to the high-voltage transmission system are not located within the Priority Area.

g. The Board shall publish its decision regarding a Siting Application in the State Register. If the Board approves a Siting Application, its published decision should include the terms set forth in Subsection (h).

h. If the Board approves a Siting Application, concurrently with the publication of the Board's decision in the State Register the Board must issue to the Applicant a Siting Authorization Certificate containing:

- i. The location of the approved Utility-Scale Renewable Generation Facility;
- ii. The approved Renewable Energy Source to be utilized at the Utility-Scale Renewable Generation Facility;
- iii. The date on which construction of the Utility-Scale Renewable Generation Facility may commence and an estimate of when it is expected to be completed; and
- iv. If applicable, any reasonable mitigation measures imposed by the Board so that the State's policy of promoting rapid adoption of utility-scale renewable generation may outweigh the factors set forth in Subsection (d).

i. If the Board rejects a Siting Application under any of the considerations set forth in Subsection (d), it shall identify such consideration or considerations and explain the bases for rejection. The Applicant shall then have 30 days in which to revise its Siting Application. The Board shall then have an additional 60 days to review the revised Siting Application; this review shall be limited to the revisions made by the Applicant in response to the Board's rejection of the initial Siting Application. The Board shall then have 30 days to accept or reject the revised Siting Application.

Section 7. Municipal Authority

a. Municipalities shall have exclusive authority to consider all Siting Applications for Renewable Generation Facilities with the capacity to generate between 5 and 25 megawatts of electricity and shall, upon the election of the Applicant, have authority to consider all Utility-Scale

Generation Facilities with the capacity to generate up to 75 megawatts of electricity. Where the proposed site of the Renewable Generation Facility is located within two or more Municipalities, the following conditions apply:

- i. If the proposed Renewable Generation Facility is located in a county of the State and a town, village, city, or other political subdivision that is entirely within the aforementioned county, the county maintains jurisdiction;

- ii. If the proposed Renewable Generation Facility is located within two or more counties, and the proposed facility is a Utility-Scale Renewable Generation Facility, the Board has exclusive jurisdiction; and

- iii. If the proposed Renewable Generation Facility is located within two or more counties, and the proposed facility is not a Utility-Scale Renewable Generation Facility, each county may consider the portion of the facility within its borders or the Municipalities may, by mutual consent of the authorities that consider Siting Applications pursuant to Subsection (b) and the Applicant, submit the Siting Application to the Board.

- b. Each Municipality shall have the authority to establish its own municipal renewable energy siting board for the consideration of Siting Applications, which shall consist of seven members serving four-year terms. The Municipality may select the method of appointing members of its municipal renewable energy siting board. If the Municipality fails to establish a municipal renewable energy siting board, then Siting Applications shall be considered by the municipality's zoning board.

- c. Municipalities shall have the authority to establish procedures for the review of Siting Applications, but must provide the Applicant with a decision on the Siting Application in writing

within 180 days of the completion of the Siting Application and provide for publication of any final decisions on Siting Applications.

d. Any procedures established by a Municipality pursuant to Subsection (c) shall be consistent with the State's policy of advancing the rapid adoption of renewable energy, and shall not create unreasonable barriers to the rapid siting of non-Utility Scale Renewable Generation Facilities.

e. A Municipality shall approve a Siting Application unless it makes written findings based upon substantial evidence in the record that the State's policy of advancing the rapid adoption of renewable energy would be outweighed by a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact. The findings shall include the basis for the rejection of potential feasible alternatives of preventing the adverse impact.

Section 7. Appellate Review

a. The [State] Supreme Court (the "Court") shall have exclusive jurisdiction to review all final decisions on Siting Applications made by the Board, and the designation of Priority Areas by the Board pursuant to Section 4(b). All determinations not identified in this Subsection shall be reviewed by a court of ordinary jurisdiction in accordance with the State's Administrative Procedure Act.

b. For purposes of this Section, the determinations set forth in Subsection (a) shall be final when:

i. For decisions on Siting Applications by the Board, the publication of the Board's determination as set forth in Section 6(g);

ii. For the designation of Priority Areas, the publication of designated Priority Areas in the State Register as set forth in Section 4(b).

c. Any petitions for review on determinations set forth in Subsection (a) shall be filed in the Court no later than 30 days after the relevant authority has made a final decision. Upon the expiration of the 30-days limitation period, the Court shall consolidate any petitions on the same final determination and schedule a hearing on the merits based solely on the written record developed before the Board. The Court shall expedite its decision on the petition for review to the extent possible.

d. The Court shall affirm the determinations set forth in Subsection (a) unless the Court finds, solely on the record, that:

i. For decisions of the Board on Siting Applications, the Board's decision demonstrates a clearly erroneous analysis of the factors set forth in Section 6(d);

ii. For the designation of Priority Areas, the Board's decision demonstrates a clearly erroneous analysis of the factors set forth in Section 4(b) or is inconsistent with the State's policy of advancing the rapid adoption of renewable energy;

iii. For all determinations set forth in Subsection (a), the decision of the relevant authority was inconsistent with the procedures set forth herein or established by the regulations of the relevant authority, and the procedural deficiency was not a harmless error.

e. If the Court does not affirm one of the determinations set forth in Subsection (a), the Court shall vacate the decision of the relevant authority and remand to the authority with instructions to issue an updated decision at the earliest practicable date. However, where the Court vacates the designation of a Priority Area pursuant to Section 4(b), the Court must clearly indicate

which putative Priority Area(s) or sections of a Priority Area are affected by the Court's order. All Priority Areas or sections of a Priority Area not affected by the Court's order shall remain in effect.