Environmental Law Update

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2021 UPDATE ON RENEWABLE ENERGY FACILITY SITING IN NEW YORK

CAASNY 2021 ANNUAL MEETING

SEPTEMBER 14, 2021

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INTRODUCTION

- 2011: Public Service Law Article 10 enacted to speed up siting of power plant of 25MW and greater
- April 2020: New York enacted the Accelerated Renewable Energy Growth and Community Benefit Act (Executive Law §94-c) to supplant Article 10 and streamline the process
- March 2021: §94-c Regulations Issued

PSL ARTICLE 10

- Applies to non-renewable and renewable energy facilities of 25 MW or greater
- State Board on Electric Generation Siting and the Environment ("Siting Board")
- Oversees siting process and issues a Certificate of Environmental Compatibility and Public Need
- Concept: one-stop permitting with specific steps and time frames
- Supplants SEQRA

PSL ARTICLE 10

- Was Intended to ensure broad public involvement opportunities including Intervenors
  - Municipalities and residents where facility is located
- Intervenor Funding
  - Paid by applicant
  - For legal and expert fees and expenses
  - Minimum of 50% funding to municipalities

PSL ARTICLE 10

- Siting Board must make certain "Explicit Findings" regarding:
  - Nature of probable environmental impacts of construction and operation
  - Cumulative environmental impacts on:
    - Ecology, air, ground and surface water, wildlife, and habitat
    - Public health and safety
    - Cultural, historical and recreational resources
    - Transportation, communication, utilities and other infrastructure

PSL ARTICLE 10

- Siting Board must determine that:
  - Facility is a "beneficial addition to or substitute for" generation capacity
  - Adverse environmental effects "will be minimized or avoided to the maximum extent practicable"
  - Facility is in compliance with local laws and regulations **unless:**
    - Local law is "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality"

PSL Article 10
Hecate Energy Greene 1 LLC

August 16, 2021 Article 10 Recommended Decision

* Application of Hecate Energy Greene 1 LLC (17-F-0619)
* ALJs Ruled that:
  * The construction/operation of the Facility will be a beneficial addition to electric generation and will be in the public interest
  * After review of Probable Environmental Impacts regarding ecology, wildlife, water, agricultural and cultural, historic and recreational resources and visual impacts and found that, subject to certain certificate conditions, the project minimizes or avoids such impacts to the maximum extent practicable.
* ALJs Ruling on Local Law Compliance:
  * Recommended that waivers of a range of local law requirements under the municipal solar law, despite municipal opposition, as being unreasonably burdensome.

PSL Article 10
Hecate Energy Greene 1 LLC

August 16, 2021 Article 10 Recommended Decision

Glare:

* Local Solar Law required that there be no "unreasonable glare" or beyond the boundaries of the lot on which the panels were located and that any "utility-scale solar energy system shall prevent the misdirection and/or reflection of solar rays onto neighboring properties, public roads and public parks in excess of that which already exists."
* ALJs found that the application fails to demonstrate that there will be **no glare** at the locations identified in the local law and seemingly concedes that some glare or reflection will occur.
* **ALJs recommend that the Siting Board deny the certificate because the record does not demonstrate compliance with the local law and because the Applicant never requested waiver of this provision, and, thus, the Siting Board cannot make the requisite finding that the facility will comply with all substantive local laws**

Executive Law §94-c

- April 2020: "Accelerated Renewable Energy Growth and Community Benefit Act" codified in Executive Law 94-c
  - Aims to help achieve State CLCPA targets for renewables
  - New and very streamlined permitting scheme for major renewable energy projects of 25 MW and greater
- Creates an entirely new office in the New York Department of State:
  - Office of Renewable Energy Siting ("ORES")
- Executive Director of ORES solely responsible for approval of project and issuance of the permit to construct and operate.
- **Reduces Public Involvement**

Executive Law §94-c

- ORES promulgated 94-c Regulations and Uniform Standards and Conditions in March 2021
  - To implement siting program
  - Regarding design, engineering, construction and operation of major renewable projects
  - To avoid or minimize significant adverse environmental impacts to "maximum extent practicable" *common* to each type of renewable facilities
- ORES can set site-specific conditions to address environmental impacts not completely address by uniform standards and conditions

Executive Law §94-c

Permitting Process and Time Frames Generally

- Application Filed
- Within 60 days: Application must be deemed complete
- Within 60 days later: ORES to **publish *draft permit conditions*** for 60 day public comment period
- 1 Year from complete application:
  - ORES must make a final determination *or*
  - *Default:* Permit automatically issued with conditions in draft permit
- 6 Months: ORES to make final determination *or* permit is automatically issued for projects on abandoned commercial sites, brownfields, landfills, and dormant electric generating facilities

Executive Law 94-c

Local Agency Funding Awards

- $1,000/MW
- Awarded to
  - "Local Agencies" including County, Towns, Cities, etc.
  - "Community Intervenors"
- Funds awarded for participation in public comment periods and hearing proceedings
- Funds to be awarded to municipalities to determine if project will be in compliance with local laws and regulations
- Municipalities must receive at least 75% of Funds (contrast to 50% under Article 10)

Executive Law §94-c

Compliance with Local Laws

- Ores Draft Permit Identifies applicable local laws and states whether or not such local law should apply
- Local law will not apply if ORES finds that it is **"unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility."**
- Much less stringent standard than Article 10 standard:
  - "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality"

Executive Law §94-c

Issues Determination Procedure under 19 NYCRR §900-8.3:

* Purpose of the issues determination procedure is:
* (i) to receive argument on whether party status should be granted to any petitioner;
* (ii) to narrow or resolve disputed issues of fact without resort to taking testimony
* (iii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues
* (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues

Executive Law §94-c

Party Submissions:

* Petition for Full or Amicus Party Status by Municipal and Intervenor Parties (Citizens Groups)
  * For each issue Petition must include an offer of proof "specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect [to] each issue identified."
* Municipality Statement of Local Law Compliance
  * Whether proposed facility will be sited, constructed and operated in compliance with municipalities' applicable substantive laws and regulations
* Applicant's Issues Statement
  * Identifying issues for adjudication in the Draft Permit issued by ORES
* ORES Response to Submissions
  * Opinion on whether any issues raised should be subject to adjudication
* Applicant's Response to Party Status Petitions and Local Law Compliance Statement

Executive Law §94-c

Standard for Adjudicable Issues under 19 NYCRR §900-8.3(c)(1):

* An issue is adjudicable if:
  * It relates to a substantive and significant dispute between ORES Staff and the applicant over a proposed permit condition
  * Public comments on a draft siting permit condition raise a substantive and significant issue;
  * It relates to a matter cited by ORES Staff as a basis to deny the siting permit and is contested by the applicant; or
  * **It is proposed by a potential party, including municipality, and is both substantive and significant**

Executive Law §94-c

Substantive and Significant Issues Under 19 NYCRR §900-8.3(c)(2) and (3)

* An issue is "Substantive" if:
  * There is "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry."
    * ALJ shall "consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination and any subsequent written or oral arguments authorized by the ALJ."
* An issue is "Significant" if:
  * It "has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions."

Executive Law §94-c
Heritage Wind, LLC

Matter of Heritage Wind LLC (Matter 21-00026)

* First 94-c Issues Determination Ruling (July 2021)
* Case Transferred from Article 10 after DPS deemed application complete
* "Initial" Parties:
  * 2 Citizen Groups (Clear Skies Above Barre, Save our Shores)
  * Town of Barre and Orleans County (working jointly)
* March 2021 ORES issued Draft Permit with conditions and statement of "waiver" of parts of Town's local Wind Law
* March 2021 ALJs issued Notice of Commencement of Issues Determination Procedure pursuant to 19 NYCRR §900-8.2
* March 2021 Ruling on Local Agency Funding

Executive Law §94-c
Heritage Wind, LLC

Citizen Groups Petition for Party Status/Issues Determination

* Asserted that multiple issues were substantive and significant including:
  * Impacts to birds, bats and threatened and endangered species
  * Inadequacy of Visual Impact Assessment
  * Local Law compliance

July 8, 2021:

* ALJ Ruling: **Party Status Denied**
  * Citizen Groups failed to raise any adjudicable issue
  * Citizen Groups will not make a meaningful contribution with regard to any adjudicable issue raised by another party

Executive Law §94-c
Heritage Wind, LLC

Town and County Joint Petition for Party Status/Issues Determination

* Asserted that multiple issues were substantive and significant:
  * Non-compliance with Town's Wind Law including:
    * ADLS (Aircraft Detection Lighting System) or similar lighting mitigation
    * Shadow Flicker
    * Nighttime noise standard and noise complaint resolution plan
    * Decommissioning plan and financial assurance calculation
  * Interference with Orleans County's planned affordable high-speed broadband internet communication system
* July 8, 2021 ALJ Ruling: **Party Status Denied**
  * No Substantive and Significant Issues for adjudication
  * County broadband system doesn't exist yet so cannot be an adjudicable issue.

Executive Law §94-c
Heritage Wind, LLC

Applicants Statement of Issues:

* Applicant objected to site-specific Draft Permit condition requiring applicant to submit a net conservation benefit plan for wintering habitat of the short-eared owl and northern harrier impacted within the Facility site
* ORES staff asserted this is needed but ORES staff failed to identify the factual basis in the record for its determination that occupied habitat exists on the site and will be adversely impacted by facility

ALJ Ruling: **Adjudicable Issue Exists**

* Applicant raises a "substantive and significant dispute" with ORES staff with respect to the factual basis for this requirement
  * Substantive because concerns applicant's ability to meet statutory or regulatory criteria concerning threatened and endangered species
  * Significant because it concerns ORES staff's proposal to impose a significant permit condition

Executive Law §94-c

Host Community Benefits

- Final Siting Permit will requires developer to provide a "host community benefit" which may be:
  - A host community benefit as determined by the PSC or
  - Another project as determined by ORES or
  - One "subsequently agreed to" between the developer and the host community

Off-Site Mitigation

- Permit may require environmental impacts to be mitigated by off-site mitigation effort funded by developer
- Permit may require payment into Endangered And Threatened Species Mitigation Fund to facilitate a "net conservation benefit"

Questions and Answers

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STATE OF NEW YORK
OFFICE OF RENEWABLE ENERGY SITING

DMM Matter Number 21-00026 - Application of Heritage Wind, LLC for a Permit for a Major Renewable Energy Facility Pursuant to Section 94-c of the New York State Executive Law to Construct a 184.8 MW Wind Energy Facility Located in the Town of Barre, Orleans County.

RULING ON ISSUES AND PARTY STATUS

(Issued July 8, 2021)

RICHARD A. SHERMAN and ASHLEY MORENO, Administrative Law Judges:

I. BACKGROUND AND PROCEEDINGS

On January 13, 2021, Heritage Wind, LLC (applicant), filed an application pursuant to Executive Law §94-c to transfer a pending Public Service Law (PSL) article 10 application to the New York State Office of Renewable Energy Siting (Office or ORES) for a permit that would authorize it to construct and operate a wind energy facility (Facility or Project) in the Town of Barre, Orleans County. Because an application completeness determination was issued in the PSL article 10 proceeding, the transfer application was deemed complete upon filing.

The proposed Facility would consist of up to 33 wind turbines generating up to 184.8 megawatts (MW) of electricity and would include approximately 12 miles of access roads, two permanent meteorological towers, approximately 36 miles of collection lines from the wind turbines to the collection substation, a temporary construction laydown yard of approximately 13 acres, an operations and maintenance (O&M)

facility consisting of two buildings totaling approximately 4,000 square feet, and other components.

On March 15, 2021, the assigned Administrative Law Judges (ALJs) issued a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and commencement of issues determination procedure (Combined Notice) and ORES issued a draft permit (Draft Permit). The Office posted the Combined Notice and the Draft Permit on the Department of Public Service's Document and Matter Management (DMM) system on March 15, 2021. Applicant published the Combined Notice in The Daily News on March 18, 2021 and in the Lake County Pennysaver on March 28, 2021. The Combined Notice invited members of the public to comment on the proposed Facility and the Draft Permit, either orally at the public comment hearing held on May 20, 2021 or by submitting written comments to the Office by May 21, 2021.

The Combined Notice also advised that, in accordance with 19 NYCRR §900-8.3(b), the assigned ALJs would conduct a pre-adjudicatory issues determination procedure to determine party status for persons who properly filed for party status and to determine which issues, if any, will be adjudicated in this matter. Persons seeking party status were directed to file a written petition and brief in support of their petitions on or before May 18, 2021. Applicant and assigned ORES staff are mandatory full parties to this proceeding. Other State and local agencies are mandatory full parties if they were consulted during the pre-application or application process, or if issues related to the jurisdiction or authority of those agencies are joined for adjudication.

II. Summary of Public Comments

In accordance with the Combined Notice, we convened the public comment hearing on May 20, 2021, via Webex videoconferencing. Over 60 individuals attended and twenty-six people spoke at the hearing, including representatives of the American Bird Conservancy, Sierra Club, Rochester Birding Association, Interfaith Climate Community, Save Our Environment Limited, and Local Union 435. The commenters were split between project opponents and supporters, with a majority opposed.

Concerns were raised regarding: the proximity of the Project to ecologically sensitive areas; potential environmental impacts, including those on avian species; potential quality of life and health impacts to local residents, particularly those with pre-existing conditions; the Project's conformance to existing local laws; the sufficiency of setbacks; the sufficiency of wind in the area; water quality; impacts to air traffic and the local skydiving clubs; potential loss of agricultural land; and vague economic benefits. Those supporting the Project stated that: additional renewable energy is necessary to combat climate change and global warming; the Project will help meet renewable goals and satisfy energy demand; the Project will provide economic benefits to the community, farmers and local laborers; renewable generation is better for human and animal health than fossil fuel generation facilities.

By the close of the public comment period on May 21, 2021, ORES received approximately 140 written comments. Comments were filed both in support and in opposition to the

Project, with several commenters filing multiple comments. Many of the comments mirrored those raised at the public comment hearing. In addition to those described above, commenters also raised concerns with: the Executive Law §94-c process; the disposal of wind turbines at the end of their useful lives; visual impacts; impacts to property values; potential to disrupt communications systems, including to the radar of marine vessels in the Great Lakes; the sufficiency of existing electric infrastructure to support the Project; noise impacts; the potential for turbines to catch fire; impacts to tourism; the reliability of renewable energy; the life-span of the Project; potential improprieties between applicant and Town Board members; impacts of the Clarendon-Linden fault line; and the amount of Town property that will be dedicated to renewable energy. In addition to the comments favoring the Project addressed above, written comments also highlighted the Project's advancement of Climate Leadership and Community Protection Act (CLCPA) goals and provided a letter supported by 294 individuals. Other commenters suggested alternate generation sources, such as hydroelectric or nuclear power.

III. Petitions for Party Status and Proposed Issues for Adjudication

In accordance with the Combined Notice, Clear Skies Above Barre, Inc. (CSAB); Save Ontario Shores, Inc. (SOS); and the Town of Barre (Town) and Orleans County (County), jointly, timely filed petitions for full party status. The Town also filed a statement of compliance with local laws and regulations. Applicant filed a statement of issues. Through these documents,

the parties and potential parties proposed numerous issues for adjudication, each of which are discussed in detail below.

The New York State Department of Transportation (NYSDOT) filed an untimely request for party status on May 19, 2021 using a New York State Public Service Commission party status request form. NYSDOT's request is denied; the request was untimely, does not conform to the substantive requirements for a petition for party status, and was not properly filed and served in accordance with the Combined Notice and regulations.

IV. ISSUES RULINGS

A. Issues Determination Procedure

This ruling addresses issues that were raised by parties or potential parties during the issues determination procedure established under 19 NYCRR §900-8.3(b). In accordance with 19 NYCRR §900-8.3(b)(2), the purpose of the issues determination procedure is: (i) to receive argument on whether party status should be granted to any petitioner; (ii) to narrow or resolve disputed issues of fact without resort to taking testimony; (iii) to receive argument on whether disputed issues of fact that are not resolved meet the standards for adjudicable issues; (iv) to determine whether legal issues exist whose resolution is not dependent on facts that are in substantial dispute and, if so, to receive argument on the merits of those issues; and (v) to decide any pending motions.

The standards for determining whether an issue is adjudicable are set forth under 19 NYCRR §900-8.3(c)(1) which states that, with certain limitations, an issue is adjudicable if:

(i) It relates to a substantive and significant dispute between Office Staff and the applicant over a proposed term or condition of the draft siting permit, including uniform standards and conditions;

(ii) Public comments, including comments provided by a municipality, on a draft siting permit condition published by the Office raise a substantive and significant issue;

(iii) It relates to a matter cited by Office Staff as a basis to deny the siting permit and is contested by the applicant; or

(iv) It is proposed by a potential party and is both substantive and significant.

Pursuant to 19 NYCRR §900-8.3(c)(2), an issue is "substantive" if there is "sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry." This provision further states that, in determining whether an issue is substantive, "the ALJ shall consider the proposed issue in light of the application and related documents, the standards and conditions, or siting permit, the statement of issues filed by the applicant, the content of any petitions filed for party status, the record of the issues determination and any subsequent written or oral arguments authorized by the ALJ." Pursuant to 19 NYCRR §900-8.3(c)(3), an issue is "significant" if it "has the potential to result in the denial of a siting permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit, including uniform standards and conditions."

Where a potential party seeks full party status, it must file a petition in accordance with the provisions of 19 NYCRR §900-8.4(c)(1) and (c)(2). Pursuant to 19 NYCRR §900-8.4(c)(2), the petition must identify an issue that meets the standards for adjudication under 19 NYCRR §900-8.3(c), and must include an offer of proof "specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect [to] each issue identified."

In accordance with 19 NYCRR §900-8.3(c)(4), where Office staff has determined that a component of the proposed project, "as proposed or as conditioned by the draft siting permit, conforms to all applicable requirements of statute and regulation, the burden of persuasion is on the potential party proposing any issue related to that component to demonstrate that it is both substantive and significant."

The issues determination procedures under 19 NYCRR part 900 are modeled after similar provisions in New York State Department of Environmental Conservation's (NYSDEC's) permit hearing procedures under 6 NYCRR part 624. Accordingly, administrative decisions issued by NYSDEC under part 624 are instructive in the interpretation and application of the issues determination provisions under 19 NYCRR part 900. In that regard, the Commissioner of Environmental Conservation recently held:

> A potential party's burden of persuasion at the issues conference is met with an appropriate offer of proof supporting its proposed issues. . . . Judgments about the strength of the offer of proof must be made, among other things, in the context of the Department staff's analysis.

> An issues conference is not meant to merely catalogue areas of dispute, but rather is used to make qualitative judgments as to the strength of the offers of proof and related arguments. . . .
>
> With respect to the offer of proof, any assertions that a potential party makes must have a factual or scientific foundation. Speculation, expressions of concern, general criticisms, or conclusory statements are insufficient to raise an adjudicable issue. The qualifications of the expert witnesses that a petitioner identifies may also be subject to consideration at this stage, including for example their background and expertise with respect to the specific issue area(s). Even where an offer of proof is supported by a factual or scientific foundation, it may be rebutted by the application, the draft permit and proposed conditions, Department staff's analysis, or the record of the issues conference, among other relevant materials and submissions. In areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue.[1]

B. Clear Skies Above Barre Petition

-- General Objections

CSAB states that it objects to the proposed Facility for numerous "substantive, policy, and personal reasons" and that it will "oppose any project sited by the fundamentally flawed ORES process."[2] CSAB further asserts that ORES proceedings are "designed to inhibit or prevent local intervenors from participating," "fail to provide an opportunity

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[1] *Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, pp. 10-11 (NYSDEC) (quotation marks and citations omitted).

[2] DMM Item No. 37, CSAB Petition, pp. 5-6.

for adjudication of issues as of right[,] and fail to provide sufficient government oversight of the renewable energy development industry."[3]

CSAB does not present the foregoing objections as issues for adjudication and we do not treat them as such. We note, however, that the issues determination procedure under 19 NYCRR §900-8.3 is modeled after similar provisions that have been in use for many years by NYSDEC in permit hearings under 6 NYCRR §624.4.

-- Proposed Bird and Bat Issues

CSAB proposes the following three interrelated issues concerning the assessment, extent, and mitigation of adverse impacts to bird and bat species:

> Issue Number One: The scope and methodology of avian impact studies included in Exhibit 22 of the Application are flawed, under-represent potential significant adverse impacts, and provide insufficient information for ORES to determine whether the Draft Permit will result in sufficient mitigation of environmental impacts.[4]
>
> Issue Number Two: Likely impacts on birds and bats are potentially significant, adverse, and greater than presented in Exhibit 22 of the Application.[5]
>
> Issue Number Three: Based on local conditions, mitigation measures proposed in the Draft Permit are insufficient to avoid or mitigate potential

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[3] DMM Item No. 37, CSAB Petition, p. 6.

[4] DMM Item No. 37, CSAB Petition, p. 7.

[5] DMM Item No. 37, CSAB Petition, p. 10.

> significant adverse environmental impacts on birds and bats to the extent practicable.[6]

We note that these issues, as stated by CSAB, refer only to birds and bats generally without reference to threatened or endangered species. Further, CSAB's arguments in support of these proposed issues focus primarily on adverse impacts to birds and bats in general, without reference to species, or species status. Accordingly, our discussion regarding these three proposed issues will largely focus on birds and bats generally, without regard to threatened or endangered status.

CSAB cites the requirements of Executive Law §94-c(3)(d) as the basis for each of these three proposed issues.[7] Executive Law §94-c(3)(d) states that:

> the office, in consultation with the department of environmental conservation, shall identify those site-specific environmental impacts, if any, that may be caused or contributed to by a specific proposed major renewable energy facility and are unable to be addressed by the uniform standards and conditions. The office shall draft in consultation with the department of environmental conservation site specific permit terms and conditions for such impacts, including provisions for the avoidance or mitigation thereof, taking into account the CLCPA targets and the environmental benefits of the proposed major renewable energy facility, provided, however, that the office shall require that the application of uniform standards and conditions and site-specific conditions shall achieve a net conservation benefit to any impacted endangered and threatened species.

CSAB argues that, contrary to the provisions of §94-c(3)(d), neither applicant nor ORES has "sufficiently identified site-

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[6] DMM Item No. 37, CSAB Petition, p. 11.

[7] *See* DMM Item No. 37, CSAB Petition, pp. 7, 10, 11.

specific impacts to birds and bats" and that mitigation measures in the Draft Permit do not sufficiently avoid or mitigate site-specific impacts to birds and bats.[8]

-- Issue Number One: Scope and Methodology of Avian Impact Studies

CSAB states that it has identified numerous issues concerning ORES's ability to quantify site-specific impacts on birds and bats. CSAB argues that the record before ORES is deficient, "largely as the result of Heritage Wind's failure to provide accurate information in support of mandatory showings pursuant to 19 NYCRR §900-2.12, §900-2.13, or the Article 10 application requirements."[9] CSAB states that if its evidence is included in the record, "ORES will be required by statute to recognize greater than anticipated site-specific impacts, and may be required to deny the Permit application, or make major modifications to the draft permit including additional mitigation measures."[10]

CSAB's wildlife expert states that, "in [his] assessment, the baseline studies [undertaken by applicant] did not meet the standards of the earlier siting process, nor those of the Section 94-c Siting Process, nor those of scientific methods needed to achieving the studies' stated objectives."[11] He further states that applicant's studies "do not relate flight activity or flight behaviors to wind conditions or to proximity

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[8] DMM Item No. 37, CSAB Petition, pp. 8, 11.

[9] DMM Item No. 37, CSAB Petition, p. 10.

[10] DMM Item No. 37, CSAB Petition, p. 10.

[11] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 3.

to Iroquois National Wildlife Refuge and Oak Orchard Wildlife Management Area."[12]

CSAB's expert suggests that a number of additional studies are necessary to evaluate potential impacts of the proposed Facility on birds, bats and arthropods. He asserts that applicant's studies are "grossly inadequate [and] should be replaced by several years of wildlife studies committed to characterizing the inventory of species in the area and how volant wildlife use the aerosphere of the project site and its surroundings."[13] CSAB's expert proposes several additional studies using GPS telemetry, acoustic detectors, thermal-imaging, and behavior ecologists "to measure where and under what conditions volant animals interact intra- and inter-specifically in ways that could distract their attention from the threat of wind turbines."[14]

Applicant argues that CSAB's assertion that additional studies are required to properly ascertain potential impacts to birds and bats is "precluded by 19 NYCRR 900-8.3(c)([6]), which expressly states that the completeness of an Application is not an issue for adjudication."[15] Applicant states that the studies that it conducted were "standard pre-construction studies conducted for all wind projects in New York, pre-94-c, pre-Article 10 and dating back approximately more than 20 years."[16] Applicant further states that the scopes of its studies "were

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[12] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 3.

[13] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 5.

[14] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 5.

[15] DMM Item No. 42, Applicant Response, pp. 28, 33.

[16] DMM Item No. 42, Applicant Response, p. 30.

prepared and reviewed in coordination with NYSDEC and USFWS [U.S. Fish and Wildlife Service] [and] were the subject of agreed upon stipulations as to their adequacy and sufficiency."[17]

ORES states that it, in consultation with NYSDEC, "determined that the habitat assessments and field survey reports included in the Transfer Application were prepared in compliance with established NYSDEC and USFWS guidelines and requirements and in compliance with Article 10 procedures."[18] ORES argues that the scopes and methodologies advanced by CSAB for assessing potential avian impacts "go beyond the critique of work done under a standard that is accepted and consistent with the law and regulations, and cross into advocacy for new standards."[19]

For the reasons discussed below, we hold that CSAB has not met its burden to demonstrate that CSAB Issue Number One meets the standards for adjudication.

As an initial matter, we reject applicant's assertion that, because the application was deemed complete, CSAB's request for additional studies is precluded by operation of 19 NYCRR §900-8.3(c)(6). Pursuant to 19 NYCRR §900-1.2(l):

> completeness of an application means an application for a permit that is determined by the Office of Renewable Energy Siting, by issuance of a notice of complete application, to be sufficient for the purpose of preparing draft permit conditions, but which may need to be supplemented during the course of review in order to enable the Office of Renewable Energy Siting to make the findings and determinations required by law.

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[17] DMM Item No. 42, Applicant Response, pp. 30-31.

[18] DMM Item No. 43, ORES Response, p. 20 (citation omitted).

[19] DMM Item No. 43, ORES Response, p. 20.

Accordingly, although the determination by ORES that an application is sufficient for the purpose of preparing draft permit conditions is an important consideration, it does not preclude further supplementation of the application during the course of the review process.

Nevertheless, the assessment of applicant's wildlife studies by ORES and NYSDEC staff is an important consideration in determining the adjudicability of this issue.[20] Here, during the evaluation of the application under article 10 of the Public Service Law, NYSDEC and NYSDPS staff reviewed and stipulated to the scopes and methodologies of studies to be undertaken by applicant to assess wildlife impacts.[21] Further, on the basis of those studies, ORES in consultation with NYSDEC drafted site-specific conditions to address those impacts.

Although CSAB proposes a number of additional studies using a variety of methodologies, CSAB does not argue that applicant failed to undertake any of the studies stipulated to by ORES and NYSDEC. Nor does CSAB identify any other proposed wind energy facility for which New York State regulators have

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[20] *See Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, p. 11 (NYSDEC) (holding that, "[i]n areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue").

[21] *See* DMM Item No. 2, Fully Executed Stipulations ¶ 3 (stating that "the purpose of this document is to establish agreement among the parties that the scope and methodology of studies identified in the [Final Scoping Statement] represent the full range of studies required for the proposed Heritage Wind Project").

imposed requirements to undertake studies using the scopes and methodologies of the studies sought by CSAB. As previously noted, ORES determined that the habitat assessments and field survey reports undertaken by applicant were prepared in compliance with established guidelines and requirements and meet existing survey protocols.[22]

Where, as here, ORES and NYSDEC have reviewed and approved the scopes and methodologies of the wildlife studies to be undertaken by an applicant and have found the completed studies sufficient for use in drafting the conditions of the Draft Permit, the burden is on the petitioner to demonstrate that additional studies are needed.[23] CSAB has not met that burden.

Ruling: CSAB Issue Number One does not meet the standards for adjudication.

-- Issue Number Two: Extent of Impacts to Birds and Bats

CSAB states that it intends to present evidence of "significant adverse local impacts greater than those included in the Application or recognized by ORES."[24] CSAB's expert asserts that the proposed layout of the Facility "and the project's use of very large turbines and its close proximity to Iroquois National Wildlife Refuge and Oak Orchard Wildlife Management Area, indicate that the project would cause excessive

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[22] DMM Item No. 43, ORES Response, p. 20.

[23] 19 NYCRR §900-8.3(c)(4).

[24] DMM Item No. 37, CSAB Petition, p. 10.

collision mortality to birds and bats, and likely to arthropods as well."[25]

Applicant states that the proposed Facility's proximity to wildlife management areas was addressed in the application and associated studies. According to applicant, "[o]n-site avian surveys characterized the existing avian usage of the site, which necessarily accounted for the presence of nearby wildlife areas, and would have addressed avian usage [to] the extent that species using those areas were also using lands in the Facility Site."[26]

Applicant's expert asserts that CSAB's expert "has a history of publishing higher estimates and predictions of bird fatalities at wind energy facilities than all other experts who have studied or published on this topic."[27] He states that, in 2013, CSAB's expert published (2013 paper) "a reanalysis of data on fatalities at 71 studies done at wind energy facilities in the U.S. [that] oftentimes provid[ed] estimates more than five times that of the original authors."[28] Applicant's expert also notes that the "71 studies included in the 2013 paper were done in a variety of states and habitats by different consultants, and reviewed by USFWS, state, and wildlife agencies."[29]

ORES states that, in consultation with NYSDEC, it "thoroughly evaluated potential impacts to both threatened and non-threatened species, and considered the proximity of the

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[25] DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 4-5.

[26] DMM Item No. 42, Applicant Response, pp. 34-35.

[27] DMM Item No. 42, Applicant Response, Attachment B, p. 2.

[28] DMM Item No. 42, Applicant Response, Attachment B, p. 2.

[29] DMM Item No. 42, Applicant Response, Attachment B, p. 2.

proposed Facility to the Iroquois National Wildlife Refuge and other natural resources, and drafted the Site Specific Conditions requiring a post-construction avian and bat monitoring plan."[30] ORES further states that, again in consultation with NYSDEC, it determined that "the habitat assessments and field survey reports included in the Transfer Application were prepared in compliance with established NYSDEC and USFWS guidelines and requirements [and] meet the Office's standard for following existing survey protocols."[31]

For the reasons discussed below, we hold that CSAB has not met its burden to demonstrate that CSAB Issue Number Two meets the standards for adjudication.

With regard to the extent of potential impacts to birds and bats, we are presented with differing opinions of experts. As noted, applicant asserts that CSAB's expert has a history of publishing higher estimates of bird fatalities at wind energy facilities. In his response to CSAB's petition, applicant's expert includes a comparison of fatality estimates developed by CSAB's expert with those of other experts in the field. That comparison shows CSAB's expert estimating fatality rates that often more than double the estimates of other experts.[32]

CSAB's expert acknowledges this variation and notes a 2015 study in which he and other experts "compared our methods and our rationales for each methodological step" in formulating

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[30] DMM Item No. 43, ORES Response, p. 19.

[31] DMM Item No. 43, ORES Response, p. 20 (citations omitted).

[32] DMM Item No. 42, Applicant Response, Attachment B, pp. 2-3.

fatality estimates.[33] Notably, the other experts named by CSAB's expert are each also named by applicant's expert in his comparison of fatality estimates by CSAB's expert and other experts in the field. CSAB's expert states that some of the methods and rationales used by the various experts "were very similar, but we differed on some of the steps and assumptions."[34] He further states that "[o]ne of the takeaways for me was how greatly certain assumptions can alter the magnitude of a fatality estimate."[35]

As the arguments of the parties demonstrate, bird and bat fatalities at wind energy facilities have been studied for decades and debates over the extent of such fatalities and the methodologies to estimate them continue. Neither the application nor the Draft Permit are intended to resolve these ongoing debates. Rather, similar to conditions imposed on other New York State wind energy facilities, the Draft Permit requires a post-construction avian and bat monitoring plan that will add to the body of knowledge concerning these impacts. Importantly, the Commissioner of Environmental Conservation has held that "[c]onducting an adjudicatory hearing where offers of proof, at best, raise potential uncertainties, or where such a hearing would dissolve into an academic debate is not the intent of the Department's hearing process."[36]

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[33] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 70.

[34] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 70.

[35] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 70.

[36] *Matter of Seneca Meadows, Inc.*, Interim Decision of the Commissioner, Oct. 26, 2012, p. 4 (NYSDEC) (internal quotations and citations omitted).

As noted in our discussion of CSAB Issue Number One, ORES, in consultation with NYSDEC, has determined that the scopes and methodologies of studies used by applicant to assess avian impacts are consistent with past practice and with the law and regulations. Further, ORES argues that the scopes and methodologies for assessing avian impacts advanced by CSAB "go beyond the critique of work done under a standard that is accepted and consistent with the law and regulations, and cross into advocacy for new standards."[37]

Applicant's expert states that, for nearly 20 years, most New York State avian fatality studies have, with minor exceptions, used the same fatality estimation model and field methods used here. He further states that "the results of the post-construction studies in NYS did not show large variation. Both the species found during the studies and the rate of fatalities per turbine were quite similar among the different sites. And, those sites were scattered throughout the state, so habitats and topography varied to some degree."[38]

We note that USFWS filed a comment letter (USFWS Comment) that raises some of the same concerns that were raised by CSAB regarding potential adverse impacts to migratory birds that may result from the proximity of the proposed Facility to wildlife refuges. The USFWS Comment is based on a USFWS report (USFWS Report) that details the results of an avian radar study conducted by USFWS in 2013. As noted in the USFWS Comment, however, the radar "unit stationed near[est] [the Iroquois National Wildlife Refuge] was located approximately 12 miles

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[37] DMM Item No. 43, ORES Response, p. 20.

[38] DMM Item No. 42, Applicant Response, Attachment B, pp. 2-3.

southeast of the refuge and 24 miles due south of Lake Ontario."[39] Applicant's expert notes that the radar location "was in Genesee County 6.7 miles SSE . . . of the southernmost Heritage turbines."[40] Accordingly, the USFWS Report does not "identify . . . site-specific environmental impacts"[41] that would support the need for a site-specific permit condition.

Moreover, the USFWS radar data was captured during the spring migration, when migratory birds are generally moving from southwest to northeast[42] and, therefore, the radar unit was not positioned to detect or track migration over the Iroquois National Wildlife Refuge or the proposed Facility site.[43] Again, although the USFWS radar data may provide general insight into avian migration patterns, it does not provide site-specific data that would support the need for a site-specific permit condition.

We also note that the USFWS Comment does not cite to any studies that demonstrate a connection between proximity to wildlife areas and increased collision risk.[44] In contrast, applicant's expert provides a summary of avian fatality studies undertaken at wind energy facilities located near important

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[39] DMM Comment No. 133, USFWS Comment, p. 6.

[40] DMM Item No. 42, Applicant Response, Attachment B, p. 10.

[41] Executive Law §94-c(3)(d).

[42] DMM Comment No. 133, USFWS Comment, p. 6; DMM Item No. 42, Applicant Response, Attachment B, p. 32.

[43] *See* DMM Item No. 42, Applicant Response, Attachment B, Figure 1.

[44] *See* DMM Comment No. 133, USFWS Comment, p. 9 (noting "Literature Cited").

avian resources, such as wildlife refuges.[45] He concludes that "[l]ooking carefully at existing literature and peer-reviewed studies of wind energy sites in proximity to [National Wildlife Refuges] and other conservation areas, one would see that there has not been high or significant risk at those locations."[46]

ORES and NYSDEC staff have determined that applicant's field studies and analysis regarding the extent of adverse impacts to birds and bats are sufficient to enable staff to evaluate those impacts and to draft appropriate permit conditions. Accordingly, the burden of persuasion is on the petitioner to demonstrate that the potential for "greater than anticipated site-specific impacts"[47] to birds and bats is an issue that is both substantive and significant.[48] CSAB has not met that burden.

Ruling: CSAB Issue Number Two does not meet the standards for adjudication.

-- Issue Number Three: Mitigation Measures

In its brief statement in support of CSAB Issue Number Three, CSAB refers to both the need to "offset the anticipated reduced avian productivity of more than 122,000 birds over 30 years" and the need "to produce a net conservation benefit for bird and bat species."[49] The 122,000 figure is an estimate

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[45] *See* DMM Item No. 42, Applicant Response, Attachment B, pp. 8-9, 29-30.

[46] DMM Item No. 42, Applicant Response, Attachment B, p. 9.

[47] DMM Item No. 37, CSAB Petition, Exhibit 1, p. 11.

[48] 19 NYCRR §900-8.3(c)(4).

[49] DMM Item No. 37, CSAB Petition, p. 12.

advanced by CSAB's expert regarding reduced avian productivity for all bird species that may result from habitat loss associated with the proposed Facility, it is not an estimate of impacts to threatened or endangered species.[50] Net conservation benefit requirements, however, are only imposed where adverse impacts to threatened or endangered species are implicated.

Given the foregoing, our discussion of CSAB Issue Number Three will first address mitigation in relation to birds and bats generally and then in relation to threatened and endangered species.

-- Mitigation of Impacts to Birds and Bats

CSAB Issue Number Three states that "[b]ased on local conditions, mitigation measures proposed in the Draft Permit are insufficient to avoid or mitigate potential significant adverse environmental impacts on birds and bats to the extent practicable."[51] Specifically, CSAB argues that mitigation measures in the Draft Permit are inadequate "to offset the anticipated reduced avian productivity of more than 122,000 birds over 30 years."[52]

Applicant argues that Executive Law §94-c does not require mitigation for non-threatened and endangered avian species and, therefore, "ORES lacks the authority to impose site specific conditions to address non-threatened and endangered

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[50] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 83-84, 88.

[51] DMM Item No. 37, CSAB Petition, p. 11.

[52] DMM Item No. 37, CSAB Petition, p. 12 (citing CSAB Exhibit 1, pp. 83-89).

species."[53] Therefore, applicant argues, "this claimed defect is not likely to affect permit issuance in a substantial way, this is not an issue for adjudication."[54]

Applicant also argues that, "even assuming ORES were to consider mitigation of this potential impact, there is nothing in the record suggesting that the Facility warrants mitigation aside from what is already provided in the Draft Permit."[55] Applicant asserts that "the avian studies support the [application's] characterization of impacts at the Facility and there is nothing identified as unusual or unique about the Facility data."[56]

The Office, citing Executive Law §94-c(3)(d), states that it, in consultation with NYSDEC, "thoroughly evaluated potential impacts to both threatened and non-threatened species, and considered the proximity of the proposed Facility to the Iroquois National Wildlife Refuge and other natural resources, and drafted Site Specific Conditions requiring a post-construction avian and bat monitoring plan to address potential impacts to migratory birds."[57]

Importantly, as noted by Office staff, the monitoring plan must be submitted to the Office as an additional pre-construction compliance filing, consistent with 19 NYCRR §900-

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[53] DMM Item No. 42, Applicant Response, p. 34.

[54] DMM Item No. 42, Applicant Response, p. 34.

[55] DMM Item No. 42, Applicant Response, p. 34.

[56] DMM Item No. 42, Applicant Response, p. 34.

[57] DMM Item No. 43, ORES Response, p. 19.

3.2(a)(2).[58] As a compliance filing, the monitoring plan is subject to review and approval by ORES.[59]

As an initial matter, we reject applicant's broad assertion that ORES lacks authority to impose conditions to address unlisted species. As previously noted, Executive Law §94-c(3)(d) requires the Office, in consultation with NYSDEC, to identify site-specific environmental impacts and draft site-specific conditions to address those impacts, "including provisions for the avoidance or mitigation thereof." Accordingly, where a showing is made that site-specific environmental impacts exist that are not addressed by the uniform standards and conditions, ORES may impose site-specific conditions to avoid or mitigate those impacts.

Executive Law §94-c(3)(d) directs ORES to take into account the CLCPA targets and environmental benefits of a project when developing site-specific conditions, except that, where impacts to threatened or endangered species are involved, ORES must "require that the application of uniform standards and conditions and site-specific conditions shall achieve a net conservation benefit." Accordingly, with regard to listed species, the Office must impose conditions to achieve a net conservation benefit for impacts to endangered or threatened species. For impacts to unlisted species, however, the Office must balance potential avoidance or mitigation measures against the CLCPA targets and the environmental benefits of the proposed facility.

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[58] DMM Item No. 43, ORES Response, p. 18.

[59] *See* 19 NYCRR §900-10.1(a) and 10.2(e)(6).

CSAB cites only to its expert's estimate of the "anticipated reduced avian productivity of more than 122,000 birds over 30 years" in support of its assertion that additional mitigation is required to address impacts to unlisted bird and bat species.[60] As noted earlier, the 122,000 figure is an estimate advanced by CSAB's expert regarding reduced avian productivity that may result from habitat loss associated with the proposed Facility. The estimate, however, is not derived from site-specific conditions, with the exception that CSAB's expert used applicant's estimate of the number of acres of potential habitat that will be permanently lost because of the proposed Facility.

CSAB's expert multiplies the estimated number of acres of bird habitat to be lost as a result of the proposed Facility by the average number of nests per acre (derived from studies unrelated to the Facility site) and then multiplies the result by the average number of young per nest (derived from a study unrelated to the Facility site). The expert concludes that "[a]fter 30 years, the lost capacity of both breeders and annual chick production would total 122,265 birds, assuming an average generation time of 5 years."[61] Accordingly, the only input unique to the proposed Facility is the number of lost acres of bird habitat. This methodology, therefore, does not establish that there are unique site-specific conditions that warrant the imposition of site-specific permit conditions.

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[60] DMM Item No. 37, CSAB Petition, p. 12 (citing CSAB Exhibit 1, pp. 83-89).

[61] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 83-84.

ORES's determination that impacts to unlisted bird and bat species, when balanced against the CLCPA targets and the environmental benefits of the proposed facility, do not warrant additional site-specific conditions, is entitled to deference.[62] CSAB has not identified site-specific conditions that would require the imposition of additional site-specific permit conditions.

CSAB bears the burden of persuasion to demonstrate that this issue is both substantive and significant.[63] CSAB has failed to meet its burden with regard to its assertion that additional mitigation measures are necessary to address impacts for unlisted bird and bat species.

Ruling: CSAB Issue Number Three, as it relates to unlisted species, does not meet the standards for adjudication.

-- Mitigation of Impacts to Listed Species

As previously noted, CSAB's statement in support of CSAB Issue Number Three refers to "net conservation benefit," a requirement that is applicable only where adverse impacts to threatened or endangered species are implicated. Above, we address CSAB Issue Number Three in the context of mitigation for potential adverse impacts to birds and bats generally. Here, we address CSAB Issue Number Three in the context of mitigation for impacts to threatened and endangered species and the requirement to achieve net conservation benefit.

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[62] *See Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, p. 11 (NYSDEC) (holding that, "[i]n areas of Department staff expertise, its evaluation of the application and supporting documentation is important in determining the adjudicability of an issue").

[63] *See* 19 NYCRR §900-8.3(c)(4).

CSAB states that it "wishes to provide evidence in support of alternative and additional mitigation measures necessary to produce a net conservation benefit for bird and bat species."[64] Net conservation benefit requirements are triggered only where a proposed activity "is likely to result in the take" of a species listed as threatened or endangered.[65] Four threatened or endangered species are identified in the Draft Permit as likely to suffer a take as a result of the proposed Facility: northern long eared bat (NLEB), bald eagle, short-eared owl, and northern harrier. In its petition, however, CSAB does not specify for which of these species it wishes to propose alternative and additional mitigation measures.

In his comments on the proposed Facility, CSAB's expert includes a section entitled "net conservation benefits" and a section entitled "mitigation."[66] Under the section on net conservation benefit, CSAB's expert discusses this requirement only in the context of NLEB.[67] Under the section on mitigation, CSAB's expert discusses a variety of mitigation measures but, as to threatened or endangered species, only NLEB and curtailment protocols are discussed in any detail.[68] Accordingly, we address only NLEB here.

CSAB's expert states that he agrees that operational curtailment "should lessen the project's impacts to bats;" however, he recommends "using real-time acoustic detection of

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[64] DMM Item No. 37, CSAB Petition, p. 12.

[65] 6 NYCRR §182.11.

[66] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 73-74, 84-88.

[67] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 73-74.

[68] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 84-88.

bats combined with wind speed data" to achieve greater fatality reductions.[69] He also agrees with the need for compensatory mitigation measures but only if fatality monitoring sufficiently follows certain "best practices" that he identifies, and the "levels of take are explicitly tied to mitigation funds directed toward bat conservation."[70]

Applicant states that, to address potential impacts to NLEB, "curtailment will be used in accordance with the Section 94-c Uniform Standards and Conditions to minimize impacts to NLEB and other bats . . . which is also consistent with other wind projects in New York State. Also, the Applicant is proposing to implement bat deterrent systems to further minimize impacts."[71] To mitigate potential unavoidable impacts, applicant "will be implementing a bat cave gating project in consultation with NYSDEC."[72]

ORES states that CSAB's claims of "insufficient mitigation measures for listed species lack merit. In compliance with Executive Law §§94-c(3)(d) and (e), the Draft Permit, together with USCs [i.e., uniform standards and conditions] and Site Specific Conditions, achieves a net conservation benefit to the impacted threatened and endangered species."[73]

First, with regard to curtailment, applicant must abide by the curtailment measures set forth in the Draft Permit

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[69] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 86.

[70] DMM Item No. 33, CSAB Petition, Exhibit 1, p. 86.

[71] DMM Item No. 42, Applicant Response, p. 32.

[72] DMM Item No. 42, Applicant Response, p. 32.

[73] DMM Item No. 43, ORES Response, p. 20 (citations omitted).

at subparagraph IV(o)(4)(v). As noted by applicant, this provision of the Draft Permit is a uniform standard and condition and was adopted by regulation in accordance with Executive Law §94-c(3)(b). Accordingly, the curtailment protocol set forth in the Draft Permit is required by regulation.

Pursuant to Executive Law §94-c(3)(c), uniform standards and conditions must "be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts related to the siting, design, construction and operation of a major renewable energy facility." CSAB has not advanced any rationale that would support a finding that the Facility site poses a unique or site-specific environmental impact to NLEB that would warrant imposition of a site-specific condition for curtailment.[74] Absent such a showing, no cause exists for the imposition of permit conditions pertaining to curtailment in excess of the uniform standard and condition established by regulation. Accordingly, CSAB has failed to meet the standards for adjudicability on the issue of curtailment.

Lastly, regarding the comments of CSAB's expert on compensatory mitigation measures,[75] we do not read these comments as seeking the adjudication of an issue. Rather, these comments appear more in the nature of recommendations to ensure that compensatory mitigation measures for NLEB are properly implemented and effective.

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[74] *See* Executive Law §94-c(3)(d).

[75] *See* DMM Item No. 33, CSAB Petition, Exhibit 1, pp. 74, 86.

Ruling: CSAB Issue Number Three, as it relates to threatened or endangered species, does not meet the standards for adjudication.

-- Issue Number Four: Visual Impact Assessment

CSAB contends that the application fails to provide a full assessment of visual impacts as required by 19 NYCRR §900-2.9 and, consequently, states that the Draft Permit does not include sufficient mitigation to minimize visual impacts to the extent practicable as required by the law and regulation.[76] As an offer of proof, CSAB offers an initial analysis conducted by its visual impact witness, Dr. James Palmer.[77] Its consultant raises concerns over applicant's visibility analysis, photo simulation, visual contrast ratings, and the representation of literature concerning public perceptions of wind projects. According to CSAB, its consultant would present evidence showing the visual impact analysis fails to present the full visual impact, that proposed mitigation and conditions are insufficient, and that additional mitigation may be required.[78]

Applicant states that ORES determined that the Project conforms to the legal and regulatory requirements for visual impacts and mitigation, except as identified in the site-specific conditions. It contends that any issues raised by CSAB and its witness regarding completeness are precluded by 19 NYCRR §900-8.3(c)(5). In any event, it states that extensive scoping

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[76] DMM Item No. 37, CSAB Petition, pp. 12-13.

[77] DMM Item No. 37, CSAB Petition, pp. 12-13; DMM Item No. 33, CSAB Petition, Exhibit 2.

[78] DMM Item No. 37, CSAB Petition, pp. 13-14.

was conducted in the PSL article 10 process; its PSL article 10 application was found compliant by the Siting Board and was complete by operation of law pursuant to Executive Law §94-c(f)(i). As such, applicant states that any claims that more studies were required are not proper for adjudication.[79] Applicant states that CSAB has failed to provide an offer of proof establishing the issue is substantive and significant and provided a memorandum in response to the particular issues raised by CSAB.[80] Applicant states that: the Siting Board repeatedly rejected CSAB's witness's visual impact assessment methodology and criticisms of the methods used by applicant in its studies; CSAB's witness concedes that applicant's VIA generally meets the profession's technical standards; and, that any critique CSAB offers does not established that applicant cannot meet the statutory or regulatory criteria applicable to the project.[81] Applicant therefore contends that the issue raised is not substantive or significant.

ORES staff states that it reviewed applicant's Visual Impact Assessment (VIA) Report and determined it was "conducted in accordance with accepted methodologies and standards."[82] It opines that CSAB did "not bring substantive and significant offers of proof or showings," stating that there is no basis for expanding the VIA study area and the papers cited by CSAB apply to different environmental settings; the record reflects the camera information and lens focal lengths and appropriate

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[79] DMM Item No. 42, Applicant Response, p. 35.

[80] Id. and Attachment C.

[81] DMM Item No. 42, Applicant Response, pp. 35-36.

[82] DMM Item No. 43, ORES Response, p. 27.

information was provided regarding the panoramic photo simulations; the complaints raised fail to reflect a thorough review of the exhibits; CSAB's consultant acknowledges that the VIA was prepared in a manner meeting the profession's technical standards; and other complaints or disputes raised fail to raise any material facts.[83]

As addressed above, as an initial matter, we reject applicant's assertion that, because the application was deemed complete, CSAB's request for additional studies is precluded. Nevertheless, we find that, while CSAB and its witness raise concerns with aspects of applicant's VIA and arguments about the weight that should be afforded to certain aspects it, CSAB fails to demonstrate any doubt about applicant's ability to meet the criteria applicable to the Project. Rather, CSAB's consultant recognizes that "[i]n general, EDR has prepared a VIA that meets the profession's technical standards"[84] and acknowledges in some instances, the VIA provides more in-depth information than what is required by the applicable criteria. The witness opines that a more expansive visual study "is not unreasonable," but fails to support that such study is necessary. We find no substantive and significant issue has been demonstrated, and therefore, this issue is not adjudicable.

Ruling: CSAB Issue Number Four does not meet the standards for adjudication.

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[83] DMM Item No. 43, ORES Response, pp. 27-28.

[84] DMM Item No. 33, CSAB Petition, Exhibit 2, p. 2.

-- Issue Number Five: Local Laws

CSAB asserts that the issues whether the record is sufficient to support a waiver of local laws and whether ORES made findings and determinations in support of its intent to waive local laws require adjudication. CSAB alleges, among other things, that the application does not contain proof that the local laws are inconsistent with the CLCPA and that ORES did not identify with any specificity its rationale for granting a waiver thereof. CSAB states that, at an evidentiary hearing, applicant will bear the burden of demonstrating why waiver of local laws is essential in light of the CLCPA and that it will demonstrate why waiver is not justified or permissible.[85] CSAB indicates it may offer testimony of its members regarding the importance of compliance with local laws and provides a PowerPoint presentation developed by counsel to the Barre Town Board that identifies "multiple instances" in which the Draft Permit allegedly will violate local laws.[86]

Applicant states that the issue raised by CSAB does not warrant adjudication because the issue is legal rather than factual. Applicant nevertheless adds that, contrary to CSAB's contention, it provided sufficient support for its waiver requests, including ample discussion of the CLCPA and Project's benefits in its Application materials.[87] Applicant further contends that the statute does not contemplate local law compliance being litigated by a party other than a municipality,

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[85] DMM Item No. 37, CSAB Petition, p. 15.

[86] DMM Item No. 37, CSAB Petition, pp. 15-16, 18; DMM Item No. 33, CSAB Petition, Exhibit 3.

[87] Id.

applicant and ORES and, in any event, CSAB failed to provide a satisfactory offer of proof to support its claims.[88]

ORES staff states that its findings and determinations regarding compliance with local laws and ordinances are supported by the application materials. It declares that CSAB has failed to meet its burden of demonstrating a substantive and significant issue exists that requires adjudication inasmuch as the PowerPoint presentation offered by CSAB does not provide sufficient support for CSAB's "conclusory claims."[89] ORES staff also states that, when electing to waive a local law, it is only required to find that the law would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility. It contends that no additional justification is required, although applicants may provide additional information that the relief is grounded in other factors, such as those listed in its regulations.[90]

We find that the issue identified by CSAB is not a substantive and significant issue that requires adjudication. Notably, an issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry.[91] CSAB does not identify any concern with applicant's ability to meet the statutory or regulatory criteria identified in the Draft Permit. Rather, it

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[88] DMM Item No. 42, Applicant Response, pp. 36-37.

[89] DMM Item No. 43, ORES Response, p. 9.

[90] DMM Item No. 43, ORES Response, p. 9.

[91] 19 NYCRR §900-8.3 (c)(2).

takes issue with ORES staff's decision to waive the local laws. However, CSAB has failed to raise an adjudicable issue with respect to ORES staff's decision to do so.

Ruling: CSAB Issue Number Five does not meet the standards for adjudication.

-- Issue Number Six: Failure to Address Other Environmental Impacts

CSAB proposes the following issue for adjudication: "Issue Number Six: Specific failures of Application and Draft Permit to address or mitigate environmental impacts."[92]

In its discussion of CSAB Issue Number Six, CSAB does not identify a specific issue for adjudication but rather cites to an attached exhibit (CSAB Exhibit 4) and "seeks leave to raise any and all of the issues raised" therein.[93] CSAB Exhibit 4 consists of six pages of notes, comments, and critiques regarding the proposed Facility, Draft Permit, and potential mitigation measures.

Applicant argues that CSAB Exhibit 4 "amounts to a laundry list of largely unspecified objections, comments and general disagreements with the [uniform standards and conditions] and Section 94-c regulations."[94] Applicant further argues that CSAB's offer of proof is deficient and that CSAB "fails to articulate how the list of items in Exhibit 4 are substantive and significant issues."[95]

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[92] DMM Item No. 37, CSAB Petition, p. 16.

[93] DMM Item No. 37, CSAB Petition, p. 16.

[94] DMM Item No. 42, Applicant Response, p. 38.

[95] DMM Item No. 42, Applicant Response, p. 38.

ORES staff asserts that the CSAB Exhibit 4 is "in 'summary note' form [and] does not provide any factual or scientific foundation that is supported by evidence."[96] ORES staff argues that issues raised by CSAB under proposed CSAB Issue Number Six are rebutted by "the Draft Permit, [uniform standards and conditions] and proposed Site Specific Conditions and Compliance Filings, and the analysis of expert Office and NYSDEC staff."[97]

Although CSAB Exhibit 4 provides a long list of comments and critiques concerning the proposed Facility and Draft Permit, CSAB fails to establish that these issues are substantive and significant. CSAB does not specify how applicant may fail to meet specific statutory or regulatory criteria applicable to the Project. Indeed, neither the CSAB petition nor Exhibit 4 include citations to any specific law or regulation applicable to the proposed Facility. Additionally, CSAB does not specify how any of the issues listed in CSAB Exhibit 4 has the potential to result in the denial of the permit, a major modification to the proposed project or the imposition of significant permit conditions.

The issues determination procedure "is not meant to merely catalogue areas of dispute, but rather makes qualitative judgments as to the strength of the offers of proof and related arguments [and] any assertions that a potential party makes must have a factual or scientific foundation."[98]

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[96] DMM Item No. 43, ORES Response, p. 23 (citation omitted).

[97] DMM Item No. 43, ORES Response, p. 23.

[98] *Matter of Seneca Meadows, Inc.*, Interim Decision of the Commissioner, Oct. 26, 2012, p. 4 (NYSDEC).

In consideration of the foregoing, we hold that CSAB has failed to satisfy the standards for adjudication in relation to proposed CSAB Issue Number Six.

Ruling: CSAB Issue Number Six does not meet the standards for adjudication.

-- Ruling on CSAB Party Status

Pursuant to 19 NYCRR §900-8.4(f)(1)(ii), entitlement to full party status shall be based upon "[a] finding that the petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party." As discussed above, CSAB has failed to raise an adjudicable issue. Further, CSAB has not made a showing that it can make a meaningful contribution with regard to an adjudicable issue raised by another party.

Ruling: CSAB has not met the requirements of 19 NYCRR §900-8.4(f)(1)(ii) and, therefore, its petition for party status is denied.

C. Save Ontario Shores Petition

SOS proposes the following seven issues for adjudication:

> 1. Issue Number One. Proximity to wildlife refuge and management areas is a site-specific condition that requires a fact hearing to determine the nature and extent of possible negative impacts. The applicant has not completed sufficient studies in or near these resource areas in a manner to provide adequate detail of potential harm and appropriate mitigation.[99]

[99] DMM Item No. 36, SOS Petition, p. 7.

2. Issue Number Two. Site specific condition exists in the location of the Heritage Wind project in close proximity to extensive wildlife resources and requires that additional visual studies be completed and effective mitigation measures be implemented.[100]

3. Issue Number Three. Not all threatened Species are listed as required to be included in the Net Conservation Benefit Plan.[101]

4. Issue Number Four. There is insufficient evidence presented to determine the lighting plan. Site specific conditions merit a fact hearing if ADLS lighting is not provided.[102]

5. Issue Number Five. The application and draft permit do not acknowledge Impacts to Tourism and other economic activities as a result of the project[103]

6. Issue Number Six. The site-specific proximity to the extensive wetland wilderness area should require extra review of wetlands and surface waters. All studies must be completed and permits must be obtained in a manner that protects the project area as well as national and state resources from pre-construction through decommissioning.[104]

7. Issue Number Seven. The site-specific proximity to the extensive wetland wilderness area should require extra review of invasive species management. The site-specific conditions in the draft permit fail to raise this as an issue or provide appropriate best management and mitigation measures to protect the national and state resources from pre-construction through decommissioning.[105]

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[100] DMM Item No. 36, SOS Petition, p. 9.

[101] DMM Item No. 36, SOS Petition, p. 10.

[102] DMM Item No. 36, SOS Petition, p. 10.

[103] DMM Item No. 36, SOS Petition, p. 12.

[104] DMM Item No. 36, SOS Petition, p. 13.

[105] DMM Item No. 36, SOS Petition, p. 14.

A potential party's burden of persuasion under the issues determination procedure is met though the submission of an appropriate offer of proof supporting its proposed issues.[106] Pursuant to 19 NYCRR §900-8.4(c)(2)(ii), a petitioner must provide an offer of proof "specifying the witness(es), the nature of the evidence the person expects to present and the grounds upon which the assertion is made with respect [to] each issue identified." SOS's offer of proof does not satisfy these criteria. Rather than providing an offer of proof for each issue identified, SOS submits one generic offer of proof for all seven of the issues it proposes for adjudication.

SOS proposes a group of three witnesses to provide testimony in relation to all of the issues it proposes for adjudication. SOS states that the witnesses "have knowledge of the resources that will be impacted by the project [and] have seen changes over the years in how people utilize these resources."[107] SOS further states that these witnesses will "testify regarding their experiences as longtime residents in the county, the site-specific conditions that merit additional consideration and mitigation and the details of potential harm."[108]

Although all of the witnesses SOS proposes to call demonstrate some familiarity with environmental resources in the area of the proposed Facility and have had prior involvement in local conservation or environmental matters, none is purported

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[106] *See Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, p. 10 (NYSDEC).

[107] DMM Item No. 36, SOS Petition, p. 15.

[108] DMM Item No. 36, SOS Petition, p. 15.

to have expertise related to assessing environmental impacts associated with wind energy facilities. The offer of proof does not demonstrate that these witnesses will inform the record with regard to any issue that meets the criteria for adjudication. Rather, the proposed testimony of these witnesses is more in the nature of public comment.

For example, under SOS Issue Number One, SOS asserts that applicant "has not provided sufficient evidence" to demonstrate that important wildlife resources "have been adequately studied and that they will be protected."[109] The offer of proof, however, does not state that any of its three proposed witnesses has expertise in developing or evaluating studies to assess impacts to wildlife that may result from the construction and operation of a wind energy facility.

As noted earlier, judgments about the strength of an offer of proof must be made, among other things, in the context of the reviewing agency's analysis.[110] Here, during the evaluation of the application under article 10 of the Public Service Law, NYSDEC and NYSDPS staff reviewed and stipulated to the studies to be undertaken by applicant to assesses wildlife impacts.[111] Further, ORES, in consultation with NYSDEC, deemed these studies sufficient for the purpose of drafting site-specific conditions to address those impacts.

We hold that SOS's offer of proof does not satisfy the requirements of 19 NYCRR §900-8.4(c)(2)(ii). The offer of proof does not specify the nature of the evidence its witnesses will

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[109] DMM Item No. 36, SOS Petition, pp. 7-8.

[110] *See Matter of Roseton Generating LLC*, Decision of the Commissioner, Mar. 29, 2019, p. 10 (NYSDEC).

[111] *See* DMM Item No. 2, Fully Executed Stipulations.

present, nor provide the grounds upon which the assertions are made, with respect to each issue identified.

Ruling: We hold that SOS's offer of proof in support of its proposed issues for adjudication does not satisfy the requirements of 19 NYCRR §900-8.4(c)(2)(ii). Accordingly, SOS's proposed issues will not be adjudicated.

-- Ruling on SOS Party Status

Pursuant to 19 NYCRR §900-8.4(f)(1)(i), entitlement to full party status shall be based upon "[a] finding that the petitioner has filed an acceptable petition pursuant to subdivisions (c)(1) and (2) of this section." As discussed above, SOS has failed to satisfy the requirements of 19 NYCRR §900-8.4(c)(2)(ii).

Ruling: SOS has not satisfied the requirements of 19 NYCRR §900-8.4(c)(2)(ii)and, therefore, in accordance with 19 NYCRR §900-8.4(f)(1)(i), its petition for party status is denied.

D. Applicant Statement of Issues

-- NCBP for Short-eared Owl and Northern Harrier

Applicant objects to site-specific condition 6(b)(i) of the Draft Permit. This condition requires that applicant submit a net conservation benefit plan (NCBP) for wintering habitat of the short-eared owl and northern harrier impacted within the Facility site. Applicant asserts that no basis for this requirement exists because "no occupied habitat is present within the Facility Site, and no Facility-related impacts to

occupied habitat are anticipated."[112] Applicant attached a "Technical Memorandum" in support of this assertion.

The Technical Memorandum discusses efforts undertaken by applicant to identify use of the Facility site by threatened or endangered grassland birds. It concludes that "[o]verall, given that very few short-eared owl and northern harrier observations have been recorded within the Facility Site, and no known occupied habitat for these species has been identified within or overlapping the Facility Site, the Record supports the conclusion that the Facility Site does not contain occupied habitat for these species."[113] Further, in the absence of occupied habitat, "the Facility is not likely to take or adversely modify habitat, and an NCBP as mitigation for impacts should not be required for these species."[114]

In response to applicant's objection, Office staff states that it made the determination to require a "supplemental NCBP" for northern harrier and short-eared owl, in consultation with NYSDEC, on the basis of its "thorough review of existing public information on bird, bat, and other species in the vicinity of the Facility" and its "comprehensive review of the Transfer Application."[115] ORES staff does not, however, identify the factual basis in the record for its determination that occupied habitat exists on the Facility site and will be adversely impacted by the proposed Facility.

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[112] DMM Item No. 34, Applicant Statement of Issues, p. 8.

[113] DMM Item No. 34, Attachment D, p. 8.

[114] DMM Item No. 34, Attachment D, p. 8.

[115] DMM Item No. 43, ORES Response, p. 18.

We note that Office staff also states that the supplemental NCBP remains "under review, and no decisions have been made."[116] Nevertheless, as written, the Draft Permit states that "the Permittee shall submit an additional Net Conservation Benefit Plan (NCBP) which shall . . . achieve a net conservation benefit for wintering habitat of the short-eared owl and northern harrier impacted within the Facility site."[117] Moreover, Office staff concludes its discussion of the requirement for a NCBP for short-eared owl and northern harrier with that statement that "[n]o changes are proposed to Site Specific Condition 6(b)."[118]

Applicant raises a "substantive and significant dispute" with Office staff with respect to the factual basis for the requirement that applicant develop a NCBP for wintering habitat of the short-eared owl and northern harrier impacted within the Facility site, site-specific condition 6(b)(i).[119] This condition is substantive as it concerns applicant's ability to meet statutory or regulatory criteria applicable to the Project concerning threatened and endangered species, and significant because it concerns Office staff's proposal to impose a significant permit condition.

Ruling: The issue whether a factual basis exists for the imposition of site-specific permit condition 6(b)(i) meets the standards for adjudication.

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[116] DMM Item No. 43, ORES Response, p. 18.

[117] DMM Item No. 25, Draft Permit ¶6(b)(i).

[118] DMM Item No. 43, ORES Response, p. 20.

[119] 19 NYCRR §900-8.3(c)(1)(i).

-- Post Construction Avian and Bat Monitoring

Applicant objects to the placement of site-specific condition 6(b)(ii) within the permit condition addressing an additional net conservation benefit plan. Applicant states that it has proposed to develop a post-construction avian monitoring plan and conduct two years of migratory bird monitoring during the first five years of the Facility's operation. Applicant seeks confirmation from the Office that the monitoring plan under this site-specific condition is "consistent with" such plans at other facilities.[120]

Office staff states that, in consultation with NYSDEC, it evaluated potential impacts to "both threatened and non-threatened species" and that it drafted site-specific condition 6(b)(ii) in consideration of the "proximity of the proposed Facility to the Iroquois National Wildlife Refuge and other natural resources."[121] Office staff expressly states that site-specific condition 6(b)(ii) requires an "avian and bat monitoring plan" and does not limit the plan to threatened or endangered species.[122] Office staff concludes that "[n]o changes are proposed to Site Specific Condition 6(b)."[123]

Although the placement of the monitoring condition may be viewed as confusing, Office staff's response clarifies that, unlike a NCBP, the monitoring plan is not limited to threatened and endangered species. Moreover, applicant's requests for clarification of site-specific condition 6(b)(ii) does not

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[120] DMM Item No. 34, Applicant Statement of Issues, p. 8.

[121] DMM Item No. 43, ORES Response, p. 19.

[122] DMM Item No. 43, ORES Response, p. 19.

[123] DMM Item No. 43, ORES Response, p. 20.

identify a substantive and significant factual dispute that would require adjudication.

Ruling: The issues raised by applicant concerning site-specific condition 6(b)(ii) do not meet the standards for adjudication.

E. Town and County Petition

The Town of Barre timely filed a joint statement of compliance with local laws and regulations,[124] and the Town and County of Orleans (Municipalities) timely filed a joint petition for party status seeking full party status.[125] The Municipalities state that the Draft Permit does not apply currently applicable local laws and that the Project will not comply with all local laws and regulations. The Municipalities identify two proposed issues for adjudication: non-compliance with applicable local laws, and the potential for the Project to "interfere with Orleans County's effort to expand reliable and affordable high-speed broadband internet access to residents of

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[124] Only the Town addressed compliance with local laws, the County did not address compliance with its laws. See 19 NYCRR §900-8.4(d); DMM Item No. 32, Town of Barre Statement of Compliance with Local Laws and Regulations (Barre Statement).

[125] See 19 NYCRR §900-8.4(c); DMM Item No. 32, Town of Barre and County of Orleans Petition for Party Status and Issues for Adjudication (Municipalities' Petition). Because the Municipalities seek to jointly adjudicate issues, positions expressed by the Town in the Barre Statement and repeated in the Municipalities' Petition will be attributed to the Municipalities.

the Town and the County who do not presently have such service."[126]

-- Local Laws: 19 NYCRR §900-2.25

The Town states that after the filing of the application, it adopted the Wind Energy Facilities Law of the Town of Barre, Local Law No. 1 of 2021, codified as Article XI of Chapter 350 of the Code of the Town of Barre (Amended Wind Law), and that its analysis of local law compliance is based on the Amended Wind Law rather than the prior wind law, the Town Wind Energy Facilities Law, Local Law No. 2 of 2008 (Prior Wind Law), which was considered in the Draft Permit. Based on the Amended Wind Law, the Town claims that the Project will not comply with certain local laws and regulations.

The Town states that, in the Draft Permit, ORES elected not to apply certain provision of the Prior Wind Law, finding them unreasonably burdensome in view of the Climate Leadership and Community Protection Act (CLCPA) targets and in consideration of the environmental benefits of the Project.[127] The Town states that the following waivers provided for in the Draft Permit are no longer required as a result of the adoption of the Amended Wind Law: Draft Permit §4(1) Prior Wind Law §350-103(B)(1) (providing for a 45 dBA noise limit 1,000 feet from the base of a wind turbine); Draft Permit §4(2) Prior Wind Law §350-103(a)(6) (restricting the use of guy wires in certain circumstances); Draft Permit §4(4) Prior Wind Law §350-103(F) (limiting the height of wind turbines to 500 feet); Draft Permit

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126 DMM Item No. 32, Municipalities' Petition, p. 1.

127 See DMM Item No. 25, Draft Permit §4, Required Findings.

§4(5) Prior Wind Law §350-106(A) (requiring certain reforestation); and Draft Permit §4(7) Prior Wind Law §350-103(L) (directing foundations of wind turbines to be buried to a certain depth).

According to the Town, if the Amended Wind Law is applied, the Project will comply with the Town's local laws and regulations except for the provisions addressed below, all of which the Municipalities allege are appropriate for adjudication.

In its issues statement, applicant sought clarification on matters of local law and stated that, depending on how the issues were clarified, there may be a substantive and significant dispute between it and ORES Staff.[128] In its response to municipal statements of compliance and party status requests (Applicant Response), it "proposes to stipulate or otherwise agree" that the Amended Wind Law is applicable to the Project.[129]

Inasmuch as the Draft Permit was issued based upon the Prior Wind Law, but the parties agree that the Amended Wind Law is applicable, our analysis whether any issue raised is

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[128] DMM Item No. 34, Applicant Statement of Issues, p. 1. The Statement also: identified which waivers of local law would be obviated by the amendments (Draft Permit §§4(2), (4), (5), (6), and (7)); stated that it can comply with Amended Wind Law §350-103(12) regarding construction hours and states that a waiver is not needed for it to comply with that provision (Applicant Statement of Issues, pp. 2-3); and identified which substantive provisions of the Amended Wind Law it continues to seek waiver of, as modified (Draft Permit §§4(1), (3), and (8)), along with supporting arguments.

[129] DMM Item No. 42, Applicant Response, p. 11.

substantive and significant will be based upon the statutory and regulatory conditions of the Draft Permit and the application of the Amended Wind Law.

-- Amended Wind Law §350-103(4) Standards, Lighting - Aircraft Detection Lighting System (ADLS)

The Amended Wind Law modifies the Prior Wind Law to require the use of ADLS or other similar lighting minimization technologies that avoids visual lighting impacts at night. If ADLS is not permitted by the Federal Aviation Authority (FAA), the law requires other mitigation to minimize visual nighttime impacts, such as light shields.[130]

The Municipalities claim that the Project will not satisfy the Amended Wind Law requirement because the Draft Permit does not require the use of ADLS or similar lighting mitigation to avoid nighttime impacts.[131] The Municipalities argue that the issue is substantive since the local law threshold is not met and that it is significant because mitigating night-sky lighting impacts would require a major modification of the Project. The testimony of the Town's Supervisor is offered as proof of the character of the night sky and the Town's concern about negative aesthetic impacts. The Municipalities also offer an expert to testify to the efficacy of an ADLS or similar system to mitigate visual disturbances to the night sky.[132]

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[130] DMM Item No. 32, Barre Statement, p. 2.

[131] DMM Item No. 32, Barre Statement, p. 3.

[132] Ibid., p. 9.

Applicant and ORES staff disagree with the Municipalities' interpretation that the Draft Permit does not meet the legal requirements as a matter of law.[133] They note that the applicable regulations and uniform standards and conditions (USCs) require applicants to first consider and pursue an ADLS system, but where it is either not approved by the FAA/Department of Defense (DOD), or the applicant determines such system is not technically feasible, it must consider other means of minimizing lighting effects.[134] They note that the Draft Permit imposes a site-specific condition requiring applicant to file an updated Wind Facility Lighting Plan as a pre-construction compliance filing, which must be reviewed and approved by ORES.[135]

The Draft Permit does not waive the local law and, according to ORES, the Draft Permit is designed to ensure that the Project will substantially comply with the Amended Wind Law. Indeed, applicant is required to submit an updated lighting plan for the Facility and such plan must comply with 19 NYCRR §900-2.9(d)(9), which requires applicant to first pursue ADLS or a dimmable lighting option with the FAA/DOD. This requirement is consistent with the provisions of the Amended Wind Law. Inasmuch as the Municipalities have not made an offer of proof establishing that the Project cannot satisfy this provision of

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[133] DMM Item No. 42, Applicant Response, p. 14; DMM Item No. 43, ORES Response, p. 26.

[134] DMM Item No. 42, Applicant Response, p. 13; DMM Item No. 43, ORES Response, p. 26.

[135] DMM Item No. 42, Applicant Response, p. 14; DMM Item No. 43, ORES Response, p. 27.

the Amended Wind Law, we find that no substantive and significant issue is raised that requires adjudication.

-- Amended Wind Law §§350-103(2)(a)(1) and (2) Standards, Noise - Nighttime Noise Standard for Non-participating Structures

The Amended Wind Law substantively modifies the noise limits in the Prior Wind Law to require that sound produced by wind energy conversion systems shall not exceed, as relevant here, 45 dBA Leq 8-hour at non-participating structures and 40 dBA Leq night (10:00 p.m. to 7:00 a.m.) outside at non-participating structures and 55 dBA Leq 8-hour at participating structures and 50 dBA Leq night (10:00 p.m. to 7:00 a.m.) outside at participating structures. The Municipalities contend that the Project will not comply with this standard because the Draft Permit establishes a limit of 45 dBA Leq (8-hour) outside of any non-participating residence, thus exceeding the nighttime standard in the Amended Wind Law.[136] The Municipalities state that the application indicates the Project complies with an annual nighttime design goal of 40 dBA Leq for non-participating residences, but that the Draft Permit does not adopt such standard. They further opine that, in any event, as an annual standard, it would be impractical to measure.[137]

The Municipalities argue that this issue is substantive because the Project would not comply with the Amended Wind Law on an issue of significant concern to the Municipalities and would impact residents. They further argue

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[136] DMM Item No. 25, Draft Permit §5(V)(a)(1).

[137] DMM Item No. 32, Barre Statement, p. 3.

that the Draft Permit should not waive this provision because the Amended Wind Law's nighttime noise standard is not unreasonably burdensome, citing the design goal in the application of an annual nighttime noise level of 40 dBA at non-participating residences. The Municipalities contend this issue is significant because compliance with the Amended Wind Law would require substantial modification to the post-construction operational requirements in the Draft Permit. They offer testimony from the Town Supervisor and an expert witness who would opine on the reasonableness of the Amended Wind Law nighttime noise standard, the practicality of measuring compliance, and the likelihood the Project could comply with the nighttime noise standard.

Applicant states it continues to seek relief from the local noise standards. It notes that the Project was designed to comply with ORES's USCs and that it can comply with the Amended Wind Law's noise standards applicable outside of the nighttime hours, but that the Amended Wind Law's noise standards for nighttime hours are unreasonably burdensome in consideration of "the State's explicit rejection of proposed noise standards lower than 45 dBA at nonparticipants, and because it would be impractical for the Facility to comply with such a standard."[138] Applicant further contends that the Town's nighttime standard does not have an articulated basis in science or health, and that to impose such law would significantly reduce the renewable generation capacity of the Project or even render the Project unbuildable -- it states that "the Facility cannot be redesigned

[138] DMM Item No. 34, Applicant Statement, Attachment C, p. 1; see also DMM Item No. 42, Applicant Response, pp. 16-17.

to meet a short-term noise limit of 40 dBA Lnight" and reports that there are 327 non-participating residential receptors that would comply with the noise limits established by ORES, but could not comply with the Town's nighttime standard.[139] Nevertheless, in an effort to address the issue raised by the Town, applicant consents to the inclusion of a site-specific condition that would require compliance with the Town's more restrictive standards that impose noise limits at structures rather than only at residences.[140] Applicant states that there is no factual dispute about the Project's non-compliance with the Amended Wind Law and, therefore, no basis for an evidentiary hearing with respect to this issue.[141]

ORES staff reports that it will waive the provisions of the Amended Wind Law pertaining to noise standards -- presumably in the Final Permit -- and will apply the noise standards in its regulations and USCs. In making such declaration, it points to the consistent noise thresholds applied in PSL article 10 proceedings and the goal of the Executive Law to establish uniform standards and conditions.[142] ORES staff contends that the Municipalities have failed to establish that the matter is substantive and significant because there is no factual dispute that applicant has designed or will design the Project to comply with ORES's standard for wind

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[139] DMM Item No. 34, Applicant Statement, Attachment C, pp. 2-4; DMM Item No. 42, Applicant Response, pp. 14-17.

[140] DMM Item No. 42, Applicant Response, p. 14 and Attachment A, Proposed Site-Specific Condition 6(j).

[141] DMM Item No. 42, Applicant Response, p. 17.

[142] DMM Item No. 43, ORES Response, pp. 6-7.

facility noise as provided in the Draft Permit and regulations. It recommends minor modification of its Draft Permit to include an additional determination that the Amended Wind Law provisions are unreasonably burdensome in light of the CLCPA targets and environmental benefits of the Project, and that ORES's regulatory standards are applicable. ORES staff contends that such change to the Draft Permit is not a material change because the subject matter is the same.[143]

Given ORES staff's assertion that the provisions of the Amended Wind Law related to noise standards will be waived and, therefore, will not be applicable to this Project, we find that the Municipalities' arguments with respect to the issue of whether the Project will comply with this local law do not rise to the level of substantive and significant.[144]

-- Amended Wind Law §350-104(A)(3) Noise and Setback Easements-Variances-Recording Waivers

The Amended Wind Law authorizes affected property owners, in certain circumstances, to waive noise, shadow flicker, or set-back requirements by providing written consent, which then must be recorded in the property records in the County Clerk's Office as a permanent easement. The Municipalities contend that the Project will not be compliant with the Amended Wind Law because the Draft Permit does not

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[143] DMM Item No. 43, ORES Response, p. 8.

[144] It is worth noting, however, that if ORES staff does not waive the Amended Wind Law provisions when it issues a Final Permit, there is reasonable doubt as to whether Applicant can meet the Amended Wind Law's substantive provisions and a major modification to the proposed project or the imposition of significant permit conditions would perhaps be required.

require written waivers of noise, shadow flicker, or set-back requirements to be recorded with the County Clerk.[145]

The Municipalities argue that this provision is substantive in nature as it is necessary to put subsequent landowners on notice of the waiver and is intended to be protective of human health and safety.[146] The Municipalities opine that compliance with this provision is not unduly burdensome because leases and other agreements with participating land owners already must be recorded with the County Clerk. The Municipalities argue that the provision is significant because it could require a substantial modification to the conditions in the Draft Permit. The Municipalities offer the testimony of the Town supervisor, who would express the concerns of the Town in passing the law.[147]

Applicant states that because the recording provision of the local law imposes local conditions, approvals, or processes on construction or operation of the Facility in contravention of Executive Law §94-c(6)(a),[148] it is a procedural provision that is preempted by Executive Law §94-c and, therefore, is not an adjudicable issue.[149] It further argues that, even if the provision were considered to be substantive, the Town's law is not the type of law contemplated as applicable to the Facility because it does not address the environment,

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[145] DMM Item No. 32, Barre Statement, p. 4.

[146] DMM Item No. 32, Municipalities' Petition, p. 12.

[147] DMM Item No. 32, Municipalities' Petition, p. 13.

[148] DMM Item No. 42, Applicant Response, p. 12

[149] DMM Item No. 42, Applicant Response, pp. 12-13; 17-18.

public health or safety.[150] Applicant nevertheless believes that the Project will comply with the intent of the law because applicant "routinely records its leases, easements, and other agreements…and other land rights with the County Clerk."[151]

ORES staff contends that this issue is not substantive and significant and states that it "will be addressed as a required real property pre-construction compliance filing in accordance with 19 NYCRR §900-10.2(h)."[152]

We find the local law's requirement to *record* landowners' waivers with the County Clerk is a property law matter that is procedural, rather than substantive, and, therefore the Municipalities have not raised a substantive or significant issue requiring adjudication. We note, however, that applicant has committed to complying with the intent of the law and will record necessary land rights with the County Clerk prior to construction.

-- Amended Wind Law §350-105(3) Decommissioning - Financial Assurance Calculation

As relevant here, the Amended Wind Law requires an applicant to post and maintain a financial assurance in the amount of the net decommissioning costs, on a per turbine basis, and does not authorize the decommissioning calculation to be offset by projected salvage values. The Municipalities allege that a substantive issue exists because the Draft Permit does not explicitly reject the use of salvage values to offset

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[150] DMM Item No. 42, Applicant Response, pp. 17-18.

[151] DMM Item No. 42, Applicant Response, p. 18.

[152] DMM Item No. 43, ORES Response, p. 30.

decommissioning calculations and is therefore inconsistent with the Amended Wind Law. They claim the matter is significant because compliance would require a substantial modification to the Draft Permit conditions. As an offer of proof, the Municipalities offer testimony of an environmental analyst regarding the exclusion of salvage values in the decommissioning provisions of approved PSL article 10 projects; the difficulty of estimating projected salvage values; historical patterns of developers overestimating salvage value to the detriment of municipalities; and, the burden on municipalities who may be required to undertake decommissioning and pursue industrial recycling opportunities.[153]

Applicant states that the Amended Wind Law provision is a procedural requirement; not related to the environment or public health and safety; or preempted by Executive Law §94-c and not applicable. It opines that because the Executive Law and implementing regulations define the appropriate methodology for calculating decommissioning costs and financial security, as well as updating those costs, the Town's law must yield to the State's.[154] Applicant contends that to the extent this issue could be considered substantive and significant, it would result in relitigating the merits of the USCs and its treatment of salvage value.[155] In any event, it states that the Town has not submitted any evidence to demonstrate the issue is substantive or significant, and that, "[t]he Application meets the statutory and regulatory requirements for decommissioning under Section

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[153] DMM Item No. 32, Municipalities' Petition, pp. 15-16.

[154] DMM Item No. 42, Applicant Response, p. 18.

[155] DMM Item No. 42, Applicant Response, pp. 18-19.

94-c and there [sic] the mere disagreement with the regulatory standard is not a basis for adjudication, even where there is an inconsistency with a local law."[156]

ORES staff states that no factual issue is in dispute because the Office has yet to make a determination regarding the appropriate decommissioning fund. It states that salvage value will be considered in a pre-construction compliance filing and it will determine at that time if the final net decommissioning and site restoration cost estimate is appropriate.[157] ORES staff states that, pursuant to 19 NYCRR §900-6.6, applicant and the Municipalities may negotiate the appropriate amount of financial security and, if they cannot reach agreement, it will determine what sufficient funds will be available to the Town if they are forced to undertake decommissioning of the Project. It states that, generally, ORES staff will consider inclusion of salvage value but not re-sale value of major facility components.[158] ORES staff avers that for those reasons, no substantive or significant issue has been raised.[159]

As an initial matter, we reject applicant's proposition that the local law is inapplicable because it is not a substantive law "concerning the environment, or public health and safety." The local law requires a decommissioning fund to restore disturbed areas at the end of the useful life of the

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[156] DMM Item No. 42, Applicant Response, p. 19.

[157] Id.

[158] Id.

[159] Id.

project or as otherwise necessary. Therefore, we find this provision applicable as it is protective of the environment.

While we agree that this provision of the local law contains both procedural and substantive provisions, the provision in question here, -- exclusion of salvage value from the calculation of a financial surety, -- is substantive and applicable to the Project. The requirement of the establishment of a surety and criteria for establishing such surety is more than a mere administrative process or fee associated with processing a permit or application, but rather is a substantive precursor for constructing a wind facility in the Town to protect the Town's interests. Further, we reject applicant's assertion that a local law that conflicts with USCs must be rejected per se to the extent that it relates to the same subject matter. The Executive Law does not provide that a substantive local provision that conflicts with the USCs is preempted, rather it provides the Office with the discretion to waive local laws that, in its view, would be unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed facility. Nevertheless, uniform standards and conditions are "designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts"[160] and, therefore, they are an important consideration in the determination of whether a local law is unreasonably burdensome.

The Draft Permit does not apply the Amended Wind Law and consequently the Municipalities have identified a

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[160] Executive Law §94-c(3)(c).

substantive issue. However, we nevertheless find that this issue is not ripe for adjudication because ORES staff has not yet made the determination whether to apply the Amended Wind Law or waive its application. Moreover, the Municipalities have not established that application of the Amended Wind Law is likely to result in denial or a major modification of the project or in additional significant permit conditions. Accordingly, the issue is not advanced to adjudication.

-- Amended Zoning Code §350-105(6), (7), (8), (9) Decommissioning - Trigger

As relevant here, the Amended Wind Law provides that if a wind energy conversion system, or any portion thereof, is out of operation for a total period of 60 days within any 90-day period, the system shall be removed or made operational. If an applicant fails to remove the system or portion thereof in the authorized time period, the Town may use the financial surety provided by the applicant to pay for the cost of removing the offending system or portion thereof.

The Municipalities state that applicant proposes a trigger for decommissioning that is "wholly open ended and apparently leaves the discretion to the Applicant."[161] According to the Municipalities, there is no well-defined trigger to decommission the Project in the event of abandonment or indefinite non-operation and there is no clear definition as to when the financial assurance held by the Town can be used. Consequently, the Municipalities argue that the Project does not comply with the Amended Wind Law's provisions and that this

[161] DMM Item No. 32, Barre Statement, pp. 5-6.

issue is substantive.[162] They contend that the issue is significant because compliance with the local law would require a substantial modification of the Draft Permit. They offer testimony of the Town supervisor who would attest to the concerns of the Town Board and potential impacts to the Town, and the testimony of an environmental analyst who would opine on the need for a clearly articulated trigger for decommissioning.[163]

Like the decommissioning salvage value amount, applicant argues that these provisions of the Amended Wind Law are procedural requirements or preempted by Executive Law §94-c.[164] Nevertheless, noting that ORES previously granted its request for waiver of the Prior Wind Law's decommissioning provisions, it seeks a waiver of the Amended Wind Law for the reasons it expressed previously. It emphasizes the need for flexibility to balance the interests of the Town, applicant, and State in reaching its policy goals.[165] Applicant also suggests two means of addressing the Municipalities' concerns. First, it states that a decommissioning agreement can be negotiated with the Town in the context of discussions to establish a host community agreement to establish "clear instructions as to how the Town can access the financial assurance should the Applicant fail to perform decommissioning activities, how the company will

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[162] DMM Item No. 32, Barre Statement, p. 6 and Municipalities' Petition, pp. 16-17.

[163] DMM Item No. 32, Municipalities' Petition, pp. 17-18.

[164] DMM Item No. 42, Applicant Response, pp. 19-20.

[165] DMM Item No. 34, Applicant Statement, pp. 6-7; DMM Item No. 42, Applicant Response, p. 20.

ensure the Town has the necessary land rights to undertake decommissioning activities, and how the decommissioning process will work."[166] Second, it proposes a site-specific condition that clarifies decommissioning triggers.[167]

ORES staff states that no factual issue is in dispute because the final decommissioning triggering protocols will be established in the Final Decommissioning and Site Restoration Plan, which will be filed as a mandatory pre-construction compliance filing, and states that matters can be addressed through administrative process and pre-construction compliance.[168] ORES staff remarks that final decommissioning triggering protocols will be established in: the Final Decommissioning and Site Restoration Plan, proof of filing letters of credit, and agreements between applicant and the Town establishing a right for each municipality to draw on the letter of credit.[169] It further states that the Draft Permit imposes a site-specific condition requiring applicant to file its plan to address turbines that are out of service in excess of one year for reasons beyond applicant's control. For those reasons, it states that there are no substantive or significant issues requiring adjudication.[170]

Our review of the above provisions identifies that there are both substantive and procedural aspects to the above-

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[166] DMM Item No. 42, Applicant Response, p. 20.

[167] DMM Item No. 42, Applicant Response, pp. 20, Attachment A, Proposed Site Specific Condition 6(k).

[168] DMM Item No. 43, ORES Response, p. 16.

[169] Id.

[170] Id.

referenced laws. As relevant here, we find that the triggering timeframes for decommissioning established in the Amended Wind Law are substantive in nature and we reject applicant's contention that they are inapplicable to the Project. As we indicated above, we find the decommissioning provisions are within the scope of applicable substantive local laws regarding the environment because, as relevant here, they describe the conditions under which the locality may commence the process to restore disturbed areas at the end of the useful life of the project or as otherwise necessary. Therefore, we find that the substantive provisions applicable as they are protective of the environment. Likewise, as described above, we do not find that the Executive Law preempts applicable substantive local laws that conflict with USCs.

We note that applicant seeks waiver of the above Amended Wind Law provisions. To the extent that ORES staff elects to waive the Amended Wind Law in the Final Permit, no substantive and significant issue exists -- the Municipalities have failed to establish that the Draft Permit cannot comply with ORES's regulatory requirements or that the issue is significant.

To the extent ORES does not waive the above provisions, we note that because the Draft Permit fails to impose the decommissioning triggers in the Amended Wind Law, the issue identified by the Municipalities is substantive. As ORES staff identifies, the Draft Permit does require that a Final Decommissioning and Site Restoration Plan be filed as a compliance filing and there is an opportunity to resolve this matter through administrative means. Insomuch as there is

opportunity to resolve this issue in that context without requiring additional significant Draft Permit conditions, we find that this issue is not significant in any event. Moreover, we note that there is no factual dispute that the Draft Permit does not require compliance with the Amended Wind Law.

Finally, we note that applicant has proposed an additional site-specific condition and further negotiations to satisfy the Municipalities' concerns.

-- Amended Wind Law §350-106(3) Other Operating Considerations and Permit Revocation - Testing and Inspection Fund

The Amended Wind Law requires an applicant, or successor, to conduct periodic structural inspections and noise testing to assess compliance with applicable standards, evaluate complaints, and remedy any deficiencies within a set period of time. While the Municipalities concede that the Draft Permit requires some testing, monitoring and reporting elements, they contend that applicant has not yet satisfied certain ORES regulatory requirements.[171] Further, they argue that applicant's noise complaint resolution plan would preclude consideration of noise complaints and sound monitoring in circumstances where the Amended Wind Law would require it, and could shift the costs of sound monitoring from applicant to a complainant.[172] The Municipalities opine that this issue is substantive because the

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[171] 19 NYCRR §§900-6.5(a)(2)(i), (a)(4)(iv), and (a)(4)(v), and 900-6.4(k)(2).

[172] DMM Item No. 32, Barre Statement, pp. 6-7.

Draft Permit does not apply the Amended Wind Law and that without ensuring ongoing compliance with applicable standards, there is doubt about applicant's adherence to such standards.[173] It alleges that the issue is significant because it would require substantial modification of the permit conditions.[174] As an offer of proof, the Municipalities offer the testimony of an acoustical engineer who would opine on the reasonableness of the Amended Wind Law, the deficiencies in the noise monitoring requirements in the Draft Permit and noise complaint resolution protocol in the application, and its potential impact on noise standard compliance.[175]

Applicant contends that this provision of law is procedural; does not concern the environment, public health and safety, and therefore was not contemplated by the Executive Law to be applicable to the project; or, in the alternative, is preempted by Executive Law §94-c.[176] It states that, even if the provisions are considered substantive, the State has demonstrated an interest in occupying this field of regulation and therefore the Town should not be authorized to impose laws inconsistent with the regulatory structure established by the Executive Law and regulations.

ORES staff asserts that this matter is not substantive and significant because it has yet to make a final determination

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[173] DMM Item No. 32, Municipalities' Petition, p. 20.

[174] Id.

[175] DMM Item No. 32, Municipalities' Petition, pp. 20-21.

[176] DMM Item No. 42, Applicant Response, pp. 21-22.

regarding the sufficiency of applicant's plan.[177] It states that the Draft Permit imposed site-specific conditions requiring additional information to avoid, minimize and mitigate potential significant adverse noise impacts to the maximum extent practical and additional compliance filings requiring ORES's review and approval. ORES staff argues that, to address the issue raised by the Town, it has already imposed site-specific conditions[178] and, consequently, there is no potential for the issue to result in a denial of the permit or major modification; there is insufficient doubt that applicant will meet the standards; and, because it involves a matter regarding a compliance filing not yet before the Office, it is not an adjudicable issue.[179]

As an initial matter, we disagree with applicant that this provision of local law is strictly procedural. While the provision includes some procedural aspects, the requirement for applicant to conduct noise testing and address complaints and noncompliance with applicable standards are substantive. We also find that these provisions are protective of human health and safety as they are intended to address compliance with the local noise standards and nuisance to residents. As discussed above, merely because the USCs address a topical area does not mean that applicable local substantive laws are preempted.

Draft Permit §6(e) addresses the ORES regulatory provisions that the Municipalities alleged had not been

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[177] DMM Item No. 43, ORES Response, p. 24.

[178] DMM Item No. 25, Draft Permit §6(e).

[179] DMM Item No. 43, ORES Response, p. 25.

addressed by the Draft Permit. The Draft Permit does not apply the Amended Wind Law or waive it. However, as ORES staff identifies, the Draft Permit does require that a final Noise Complaint Resolution Protocol and Sound Testing Protocol be filed, and the Municipalities have not demonstrated that the final Protocol will not comply with the requirements of the Amended Wind Law. Accordingly, we find no substantive and significant issue for adjudication.

-- Amended Wind Law §350-103(10) Standards - Shadow Flicker

The Amended Wind Law requires that wind energy conversion systems be designed so that shadow flicker from an individual unit will not fall on any portion of a residential or commercial building in excess of 25 hours per year. Where an individual residence is impacted by multiple units, the cumulative effect may not exceed 25 hours per year. If shadow flicker exceeds the conditions, the unit must be shut down until the condition is remedied. The Town notes that the 25-hour limit was included in the Prior Wind Law which persists in the Amended Wind Law. The Amended Wind Law removed a provision that limited shadow flicker on any point on roadways to 25-hours annually.

The Town states that the Draft Permit is non-compliant with the local law because it allows a maximum of 30-hours of shadow flicker annually at any non-participating residential receptor, thereby exceeding the limit in the local law. The Municipalities contend this issue is significant due to the Draft Permit's non-compliance with the local standard and significant because compliance would require substantial

modification to the conditions in the Draft Permit. As an offer of proof, the Municipalities offer the testimony of the Town supervisor who would express the concerns of Town residents as well as the aesthetic impacts of concern to the Town Board. They also offer the testimony of an environmental analyst who would opine on the lack of scientifically-based standard for a 30-hour annual shadow flicker standard.[180]

Applicant states that waiver of the 25-hour annual limit granted in the Draft Permit continues to be necessary for the reasons explained in the application and urges ORES staff to retain the waiver.[181] Applicant states that there is no dispute that it cannot meet the Town's 25-hour annual shadow flicker standard and the Town has failed to meet its burden to establish that its local law standard should be applied, rather than the limit established by the Draft Permit.[182]

ORES staff states it would waive -- presumably in the Final Permit -- the 25-hour annual limit in the Amended Wind Law. It states that the limits contained in the regulations and USCs are consistent with previous PSL article 10 cases, as well as the majority of other jurisdictions, and that it is reasonable to avoid nuisance conditions at residential locations. ORES staff states that no factual dispute is raised regarding applicant's ability to satisfy the Office's regulations and USCs reflected in the Draft Permit and that consequently, the Municipalities have failed to establish the

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[180] DMM Item No. 32, Municipalities' Petition, pp. 22-23.

[181] DMM Item No. 34, Applicant Statement, pp. 5-6.

[182] DMM Item No. 42, Applicant Response, pp. 23-25.

matter is substantive and significant or a basis for the grant of full party status.[183]

Given ORES staff's assertion that the provisions of the Amended Wind Law related to the 25-hour limit will be waived and inapplicable to this Project, we find that there is no substantive and significant issue for adjudication. The Municipalities have identified no error of law or abuse of discretion with respect to ORES staff's waiver determination.

-- Amended Wind Law §350-103(12) Standards - Construction Hours

The Amended Wind Law restricts construction activities on wind energy conversion systems from 6:00 a.m. to 8:00 p.m. Mondays through Saturdays, except where certain activities or other conditions demand an occasional deviation from those hours. In addition, with the exception of emergencies, all maintenance should occur during the same time frame.

The Town states that the project and Draft Permit do not comply with the Amended Wind Law because it would allow construction work on Sundays.[184] The Municipalities opine that, because the Draft Permit would not comply with the local law, the issue is substantive, it contends that the issue is significant because compliance would require a substantial modification to the permit conditions.[185] They offer testimony of the Town supervisor who would attest to the concerns expressed by residents and the Town Board regarding the need for

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[183] DMM Item No. 43, ORES Response, p.12

[184] See DMM Item No. 25, Draft Permit §§4(6) and 5(IV)(a).

[185] DMM Item No. 32, Municipalities' Petition, p. 23.

the community to have a break from construction noise and conditions at least once weekly.[186]

Applicant proposes to resolve this issue through a site-specific condition that would restrict construction on Sundays, except for certain circumstances and activities that are envisioned in the local law. It states that, in consideration of the proposed condition, there is no disputed issue of fact for adjudication.[187]

ORES staff states that Amended Wind Law renders the waiver in Draft Permit §4(6) unnecessary. It states that applicant will adhere to the new construction hour limits, subject to the exception in the law that allows for deviations from those hours under certain circumstances. As such, ORES staff opines there is no dispute and the permit should be clarified to reference the agreed-upon construction hours consistent with the Town's local laws.[188]

ORES staff and applicant both indicate that the Project can comply with the terms of the Amended Wind Law without waiver. Applicant has proposed a site-specific condition to memorialize that understanding and ORES staff has indicated it will clarify the permit to reflect the standards in the Amended Wind Law. The Town has not made an offer of proof raising any reasonable doubt that applicant can comply with

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[186] Id.

[187] DMM Item No. 42, Applicant Response, pp. 10-11, 25; Attachment A Site Specific Condition 6(i).

[188] DMM Item No. 43, ORES Response, p. 14.

Amended Wind Law and therefore we find this issue is not adjudicable.

-- Communications Systems: 19 NYCRR §900-2.22

The Municipalities contend that the Project's potential to interfere with a planned communications system is a substantive issue because, without study of the effects of the Project on such system, it is uncertain whether the Project will have an adverse impact on communications systems. The Municipalities claim that the issue is significant because, if such interference is shown to exist, it may require a major modification to the design of the Project.[189]

Both applicant and ORES staff argue that no substantive or significant issue is raised because the broadband system does not yet exist.[190]

We find that no substantive and significant issue requiring adjudication has been raised by the Municipalities with respect to the Project's impacts on communications systems. ORES's regulations require an applicant to review and mitigate impacts to existing broadcast communication systems -- there is no requirement for an applicant to consider potential impacts to hypothetical or prospective communications systems.[191]

-- Ruling on the Municipalities' Party Status

Pursuant to 19 NYCRR §900-8.4(f)(1)(ii), entitlement to full party status shall be based upon "[a] finding that the

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[189] DMM Item No. 32, Municipalities' Petition, pp. 24-25.

[190] DMM Item No. 42, Applicant Response, pp. 25-27; DMM Item No. 43, ORES Response, p. 30.

[191] 19 NYCRR §900-2.21(b).

petitioner has raised a substantive and significant issue or that the petitioner can make a meaningful contribution to the record regarding a substantive and significant issue raised by another party." As discussed above, the Municipalities have failed to raise issues that require further adjudication. Further, the Municipalities have not made a showing that they can make a meaningful contribution with regard to an adjudicable issue raised by another party.

Ruling: The Municipalities have not met the requirements of 19 NYCRR §900-8.4(f)(1)(ii) and, therefore, their petition for party status is denied.

We further note that although we are joining for adjudication an issue between applicant and ORES staff, that issue does not related to the jurisdiction or authority of the Municipalities, nor were the Municipalities consulted with respect to that issue during the pre-application or application process. Accordingly, the Municipalities are not parties to the adjudication pursuant to 19 NYCRR §900-8.4(b).

CONCLUSION

We hold that there is one issue for adjudication. Specifically, a substantive and significant factual dispute exists between applicant and ORES staff with regard to whether occupied habitat of the short-eared owl or the northern harrier will be adversely impacted due to the construction or operation of the proposed Facility.

FURTHER PROCEEDINGS

We will contact the parties shortly after this ruling is issued to discuss hearing dates and procedures.

(SIGNED)

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