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December 7, 2020

VIA ELECTRONIC DELIVERY

Houtan Moaveni
Deputy Executive Director
State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

RE: Comments on Draft Regulations to Chapter XVIII, Title 19 of NYCRR Part 900 – Office of Renewable Energy Siting Permits for Major Renewable Energy Facilities

Deputy Executive Director Moaveni,

On behalf of Audubon New York, the state program of the National Audubon Society with a membership of 93,000 New Yorkers, I thank you for the opportunity to comment on the proposed regulations, as authorized by the Accelerated Renewable Energy Growth and Community Benefit Act (“the Act”) and for the Office of Renewable Energy Siting’s (“the Office”) leadership and commitment to providing New York State with a greener future. New York State is a national leader in its approach to combatting climate change, and we are pleased to assist the State in achieving carbon neutrality by 2050.

Audubon strongly supports the development of renewable energy and transmission infrastructure that is sited and operated to avoid, minimize, and effectively mitigate impacts on birds and other wildlife. Wind and solar power are clean, renewable sources of energy with few negative environmental impacts and are essential components in our fight against climate change. However, renewable energy projects and the development of new transmission infrastructure can negatively affect birds and other wildlife through direct mortality, displacement, and habitat degradation and loss if developers do not take proper precautions.

Fortunately, many of these impacts are avoidable. Our ongoing work with New York State’s agencies has proven that the development of renewable energy and the protection of New York State’s birds are not mutually exclusive. We have partnered with the New York State Department of Environmental Conservation (“the Department”), the New York State Energy and Research Development Authority (“NYSERDA”), and other state agencies to develop responsible siting guidelines for renewable energy and to create best management practices (“BMPs”) for protecting at-risk birds – all of which should be incorporated into the State’s regulatory program for approving renewable energy projects.

We appreciate the Office's attention to the need to protect endangered and threatened species and grassland birds in both of these regards, but the State needs to ensure that the protection of endangered and threatened species is not diminished by the urgency of our fight against climate change. The regulations need to include stronger language that requires applicants and permittees to avoid and minimize adverse environmental impacts to the maximum extent practicable, provide adequate time for the development of actions that will provide a net conservation benefit for impacted species, make greater use of the guidance and recommendations for wind and solar developers that have already been developed by New York State, and conduct compensatory mitigation with the same vigor and oversight as any other project component.

New York State is a leader in protecting vulnerable wildlife – bringing back species like the Bald Eagle and Peregrine Falcon from the brink of extinction – and now has the opportunity to develop a siting process that will allow us to abate climate change and protect wildlife at the same time. We are confident that the State can develop a sufficient number of renewables to meet the goals of the CLCPA while also protecting our wildlife and natural lands. We urge the Office to ensure that these regulations will allow New York State to continue to uphold its strong legacy of environmental stewardship.

To achieve those ends, we respectfully submit the following comments for your consideration. As you will read, we have focused our comments primarily on the issues relating directly to Audubon's mission to protect birds and their habitats.

Avoidance, Minimization, and Mitigation of Adverse Environmental Impacts. Even in a best-case scenario, following the State's leadership in implementing the Climate Leadership and Community Protection Act, it will be years before we can stabilize atmospheric greenhouse gases and the global climate. In the interim, temperatures will continue to rise and force us to confront climate change's immediate impacts. The long-term survival of threatened and endangered bird species requires that we ensure their short-term survival by continuing to protect occupied habitat to the maximum extent possible and ensuring that appropriate mitigation takes place where that is impracticable – as we do our utmost to contribute to solving the global climate crisis. A suitable climate does not help birds that are lacking a suitable habitat. We must maintain or increase population levels while we wait for the benefits of climate mitigation efforts to have a positive impact on our currently projected global warming.

Pursuant to the Act, renewable energy projects must avoid and then minimize significant adverse environmental impacts to the "maximum extent practicable" before being allowed to proceed with site-specific compensatory mitigation, otherwise known as the mitigation hierarchy. Applying the mitigation hierarchy, efforts should be sequenced with a preference for avoiding and minimizing habitat impacts before resorting to compensatory mitigation. There are areas in the state that should be avoided, in particular sites that regularly support highly at-risk species, like state-listed endangered and threatened species. Moreover, there are also many minimization strategies and BMPs that can reduce adverse environmental impacts on the site.

We appreciate the Office's efforts to afford protections to threatened and endangered species and grassland birds in particular. Still, we are concerned that the regulations emphasize mitigation over avoiding and minimizing impacts and set up a dual standard for the treatment of endangered and threatened species both within the regulations proposed by the Office and as compared to the State's existing permitting process under Part 182 of Title 6 of the NYCRR. This issue can be resolved by aligning the requirements for threatened and endangered species and utilizing BMPs developed by the State.

Parity in Endangered Species Protections. While the regulations do include some specific measures that avoid or minimize impacts to grassland birds – such as the wildlife characterization report, preconstruction surveys, and uniform standards and conditions – the regulations also create a standard for endangered and threatened grassland birds that is different from the requirements for other threatened or endangered species. Under §900-6.4(o)(1), applicants must develop a NCBP that includes detailed determinations of the net conservation benefits that will result for each threatened and endangered species based on the location of the site and the exact strategies to be used, including source information that supports that determination, among other requirements. These requirements are not included in the NCPB for grassland birds; instead, the applicant is directed to implement avoidance and minimization measures identified in §900-2.13. We are unclear as to why applicants are not required to make the same determinations for grassland birds and ask the Office to ensure that applicants take the same level of care in avoiding impacts to grassland birds as they would to any other threatened or endangered species.

Additionally, while the statute intends to streamline the process for siting and constructing renewable energy, we must ensure that the new application process has the same rigor used to assess other human activities and development under the laws governing threatened and endangered species. While the process set out in §900-1.3(g) follows the permitting guidelines and structure set out in Part 182 of Title 6 of the NYCRR, there are still significant differences when it comes to the treatment of grassland birds, and particularly those that would only suffer de minimis impacts. It is important to maintain consistency in determinations regarding threatened and endangered species. There should not be different regulatory structures and resulting standards of protection based on species or the size of occupied habitat.

Grassland Bird Management Plan and Conservation Centers. Grassland bird populations are in rapid decline, making it even more critical to protect the places where they are currently found. According to research published in *Science* in 2019, North America has lost one in four birds since 1970, with the most significant loss observed in grassland birds, which experienced a 53% decline in population. In the northeast United States, grassland birds are declining faster than any other group of birds, and several are included on New York's threatened and endangered species list. The declines tell us that we need additional quality habitat to ensure populations are maintained and rebound. Conserving the remaining grasslands that provide suitable nesting, foraging, and roosting habitat should be a priority of the Office and the Department.

While the regulations do include provisions for protecting and conserving grassland birds if a project site contains occupied habitat as identified by the Office, we believe that the Office needs to make additional efforts to avoid or disincentivize development in suitable and occupied habitat. In New York State, the Office can accomplish this by advising applicants to avoid the Grassland Bird Conservation Centers identified by the Department. The New York State Grassland Bird Conservation Centers, which provide grassland birds with the greatest chance of sustaining their populations, should be prioritized for conservation by the State and should be avoided when siting projects. To accomplish this, we urge the Department to approve and release the *NYSDEC Strategy for Grassland Bird Habitat Management and Conservation*. The plan's release would help the Office and Department further refine what conservation actions are needed within the grassland focus areas and other areas that support the occupied habitat of grassland birds.

Other areas that have consistently supported highly vulnerable state-listed grassland bird species should be avoided as well. The Henslow's Sparrow, Upland Sandpiper, and Short-eared Owl are all rare species

that have consistently struggled in New York State. If they are present in a particular area, it will be difficult to achieve successful mitigation that provides a net conservation benefit in other locations. The Office and Department should advise applicants that these areas will be subject to heavy restrictions if a project moves forward and suggest relocation of the project.

Identifying Least Conflict Sites. As the new regulations are finalized, we ask that the State identify least-conflict sites and prioritize them for development. Responsible siting is the most powerful tool we have in mitigating adverse environmental impacts, and identifying areas of least conflict for renewable energy would be beneficial to stakeholders, applicants, and the State. The assessment could examine factors such as renewable resources (e.g., wind), access to transmission lines, and natural resources like state-listed species, critical habitats (e.g., grassland focus areas, contiguous blocks of forest, wetlands. Etc.), and other environmental considerations. Ultimately, the process to identify least conflict areas could help the State achieve its energy goals and more efficiently reduce costs to companies and protect our critical natural resources.

Best Management Practices. The preapplication and uniform standards and conditions both contain procedures and specific requirements for avoiding and minimizing adverse impacts to endangered and threatened grassland birds, some of which are dependent on whether or not the impacts are considered de minimis. We appreciate these considerations but believe that there should be baseline actions that applicants and permittees are required to take regardless of whether the project affects threatened or endangered species or whether the impacts are considered de minimis. Each applicant or permittee should be required to use appropriate BMPs to decrease the adverse impacts caused by the project, including the Department's *Best Management Practices for Grassland Birds*, the *2016 Guidelines for Conducting Bird and Bat Studies at Commercial Wind Projects*, and the U.S. Fish and Wildlife Service's *Land-based Wind Energy Guidelines*, among others.

For example, the application states that "For wind facilities, wind turbines, towers and blades shall be Federal Aviation Administration (FAA) approved white or off-white colors to avoid the need for daytime aviation hazard lighting, unless otherwise mandated by FAA, and non-reflective finishes shall be used on wind turbines to minimize reflected glare." There is substantial evidence of avian attraction and disorientation to white artificial lights, particularly those that are steady. Only a portion of the turbines should be lighted with a non-white color that blinks, and all pilot warning lights should fire synchronously.

While the Department and other agencies are certainly well-equipped to advise on these practices, the State could also accomplish this work by convening a working group that can advise on the development and refinement of BMPs for wind and solar sites. This model has proved to be very successful during the development of the procurements for offshore wind, and it would also benefit the State's push for additional land-based renewables.

Involvement of the Department in Surveys and Habitat Assessments. The Office should defer to the Department's expertise and experience in reviewing projects for potential impacts to threatened and endangered species. This is particularly important when considering if additional habitat assessments or surveys are needed. Existing data sources are often inadequate, especially on private land, meaning assessments or surveys are often the only way to gather current information on the presence of suitable habitat or vulnerable species. Habitat assessments should note state-listed federal and threatened species, as well as special concern species and critical habitats like grasslands, contiguous blocks of forest, and other unique natural habitats so they can be avoided.

Additionally, habitat assessments should be evaluated by a technician or biologist with knowledge of the habitat variables and needs of various bird species, especially grassland birds. All grassland birds rely on herbaceous cover for nesting or foraging, but each species or group of species has different preferences, such as differences in cover requirements. Also, landscape context and surrounding land use should be a critical component of the habitat assessment.

Site-specific Requirements. In addition to the uniform standards and conditions, the statute requires the Office to develop site-specific requirements for impacts that are not adequately addressed by the uniform standards and conditions. We presume that any site-specific impacts would be addressed in the NCBP. Some species, such as the Upland Sandpiper, need large uninterrupted areas of space in order to achieve reproductive success. The Upland Sandpiper prefers large grassland-associated landscapes (250 acres or more) with low levels of human disturbance, has specific habitat requirements, is highly sensitive to habitat fragmentation, and may exhibit avoidance of renewable energy infrastructure. This means that while a particular installation may only infringe on a small portion of grassland, it can provide a disturbance significant enough to displace sensitive species from the surrounding area. Individual projects will have to consider these impacts based on the species that are present in the project area, and the Office and Department will need to be ready to assist developers with creating site-specific requirements for avoiding and minimizing impacts to these species.

Definition of De Minimis. The regulations rely on the concept of “de minimis” impacts when considering whether applicants or permittees will be subject to additional or baseline requirements in the uniform conditions and standards. Based on our reading of the regulations, it appears that an applicant would be subject to the requirements in §900-6.4(o)(3) if the Office determines that the occupied habitat of an endangered or threatened grassland bird is present on the site and that the impacts would be more than de minimis. Those additional actions would include, among others, monitoring before and during construction, limits on construction if there is an active nest, breeding, or wintering on the site, requirements to replace grassland vegetation following construction, and requirements regarding mitigation ratios for onsite conservation.

The regulations do not provide a definition of what is considered a de minimis impact. However, Article 12 of the preapplication infers that an action is de minimis if:

- §900-2.13(e)(1) The facility has been designed such that the only impacts would be to occupied habitat identified based on records greater than five (5) years old from the time of the wildlife site characterization report, but for which the applicant conducted appropriate surveys as approved by the Office that demonstrate that the species is not present at the facility site; or
- §900-2.13(e)(2) Construction of the facility within each mapped area of listed bird occupied habitat (based on the documented area of species’ use prior to addition of buffers) will only impact grasslands less than twenty-five (25) acres in size and will not include a recent (i.e., less than five (5) years) confirmed nesting or roosting location; or
- §900-2.13(e)(3) The facility has been designed such that the only impacts would be to occupied habitat identified for NYS threatened or endangered species for which the NYSDEC has issued a Notice of Adoption of regulations delisting or downlisting to Special Concern.

Additionally, per §900-6.4(o)(2)(i) of the uniform standards and conditions, if impacts are determined to be de minimis, and an active nest is later identified on a facility site that contains twenty-five or more

acres of occupied habitat, then the permittee will have to consult with the NYS Department of Public Service and the Office as to whether they need to adjust the construction schedule or their operations until nesting is complete or the permittee has to pay into the Threatened and Endangered Species Mitigation Bank Fund.

We have several concerns with the above language and the structure of the requirements.

Occupied Habitat. The first concern relates to §900-2.13(e)(2), which states that a project's impacts are de minimis if the identified occupied habitat is less than twenty-five acres in size and does not have a confirmed nesting or roosting location in the last five years. Pursuant to 6 CRR-NY 182.2, occupied habitat is a "geographic area in New York within which a species listed as endangered or threatened in this Part has been determined by the department to exhibit one or more essential behaviors." Those essential behaviors include "behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering." Under the current permitting system for incidental takes, the Department determines whether they have jurisdiction over habitat by ascertaining whether there are verified reports of a species engaging in one more essential behaviors on the project site. By excluding consideration of these other essential behaviors, such as feeding and migration, these regulations would create a standard for the treatment of threatened and endangered grassland bird species that is different from Part 182 of Title 6 of the NYCRR, which does not limit the consideration of essential behaviors or provide for differing treatments based on the size of the occupied habitat.

§900-6.4(o)(2) is similarly problematic because it relieves applicants of the duty to develop a NCBP if the applicant's proposed actions are de minimis. We believe that any habitat that supports a state-listed species engaging in one or more essential behaviors should be considered occupied habitat and that allowing permittees to engage in an action that adversely impacts that individual or habitat is a take as defined in NYS law and regulations. Based on this understanding, applicants must be required to follow the mitigation hierarchy and develop appropriate avoidance and minimization strategies regardless of the occupied habitat's size.

Additionally, §900-6.4(o)(2) states that if an active nest is identified on occupied habitat that is more than twenty-five acres in size, then the permittee is required to work with the Office and DPS to limit disturbances or adjust the construction schedule. We recommend that the Department be consulted as well to ensure that the measures being taken are appropriate given the species that are determined to be nesting on the project site.

We are also concerned that the de minimis construct only considers occupied habitat for grassland birds and not the buffers and larger landscapes that are needed for highly sensitive species. As discussed above, species such as the Upland Sandpiper and Henslow's Sparrow require large acreages of contiguous habitat with few disturbances. This means that so-called de minimis actions as defined in §900-2.13(e)(2), which requires consideration of the habitat in use without the addition of needed buffers, will result in a take if the active use is in less than twenty-five acres.

Conflicting Definitions of De Minimis. The second concern is that Exhibit 12 of the preapplication and the uniform standards and conditions appear to create conflicting definitions of de minimis based on whether an active nest is discovered before or after the start of construction. According to the language in Exhibit 12, §900-2.13(e)(2), impacts will be considered de minimis if they affect occupied habitat that is less than twenty-five acres in size AND do not have a recent confirmed nesting or roosting location.

But according to §900-6.4(o)(2)(i), if there is an active nest and the impacts are to occupied habitat that is less than twenty-five acres in size, than the permittee does not have to coordinate with the Office and NYS DPS to limit disturbance to the nest and/or adjust the construction schedule. This appears to set up a conflict for occupied habitat that is less than twenty-five acres in size, where Exhibit 12 states that nesting and roosting locations must not be present, and where the uniform standards and conditions state that a nest may be present as long as the occupied habitat is less than twenty-five acres in size. This should be clarified as the loss of even one active nest can be significant for some especially rare grassland bird species.

Avoidance, Minimization, and Mitigation. Additionally, the language in §900-6.4(o)(2) states that permittees must make adjustments to the construction schedule or facility operations until either the nesting has been completed or a payment has been made into the Endangered and Threatened Species Fund Bank. It should be made clear that the Office and NYS DPS will review the anticipated impacts and then employ the mitigation hierarchy, and compensatory mitigation will only be allowed if avoidance or minimization are not feasible.

Uniform Application of Best Management Practices. Our last concern is that many of the actions in §900-6.4(o)(3) are considered BMPs for a project site regardless of whether the actions are de minimis or whether they impact threatened and endangered species. Adherence to those practices should be a uniform standard or condition for all projects that may impact birds and other wildlife, regardless of vulnerability. It should not be an additional requirement that is solely aimed at threatened and endangered grassland birds that will suffer more than de minimis harm.

Based on this assessment, we conclude that the de minimis construct will actively harm grassland birds and state-listed species and create different standards for renewable energy projects and other human development. We ask that the Office remove the de minimis construct and require all projects to adhere to BMPs for grassland birds if there is occupied habitat present on the site.

Endangered Species List. We appreciate that the Department has moved forward with updating the Endangered and Threatened species list by issuing its preproposal on October 25, 2019. As you know, the list was last updated in 1999, and since then, many species have experienced significant changes in their populations as well as new threats, which justify a review of and updates to the state list. As we accelerate the development of renewable energy, it is even more critical that the updates to the list be made as soon as possible to ensure that each species has the proper listing status and that the Office and applicants are acting on current information. Recognizing the list's significance, we again ask the Department to conduct a thorough, consistent, inclusive, and transparent review of species to determine the appropriate current listing for each species. This will ensure that the list is optimized to meet the preapplication needs of the Office, Department, and applicants. Without these updates, the protections that are provided for threatened and endangered species and the associated efforts of applicants will be skewed towards species that may no longer be properly listed.

Public Engagement. As an organization with 93,000 members located throughout the state, we believe that the engagement of local communities and stakeholders is critical to the success of any action. We appreciate that the regulations include requirements for meetings with the public and a website to disseminate information regarding projects. Still, we believe that some additional requirements could be built in without sacrificing the need to streamline the preapplication process.

The regulations currently require the applicant to meet with the community no less than sixty days before their application is submitted to the Office. We would recommend increasing this timeframe to at least 120 days in order to ensure that communities have as much notice as possible and have the opportunity to provide feedback on the project. This will also offer potential intervenors the opportunity to identify whether they have the capacity to review project actions and to request initial funding. Additionally, the website required by §900-1.3(a)(7) should also provide a mechanism for receiving input from the public and requests for additional meetings. This will ensure there is a channel for both disseminating and receiving information, which is critical to building buy-in for projects.

Preapplication Timeline. We appreciate that the regulations urge developers to consult with the Office and Department regarding impacts to threatened and endangered species, “At the earliest point possible in the applicant’s preliminary project planning.” Reviewing the proposed project site for potential adverse environmental impacts early in the process is a critical step that will allow the Office and applicants to determine whether the site is appropriate for the proposed facility and will ensure that applicants have adequate time to develop actions to avoid or minimize adverse impacts to the maximum extent practicable.

However, we are concerned that the timelines set forth in the regulations for the review of the wildlife site characterization report, habitat assessments, and surveys may prove to be insufficient for a thorough and adequate review, especially as the submission of applications increases to meet both demand and the goals set forth by the CLCPA. As we’ve stated in other letters on the topic of the DEC’s current staffing, we believe that additional conservation biologists and technicians are needed in the Division of Fish and Wildlife in order to ensure both timely and adequate review of applications with permitting requirements. This is particularly true for applications for siting permits, which we agree should be issued in an expeditious manner. However, if tight timelines are imposed, they should be accompanied by the resources that make such review possible; otherwise, the timelines should be adjusted to reflect current staffing levels and workloads.

Additionally, the regulations do not appear to provide guidance as to what will happen if the Office, Department, or applicant fails to meet the timelines for producing, reviewing, or making a determination regarding these documents. We would be concerned if any items were considered automatically approved, or removed from consideration, due to a failure to meet these deadlines. There absolutely should be no automatic approvals of projects if the Office or Department is unable to respond by a deadline.

National Audubon Society Climate Models. The regulations refer to Audubon’s Climate Report, but it isn’t clear how that information is being used. Many bird species are in decline and vulnerable to climate change, but Audubon’s Climate Report and associated list of climate threatened species should not be used to justify the destruction of critical habitats or unnecessary trade-offs. If renewable energy development contributes to population declines and species are extirpated, it doesn’t matter how climate change impacts them in the future.

Uniform Standards and Conditions. As discussed in the section on de minimis impacts, we believe that the uniform standards for grassland birds in §900-6.4 (o)(3) should apply to all projects regardless of whether the impacts are considered de minimis, the acreage meets a certain threshold, or the impact is to vulnerable species or not. We do, however, concur with the Office’s recommendations on monitoring prior to and during construction, the windows for construction based on impacts to nesting and wintering species, replanting native vegetation, and implementing avoidance and minimization

measures as identified in Exhibit 12 of the permit application, and ask that the Office consider the following concerns as they review the regulations.

Row Crops. The uniform standards and conditions state that “If fields within identified occupied breeding habitat are planted with row crops... in the farming season prior to the commencement of facility construction and such fields were historically used for row crops during at least one of the prior five (5) years, these fields will not be subject to the construction timing restrictions.” We are concerned that this exception could create an incentive for property owners to plant row crops for the years preceding entering a lease with a renewable energy company and bypass restrictions that would apply to the prior landscape features, such as grasslands or forests.

Additionally, some “row crop” land is within the core geographical areas of the grassland focus areas, and development could work to break up these critical blocks of suitable habitat. As discussed above, many grassland bird species need additional undisturbed grassland areas beyond their immediate occupied habitat to achieve reproductive success. Due to these considerations, current field surveys must be used to inform the review of applications rather than relying on the designation of the current land cover.

Post-Construction Monitoring. The regulations state that monitoring must occur prior to and during construction, but do not mention monitoring post-construction. Monitoring is a critical component of responsible renewable energy development. Adequate monitoring before, during, and after project construction will help explain whether and how a project impacts its surrounding environment and the degree to which efforts taken to avoid, minimize, and mitigate harm have been successful, while also enabling the adaptive management of environmental impacts that may occur. Determining the exact protocols, including the number of years required to survey, should be done in consultation with the Department and other experts to ensure the surveys answer the questions being posed. We would anticipate that post-construction monitoring would be needed for at least two years, but possibly up to ten depending on the project. Monitoring should be conducted in a collaborative and transparent manner, and the results should be publicly available. Post-construction monitoring is a key element of ensuring that siting is developed and operated responsibly and should be included in the uniform standards and conditions, especially for sites that require a NCBP.

Ratios for Mitigation. Compensatory mitigation is intended to compensate for the loss of known, occupied habitat by protecting or enhancing potential habitat elsewhere to replace or offset the specific habitat and species impacted. However, there is no guarantee that proposed mitigation will be successful and replace the lost habitat and impacted species. For example, reviews of both published literature and agency reports on wetland mitigation found that permit-linked mitigation projects' success rate is low overall (Race and Fonseca 1996). Because of this, the compensatory mitigation ratio should be above 1:1 to address the uncertainty of success and desire to achieve a net conservation benefit. In § 900-6.4 (o)(3)(ix) a developer can forego payment to the Endangered Species Fund in the event of a take and instead propose mitigation at ratios of 1:0.4 acres of mitigation habitat for every acre of occupied grassland bird breeding habitat taken and 1:0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat taken; it is very doubtful that these ratios will result in a net conservation benefit.

In addition to requiring larger mitigation areas than the area impacted, mitigation areas could target areas with higher resource value than the acres impacted (e.g., support multiple nesting species or threatened species), and mitigation should begin before the Office grants a siting permit in order to

ensure compliance. As mentioned above, there needs to be a monitoring mechanism in place to ensure compliance and evaluate whether mitigated habitats compensate for the lost habitat. In particular, if a solar project impacts Upland Sandpiper nesting habitat, the areas that are part of the mitigation should be monitored to confirm they ultimately support nesting Upland Sandpipers. If there is a long lag between when mitigation is implemented and those efforts prove unsuccessful, New York State will be at serious risk of losing state-listed species that already have relatively small populations. We recommend emphasizing strong NCBPs that include adequate mitigation acreage and a monitoring scheme to ensure that there is not a net loss over time from renewable energy, especially from cumulative impacts of multiple projects.

Protection of Wetlands. Wetlands are critical for bird health and population stability and provide numerous benefits to people and communities – illustrating the need to protect the state’s freshwater wetlands to the greatest extent possible. Approximately one-third of North American bird species use wetlands for food, shelter, or breeding, and one hundred thirty-eight species and subspecies of birds in the U.S. are designated as “wetland dependent,” including the Black Rail, Pied-billed Grebe, and Least Bittern, which are listed as threatened or endangered in New York State. Protecting these birds’ habitats is absolutely essential to their future survival.

We appreciate the protections offered to freshwater wetlands by the regulations and that they advise applicants to delineate any wetlands as early in the process as possible. Identifying wetlands early in the process and then receiving input from the Office and Department will allow applicants to avoid critical wetlands and plan for appropriate minimization or mitigation actions. We concur with the regulation’s recommendation that Class I wetlands provide unique ecological values and should be avoided and prioritized for conservation, and that all other wetlands should be subject to mitigation as outlined in Table 1 of § 900-2.15.

In addition to the aforementioned protections, we recommend that the Office revise the regulations to incorporate the following recommendations.

Unmapped Wetlands. Currently, the Department can only regulate wetlands if they are delineated on jurisdictional maps, which has left more than 50,000 acres of wetlands unprotected. Unless the Department expands its authority, it will not be able to protect critical wetlands that provide food and shelter for our birds and improved water quality and flood management for our communities. Until their authority is expanded, we would strongly encourage the Office and the Department to recognize all wetlands over 12.4 acres as jurisdictional for the purposes of siting wind and solar facilities, for the purposes of both parts § 900-1.3(e), §900-2.15, and § 900-1.3(g)(1)(v). Additionally, we would strongly encourage the Governor to advance the language from the SFY 2020-21 Executive Budget (S7508-B TED Part TT) again this coming year in order to resolve this issue permanently. Applicants and interested stakeholders should have a consistent framework for identifying wetlands on project sites and determining what mitigation measures need to be undertaken.

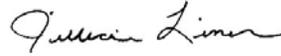
Involvement of the Department. According to § 900-1.3(e)(4) and (5), the Office may request that the Department review the draft wetland delineation and provide a determination as to whether the project components will impact regulated wetlands. While we appreciate that the Office intends to rely on the Department’s expertise, we would recommend that the Department’s involvement be required for the review of each application and be conducted within the 60-day review window currently in the regulations. This will ensure that all wetlands present on the project site are identified promptly and that applicants have the maximum amount of time available to resolve any conflicts.

Thank you again for considering these comments and for your commitment to developing renewable energy while upholding environmental protections. If you have any questions regarding this letter, please contact our Policy Manager, Erin McGrath, at 518-860-4296 or erin.mcgrath@audubon.org, or Jillian Liner at jillian.liner@audubon.org or 607-262-0006.

Sincerely,



Erin McGrath
Policy Manager
Audubon New York



Jillian Liner
Director of Conservation
Audubon New York

We are joined in this letter by the following Audubon Chapters:

Audubon Community Nature Center
Bedford Audubon Society
Bronx River – Sound Shore Audubon Society
Buffalo Audubon Society
Central Westchester Audubon
Chemung Valley Audubon Society
Eastern Long Island Audubon
Four Harbors Audubon Society
Genesee Valley Audubon Society
Hudson River Audubon Society
Huntington-Oyster Bay Audubon Society
New York City Audubon
North Shore Audubon Society
Northern Catskills Audubon Society
Northern New York Audubon Society
Onondaga Audubon Society
Orange County Audubon Society
Putnam Highland Audubon Society
Saw Mill River Audubon Society
South Shore Audubon Society
Southern Adirondack Audubon Society

CC:

Deputy Secretary Ali Zaidi

Commissioner Basil Seggos
Senator Todd Kaminsky
Senator Kevin Parker
Assemblymember Steven Englebright
Assemblymember Michael Cusick

NRDC

Attached are updated comments from Sierra Club, Natural Resources Defense Council, New Yorkers for Clean Power, Environmental Advocates NY, and New York League of Conservation Voters. These updated comments include a footnote that was inadvertently omitted.

December 7, 2020

VIA ELECTRONIC MAIL

Houtan Moaveni
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State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

RE: Chapter XVIII, Title 19 of NYCRR Part 900, Office of Renewable Energy Siting Subparts 900-1 – 900-5; 900-7 – 900-14; Comments of Sierra Club, Natural Resources Defense Council, New Yorkers for Clean Power, Environmental Advocates NY, and New York League of Conservation Voters

Dear Mr. Moaveni:

On behalf of the Sierra Club, Natural Resources Defense Council, New Yorkers for Clean Power, Environmental Advocates NY, and New York League of Conservation Voters (Commenters), we respectfully submit the following comments regarding the proposed regulations to be codified at Chapter XVIII, Title 19 of NYCRR Part 900: Subparts 900-1 – 900-5; 900-7 – 900-14. We appreciate the leadership of Governor Cuomo and state lawmakers in enacting the Accelerated Renewable Energy Growth & Community Benefit Act (Accelerated Renewable Act), which will improve the processes for building renewable energy projects across the state and help New York achieve its nation-leading goal of 70 percent renewable electricity by 2030 and 100 percent clean zero-carbon energy by 2040 as required by the Climate Leadership and Community Protection Act (CLCPA). The proposed siting regulations will help bolster New York's clean energy economy and the tens of thousands of jobs that come with it. More than 60 wind and solar projects are ripe for construction once undergoing environmental review and permitting.

The proposed regulations will help ensure these projects are permitted in a timely manner while maintaining the State's strong environmental and public participation standards. Commenters largely support the regulations as proposed, but urge certain modifications described below in order to ensure the effective protection of grassland species and timely and appropriate delineation of jurisdictional wetlands. Commenters also urge the Office of Renewable Siting (ORES) to adhere to a data driven approach when considering issues such as setback and noise requirements and not to unduly tighten requirements in the absences of credible evidence of harm, as changes to these requirements could severely impede siting of important clean energy resources.

§ 900-2.6 Exhibit 5: Design Drawings

Commenters recognize that excessive setback requirements can significantly limit the viability of renewable energy siting and could impair New York's ability to meet its renewable energy commitments. It is important that setback requirements be supported by credible data on adverse effects. Commenters are not aware of any credible data suggesting that adverse effects

occur at the setback distances currently proposed in § 900-2.6(b) and (d) and therefore urge ORES not to increase these setback distances.

§ 900-2.8 Exhibit 7: Noise and Vibration

Commenters likewise recognize that unduly restrictive noise requirements can hamper the ability to site renewable energy projects without providing a meaningful benefit. Noise limits must therefore be supported by credible data regarding adverse effects. Absent data showing adverse impacts at noise levels below 45 dBa (which Commenters have not seen)¹, the noise limits set forth in § 900-2.8(b) should be retained.

§ 900-2.19 Exhibit 18: Socioeconomic Effects

The development of renewable energy projects in New York has the potential to create significant job and economic development benefits. However, to ensure that the construction and operation of new renewable energy facilities create family-sustaining employment opportunities for New Yorkers, we urge ORES to include within the disclosures required for Exhibit 18 the following additional information: (a) the use of project labor agreements for project construction; (b) whether jobs created by the project will pay prevailing wage for construction and building service workers; (c) whether the developer has entered into labor peace agreements covering operations, maintenance, and/or manufacturing work; (d) whether the project will utilize apprenticeship and labor-management training programs; (e) whether the project will create jobs for nearby workers exiting fossil fuel industries; (f) whether the project will employ New York State residents; (g) whether the project will employ New York State contractors and subcontractors; and (h) whether the project will create jobs for disadvantaged communities.

§ 900-1.3(e) Pre-application Procedures: Wetland Delineation & § 900-2.15

Freshwater wetlands are a critical resource in New York providing valuable ecosystem services. It is important that renewable development occur in a manner that prioritizes minimization of adverse impacts to these vital resources and mitigates those impacts where they must occur. An essential initial step in minimizing and mitigating wetland impacts from renewable project development is the delineation of wetland boundaries. Commenters recognize that existing jurisdictional wetland mapping in New York State is not always current and accurate and to ensure important aquatic habitats are identified on a project site, early delineations of jurisdictional wetlands are important. Because of the expansive nature of solar energy development, and the dual imperative to protect natural infrastructure for climate resiliency, we strongly support the Office of Renewable Energy Siting recognition of unmapped

¹ The scientific literature strongly supports the protectiveness of 45 dBa. *See, e.g.*, World Health Organization, Environmental Noise Guidelines for the European Region (Oct. 10, 2018), available at https://www.euro.who.int/__data/assets/pdf_file/0008/383921/noise-guidelines-eng.pdf; see also Simon Chapman & Fiona Chrichton, Wind turbine syndrome: a communicated disease. Sydney University Press. (2017) at 270; R.J. McCunney, et al., Wind turbines and health: A review of the scientific literature, *Journal of Occupational and Environmental Medicine* 56 (2014), (11) doi: 10.1097/JOM.0000000000000313; R.G. Berger, et al., Health based audible guidelines account for infrasound and low-frequency noise produced by wind turbines. *Frontiers in public health* (2015) 3 doi:10.3389/fpubh.2015.00031; L.D. Knopper & C.A. Ollson, Health effects and wind turbines: A review of the literature. *Environmental Health* (2011), 10:78 doi:10.1186/1476-069X-10-78.

wetlands over 12.4 acres as jurisdictional, and inclusive under the overarching permitting program for siting of facilities. To ensure that wetland delineation does not unduly delay project development, any conflicts regarding wetland delineation must be addressed in a timely and efficient way as early as possible in the project development process. Moreover, the roles for ORES and the Department of Environmental Conservation (DEC) must be clearly established to ensure that inter-agency disagreements do not delay development timelines. In light of these considerations, Commenters offer the following recommendations regarding the proposed regulations:

- Commenters support the requirement that applicants conduct wetland delineations “[a]t the earliest point possible in the applicant’s preliminary project planning.” § 900-1.3(e)(1). Any disagreements between the applicant and State agencies regarding wetland delineation should be addressed, if possible, prior to filing of the application.
- In recognition of the particular ecological value of Class I freshwater wetlands, Commenters support the prohibitions in § 900-2.15 Table 1 on siting projects and conducting tree clearing, grading, and intermediate activities in these highest quality jurisdictional wetlands.
- Commenters recommend that the language of § 900-1.3(e)(4) and (5) be modified to clarify the role for DEC in reviewing the applicant’s proposed wetland delineation. Specifically, while it is appropriate for ORES to be able to call upon the expertise of DEC in reviewing the applicant’s wetland delineation (as the sections currently provide), the regulations should also clearly authorize DEC to provide input on proposed wetland delineations in the absence of an express request from ORES. Any DEC input on wetland delineation should occur within the same 60-day review window presently provided for ORES pursuant to § 900-1.3(e)(5) so that wetland delineation conflicts can be resolved prior to the filing of the application.

§ 900-1.3(g) & § 900-2.13 Exhibit 12: NYS Threatened or Endangered Species

Grasslands are an important and diminishing habitat in New York that support a number of endangered and threatened bird species. Because grasslands often have marginal land value and can provide vast contiguous acres of open space, they are also desirable to developers for large-scale solar installations. While solar development should target every facet of the human built environment, achieving New York’s climate goals will likely require prioritizing renewable energy development beyond the built environment including on neglected agricultural fields.

Grassland habitat provides value to threatened and endangered species not merely based on the immediate quality of the habitat but also based on its proximity to other parcels of high quality habitat. It is therefore critical to consider grassland species conservation at a landscape scale rather than a project scale. DEC and the New York State Natural Heritage Program have been monitoring the decline of grassland species, and in some regions, have assisted in the creation of management plans for existing grassland areas. Indeed, DEC has developed a draft Statewide Grasslands Conservation and Management Plan (Plan), but has not released it

publicly. We continue to urge DEC to release this plan and, in the context of solar siting, to use the Plan to identify which prime grassland areas should be off limits to development. In addition, the Plan should be used to identify where conservation and management of grasslands should be pursued. By providing more guidance, certainty and predictability to developers, the Plan would help identify agricultural areas outside of these core areas that can support a greater density of solar or other forms of development.

Unfortunately, the proposed regulations continue a piecemeal, project-by-project approach to grassland species conservation that is ill-suited to the conservation needs of grassland species and the certainty that renewable energy developers require. In general, Mitigation funds and Net Conservation Benefit Plans should track the conservation priorities identified in the Plan rather than being developed and administered on an ad hoc basis. The Accelerated Renewable Energy Growth and Community Benefit Act makes clear that the application of uniform standards and conditions and site-specific conditions must achieve a net conservation benefit to any impacted endangered and threatened species.² Isolating listed grassland species for specific and separate standards and conditions may not bring about the required protection and advancement of northern harrier, short-eared owl, upland sandpiper and other endangered grassland species in New York that the law demands.

Moreover, the regulations are unclear as to whether a Net Conservation Benefit Plan (NCBP) is required at all for some situations where endangered birds may in fact occupy a project site. Absent from the regulations is the option for regulators to declare that an occupied endangered grassland bird habitat is so significant or unique that it cannot be developed. The draft regulations focus on prescribing limits and rules during construction for grassland birds, which circumvents the process afforded all other endangered species, i.e. the NCBP, which may include strict avoidance provisions. In particular, the regulations establish a de minimis impact threshold on NYS threatened or endangered grassland birds with contradictory requirements between § 900-2.13(e) and § 900-6.4 (o)(2)(i).

The term “de minimis” in § 900-2.13(e) is defined by land that has been unoccupied for 5 years by a listed grassland bird or is less than 25 acres or features a species that is in a potential delisting proceeding. Alternatively, §900-6.4 (o)(2)(i) presents a scenario in which a “de minimis” action takes place on land that is more than 25 acres and is occupied by a nesting endangered bird. ORES should, at the very least, resolve this inconsistent use of the term de minimis within its regulations. To be clear, any activity on or near a nesting site of a listed grassland bird should trigger a Net Conservation Benefit Plan with a strong prioritization of avoidance and minimization before mitigation. The de minimis threshold established in § 900-2.13(e) may not indeed capture the unique ecological value of a smaller property to endangered grassland birds. And exempting species that have yet to be delisted prejudices the public delisting process and does not live up to the Office’s obligation to achieve a net conservation benefit for what is currently listed.

Ultimately, Commenters assert that creating any de minimis category solely for

²S. 7508--B Part JJJ Executive Law amended § 94-c 3(d).

grasslands bird species is unnecessary, overly prescriptive and will cause more confusion to the permitting process than following protocols established for all endangered species. The standard requirements for monitoring and habitat analysis is sufficient to establish endangered species occupancy on any particular site. We therefore ask that all mention of de minimis exemptions be removed from regulation.

Row Crop Exemptions for Listed Grassland Birds

The draft regulations and permitting conditions create further exemptions for potential endangered species habitat that has been planted with row crops:

§ 900-6.4 (o)(3)(iv): If fields within identified occupied breeding habitat are planted with row crops (e.g., corn, beans, or vegetables) in the farming season prior to the commencement of facility construction and such fields were historically used for row crops during at least one of the prior five (5) years, these fields will not be subject to the construction timing restrictions set forth in subparagraphs (iii)(a) and (c) of this paragraph

If such a policy is adopted by ORES, it could be exploited by the development community in general, and valuable grassland habitat across the state could be converted to row crops simply to obtain an exemption from endangered species mitigation requirements. Some row crop land, in turn, may in fact be geographically valuable to core grassland habitat areas and with some management be restored to excellent habitat for short eared owl – while allowing for solar development in higher quality grasslands that are less advantageously positioned geographically to support endangered birds. Commenters recommend that occupied land by endangered species be determined by past and present field surveys, regardless of current land cover type.

Mitigation Land

Section 900-6.4 (o)(3)(viii) dictates that if ORES has determined a project impacts occupied grassland bird habitat and that impact requires mitigation, the permittee can pay a required mitigation fee commensurate with the actual acreage of occupied habitat taken into the Endangered Species Fund. The sole purpose of this payment is to conserve habitat and achieve a net conservation benefit to the impacted species. Commenters suggest that with some master planning this could be a valuable component to financing grassland habitat reserves while strategically siting significant areas of solar on the periphery of core habitat areas. But the regulations do not require that the money paid to the Fund be spent within the area of impact or be part of a larger comprehensive plan to guide spending. Regulations should specify that a key component to a Net Conservation Benefit land exchange is local and regional land replacements, with protection and maintenance of that mitigation habitat within the context of a broader conservation plan.

In addition, § 900-6.4 (o)(3)(ix) provides for land mitigation ratios if a developer is to forego payment to the Endangered Species Fund in the event of a taking. As prescribed,

developers must secure 0.4 acres of mitigation habitat for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat determined to be taken. It is difficult to determine how less acreage translates into a net conservation benefit. This section requires more specificity and an appropriate explanation of the adequacy of acreage amounts. The Greene County IDA has required land offsets that have yielded 1.4 acres of protected habitat for every acre of grasslands developed, regardless of breeding or winter habitat.³

This section should specify: (1) that the habitat mitigation land must be reasonably adjacent or local to the impact or taking and (2) that the mitigation ratio is contingent on a grasslands management plan for that acreage, the severity of the impact and the habitat value and strategic location of the mitigation land. In general, Commenters would support a 1:1 land mitigation ratio if the appropriate habitat is donated to a grassland reserve to be managed by DEC, land trust or some other entity for the benefit of endangered species and a 1:.5 ratio if a developer commits to a management plan and mowing schedule of mitigation lands that they themselves finance and execute on their own.

Conclusion

Passage of the Accelerated Renewable Energy Growth & Community Benefit Act and promulgation of these implementing regulations are critical steps to enabling the rapid construction and deployment of wind and solar energy facilities as New York strives to achieve a carbon neutral electrical grid by 2040. Our organizations represent tens of thousands of New Yorkers who are eager to accelerate the development of renewable energy in their communities and throughout the State. Success in administering this bold new permitting program relies upon maintaining a judicious balance between an accelerated build out of wind and solar facilities, the promotion of community benefits, and the protection and enhancement of the unique ecological features to New York's environment that will be so important to maintaining climate resiliency and facilitating adaptation. In this spirit, please accept these comments and suggested changes to the draft regulations so that we can ensure that we meet all these goals in combating climate change, supporting natural infrastructure and uplifting our communities.

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³ Greene County Grassland Management Plan pg. 57.

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Scenic Hudson, Inc.

Please see attached comments of Scenic Hudson, Inc. on draft regulations Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15). Thank you.



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**Re: Siting of Major Renewable Energy Facilities; Addition of Subparts 900-1 through 900-5 and 900-7 through 900-14 to Title 19 NYCRR; NYS Register I.D. No. DOS-37-20-00015-P
Comments of Scenic Hudson, Inc.**

Dear Deputy Director Moaveni:

On behalf of Scenic Hudson, Inc. ("Scenic Hudson"), please accept these comments on proposed 19 NYCRR Subparts 900-1 through 900-5 and 900-7 through 900-14, establishing procedural requirements for permits for siting, construction, and operation of major renewable energy facilities pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act (the "Renewables Act") and Executive Law § 94-c(3)(g). Scenic Hudson is submitting comments on proposed Subpart 900-6 separately pursuant to NYS Register, Proposed Rulemaking, Siting Permits for Major Renewable Energy Facilities. I.D. No. DOS-37-20-00016-P, September 16, 2020.

Scenic Hudson's Interest

Scenic Hudson is a 501(c)(3) not-for-profit organization based in Poughkeepsie, New York, dedicated to preserving the scenic, ecological, recreational, historic and agricultural treasures of the Hudson River valley. Scenic Hudson strongly supports the goals of the 2019 Climate Leadership and Community Protection Act ("CLCPA"), which increased the state's 2030 renewable energy supply target from 50% to 70% in the interest of reducing greenhouse gas emissions and mitigating the worst impacts of climate change. We seek to ensure that the development of solar energy projects in the Hudson Valley is maximized while protecting the region's priceless natural resources, designated scenic views and historic sites. It is Scenic Hudson's view that we can fight climate change by helping make the Hudson Valley a leader in clean energy. This can create new jobs, provide reliable and affordable energy, and shape healthier, stronger communities.

The renewable energy targets contained in the CLCPA require buildout of new, clean energy infrastructure on an unprecedented scale. To achieve it, the Renewables Act sets out a plan for a statewide energy transformation that ensures necessary electric grid upgrades, maximizes re-use of industrial sites for renewable energy, provides community benefits, and streamlines permitting of utility-scale renewable energy projects. To achieve this last goal, the new Office of Renewable Energy Siting ("ORES") "is proposing a comprehensive set of regulations necessary to process applications for the siting, design,

construction and operation of major renewable energy facilities.”¹ We look forward to implementation of final regulations by ORES that “[support] the development of large-scale renewable energy projects in a way that also ensures the protection of the State’s valuable natural resources...”²

We have the following comments on the proposed procedural regulations:

Pre-Application Procedures Should Maximize Transparency and Address All Relevant Potential Impacts

Proposed § 900-1.3 (Pre-application procedures) provides for two phases of pre-application disclosure by applicants. First, §§ 900-1.3(e), (f), (g) and (h) require that “as early as possible,” the applicant must conduct wetland delineation, stream delineation, threatened and endangered species habitat characterization, and an archaeological study and submit them to ORES and NYS Department of Environmental Conservation (“NYSDEC”) or Office of Parks and Historic Preservation (“OPRHP”) for feedback and direction from these agencies.

Second, §§ 900-1.3(a) and (b) require that “no less than sixty (60) days” before the date on which an applicant files an application, the applicant must conduct pre-application meetings with local agencies to address issues of local law compliance and begin consultation on impacts such as transportation and visual resources that must be studied in the application, and must also hold a meeting with community members to “educate the public about the proposed project.”

We support inclusion of these pre-application requirements in the interest of streamlining the application review process and early identification of potential significant environmental impacts. In order to maximize effectiveness and transparency of this early process, we encourage ORES to establish an electronic filing system and post information for public review even prior to the dates of the mandatory local agency and community meetings. As noted in the regulations, one of the important purposes of these meetings is to facilitate consultation on potential impact areas where local knowledge and input is vital. Making information publically available during the time of consultation with ORES, NYSDEC and OPRHP will serve to increase transparency and maximize opportunities for public input. The applicant’s website required by proposed § 900-1.4(a)(4) should be published as early as possible during the pre-application process and supplemented as the process moves forward. In addition, the final regulations should include provisions to ensure that required notice of meetings, filings and other actions is received by all relevant stakeholders who may be affected by a proposed renewable energy project, including property owners, easement holders (such as land trusts), not-for-profit organizations and other potential community intervenors and interested parties.

Finally, the requirements for early study and consultation should be broadened to include publically designated visual resources, forest resources, and agricultural resources, and include consultation with New York State Department of Agriculture and Markets (“NYSDAM”). The proposed regulations require that these important resources are addressed in application Exhibits (e.g., Exhibit 8 (Visual Resources), Exhibit 11 (Terrestrial Ecology) and Exhibit 15 (Agricultural Resources). Impacts to designated visual resources and community character, forests, and farmlands have proven to be important and even controversial issues in the Article 10 process. In order to help facilitate an improved permitting process for major renewable energy facilities, they should be included and addressed as early as possible in the

¹ NYS Register, Proposed Rulemaking, Siting of Major Renewable Energy Facilities. I.D. No. DOS-37-20-00015-P, September 16, 2020.

² *Id.*

new ORES review process by including them in pre-application consultation and addressing them at meetings with local agencies and community members.

All Applicable Uniform Standards and Conditions Should be Consolidated or Clearly Identified to Maximize Comprehension by Regulated Entities and the Public

While proposed Subpart 900-6 is titled “Uniform Standards and Conditions,” there are several instances where requirements that may be considered uniform standards and conditions (“USC”) appear outside proposed Subpart 900-6 and in the proposed procedural regulations.³ For example, proposed Subpart 900-2, which contains exhibit requirements, also contains numerous embedded criteria that may be considered USC, and an additional uniform requirement is found in the proposed provision for compliance filings in proposed Subpart 900-10. This makes it difficult to identify and understand the full set of criteria applicable to proposed major renewable energy facilities. The following requirements should be included or consolidated with the USC, or otherwise clearly identified:

1. Exhibit 3: Location of Facilities and Surrounding Land Use must demonstrate that conflicts from facility-generated noise, traffic and visual impacts with current and planned uses have been minimized to the extent practicable.⁴ Exhibit 3 must also include a description of community character, impacts analysis, and identification of avoidance or mitigation measures that will minimize adverse impacts on community character.⁵
2. Exhibit 4: Real Property must demonstrate that the applicant has obtained title to or a leasehold interest in the facility site, or is under binding contract or option, or can obtain title or leasehold interest.⁶
3. Exhibit 5: Design Drawings must demonstrate compliance with setbacks for wind and solar facilities as follows:

Setback Requirements for Wind Turbine Towers⁷

Structure Type	Wind Turbine Towers Setback*
Substation	1.5x
Any Above-ground Bulk Electric System**	1.5x
Gas wells (unless waived)	1,1x
Public Roads	1.1x
Property Lines	1.1x

³ Scenic Hudson is submitting comments on proposed Subpart 900-6 separately pursuant to NYS Register, Proposed Rulemaking, Siting Permits for Major Renewable Energy Facilities. I.D. No. DOS-37-20-00016-P, September 16, 2020.

⁴ Proposed § 900-2.4(l).

⁵ Proposed § 900-2.4(s).

⁶ Proposed § 900-2.5(c).

⁷ Proposed §900-2.6(b).

Non-participating, non-residential Structures	1.5x
Non-participating residences	2x
**Operated at 100kV or higher	*1.0 times Wind Turbine Towers setback = Total Height of the Wind Facility (at maximum blade tip height)

Setback Requirements for Solar Facility Components⁸

Setback Type	Solar Facility Setback
Non-participating residential property lines	100'
Centerline of public roads	50'
Non-participating property lines (non-residential)	50'
Non-participating occupied residences	250'

In addition, proposed Exhibit 5 requirements provide that the maximum height of solar facilities, exclusive of electric collection, transmission or substation/switchyard components, shall not exceed 20' from finished grade.⁹

4. Exhibit 7: Noise and Vibration proposed requirements state that the noise study shall demonstrate compliance with specified maximum noise limits for wind and solar facilities.¹⁰
5. Exhibit 13: Water Resources and Aquatic Ecology must provide a demonstration of avoidance and minimization measures by siting all components more than 50' from any delineated NYS protected waterbody. If impacts cannot be avoided (as demonstrated by the applicant), the regulations set forth best management practices for design. The regulations also set forth mandatory Waterbody Mitigation Requirements for certain impact types.¹¹
6. Exhibit 14: Wetlands must include a map of jurisdictional wetlands and facility components as confirmed by ORES and NYSDEC along with a functional assessment. Exhibit 14 must include a demonstration of avoidance of impacts to jurisdictional wetlands and their 100' buffer area by siting all components more than 100' from any delineated NYS wetlands.¹² If impacts cannot be avoided (as demonstrated by the applicant), the regulations require wetland mitigation for certain specified major, intermediate and minor activities and preparation of a Wetland Restoration and Mitigation Plan. (§ 900-2.15(f), (g)).

⁸ Proposed § 900-2.6(d).

⁹ Proposed § 900-2.6(e).

¹⁰ Proposed § 900-2.8(b).

¹¹ Proposed §900-2.14(b)(5), (6), (7).

¹² Proposed § 900-2.15(e).

7. Pre-construction compliance filing requirements include filing of a copy of a Cultural Resources Avoidance, Minimization and Mitigation Plan which demonstrates that “impacts of construction and operation of the facilities on cultural resources (including archaeological sites and any stone landscape features, and historic resources) will be avoided or minimized to the extent practicable by selection of the proposed facility’s location, design and/or implementation of identified mitigation measures.”¹³

The final regulations should make the full and complete list of USC that combines these as well as the requirements in proposed Subpart 900-6 and makes them clear and easily understood by regulated entities and the public. This will facilitate understanding and analysis of a proposed major renewable energy project’s compliance with all of these requirements, helping to provide transparency and streamline the review process.

The Regulations Should Include a Specific Standard to Justify Use of Site Specific Conditions in Lieu of USC and Prohibit Over-Reliance on Site Specific Conditions

Per the proposed regulations, an application to ORES must include an application form, required exhibits, and “any requests for a site specific condition in lieu of any exhibit requirement or uniform standard or condition, including justification and supporting documentation and an explanation as to why such site-specific condition is required.”¹⁴ The proposed regulations do not include any standard for ORES’s determination on such requests.

According to the Renewables Act, when site-specific environmental impacts may be caused or contributed to by a proposed facility and are unable to be addressed by the uniform standards and conditions, ORES “shall draft site-specific standards and conditions for such impacts, including provisions for avoidance and mitigation thereof, taking into account the CLCPA targets and environmental benefits of the proposed facility.” Based on this directive, the final regulations should include a specific requirement that the permittee shall construct and operate the facility in accordance with the uniform standards and conditions, except for those that ORES determines to be unreasonably burdensome, taking into account the CLCPA targets and environmental benefits of the proposed facility. Such a standard can be modeled on the proposed standard for waiver from local law requirements.¹⁵

In addition, the final regulations should include guidance for ORES’s determination of how many site-specific condition requests may be granted to an applicant. We recognize and support the purpose of the USC to incentivize better-sited and better-designed projects from inception, as well as create certainty and streamline the process. These goals should not be undermined by applicants who seek too many waivers to accommodate poorly-sited projects.

Award of Local Agency Account Funds Should Provide for Maximum Public Participation

The Renewables Act requires that each application must be accompanied by a fee of \$1,000 per megawatt to be deposited into a local agency account and disbursed by ORES for the benefit and use of local agencies and community intervenors. Under Public Service Law Article 10, 50% of intervenor funding is reserved for municipalities. The proposed regulations depart from the existing intervenor funding framework under

¹³ Proposed § 900-10.2(g).

¹⁴ Proposed § 900-1.4(a).

¹⁵ See proposed § 900-2.25(c).

Article 10, and instead, proposed § 900-5.1(g)(2) provides “at least 75% of the local agency account funds must be reserved for local agencies.”

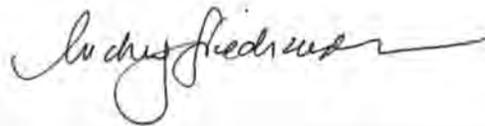
In order to facilitate community participation, we request that the final regulations provide that “at least 50% of the local agency account funds must be reserved for local agencies.” This will allow for more equitable distribution of financial support for participation in the new ORES permitting process between local agencies and community intervenors, while still leaving discretion for ORES to award greater than 50% to local agencies when appropriate. The proposed standard for award of funds to non-profit potential community intervenors that requires a showing of a concrete and localized interest that may be affected by a proposed facility and that such interest has a significant nexus to its mission will serve to ensure that the community intervenor will provide information into the record that is relevant and important for ORES’s determination on an application.

The Final Regulations Should be Titled and Organized to Maximize Comprehension by Regulated Entities and the Public

We note that not all subparts of the proposed procedural regulations are titled.¹⁶ For ease of navigation and quick comprehension by regulated entities and stakeholders, each subpart should be titled to indicate its substance.

Scenic Hudson requests that ORES consider the above comments prior to finalizing the procedural regulations and look forward to working with ORES to fully implement Executive Law § 94-c and the Renewables Act.

Sincerely,



Audrey Friedrichsen, Esq., LL.M.
Land Use & Environmental Advocacy Attorney
Scenic Hudson, Inc.

¹⁶ Proposed Subparts 900-1, 900-7, 900-9, 900-12, 900-13, 900-14, and 900-15 are untitled.

Save Ontario Shores, Inc. This

I am submitting the attached pdf document representing comments on the draft regulations with regards to impacts on the process relating to COVID-19. Please replace the word document submitted earlier today with this pdf.



Save Ontario Shores, Inc.

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December 7, 2020

Houtan Moaveni
Executive Deputy Director
New York State Office of Renewable Energy Siting
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Subject: Comments on ORES Draft Regulations and Uniform Standards regarding COVID-19 impacts on the comment process

Dear Mr. Moaveni:

Please accept the following comments regarding the impacts of the COVID-19 pandemic on the comment process associated with the ORES Draft Regulations and Uniform Standards.

Comments on ORES Draft Regulations and Uniform Standards comment process as impacted by COVID-19 Pandemic

A. Cancelled In-Person Hearings Should be Rescheduled

The budget bill in April 2020 that established the new Office of Renewable Energy Siting (ORES), also mandated that ORES hold hearings in four areas around the state on the new Uniform Standards and Conditions section of the regulations. It appeared that this was an effort to make it possible for communities that would be impacted by the regulations to comment on the Uniform Standard and Conditions.

The hearings in upstate New York were converted to virtual events due to COVID-19. SOS requests that the in-person hearings that were cancelled be rescheduled. The very people who will be most impacted by the regulations are the ones least likely to take part in a virtual hearing due to non-existent high-speed internet and unreliable phone service. The people who the Law intended to include in the process have been excluded.

It is inexcusable that many New York residences do not have even one internet provider. This is true in many rural counties, particularly the poorer ones. These are the very counties often targeted for

large scale renewable projects. WBEN reporter, Mike Baggerman, quoted New York State Senator Rob Ortt as follows, "It's galling to me that I have thousands of constituents and there are tens of thousands of New Yorkers who live in their own homes who pay property taxes that do not have high-speed internet," Ortt said. "They have to go to McDonalds. They have to go to a public library. They have to go to a town hall so kids do their homework. Now, they can also go to a homeless shelter but they can't get it in their own home." In the same article Lynne Johnson, a legislator from Orleans County, stated that she heard from some constituents whose children cannot get access to internet and do their school work remotely.

<https://www.radio.com/wben/news/local/why-the-lack-of-broadband-internet-in-rural-areas-across-ny>

There are multiple large scale renewable projects proposed in Orleans County and yet many of these citizens would have found it difficult if not impossible to take part in these virtual hearings. Large tracts of Allegany and Cattaraugus counties are slated for 2021 or 2022 internet line construction because they do not now have service. <http://armstrongny.com/Home/Map>. These counties are the site of Alle-Catt, the largest industrial wind project in the state, that was recently approved under the Article 10 process. If these regional hearings were meant for anyone, they were meant for these citizens, and due to COVID-19, for these citizens, they were effectively cancelled.

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Map Legend

- Accepting Orders
- Under Construction
- Pending Construction 2021
- Pending Construction 2022

A letter was sent to Houtan Moaveni, ORES Executive Deputy Director, on November 16, 2020, from Save Ontario Shores requesting that the hearings be rescheduled for the above reasons. The response stated the statutory deadline along with the uncertain timing of COVID-19 as reasons that the hearings were not postponed. This decision, along with the statutory deadline, should be revisited in light of the population that is excluded and the impact of the pandemic on all aspects of State government.

SOS requests that the Uniform Standards and Conditions not be finalized until in person hearings are rescheduled and take place and rural citizen in person comments are considered.

B. Due to the Impacts of COVID-19, the Deadline for Finalizing the Regulations and Uniform Standards and Conditions Should be Extended.

In the same manner that the state has extended unemployment insurance, the tax filing deadline and the deadline for COVID-related residential and commercial evictions, it is reasonable that New York State extend the deadline for implementation of the renewable energy siting regulations.

Many State offices have been impacted by various stay at home orders and practices to keep employees safe. ORES is no exception. Hiring, setting up an office from the ground up, drafting regulations and having them reviewed by experts, State Agencies, the public and municipal officers are adversely affected by pandemic limitations.

The Accelerated Renewable Siting Act was passed during the start of a pandemic in April 2020. A deputy director was hired in June 2020. Regulations and Uniform Standards and Conditions were drafted and posted for comment on September 17, 2020. In person hearings were scheduled in November 2020 and then cancelled and replaced with virtual hearings that were not accessible to all rural residents. All of these actions took place during a time when county health departments, including many that had been very concerned about impacts of large scale renewables in their counties, were focused on attending to the pandemic crisis, and many affected by the ORES proposal were limiting contacts outside their homes.

Indications to the public are that ORES does not have sufficient staffing with expertise to manage a thorough review of the comments on the regulations.

- The draft regulations were not grounded in science, biology, engineering and best practices. In some places the draft was incomprehensible. The content of the draft

regulations indicate that they were not extensively reviewed by DEC or DPS staff. The draft regulations appear to be hastily drafted.

- The three month time period between hiring the Deputy Director and posting of the draft documents is short by any measure for detailed extensive new regulations that impact the lives of tens of thousands of people and hundreds of thousands of acres, and appear to be the State's chosen method to reach state greenhouse gas goals.
- Citizen emails to the Office were returned with form responses that were not responsive to the inquires, or the emails received no response.
- There is no indication that ORES has hired an Executive Director.
- Citizen FOIA requests for documents have not been returned in a timely fashion.
- The ORES website regarding the draft regulations is confusing, using "regulations" and "Uniform Standards and Conditions" interchangeably without clear explanation as to the similarities/distinctions.
- Despite today's technological expectations, and despite DPS's ability to do so, SOS is informed that the ORES Office will not post the public's comments on the regulations on its website but will instead require the public to request the comments through the lengthy Freedom of Information Law process. This indicates a lack of planning and staffing.

Rural New Yorkers will be seriously affected by the proposed regulations and Uniform Standards and Conditions. The unplanned, unprofessional and rushed nature of these regulations and standards show disrespect for rural communities. Article 10 project developers, even before the regulations are final, are making plans to shift to the ORES 94-c process. There are no indications that the Office is ready to manage the unreasonable deadlines and timelines set by the Accelerated Renewables Act and by these regulations.

Without a pandemic, the one year timeline for finalizing the regulations 900-1-14 was unrealistic. Maintaining the one year timeline in spite of the fact that the entirety of the year has been under the cloud of a pandemic, when other timelines for other aspects of State government were paused or granted an extension of time, will guarantee that mistakes are made and corners will be cut that will harm New York.

Thank you for your consideration of these comments.

Sincerely,

Pamela Atwater, President
Kate Kremer, Vice President
Save Ontario Shores, Inc.

Save Ontario Shores, Inc. This

I am submitting the attached pdf document representing comments on the draft regulations with regards to intervenor funding. Please replace the word document submitted earlier today with this pdf.



Save Ontario Shores, Inc.

PO Box 382, Lyndonville, NY 14098
www.SaveOntarioShores.com
Info@SaveOntarioShores.com

December 7, 2020

Houtan Moaveni
Executive Deputy Director
New York State Office of Renewable Energy Siting
99 Washington Ave.
Albany, New York 12231-0001

Subject: Comments on ORES Draft Regulations and Uniform Standards regarding intervenor funding allocation

Dear Mr. Moaveni:

Please accept the following comments regarding the proposed allocation of intervenor funds within the Draft Regulations and Uniform Standards from your Office.

Comment on the following Draft Regulations:

900-1.4 (a)(8) General Requirements for Application

Be accompanied by a fee to be deposited in the local agency account in an amount equal to one thousand (1,000) dollars for each one thousand (1,000) kilowatts of capacity, which may be adjusted from time to time by the Office to account for inflation;

900-1.5 (a) Office of Renewable Energy Siting Review Fee

The Office shall charge a fee to the applicant in order to recover the costs of reviewing an application in an amount equal to one thousand (1,000) dollars for each one thousand (1,000) kilowatts of capacity, which shall be due at the time of application filing.

Subpart 900-5.1 (g)(2) Local Agency Account

The Office shall reserve at least seventy-five (75) percent of the local agency account funds for each project for potential awards to local agencies.

Intervenor Funding under Article 10 was to solve problems that existed in pre-Article 10 Siting

The purpose of intervenor funds is to “facilitate[] broad public participation.” PSL § 164(6)(b). See also PSL § 163(4)(b) (the purpose of intervenor funds during the pre-application stage is “to assure early and meaningful public involvement”). Accordingly, the absence of intervenor funds is an obstacle to meaningful public participation for appropriate intervenors.

Under Article 10 there were two intervenor funding opportunities. The first was for \$350 per 1000 kw during the pre-application phase. A pre-application intervenor fund could be increased by up to \$25,000 if the preliminary scoping statement was substantially modified or revised after its filing. In the application phase of the process the amount was \$1,000 per 1000 kw. These amounts are made available to municipalities or local parties. 50% is reserved for municipalities.

Funding to both municipalities and local parties was needed due to the history of abuses by developers in renewable energy siting in New York. Prior to Article 10, renewable energy projects were approved by town boards or planning boards. Developers offered lucrative leases to board members and projects were easily approved. Citizens who raised concerns had little opportunity to influence the decision. To mitigate the effect of developer leases to town board members, Article 10 gave citizen groups and other local parties the same funding opportunity as municipalities.

Article 10 regulations give citizens and citizen groups who lived in or near the project area notices and multiple opportunities to comment on the process. Documents are made available on a public website. There is an opportunity to submit public comments during the process. But in order to provide an effective opportunity for municipalities and town residents to participate in the process, they must be given funding to defray the cost of attorneys, experts and other costs.

When a developer has leases with board members or their families, then the intervenor funding that goes to the town is essentially giving the money back to the applicant. It will generally not be used to raise issues and concerns of citizens.

Funding to both municipalities and citizen groups is important due to the location of where these renewable projects are proposed – in the lowest income counties in the state. Franklin, Allegany, Wyoming, Orleans, Cattaraugus, Lewis, and Chautauqua are all locations with industrial projects built or proposed or both and they are seven of the ten lowest income counties of New York's 65 counties. Funding is crucial to meaningful participation in these poor counties.

26% Decrease in Funding to Local Parties and 270% Decrease in Citizen Stakeholder Funding contradicts Justice aspects of CLCPA

The Draft Regulations change the Article 10 funding process by eliminating the first round of funding. Since Article 10 provides \$350 per MW in the first round of funding and \$1,000 per MW in the second round, reducing funding to defray the costs of participating in the proceeding by \$350 is a 26% cut in funding to local parties.

Funding for citizens and citizen group parties under Article 10 was half of the amount available to municipalities at \$675 per 1000 kw. Under the draft regulations this amount is reduced to \$250 per 1000 kw. That is a 270% decrease! For a 200 MW project that is the difference between \$135,000 under Article 10 and \$50,000 under the 94-c regulations. The effect on municipalities is quite different. Under Article 10 they would be able to receive a minimum of \$675 per 1000 kw. Under the draft regulations they will be eligible for a minimum of \$750 per 1000 kw.

Developers continue to locate projects in poor counties. In light of the CLCPA commitment to funding low income urban communities it is unacceptable to decrease funding to poor rural communities. Given the pace at which these projects are being pushed and the proliferation of projects in some of these counties, the funding should be increased, not decreased.

This decrease in funding is indefensible in that the Draft Regulations have added a fee of \$1,000 per kw to be paid to the ORES office for the cost of the review. Instead of requiring developers to provide a total of \$1,350 per MW, funding is effectively being taken from local parties and being given to the State.

This transfer of funds from local stakeholders to the State to cover the added costs of ORES is contrary to good government practices. ORES duplicates (but weakens) the now mature development of siting standards under Article 10. Employees, infrastructure and procedures are already in place. If speed was the issue then the processes and procedures can be modified and new employees can be hired. But ORES should still utilize DPS employees with experience and the Article 10 Siting Board's history of decisions. ORES is the opposite of governmental consolidation. In creating a new office to do the same thing that DPS is doing, ORES is also the opposite of "smart growth", a principle that the State urges for municipalities in an effort to utilize existing infrastructure before creating new.

The regulations should be revised so that local parties have the opportunity to request up to \$1,500 per 1000 kw and the ORES office fee shall be \$500 per 1000 kw. This does not increase the cost on the developer, compared to ORES's proposal.

Draft Regulations Promote the same Abuses that Article 10 Tried to Solve

Directing funding to Municipalities at the expense of citizens and citizen group intervenors will encourage more of the same conflict of interests that currently plagues large-scale renewables siting in New York. Based on that experience, ORES's proposal will encourage developers to target board members for lease contracts, thus increasing conflicts of interest.

Under Article 10, ALJs have granted more than 50% of participation funding to municipalities, particularly if there is more than one municipality involved in a project. ALJs should continue to have the discretion, in light of the purposes of the funds, to direct up to 50% of the funding to local citizens or citizen groups.

Citizens and citizen groups have raised substantial issues, discovered relevant information from applicant experts and added relevant evidence to the record in Article 10 proceedings. In some cases, municipalities awarded funding have not contributed at all to the record. In most of those cases, local officials with conflicts of interest decided to support the project before any project review. Citizen groups have retained experienced attorneys who facilitate their participation in a manner that does not slow down the process. It is in the best interests of New York State, and in the interest of the ORES goal of increasing the pace of decision making on these projects, to substantially fund local groups.

Under these draft regulations, developers already in the Article 10 process can move to the Section 94-c permitting process under ORES and in so doing cut the funding anticipated for the citizen stakeholders in half. For stakeholders, this would be an abuse of process.

In short, the entire impact of the decrease in overall funding, plus a little more, has been shifted to the citizen group in the poorest counties in the state, very often where town boards and town employees have signed leases with developers.

This change in funding for municipalities and citizen group does not speed the siting process. It does not save the developer funding. This aspect of the draft regulations highlights the main thrust of these regulations. It is to silence local communities.

The draft regulations should be revised to maintain the Article 10 intervenor regulation that reserved 50% of the intervenor funding for municipalities and gave discretion to ALJs to determine further allocations.

Thank you for your consideration of these comments.

Sincerely,

Pamela Atwater, President

Kate Kremer, Vice President

Town of Lansing

Comments attached. Thanks!

December 7, 2020

Dear Deputy Director Houtan Moaveni and ORES Staff:

The Town of Lansing, Tompkins County, is in the current New York Independent System Operator (NYISO) Interconnection Queue for three-utility scale solar projects, which include 160 MW in the Towns of Groton & Lansing (anticipated in-service 5/2022); 200 MW Lansing (anticipated in-service 4/2023); and 207 MW Lansing (anticipated in-service 3/2023).

The Town of Lansing is a longtime contributor to the energy grid as the Town was home to Milliken Station, a coal-fired 306 MW generating plant that operated from 1955 until it was mothballed by the Public Service Commission in October 2019.

It is in this context that the Town respectfully submits the following comments, and ask that particular attention be paid to impacts to agriculture, adequate funding for decommissioning, water quality, and property values of project-adjacent parcels:

§900-1.3(a) Consultation with Local Agencies.

The Town echoes the Tompkins County Commissioner of Planning's comments that "in order to ensure that entities tasked with evaluating local and regional impacts are also involved early in the process, we suggest that the consultation process include notification to the local planning department, county planning department, and regional planning development board (or their equivalents)."

§900-1.3

(g) NYS threatened or endangered species.

Request that local, County, and regional planning agencies receive GIS data. Wildlife characterization should also be submitted to County Environment Management Council and / or municipal Conservation Advisory Council or Conservation Board, as they can advise ORES, municipalities, and developers / applicants on environmental conditions of specific local concern.

§900-1.6 Filing, Service and Publication of an Application

Consider requiring Applicant to post participating properties with signs either issued by the Town or by the Office of Renewable Energy Siting. Consider requiring Developer to post a sign at the center of each property line of the project site which front on a public or private roadway or a public right-of-way. Suggest such signs be continuously maintained and displayed facing the roadway until final action has been taken by ORES to approve or deny the Siting permit.

§900-2.12 Exhibit 11: Terrestrial Ecology

Request that particular attention be paid to keystone species habitats; these should be maintained. Large-scale solar is likely to include hundreds of contiguous acres; wildlife travel corridors for mammals, reptiles, amphibians (and fish), and other travel corridors, should be given priority to continue to exist, in order to maintain ecosystem connectivity. Possible

mitigation may include no fencing in these areas (e.g., separate enclosures on each side of a stream or wildlife travel corridor with ample buffer).

§900-2.25 Exhibit 24: Local Laws and Ordinances

(e) Consider amending the language allowing an applicant to request that the Office expressly authorize electric, plumbing and building permit applications to the language in §900-6.1(d)(1) which expressly authorizes that local agencies implement the New York State Uniform Fire Prevention and Building Code. The health, safety, and welfare of our residents and businesses depend on the first responders' ability to act quickly and Code Enforcement Officer knowledge of local construction.

The Town of Lansing, home to a substantial percentage of Prime Soils and Soils of Statewide Significance, has a rich agricultural heritage. Research is just beginning at Cornell Engineering on 'agrivoltaics' – the confluence of agriculture and solar energy – to help determine how utility-scale solar impacts microclimates and soils. The Town respectfully requests that ORES and the New York State Energy Research and Development Authority (NYSERDA) consider issuing a Funding Opportunity similar to that of the recent Just Transition Technical Assistance and Planning Services Request for Proposal (RFP 4563) to help build planning and research capacity in advance of formal adoption of these draft regulations.

Sincerely,



C.J. Randall, LEED AP ND
Director of Planning
Town of Lansing, Tompkins County, New York
crandall@lansingtown.com
(607) 533-7054

Livingston County Planning Department

Please find the comments document attached.



**LIVINGSTON COUNTY
PLANNING DEPARTMENT**

Livingston County Government Center
6 Court Street, Room 305
Geneseo, New York 14454-1043

Telephone: (585) 243-7550
(585) 335-1734
Fax: (585) 243-7566
www.livingstoncounty.us

December 7, 2020

RE: Comments on the Office of Renewable Energy Siting (ORES) Draft Regulations and Uniform Standards and Conditions, Chapter XVIII Title 19.

Dear Mr. Houtan Moaveni,

Thank you for the opportunity to provide public comments on the ORES Draft Regulations and Uniform Standards and Conditions to implement the Accelerated Renewable Energy Growth and Community Benefit Act.

We understand the intent of the regulations to consolidate, streamline, and expedite the siting of major renewable energy projects and to ensure that these projects deliver economic benefits to the local communities where they are built. Livingston County has a strong interest in this process as our County has a significant number of solar and battery energy storage facilities in application, construction, and operation presently.

As part of our process, we reviewed the Draft Comments of the NYS Association of Counties (NYSAC), NYS Conference of Mayors (NYCOM), and Association of Towns (AOT) expressing technical concerns that local governments have regarding the Draft Regulations. Of particular note is the protection of home rule authority, a concern shared by our local municipal officials. We also reviewed the American Farmland Trust Draft Comments. Of particular note was the protection of prime agricultural land during the 94-c siting process, a concern shared by the Livingston County Agricultural and Farmland Protection Board. We have reiterated several of their Draft Comments below that were of high significance to our County and added a few additional comments.

Local Government Concerns and Recommendations

a. Implications for Home Rule Authority

The draft regulations describe how an Applicant may request that ORES make a finding that compliance with a local law would be unreasonably burdensome in the view of the CLCPA targets and environmental benefits of the facility; it does not specify how ORES will make the decision.

Recommendations:

1. Regulations should specifically articulate how ORES will determine that provisions of substantive local laws are unreasonably burdensome in the view of the CLCPA targets and environmental benefits of the facility, and how ORES will make its decision.
2. Applicants should provide clear criteria for this determination and should be required to articulate actionable measures they will take to incorporate local standards to the greatest extent practicable.
3. Applicants should be required to consider all applicable local laws and ordinances, both in comprehensive plans or stand-alone laws.

4. Draft Regulations require local law compliance statements for the environment, and public health and safety. Livingston County municipal local laws, and projects under Article 10, contain regulations that address community character, social, economic, visual, and other aesthetic considerations, but these are not addressed in the Draft Regulations. ORES regulations should seek compliance statements with these portions of local laws as well.

b. Requirement to Consult with Local Agencies and Community Members

The Draft Regulations require that an Applicant must consult with local agencies and community members, and hold a preapplication consultation with the Chief Executive of each impacted local government 60 days prior to an application being submitted. This abbreviated timeline does not provide any flexibility for a local government if they cannot accommodate it. The regulations state that, if the applicant and the local government fail to meet, then the applicant only needs to show they made “best efforts” to do so and can move past this needed step without delay or penalty. Intervenor funds are not yet available to local governments at this stage.

Recommendations:

1. Consideration for the extension of this 60-day period to a more reasonable time frame especially for our rural communities that may not have a technical and legal team assembled and ready for review and consultation. At least, allow for governments to extend the 60-day period when warranted to ensure that the Chief Executive will have time to assemble and consult their technical and legal team.
2. The content of the Consultation Meeting with the municipality is not highly defined. As municipal contact is significantly limited with the new expedited process, the Applicant should be required to supply more specific project details at this time. If the Chief Executive finds any of the required informational steps are left out or insufficient, ORES should allow for the 60-day preapplication window to be extended. If the Applicant feels the local government is being unreasonable, consider a system to allow for an independent arbitrator, not the State, to determine this discrepancy.
3. Allow the locality to determine the method of delivery for the application notice and that ORES require acknowledgement of receipt of the application by the local government. Applications should be delivered to the Chief Elected Official and/or their designee. The 60-day window should begin at the time of delivery, not the time of certified mail, and the county administrator in which a locality is located should be noticed at the same time as the town, city, or village.
4. Notification should be provided at the same time to the local planning department and county planning department.
5. Intervenor funds in the local agency account should be made available earlier than proposed, and allow for flexibility in use to cover the pre-application phase.

Protection of Agricultural Land

While the Clean Energy Plan recognizes that the impact to farmland from renewable development overall may be minimal, the impacts from large scale projects to the farmland base within host communities may be outsized, and without mitigation efforts, this can increase land values beyond what farmers can afford, displace farmer-renters, and impact local farm economies. Under the current proposed regulations, developers siting on agricultural land must create an agricultural plan and follow NYS Agriculture & Markets (NYS DAM) guidelines for siting solar “to the maximum extent practicable”.

Recommendations:

1. Encourage NYS to increase support of solar energy facilities of all sizes, including residential, agricultural, commercial and industrial solar that will help to meet renewable energy goals while still supporting farms and farmlands.
2. Specify how documents requested of developers will be used to mitigate impacts on farmland, further define “maximum extent practicable” when following NYSDAM guidelines and when developers must follow these guidelines. If guidelines are not followed, specify conditions that trigger this option.
3. Require a pre-application consultation with the NYSDAM, similar to the requirement for a NYSDEC consultation.
4. The Livingston County Agriculture & Farmland Protection Board has a strong interest in true agrivoltaics/agricultural co-location, not just pollinator plantings. Consider including language and provisions in the Uniform Standards and Conditions and guidelines for this industry. Applicants should supply plans that guarantee feasibility and continuity throughout the lifetime of the project. Consider NYS funds and potential NYSERDA incentives for the development and siting of this innovative technology.

We appreciate the opportunity for public comments and thank ORES for consideration of the concerns and recommendations above.

If you have any questions regarding the Planning Department comments, please feel free to contact me at (585) 243-7550, or aellis@co.livingston.ny.us.

Sincerely,



Angela Ellis
Deputy County Administrator

cc. Mr. David LeFeber, Livingston County Board of Supervisors, Chairman
Mr. Gerald Deming, Public Services Committee, Chairman
Mr. Ian Coyle, County Administrator
Agricultural & Farmland Protection Board members

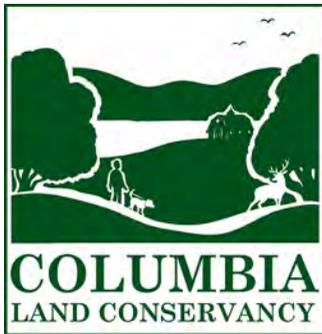
Columbia Land Conservancy

Full comments attached.

As a top line summary, the Columbia Land Conservancy makes the following recommendations:

1. Provide for greater flexibility, transparency and open dialogue with the consultation of local agencies, officials and the general public;
2. Improve the science around potential environmental impacts including wetlands and rare species;
3. Consider developing incentives and protections for renewable energy developers to utilize native species plantings that improve wildlife habitat;
4. Encourage innovative site designs which allow for improved connectivity for wildlife and/or co-utilization with agricultural practices;
5. Directly address visual impacts, particularly those around lighting and other issues which may impact wildlife;
6. Address issues and impacts around the potential loss of farmland;
7. Address the socio-economic issues more directly such as including greater transparency around the tax revenues that towns may be able to expect with a renewable project; and
8. Strengthen the regulations around decommissioning and be conservative in regard to the total costs for future decommissioning.

In the attached uploaded file, we further expand upon each of these recommendations.



December 7, 2020

Houtan Moaveni, Deputy Executive Director
New York State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

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President

Re: Siting Permits for Major Renewable Energy Facilities; Addition of 19
NYCRR Subparts 900-1 – 900-5; 900-7 – 900-14

Dear Deputy Director Moaveni:

The Columbia Land Conservancy (CLC) respectfully submits this comment letter on the proposed 19 NYCRR Subparts 900-1 – 900-5; 900-7 – 900-14, establishing the regulations for siting, design and operation of major renewable energy facilities pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act and Executive Law § 94-c.

The renewable energy targets contained in the Climate Leadership and Community Protection Act (CLCPA) are bold, nation leading and critical to addressing the near-term and long-term impacts of climate change. The result will be a rapid and unprecedented scale of development of renewable energy. At times, this scale is going to create municipal planning and community relations challenges that when paralleled with rapid landscape-scale changes will be unprecedented. While CLC supports the shift to renewable energy, we advise the state to find ways to work cooperatively with local governments, communities, landowners and residents to minimize these conflicts. As a county-based conservation organization, we are on the forefront of these conflicts and seek opportunities to work with all stakeholders to find acceptable solutions to address the critically important problem of climate change. To that end, we offer the following comments to ensure the state is ultimately successful in helping address the issue of climate change as well as issues of environmental justice, social equity, and community inclusion while minimizing impacts to important ecosystems including aquatic and terrestrial communities, forest health and connectivity, and agricultural productivity.

As a top line summary, the Columbia Land Conservancy makes the following recommendations:

1. Provide for greater flexibility, transparency and open dialogue with the consultation of local agencies, officials and the general public;
2. Improve the science around potential environmental impacts including wetlands and rare species;
3. Consider developing incentives and protections for renewable energy developers to utilize native species plantings that improve wildlife habitat;

Conserving rural landscapes. Connecting people to the land.

4. Encourage innovative site designs which allow for improved connectivity for wildlife and/or co-utilization with agricultural practices;
5. Directly address visual impacts, particularly those around lighting and other issues which may impact wildlife;
6. Address issues and impacts around the potential loss of farmland;
7. Address the socio-economic issues more directly such as including greater transparency around the tax revenues that towns may be able to expect with a renewable project; and
8. Strengthen the regulations around decommissioning and be conservative in regard to the total costs for future decommissioning.

In the following paragraphs we further expand upon each of these recommendations.

Section 900-1.3 (a) Consultation with Local Agencies

We strongly recommend that the draft regulations regarding consultation with local agencies and the public be revised to strengthen the opportunity for the local community to engage in dialogue with the applicant. We support the general timing within the draft regulations for consultation with local municipal officials and members of the host community early in the pre-application stage; however, there are several weaknesses to the draft regulations which we have identified below:

- As written, the regulations place the meeting with the public after the meetings with the municipality and other local agencies. Local officials may prefer the public be offered a chance to learn about the project before all the local boards or agency meetings with the developer occur. ORES should rely on the local municipal leaders to determine the timing of such meeting and allow flexibility in the timing of public meetings.
- More broadly, the regulations should be revised to require consultation with the chief executive officer of the municipality regarding the public meetings. The applicant should demonstrate to ORES that the local consultation meets the needs of the host community across demographic, social, economic, and cultural differences. The regulations provide no guidance regarding the choice of one or more meetings with community members, which could inappropriately allow the application to limit participation in the process by members of the host community.
- Finally, ORES should remove the phrase “for community members who may be adversely impacted by the siting of the facility.” All members of the community should be able to learn about the project. Applicants may not be in the best position to define who may be affected by a project at the pre-application phase. As the community is just learning of the project, how could it be pre-determined who may be adversely affected? Who would make that determination?

Section 900-1.3e: Wetland Delineation

The regulations indicate that the applicant must identify all federal, state and local wetlands, but it is not clear if this is done on-site or remotely. We encourage an on-site delineation that marks all wetlands regardless of current known status. Currently in Columbia County, many wetland maps were last updated in 1991 and do not accurately reflect the distribution of wetlands today. With improved technology and better science over the intervening years since many of the wetland maps were produced, many wetland areas are either not mapped at all or inaccurately mapped. As DEC’s own website states:

The science of wetlands also has matured in the past 20 years. The old perception that all wetlands are marshy and have open water has been placed in a new context. We now know that only about 14% of our wetlands fit this cattail-marsh-

with-a-duck image. Most of our wetlands are shrub or forested swamps, and many lie along rivers and streams in the floodplain riparian zone. In the past, many of these critical wetlands were missed in the mapping process.

Section 900-1.3g: NYS threatened or endangered species

The regulations require the applicant to identify threatened and endangered species as well as species of special concern. We recommend that this be expanded to include “Species of Greatest Conservation Need.” In addition, the regulations state that a list of threatened and endangered species observed within the last five years shall be provided in the application. The five-year window is too narrow as biologists are often not available to revisit known occurrences within this time frame. The NY Natural Heritage Program (NYNHP) considers species occurrence still viable even when observations have not been recorded for a much longer period of time. We recommend consulting with the experts at NYNHP on how long a window should be used for this regulation. We also recommend that applicants be required, at the applicants’ expense, to have an NYNHP biologist review the site with a contracted expert to determine site viability for threatened and endangered species.

Additionally, regarding any listed species, we would like to see an exemption added that protects the applicant in the event a listed species later arrives on site. This exemption may encourage applicants to use native pollinator species within the solar site to gain additional conservation value. Without this exemption, applicants may later be subject to threatened and endangered species regulations, providing a disincentive to create natural native habitat. This section is meant to mirror similar safeguards provided by a federal Safe Harbor Agreement. This exemption should read as:

(9) After the Office is satisfied that no listed species will be adversely affected or impacts to listed species are satisfactorily addressed, the applicant is encouraged to work with local conservation organizations to complete a site design that supports native species. Should this habitat improvement lead to any listed species later occupying the site, the Office and DEC shall provide the applicant with a permit for continued site maintenance and not hold the applicant liable for any future taking. The goal is to encourage applicants to use native herbs and grasses to promote pollinator species, birds, and other native species.

Section 900-2.6: Design

The regulations reference fencing in multiple locations but include no provisions to address fencing that minimizes the impact to wildlife movement. There are multiple scientific studies that address fencing around renewable energy. We recommend that the regulations be amended to encourage the usage of wildlife-friendly fencing.

Additionally paragraph e states that the maximum height of solar panels is 20 feet. We recommend striking this regulation and allow local jurisdictions to determine the appropriate maximum height based on individual project design plans and proposals. If implemented, the maximum height regulations as currently included may impede co-siting agricultural grazing or other agricultural practices with solar, as further described below under our Section 900.2.16 comments (“Agricultural Resources”).

Section 900-2.9: Visual Impacts

The regulations reference the need to address lighting in multiple locations including the impact of lighting on viewsheds. The regulations do not specifically call for lighting that

minimizes light pollution. Not only could lighting affect viewshed issues, lighting is known to confuse and create problems for multiple wildlife species including migratory bird. We request that the regulations be updated to require, where reasonable and practical, the use of the lighting that minimizes light pollution.

Section 900-2.16: Agricultural Resources

While the proposed regulations include a comprehensive list of materials required to be submitted for review, the use of such materials in final decision-making processes and outcomes regarding protection of agricultural resources is not obvious and should be expanded upon. Importantly, the proposed regulations should include a transparent and well-defined financial mechanism to mitigate impacts to agricultural lands. While the Agricultural Plan overseen by the New York State Department of Agriculture and Markets is intended to help “avoid, minimize and mitigate” impacts to such lands, a more well-defined program should be put in place to specifically strengthen agricultural mitigation procedures and fee requirements. Such a program is needed to counterbalance the anticipated widespread use of agricultural lands for solar development, and would strengthen farmland protection more broadly.

Thank you for including mention of agricultural co-utilization. We suggest that should the developer be seeking financial or other regulatory or procedural benefits (such as exemption from an agricultural mitigation fee or other Agricultural Plan requirements) through the employment of co-utilization, any such plan must not only demonstrate long-term commitment and feasibility of the effort but additionally should guarantee the actual continuation of such activity throughout the life of the project.

Section 900-2.19: Socioeconomic Effects

The Columbia Land Conservancy recognizes the importance of supporting our local communities and in many cases we provide Payment In Lieu Of Taxes (PILOTs) to local communities on lands we own. Likewise, renewable energy projects should pay their full share of taxes so that communities come to see these facilities as resources. As such, applicants should be required to provide a summary of local property taxes and school taxes paid during the prior ten years for the impacted property and how this compares to taxes or PILOTs that are expected to be paid to the local municipality and school district for the first 10 years of the project being operational. Some projects to date have touted the tax benefits to communities without clearly showing if there is a tax loss or gain compared to current use. The applicant should be transparent with these estimated tax payments as early in the process as possible.

Section 900-10.2b: Final Decommissioning

From reading the regulations, we are not clear who has the responsibility for decommissioning and site restoration. The plan says, “The net amount shall be allocated between Cities, Towns, or Villages based on the estimated cost associated with the removal and restoration of the facilities located in each City, Town, or Village.” We hope this does not imply local municipalities are responsible for decommissioning and restoration. Most do not have the expertise to do so. The state needs an assured system for decommissioning that fully protects funds from raids. The state should oversee such decommissioning and require that any decommissioning project is completed expeditiously and take no more than five years. Decommissioning plans should also include the “restoration of agricultural lands” as required within environmental impacts. Lastly, Section 900-2.24 allows the decommissioning plan to include the salvage value of materials. We recommend against this as the salvage price of recyclables is highly volatile. While we encourage the salvage of any recyclables on the

property, their final value will serve as a buffer to cost overruns on the final decommissioning.

Thank you for the opportunity to provide these comments. If we may be of any assistance or if you have any questions, please feel free to contact us. We welcome the opportunity to work closely with the state and solar developers on the siting and design of solar projects so as to minimize impact to natural resources and our agricultural communities.

Respectfully submitted on behalf of the Columbia Land Conservancy,

A handwritten signature in black ink that reads "Troy Weldy". The signature is written in a cursive, flowing style.

Troy Weldy
President

Email: troy.weldy@clctrust.org

Alliance for Clean Energy New York

On behalf of the Alliance for Clean Energy New York, I am submitting the third of three documents on the ORES proposed regulations. The first was a document focused exclusively on the sound provisions of the ORES proposal. The second was comments on the entire regulatory proposal (excepting the sound provisions). The third, attached here, is a redline document that is provided to illustrate adoption of the recommendations made by ACE NY, AWEA, and SEIA in the second submittal. This document provides strikeout/additions to cover most, but not all, of the changes suggested in the second submittal. Thank you for the opportunity to comment on the ORES regulatory proposal.

ORES Regulatory Proposal with Redline Recommendations from ACE NY

December 7, 2020

Chapter XVIII, Title 19 of NYCRR Part 900 Office of Renewable Energy Siting Subparts 900-1 – 900-5; 900-7 – 900-14

§900-1.1 Purpose and Applicability

- (a) The purpose of this Part is to establish procedural and substantive requirements for permit applications for major renewable energy facilities (as defined in section 900-1.2(af) of this Part) reviewed by the Office of Renewable Energy Siting and applies to applications for permits for the siting, design, construction, operation, compliance, enforcement and modification of such facilities pursuant to Section 94-c of the New York State Executive Law.
- (b) This Part shall not apply to the following:
 - (1) to a major renewable energy facility (as defined in section 900-1.2(af) of this Part), or any portion thereof, over which any federal agency or department has exclusive siting jurisdiction or has siting jurisdiction concurrent with that of the state and has exercised such jurisdiction to the exclusion of regulation of the facility by the state. However, nothing herein shall be construed to expand federal jurisdiction;
 - (2) to normal repairs, maintenance, replacements, non-material modifications and improvements of a major renewable energy facility (as defined in section 900-1.2(af) of this Part), whenever built, which are performed in the ordinary course of business and which do not constitute a violation of any applicable existing permit, including permits issued pursuant to this Part;
 - (3) to a major renewable energy facility (as defined in section 900-1.2(af) of this Part) if, on or before the effective date of Section 94-c of the New York State Executive Law, an application has been made or granted for a license, permit certificate, consent or approval from any federal, state or local commission, agency, board or regulatory body, including the submission of a preapplication public involvement program plan under Article 10 of the New York State Public Service Law, in which the location of the major renewable energy facility has been designated by the applicant, except where an applicant elects to be subject to this Part as authorized by Public Service Law Section 162;

(4) any renewable energy system as such term is defined in Section 66(p) of the New York State Public Service Law, with a nameplate capacity of less than twenty-five thousand kilowatts, unless such system becomes an opt-in renewable energy facility (as defined in section 900-1.2(az) of this Part); and

(5) any stand-alone battery energy storage system.

§900-1.2 Definitions

Whenever used in this Part, unless otherwise expressly stated, the following terms shall have the meanings indicated below. The definitions in this section are not intended to change any statutory or common law meaning of these terms, but are merely plain language explanations of legal terms used in this Part.

- (a) *Adjudicatory hearing* means a hearing held pursuant to Section 94-c of the New York State Executive Law, this Part or Article 3 of the New York State Administrative Procedure Act, where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the Executive Director (as defined in subdivision (v) of this section) or their designee rendering a decision on the merits, but shall not include public comment hearings.
- (b) *Administrative law judge or ALJ* means the designated representative authorized by the Executive Director (as defined in subdivision (v) of this section) to conduct hearings pursuant to this Part.
- (c) *Amicus* means a person who is not otherwise eligible for party status, but who is allowed to introduce written argument upon one or more specific issues.
- (d) *APA* means the New York State Adirondack Park Agency.
- (e) *Applicant* means a person (as defined in subdivision (be) of this section) filing appropriate applications and supporting materials for the purpose of obtaining a siting permit from the Office of Renewable Energy Siting.
- (f) *Argument* means opinions or viewpoints, as distinguished from evidence.
- (g) *Certificate of Completion or COC* shall have the same meaning as set forth in 6 NYCRR Part 375.
- (h) *Chief Executive Officer* means: for a county outside of a city, the executive of a county elected on county-wide basis or, if there be none, the chairman of the board of supervisors; for a city, the mayor; for a village, the mayor; and for a town, the supervisor.
- (i) *Commencement of commercial operation or commercial operation date* is defined as the date on which the major renewable energy facility (as defined in subdivision (af) of this section) as a whole first commences generating or transmitting electricity for sale, excluding

electricity generated or transmitted during the period of on-site test operations and commissioning of the facility.

- (j) *Commencement of construction* means the beginning of unlimited and continuous site clearing, site preparation and grading activity, but does not include staging, limited tree-cutting activities related to testing or surveying (such as geotechnical drilling and meteorological testing), together with such testing, surveying, drilling and similar pre-construction activities to determine the adequacy of the site for construction and the preparation of application materials or compliance filings.
- (k) *Community intervenor* means a potential community intervenor (as defined in subdivision (bg) of this section) who has been granted party status pursuant to section 900-8.4 of this Part.
- (l) *Complete application or 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. Applications deemed compliant with Section 164 of the New York State Public Service Law by the Chair of the New York State Board on Electric Generation Siting and the Environment shall be considered complete upon filing of a transfer application (as defined in subdivision (bx) of this section) pursuant to this Part.
- (m) *CLCPA targets* means the public policies established in the Climate Leadership and Community Protection Act enacted in Chapter 106 of the Laws of 2019, including the requirement that a minimum of seventy percent of the statewide electric generation be produced by renewable energy systems by two thousand thirty, that by the year two thousand forty the statewide electrical demand system will generate zero emissions and the procurement of at least nine gigawatts of offshore wind electricity generation by two thousand thirty five, six gigawatts of photovoltaic solar generation by two thousand twenty-five and to support three gigawatts of statewide energy storage capacity by two thousand thirty.
- (n) *CPLR* means the New York State Civil Practice Law and Rules.
- (o) *Delegated permit* means a permit issued by the New York State Department of Environmental Conservation which substitutes for a comparable permit required by federal law and is recognized by the federal agency responsible for administering the federal program.
- (p) *Department of State or Department* means the New York State Department of State.

- (q) *Disclosure* means the disclosure of facts, documents, or other things that are known by or in the possession of a person and that are material and necessary in the prosecution or defense of the proceeding regardless of the burden of proof.
- (r) *Draft permit* means a document prepared by the Office of Renewable Energy Siting which contains terms and conditions staff find necessary for a proposed major renewable energy facility (as defined in subdivision (af) of this section) to meet all legal requirements associated with such a permit, but is subject to modification as a result of public comments or an adjudicatory hearing.
- (s) *ECL* means the New York State Environmental Conservation Law.
- (t) *Electronically stored information* or *ESI* means any information that is created, stored, or utilized with computer technology of any type. ESI includes, but is not limited to, word-processing files, audio files, video files, spreadsheets, images, emails and other electronic messaging information that are stored electronically.
- (u) *Environmental justice area* or *EJ area* means a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from the siting of a major renewable energy facility.
- (v) *Executive director* or *director* means the Executive Director of the Office of Renewable Energy Siting.
- (w) *Executive Law* or *EL* means the New York State Executive Law.
- (x) *Evidence* means sworn or affirmed testimony of witnesses, and physical objects, documents, records or photographs that tend to prove or disprove the existence of an alleged fact.
- (y) *Hearsay* means a statement, other than one made by a sworn witness testifying at the hearing, offered into evidence to prove the truth of the matter asserted.
- (z) *Interconnections* means off-site electric transmission lines less than ten (10) miles in length, water supply lines, waste water lines, communications lines, steam lines, stormwater drainage lines, and appurtenances thereto, installed in New York State connecting to and servicing the site of a major renewable generating facility, that are not subject to the Public Service Commission's jurisdiction under Article VII of the New York State Public Service Law, not including service lines designed and sized for household type usage such as for bathrooms or ordinary telephones.
- (aa) *Local agency account* means the account established by the Office of Renewable Energy Siting and maintained by the New York State Energy Research and Development Authority pursuant to Section 94-c of the Executive Law for local agencies and potential community intervenors which meet the eligibility and procedural requirements of this Part to participate in public comment periods or hearings.

(ab) *Local agency* means any local agency, board, district, commission or governing body, including municipalities, and other political subdivision of the state within one (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility.

(ac) *Low-income community* means a census block group, or contiguous area with multiple census block groups, where 23.59 percent or more of the population have an annual income that is less than the poverty threshold; except that the percentage population and income threshold may be revised to reflect updated demographic data.

(ad) *Major amendment* means a change in a siting permit application likely to result in any material increase in any identified adverse environmental impacts, any significant adverse environmental impact not previously identified, or any new site-specific standards and conditions.

(ae) *Major modification* means a change to an existing permit standard or condition likely to result in any material increase in any identified adverse environmental impact or any significant adverse environmental impact not previously addressed by uniform or site-specific standards or conditions or otherwise involves a substantial change to an existing permit standard or condition.

(af) *Major renewable energy facility or facility* means any renewable energy system, as such term is defined in Section 66(p) of the New York State Public Service Law as added by Chapter 106 of the Laws of 2019, with a nameplate generating capacity of twenty-five thousand kilowatts or more, and any colocated system storing energy generated from such a renewable energy system prior to delivering it to the bulk transmission system, including all associated appurtenances to electric plants as defined under Section 2 of the New York State Public Service Law, including electric transmission of facilities less than ten (10) miles ~~at less than one hundred twenty-five (125) kV in order~~ to provide access to load and to integrate such facilities into the state's bulk electrical transmission system.

(ag) *Minor amendment* means a change in an application or draft permit condition that is not a major amendment.

(ah) *Minor modification* means a change in an existing permit condition or an approved compliance filing that is not a major modification.

(ai) *Minority community* means a census block group, or contiguous area with multiple census block groups, where the minority population is equal to or greater than 51.1 percent in an urban area or 33.8 percent in a rural area; except that the specific percentages may be revised to reflect updated demographic data.

(aj) *Minority population* means a population that is identified or recognized by the U.S. Census Bureau as Hispanic, African-American or Black, Asian and Pacific Islander, or American Indian.

(ak) *Motion* means a request for a ruling or an order.

(al) *Municipality* means a county, city, town or village.

(am) *Nameplate generating capacity* means, starting from the initial installation of a major renewable energy facility, the maximum electrical generating output that the facility is capable of production on a steady state basis and during continuous operation (when not restricted by seasonal or other de-ratings) as specified by the manufacture of the generating units.

(an) *No further action determination* means a written determination by the New York State Department of Environmental Conservation that a parcel of real property has been remediated to the applicable regulatory agency's satisfaction.

(ao) *Non-participating property* means a parcel of real property owned by a person (as defined in subdivision (be) of this section) who has not executed a lease, easement or other agreement with the applicant related to the facility.

(ap) *NYSAGM* means the New York State Department of Agriculture and Markets.

(aq) *NYSDEC* means the New York State Department of Environmental Conservation.

(ar) *NYSERDA* means the New York State Energy Research and Development Authority.

(as) *NYSDPS* means the New York State Department of Public Service.

(at) *NYSDOT* means the New York State Department of Transportation.

(au) *NYSDOH* means the New York State Department of Health.

(av) *OPRHP* means the New York State Office of Parks, Recreation and Historic Preservation.

(aw) *Office* or *ORES* means the Office of Renewable Energy Siting within the Department of State and established pursuant to Section 94-c of the Executive Law.

(ax) *Office of hearings* means the office within the ORES principally responsible for conducting adjudicatory hearings pursuant to this Part.

(ay) *Office staff* means those Office personnel participating in a hearing, but does not include the Executive Director, or their designee, the ALJ or those personnel in the Office of Hearings advising or consulting with the Executive Director, or their designee, or the ALJ.

(az) *Opt-in renewable energy facility* means a renewable energy system, as such term is defined in Section 66(p) of the New York State Public Service Law as added by Chapter 106 of the Laws of 2019, with a nameplate capacity of at least twenty thousand kilowatts but less than twenty-five thousand kilowatts, in which the applicant has elected to submit an application for siting pursuant to this Part and for the purposes of this Part, shall be considered a major renewable energy facility.

(ba) *Participating property* means a parcel of real property owned by a person who has executed a lease, easement or other agreement with the applicant related to the facility.

(bb) *PSL* means the New York State Public Service Law.

(bc) *Party* means any person granted full party status or *amicus* status in the adjudicatory portion of the hearing according to the procedures and standards set forth in this Part but does not include the ALJ, the Office of Hearings, or the Executive Director (or their designee).

(bd) *Pending Article 10 facility* means a major renewable energy facility, which on or before the effective date of Section 94-c of the Executive Law, had submitted a draft public involvement program plan to the New York State Electric Generation Siting and the Environment Board pursuant to Article 10 of the PSL and its implementing regulations.

(be) *Person* means any individual, public or private corporation, public benefit corporation, limited liability company, multi-state authority, political subdivision, government agency, department or bureau of the State, municipality, industry partnership, association, firm, trust, estate or any legal entity whatsoever.

(bf) *Plain language* means an eighth-grade reading level or language which is easily understandable to the lay public.

(bg) *Potential community intervenor* means any person residing within a municipality within which a major renewable electric generating facility is proposed or residing outside the municipality within which the facility is proposed, but within one (1) mile of a proposed solar facility or five (5) miles of a

proposed wind facility (as defined in subdivision (by) of this section) that has raised a potentially significant and substantive issue or any non-profit organization that can demonstrate a concrete and localized interest that may be affected by a proposed facility and that such interest has a significant nexus to their mission. For the purposes of this definition, the term "residing" shall include individuals occupying a dwelling within the geographical limitations described above.

(bh) *Potential party* means any person who has filed a petition for party status whose petition has not received either final denial or acceptance.

(bi) *Project* means the physical activity or undertaking for which a siting permit is required from the Office.

(bj) *Protective order* means an order denying, limiting, conditioning or regulating the use of material requested through disclosure.

(bk) *Public comment hearing* means the portion of the hearing process during which unsworn statements are received from the host municipalities, the public and the parties.

(bl) *Public Service Commission* or *PSC* means the New York State Public Service Commission.

(bm) *Recommended decision and hearing report* means the ALJ's summary of the proceeding, including the ALJ's findings of fact, conclusions of law, and recommendations for the Executive Director's (or their designee) consideration.

(bn) *Relevant* means tending to make the existence of any fact that is of consequence to the determination of the proceeding more probable or less probable.

(bo) *Repurposed site* means an existing or abandoned commercial or industrial use property, including without limitation, brownfields, landfills, dormant electric generating or other previously disturbed location which, if applicable, has been remediated to permit the siting of a major renewable energy facility.

(bp) *SAPA* means the New York State Administrative Procedure Act.

(bq) *Service* means the delivery of a document to a person by authorized means and, where applicable, the filing of a document with the ALJ, the Office of Hearings or the Executive Director (or their designee).

(br) *Siting permit* or *permit* means authorization to construct and operate a major renewable energy facility issued by the Office pursuant to Section 94-c of the Executive Law and this Part.

(bs) *Solar facility* means a solar-powered major renewable energy facility.

(bt) *Statement of intent to deny* means a document prepared by Office staff which identifies the reasons why the siting permit for the project may not be issued as proposed or conditionally.

(bu) *Stipulation* means an agreement between two or more parties to a proceeding, and entered into the hearing record, concerning one or more issues of fact or law that are the subject of the proceeding.

(bv) *Study area* means the area generally related to the nature of the technology and the setting of the proposed site. Unless otherwise provided in this Part, ~~in highly urbanized areas,~~ the study area for a solar energy facility is a minimum one (1)-mile radius from the property boundaries of the facility site, interconnections, and facilities with a two (2)-mile visual study area. For a wind energy facility, the study area is a minimum one (1)-mile radius from the property boundaries of the facility site, interconnections, and facilities with a five (5)-mile visual study area. ~~with components spread across a rural landscape, the study area shall at a minimum include the area within a radius of at least five (5) miles from all generating facility components, interconnections and related facilities.~~

(bw) *Subpoena* means a legal document that requires a person to appear at a hearing and testify, to produce documents or physical objects, or both.

(bx) *Transfer application* means an application submitted for a siting permit for an opt-in renewable energy facility current undergoing an alternative permitting process or a pending Article 10 facility.

(by) *Wind facility* means a land-based, wind-powered major renewable energy facility.

§900-1.3 Pre-application procedures

(a) *Consultation with Local Agencies*. No less than sixty (60) days before the date on which an applicant files an application, ~~or files a transfer application other than for a pending Article 10 facility for which the Article 10 application has been deemed complete,~~ the applicant shall conduct pre-application meeting(s) with the chief executive officer of the municipality(ies) in which the proposed facility will be located and any local agencies of such municipalities identified by the chief executive officer. During such pre-application meeting(s), the applicant shall provide:

- (1) A brief description of the proposed facility and its environmental setting;
- (2) A map of the proposed facility showing project components and regulatory boundaries as it pertains to substantive law relevant to the proposed facility;
- (3) A summary of the substantive provisions of local laws applicable to the construction, operation, maintenance and decommissioning of the proposed facility;
- (4) An identification of such substantive local law provisions for which the applicant will request that the Office make a finding that compliance therewith would be unreasonably burdensome;
- (5) An explanation of all efforts by the applicant to comply with such substantive local law provisions through the consideration of design changes to the proposed facility, or otherwise;
- (6) Any potential impacts of the facility for which consultation with the municipality(ies) is required to inform the preparation of the exhibits to the application (including, but not necessarily limited to, transportation and visual resources);
- (7) A designated contact person, with telephone number, email address and mailing address, from whom information will be available on a going-forward basis, as well as a proposed project website to disseminate information to the public; and

- (8) An anticipated application date and information regarding the future availability of local agency account funds, citing to the requirements set forth in Subpart 900-5 of this Part, including, but not limited to, the requirement that any local agency or potential community intervenor shall submit a request for initial funding within thirty (30) days of the date of application filing and that such request be made to the Office of Renewable Energy Siting, at the Albany, New York office, Attention: Request for Local Agency Account Funding.
- (b) *Meeting with community members.* No less than sixty (60) days before the date on which an applicant files an application, and following the meeting(s) held pursuant to subdivision (a) of this section, the applicant shall conduct at least one meeting for community members who may be adversely impacted by the siting of the facility. The purpose of the meeting is to educate the public about the proposed project, including the anticipated application date and information regarding the future availability of local agency account funds, citing to the requirements set forth in Subpart 900-5 of this Part, including, but not limited to, the requirement that any local agency or potential community intervenor shall submit a request for initial funding within thirty (30) days of the date of application filing and that such request be made to the Office of Renewable Energy Siting, at the Albany, New York office, Attention: Request for Local Agency Account Funding. The applicant shall provide notice of the meeting no sooner than ~~twenty-one (21)~~ thirty (30) days and no later than fourteen (14) days prior to the meeting in accordance with the publication requirements of section 900-1.6(c) of this Part.
- (c) The applicant shall provide as part of the application copies of transcripts (if any), presentation materials, and a summary of questions raised and responses provided during the pre-application meeting(s). In the event the applicant is unable to secure a meeting with a municipality, the application shall contain a detailed explanation of all of applicant's best efforts and reasonable attempts to secure such meeting, including, but not limited to, all written communications between the applicant and the municipality.
- (d) At least sixty (60) days before the date an applicant files an application, the applicant shall publish a notice of intent to file an application in accordance with the publication requirements of section 9001.6(c) of this Part and provide a copy thereof to the Office. The notice of intent to file an application may be included as part of the notice requirement of subdivision (b) of this section. The notice shall contain, at a minimum, the following:
- (1) A brief summary of the proposed facility and location;
 - (2) A designated contact person, with telephone number, email address and mailing address, from whom information will be available on a going-forward basis, as well as a proposed project website to disseminate information to the public; and

- (3) A statement of future availability of local agency account funds, citing to the requirements set forth in Subpart 900-5 of this Part, including, but not limited to, the requirement that any local agency or potential community intervenor shall submit a request for initial funding within thirty (30) days of the date of application filing and that such request be made to the Office of Renewable Energy Siting, at the Albany, New York office, Attention: Request for Local Agency Account Funding.

(e) *Wetland delineation.*

- (1) At the earliest point possible in the applicant's preliminary project planning, the applicant shall conduct a wetland delineation to determine the jurisdictional boundaries of all federal, state and locally regulated wetlands present on the facility site and within one hundred (100) feet of areas *proposed* to be disturbed by construction, including the interconnections, access roadways, and utility tie-ins. For adjacent properties without accessibility, wetland delineation surveys shall be based on remote sensing data, interpretation of existing wetland and soils mapping, observations from adjacent accessible properties, and current and historical aerial imagery.
- (2) The applicant shall produce a draft wetland delineation report summarizing the wetland characteristics and Cowardin classifications of all federal, state, and locally regulated wetlands, NYSDEC class consistent with 6 NYCRR Section 664.1, a summary of the field data collected, and an ArcGIS compliant shapefiles or geo-database of the field delineated wetland features.
- (3) The applicant shall submit the draft wetland delineation report to the Office, with a copy to the NYSDEC.
- (4) The applicant shall consult with the Office, and as necessary with the NYSDEC, to determine the status of the delineated wetlands and the NYSDEC may conduct a site visit at the request of the Office to *provide* assist in determining which wetlands are regulated pursuant to ECL Article 24 and Section 401 of the Clean Water Act, if applicable, and to advise with respect to potential impacts to jurisdictional wetlands.
- (5) At the request of the Office, the NYSDEC shall review the draft wetland delineation and advise the Office if the proposed facility components could impact regulated wetlands. The Office, with a copy to the NYSDEC, shall provide a final approved jurisdictional determination to the applicant within sixty (60) days of receipt of the applicant's draft wetland delineation report, provided that weather and ground

conditions are suitable for making such a determination. In the event that weather or ground conditions prevent the Office from making a determination within sixty (60) days, the Office shall provide a tentative jurisdictional determination based on remote sensing data, interpretation of existing wetland and soils mapping and current and historical aerial imagery with subsequent field verification when weather permits. ~~to the applicant as soon as practicable, following suitable weather and ground conditions.~~

- (6) The applicant shall provide the approved wetland delineation and associated report in the application as required in section 900-2.15 of this Part.

(f) *Water Resources and Aquatic Ecology.*

- (1) At the earliest point possible in the applicant's preliminary project planning, the applicant shall conduct a stream delineation to identify all federal, state waters regulated pursuant to ECL Article 15, and locally regulated surface waters present on the facility site and within one hundred (100) feet of areas proposed to be disturbed by construction, including the interconnections, as well as federal, state, and locally regulated surface waters within one hundred (100) feet beyond the proposed limit of disturbance that may be hydrologically or ecologically influenced by development of the facility site and the surface waters identified above. The surface water map shall indicate the jurisdictional boundaries of all state waters regulated pursuant to ECL Article 15. For adjacent properties without accessibility, surveys shall be based on remote sensing data, interpretation of wetlands and soils mapping, topographic maps, observations from adjacent accessible properties and aerial photography.
- (2) The applicant shall submit a draft report to the Office, with a copy to the NYSDEC, consisting of a description of the stream characteristics, NYSDEC classification of stream mapped features, the Fisheries Index Number (FIN) or Waterbody Index Number (WIN), a description of stream flow (perennial, intermittent, or ephemeral), summary of the field data collected, and an ArcGIS compliant geo-database (or shapefiles) of the location of streams and other waterbodies.
- (3) The applicant shall consult with the Office, and as necessary with the NYSDEC, to determine which waters are regulated pursuant to ECL Article 15 and Section 401 of the Clean Water Act, if applicable.
- (4) At the request of the Office, the NYSDEC shall review the draft delineation and advise the Office if any of the proposed facility components could impact streams otherwise regulated pursuant to ECL Article 15 or Section 401 of the Clean Water Act, if

applicable. The Office, with a copy to the NYSDEC, shall provide a determination to the applicant within sixty (60) days of receipt of the applicant's draft stream delineation report, provided that weather and ground conditions are suitable for making such a determination. In the event that weather or ground conditions prevent the Office from making a determination within sixty (60) days, the Office shall provide a tentative determination to the applicant based on remote sensing data, interpretation of wetlands and soils mapping, topographic maps, observations from adjacent accessible properties and aerial photography. ~~as soon as practicable, following suitable weather and ground conditions.~~

(5) The applicant shall provide an approved stream delineation report in the application as required by section 900-2.14 of this Part.

(g) *NYS threatened or endangered species.*

(1) At the earliest point possible in the applicant's preliminary project planning, the applicant shall conduct a wildlife site characterization summarizing existing public information on bird, bat, and other species, including, but not limited to, New York's Environmental Assessment Form (EAF) Mapper, New York Natural Heritage Program (NYNHP), USFWS iPaC and ECOs databases, New York's Environmental Resource Mapper, Nature Explorer, and Biodiversity and Wind Siting Mapping Tool, eBird, Audubon Christmas Bird Counts, United States Geological Survey (USGS) breeding bird surveys, the current New York Breeding Bird Atlas III program, New York State Ornithological Association, local birding organizations, Bat Conservation International's database on bat species ranges, NYSDEC bat information. With respect to NYS threatened or endangered species or species of special concern, the wildlife site characterization shall include:

(i) Species documented at the proposed facility, access roads, interconnections, connecting lines, from available data sources. A subset of NYS threatened or endangered species identified within the last five (5) years shall be provided.

(ii) For each listed animal species documented from available data sources, provide an evaluation of current habitat suitability for those species at the project site.

(iii) Landscape features and resources of potential concern within five (5) miles of the facility that may function to funnel or concentrate birds and bats, with a focus on NYS threatened or endangered species, during migration or for feeding, breeding, wintering, or roosting activities, such as national wildlife refuges, wildlife management areas, grassland focus areas, core forest blocks (contiguous

areas one hundred fifty (150) acres or larger), Audubon Important Bird Areas, high elevation mountaintops, prominent ridgelines, forested riparian areas, known hibernacula, records of caves and mines, or other significant habitat areas.

- (iv) Geographical, topographical, and other physical features within five (5) miles of the facility, interconnections, connecting lines, and access roads.
 - (v) National Wetlands Inventory (NWI) and NYSDEC mapped wetlands, streams, waterbodies, state forests, parks, land use, and other available information relevant to siting the facility.
 - (vi) A review of National Audubon Society climate change modeling for listed bird species documented in the wildlife site characterization, and review of other climate change models relevant to listed bird species and other wildlife species documented at the facility site, as available.
- (2) The applicant shall provide the results of the wildlife site characterization and project details (including as much information available at the time for facility component plans, preferably in GIS format) to the Office and the NYSDEC. A meeting shall be held by these agencies and the applicant within four (4) weeks of delivery of the draft wildlife site characterization, unless otherwise agreed upon by the applicant and the Office. At this meeting, the agencies shall:
- (i) Provide feedback as to the content and conclusions of the wildlife characterization study.
 - (ii) Enter into a non-disclosure agreement with the applicant, if necessary, and provide all additional data points beyond those identified in the draft site characterization.
 - (iii) Indicate whether the agencies consider occupied habitat of NYS threatened or endangered species to be present on the facility site based on existing information and, if so, indicate where such is located.
 - (iv) Recommend habitat assessments (including applicant to provide information regarding recent and planned future land uses) and/or field surveys that can be completed in the appropriate seasonal windows within one year. *For a solar energy facility additional field surveys are limited to listed bird species.*

- (3) If the applicant conducts a habitat assessment and believes suitable habitat for a given species is no longer present at the site, it shall provide a copy of the assessment report to the agencies for review and a draft determination as to whether surveys shall be required.
- (4) Following the draft determination, an applicant may submit evidence controverting an assertion that an area is occupied habitat. The applicant must provide such information within fourteen (14) days of receiving the draft determination and the Office must then issue a final determination within fourteen (14) days of its receipt of the additional information.
- (5) If surveys are recommended, the applicant shall develop a pre-construction study work plan in consultation with the Office and the NYSDEC. All surveys should follow existing protocols.
- (6) The applicant shall conduct surveys and provide draft reports and relevant GIS shape files to the Office and the NYSDEC within ~~six (6)~~ eight (8) weeks of the completion of each study. ~~If sightings of NYS threatened or endangered species were documented during the surveys, then a summary of the sightings with detailed location information shall be provided to the agencies in advance of the draft report and within three (3) weeks of the completion of each study.~~
- (7) Within thirty (30) days of submittal of the draft survey reports, the agencies and the applicant shall review the results of the habitat assessment(s) and survey(s) and the current facility design. The agencies and the applicant shall also discuss the requirements for the Net Conservation Benefit Plan, if applicable.
- (8) Within thirty (30) days of such conference pursuant to paragraph (6) of this subdivision, the Office shall provide its written draft determination regarding whether occupied habitat for one or more NYS threatened or endangered species exists within the facility site, the boundary of the occupied habitat, whether de minimis levels as provided in section 900-2.13 of this Part might be attainable for grassland birds, and, if applicable, the amount of mitigation funding that may be necessary if impacts cannot be avoided or mitigated.
- (9) The applicant shall provide the approved wildlife site characterization report, habitat assessment and/or survey reports, and Net Conservation Benefit Plan (where impacts have been determined to exceed de minimis impacts ~~if required~~) in the siting permit application as provided in section 900-2.13 of this Part.

(h) *Archaeological Resources Consultation.*

- (1) At the earliest point possible in the applicant's preliminary project planning, if any portion of the project impact area (PIA) falls within an area of archaeological sensitivity due to its inclusion on the statewide archaeological inventory map, the applicant shall conduct a Phase IA archeological/cultural resources study for the PIA.
- (2) The applicant shall submit the results of the Phase IA study to the Office. Within sixty (60) days of applicant's submittal of the Phase IA results, the Office, in consultation with OPRHP, shall inform the applicant as to whether a Phase IB field study will be required. The Office may schedule a meeting with the applicant and OPRHP to discuss the scope and content of the Phase IB field study.
- (3) If warranted by the Phase I studies, the applicant shall conduct a Phase II site evaluation study to assess the boundaries, integrity and significance of cultural resources identified in Phase I studies. (4) The applicant shall provide the Phase IA, IB and phase II, if applicable, in the siting permit application as required by section 900-2.10 of this Part.

(i) *Consultation with the Office.*

- (1) Applicants seeking a siting permit for a major renewable energy facility other than a solar facility or a wind facility shall consult with the Office at least one (1) year prior to submitting an application in order to determine which exhibits the Office will require, as well as any site-specific permit application requirements.
- (2) Any applicant may request a pre-application meeting with the Office, which request shall be granted or denied at the discretion of the Office.

§900-1.4 General requirements for applications

(a) Each application for a major renewable energy facility siting permit shall:

- (1) Include a properly completed ORES application form;
- (2) Contain the exhibits required pursuant to Subpart 900-2 of this Part unless the Office has notified an applicant during the pre-application phase that a particular exhibit would not be required because it is not relevant to a particular facility's technology or proposed location;
- (3) Contain any requests, including justification and supporting documentation, for a site-specific condition in lieu of any exhibit requirement or uniform standard or condition set forth in Subpart 900-6 of this Part and an explanation as to why such site-specific condition is required;

- (4) Provide a website through which the applicant will disseminate information to the public, which shall include at least the following information:
- (i) A summary of the application describing the proposed facility, its location, and the range of potential environmental and health impacts of the construction and operation of the facility;
 - (ii) A map(s) at a size and level of detail appropriate to substantially inform the public of the location of the proposed facility site;
 - (iii) A statement that the application, when filed, may be examined during normal business hours at the Office of Renewable Energy Siting, and the local library(ies) served in accordance with section 900-1.6(a)(6) of this Part, and the addresses thereof;
 - (iv) An explanation of the application review process, including information regarding the availability of local agency account funds, citing the requirements set forth in Subpart 900-5 of this Part, including, but not limited to, the requirement that any local agency or potential community intervenor shall submit a request for initial funding within thirty (30) days of the date of application filing and that such request be made to the Office of Renewable Energy Siting, at the Albany, New York office, Attention: Request for Local Agency Account Funding;
 - (v) Information as to how and where persons wishing to receive all notices concerning the proposed facility can file a request with the Office to subscribe to receive such notices;
 - (vi) Information as to how to access relevant documents from the ORES website;
 - (vii) Copies of all notices required pursuant to this Part; and
 - (viii) The names, addresses, telephone numbers and e-mail addresses of a representative of the applicant and relevant ORES staff.
- (5) Identify any information that the applicant asserts is critical infrastructure information or trade secrets pursuant to Article 7 of the New York State Public Officers Law, or other applicable state or federal laws, which the applicant requests the Office not to disclose and reasons why such information should be excepted from disclosure. Such information shall clearly be marked as trade secret or critical

infrastructure information and only included in applications filed with the Office. All other copies of the application served pursuant to section 900-1.6(a) of this Part shall contain information noting the location of redacted information that the applicant is asserting is critical infrastructure information or trade secrets.

- (6) In compliance with the provisions of Section 304 of the National Historic Preservation Act, and 9 NYCRR Section 427.8, information about the location, character, or ownership of a cultural resource shall not be disclosed to the public, and shall only be disclosed pursuant to an appropriate protective order. Such information shall clearly be marked and only included in applications filed with the Office. All other copies of the application served pursuant to section 900-1.6(a) of this Part shall contain information noting the location of information redacted in accordance with Section 304 of the National Historic Preservation Act, and 9 NYCRR Section 427.8.
- (7) Include an affidavit of service showing that a copy of the application and accompanying documents were served on all those required by section 900-1.6(a) of this Part;
- (8) Be accompanied by a fee to be deposited in the local agency account in an amount equal to one thousand (1,000) dollars for each one thousand (1,000) kilowatts of capacity, which may be adjusted from time to time by the Office to account for inflation;
- (9) Be accompanied by the ORES fee required pursuant to section 900-1.5 of this Part; and
- (10) If requested of the applicant by the Office, include any additional information that may be required in order to enable the Office to make the findings and determinations required by law.
- (11) If requested by the applicant, include any of the preconstruction compliance filings for early review by the ORES.

(b) Water Quality Certification. In accordance with Section 401 of the Clean Water Act, if construction or operation of a proposed major renewable energy facility would result in any discharge into the navigable water of the United States and require a federal license or permit, the applicant shall request and, prior to commencing construction in jurisdictional areas, obtain a Water Quality Certification indicating that the proposed activity will be in compliance with water quality standards, as set forth in 6 NYCRR Section 608.9.

- (1) Generally, the request for the Water Quality Certification shall be submitted as part of the application pursuant to subdivision 900-2.14(f) of this Part. In the event the related application for a federal license or permit has not been submitted on or before

the date of submission of the 94-c application, the applicant shall provide a statement describing its plan for making such a request, including a timetable, as set forth in section 900-2.14(f), and the request for the water quality certification shall be submitted to the ORES when an application for a Federal license or permit is made.

(2) When an applicant or permittee has requested both a Water Quality Certification from the ORES and permits from the U.S. Army Corps of Engineers or other federal agency, the ORES shall provide information to the district engineer or other federal agency as to whether circumstances require a period of time longer than the period specified in applicable federal regulations for the certifying agency to act on the request for certification in order to avoid a waiver.

(3) If the request for a Water Quality Certification does not accompany an application, it shall be filed and served and notice of it shall be given in the same manner as an application pursuant to section 900-1.6 of this Part. If the request for a Water Quality Certification is filed after the issuance of the siting permit, such request shall be treated as a request for a *minor* permit modification pursuant to section 900-11.1 of this Part.

§900-1.5 Office of Renewable Energy Siting Review Fee

- (a) The Office shall charge a fee to the applicant in order to recover the costs of reviewing an application in an amount equal to one thousand (1,000) dollars for each one thousand (1,000) kilowatts of capacity, which shall be due at the time of application filing.
- (b) If the fees are used to hire consulting services to assist the office in reviewing an application the Office will account for the expenditures and any unspent funds will be refunded to the applicant.

§900-1.6 Filing, Service and Publication of an Application

- (a) The applicant shall file an electronic copy and five (5) paper copies with the Office of Renewable Siting, Attention: Applicant Review, at the Albany, New York office and shall concurrently serve copies on the following, as specified:
 - (1) An electronic copy and one (1) paper copy on the NYSDEC at its central office and an electronic copy on each affected NYSDEC regional office;
 - (2) An electronic copy and one (1) paper copy on NYSDPS at its Albany, New York office;
 - (3) An electronic copy and one (1) paper copy on the chief executive officer of each municipality in which any portion of the proposed facility is to be located; and in New York City, an electronic copy upon the Borough President of any affected

borough, and upon the Community Board of any affected areas served by a Community Board;

- (4) Unless otherwise directed, an electronic copy on the commissioners of the NYSAGM, NYSDOH, NYSDOT and OPRHP;
- (5) An electronic copy on the attorney general of the state of New York;
- (6) An electronic copy and one (1) paper copy each on a library serving the district of each member of the state legislature in whose district any portion of the proposed facility is to be located or could be adversely impacted by the proposed facility;
- (7) An electronic copy on the chief executive officer of any other agency, or local agency that would (absent Section 94-c of the Executive Law) have permitting or approval authority with respect to any aspect of the proposed facility; and
- (8) An electronic copy on the APA if such proposed facility is located within the Adirondack Park, as defined in subdivision (1) of Section 9-0101 of the ECL.

(b) Upon request from any of the entities set forth in subdivisions (a)(1)-(8) of this section, the applicant shall provide up to two (2) additional paper copies within five (5) business days of receipt of the request.

(c) Publication of notice of application shall be made no less than three (3) days before the date on which an applicant files the application and the applicant shall comply with the following:

- (1) Provide a copy of the notice to the Office;
- (2) Publish notice in newspapers designated for publication of official notices of each municipality in which the proposed facility is to be located, in the newspaper of largest circulation in the county(ies) in which the proposed facility is to be located and, if any are available, in a free newspaper publication that services the area in which the proposed facility is to be located;
- (3) Provide short written notice in postcard form to all persons residing within one half 1 mile of the proposed solar facility or within 5 miles of the proposed wind facility; and
- (4) Provide notice to each member of the state legislature in whose district any portion of the proposed facility is to be located.

(d) Notices required pursuant to subdivision (c) of this section shall serve substantially to inform the public of such application and availability of local agency account funding as follows:

- (1) Contain a summary of the application and a website link which shall contain such a summary;

- (2) Contain the date on or about which the application will be filed with the Office;
- (3) Contain a statement of availability of local agency account funds, including the date the notice of intent to file an application required pursuant to section 900-1.3(d) of this Part was published, citing to the requirements set forth in Subpart 900-5 of this Part, including, but not limited to, the requirement that any local agency or potential community intervenor shall submit a request for initial funding within thirty (30) days of the date of application filing and that such request be made to the Office of Renewable Siting, at the Albany, New York office, Attention: Request for Local Agency Account Funding; and
- (4) Shall be in plain language, in English and in any other language spoken according to the United States Census data by five thousand (5,000) or more persons residing in any five (5)-digit zip code for the proposed facility. Notices published in languages other than English shall be published in newspapers, if any are available, servicing the appropriate language community.

(e) If the Office determines that any language not captured in paragraph (d)(4) of this section is spoken by a significant population of persons residing in close proximity to the proposed facility, interconnections or related facilities necessary to serve the proposed facility, the Office shall direct the applicant to provide notice and summary of the application in the appropriate language and method. **Subpart 900-2 Application Exhibits**

§900-2.1 Filing Instructions

- (a) Each application for a siting permit shall contain the exhibits described in this Subpart as relevant to the proposed facility technology and site and such additional information as the applicant may consider relevant or as may be required by the Office. Exhibits that are not relevant to the particular facility's technology or proposed location may be omitted from the application.
- (b) Each exhibit shall contain a title page showing:
 - (1) The applicant's name;
 - (2) The title of the exhibit; and
 - (3) The proper designation of the exhibit.

- (c) Each exhibit consisting of ten (10) or more pages of text shall contain a table of contents citing by page and section number or subdivision the elements or matters contained in the exhibit.
- (d) In collecting, compiling and reporting data required for the application, the applicant shall establish a basis for a statistical comparison with data which shall subsequently be obtained under any program of post-permit monitoring.
- (e) If the same information is required for more than one exhibit, it may be supplied in a single exhibit and cross-referenced in the other exhibit(s) where it is also required.
- (f) If maps are requested, the applicant shall provide both hard copy and digital files, including appropriate GIS shapefiles and/or CAD, etc. **§900-2.2 Exhibit 1: General Requirements**

Exhibit 1 shall contain:

- (a) The name, address, telephone number, and e-mail address of the applicant;
- (b) The address of the website established by the applicant to disseminate information to the public regarding the application;
- (c) The name, address, telephone number, and e-mail address of a representative of the applicant that the public may contact for more information regarding the application;
- (d) The name, business address, telephone number, and e-mail address of the principal officer of the applicant;
- (e) If the applicant desires service of documents or other correspondence upon an agent, the name, business address, telephone number, and e-mail address of the agent;
- (f) A brief explanation of the type of business entity that the applicant is, including its date and location of formation and the name and address of any parent entities; and
- (g) If the facility is to be owned by a corporation, a certified copy of the charter of such corporation; if the facility is not to be owned by a corporation, a copy of the certificate or other documents of formation.

§900-2.3 Exhibit 2: Overview and Public Involvement

Exhibit 2 shall contain:

- (a) A brief description of the major components of the facility, including collection lines, transmission lines, interconnections, access roads and related facilities. A brief, clearly and concisely written overall analysis in plain language that assembles and presents relevant and material facts regarding the facility upon which the applicant proposes that the Office make its decision. The analysis shall be analytical and not encyclopedic and shall specifically address each required finding, determination and consideration the Office shall make or consider in its decision and explain why the applicant believes that the requested permit should be granted.

- (b) A brief description of applicant's local engagement and outreach efforts as required in sections 900-1.3(a) and (b) of this Part.

§900-2.4 Exhibit 3: Location of Facilities and Surrounding Land Use

Exhibit 3 shall contain:

- (a) Latest- or recent-edition USGS maps (1:24,000 topographic edition, utilizing GIS mapping to the extent available), showing:
 - (1) The proposed location of the facility, including proposed electric collection and transmission lines and interconnections, as well as permanent ancillary features located on the facility site such as roads, railroads, switchyards, energy storage or regulation facilities, substations and similar facilities;

 - (2) The proposed location of any off-site utility interconnections, including all electric transmission lines, communications lines, stormwater drainage lines, and appurtenances thereto, to be installed in New York State connecting to and servicing the site of the facility;

 - (3) The proposed limits of clearing and disturbance for construction of all facility components and ancillary features.

- (b) Maps clearly showing the location of the facility and all ancillary features not located on the facility site in relation to municipal boundaries and taxing jurisdictions, at a scale sufficient to determine and demonstrate relation of facilities to those geographic and political features.

- (c) Written descriptions explaining the relation of the location of the facility site, and all ancillary features not located on the facility site, to the affected municipalities and taxing jurisdictions.
- (d) A map showing existing land uses within the study area.
- (e) A map of any existing overhead and underground major facilities for electric, gas or telecommunications transmission within the study area and a summary of any consultations with owners of major facilities for electric, gas or telecommunications that may be impacted by the facility (crossing existing utilities or otherwise).
- (f) A map of all properties upon which any component of a facility or permanent ancillary feature would be located, and for wind facilities, all properties within two thousand (2,000) feet of such properties, and for solar projects, all properties within one thousand (1,000) feet, that shows the current land use, tax parcel number and owner of record of each property, and any publicly known proposed land use plans for any of these properties.
- (g) A map of existing zoning districts and proposed zoning districts within the study area and a description of the permitted and the prohibited uses within each zone. For “floating” or “overlay” zones that are not specifically attributable to a specific mapped zoning district, describe the applicable substantive criteria that apply for establishment of the overlay zone.
- (h) A statement as to whether any applicable local jurisdiction has an adopted comprehensive plan applicable to lands on which facility components or ancillary facilities are located and whether the proposed facility is consistent with such comprehensive plan. A copy of the plan shall be provided in the application, with an indication of plan sections applicable to the proposed uses.
- (i) A map of all publicly known proposed land uses within the study area, as determined in consultation with State and local planning officials, from any public involvement process, or from other sources.
- (j) Maps showing designated NYS coastal areas, inland waterways and local waterfront revitalization program areas, groundwater management zones, designated agricultural districts, flood-prone areas, critical environmental areas designated pursuant to Article 8 of the ECL, and coastal erosion hazard areas, that are located within the study area.

- (k) Maps showing recreational and other land uses within the study area that might be affected by the sight or sound of the construction or operation of the facility, interconnections and related facilities, including wild, scenic and recreational river corridors, open space, and any known archaeological, geologic, historical or scenic area, park, designated wilderness, forest preserve lands, scenic vistas specifically identified in the Adirondack Park State Land Master Plan, NYS Parks, NYSDEC lands, conservation easement lands, federal or state designated scenic byways, nature preserves, designated trails, and public-access fishing areas, major communication and utility uses and infrastructure, and institutional, community and municipal uses and facilities.
- (l) A qualitative assessment of the compatibility of the facility, including any off-site staging and storage areas, with existing, proposed and allowed land uses, and local and regional land use plans, located within a three hundred feet (300) ~~a one (1)-mile~~ radius of a solar energy ~~the~~ facility site and within a one (1)-mile radius of a wind energy facility site. The assessment shall identify the nearby land uses of particular concern to the community and shall address the land use impacts of the facility on residential areas, schools, civic facilities, recreational facilities, and commercial areas. The assessment and evaluation shall demonstrate that conflicts from facility-generated noise, traffic and visual impacts with current and planned uses have been minimized to the extent practicable.
- (m) A qualitative assessment of the compatibility of proposed above-ground transmission lines, collection lines, and interconnections and related facilities with existing, potential, and proposed land uses within a three hundred feet radius of the facility site. ~~the study area.~~
- (n) A qualitative assessment of the compatibility of proposed underground transmission lines, collection lines, interconnections and related facilities with existing, potential, and proposed land uses within three hundred (300) feet from the centerline of such interconnections or related facilities.
- (o) For facilities at locations within NYS designated coastal areas, or in direct proximity of coastal areas or designated inland waterways, provide an analysis of conformance with relevant provisions of the New York State Coastal Management Program Policies, and proposed or adopted Local Waterfront Revitalization Plans. For facilities located within or adjacent to areas mapped by the National Oceanographic and Atmospheric Administration (NOAA), mapping of the proposed facility's location on the most recent edition of NOAA navigation charts shall be provided.
- (p) Aerial photographs of all properties within the study area of sufficient scale and detail to enable discrimination and identification of all natural and cultural features, as well as

current land uses. All aerial photographs shall indicate the source and the date photographs were taken.

(q) Overlays on aerial photographs which clearly identify the facility site and any facility layout, interconnection route, the limits of proposed clearing or other changes to the topography, vegetation or human-made structures, and the location of access and maintenance routes.

(r) ~~All aerial photographs shall reflect the current uses of the land. All aerial photographs shall indicate the source and the date photographs were taken.~~

(s) A description of community character in the area of the facility, an analysis of impacts of facility construction and operation on community character, and identification of avoidance or mitigation measures that will minimize adverse impacts on community character. For the purposes of this exhibit, community character includes defining features and interactions of the natural, built and social environment, and how those features are used and appreciated in the community.

(t) For repurposed sites with a history of environmental contamination only:

(1) For a site that has not been remediated under the oversight of the NYSDEC:

(i) A copy of a Phase 1 Environmental Site Assessment (ESA) and, if any Recognized Environmental Conditions were identified, a Phase 2 ESA; and

(ii) A determination by a qualified Licensed Professional Engineer, on the basis of the Phase I ESA and/or Phase 2 ESA, that it is not anticipated that hazardous substances would be encountered during construction and/or operation of the facility.

(2) For a site that has been remediated under the oversight of the NYSDEC and received a Certificate of Completion or No Further Action from the NYSDEC:

(i) A copy of the applicable Site Management Plan for the facility site and any deed or land use restrictions imposed; and

(ii) A certification by the applicant that it will implement and comply therewith.

(u) For a proposed facility where an oil, gas or mining solution well is known to exist within five hundred (500) feet of proposed areas to be disturbed within a proposed facility boundary (based on records maintained by the NYSDEC) or for any proposed facility located in NYSDEC regions 7, 8, or 9:

- (1) A description of a survey, setting forth the date(s) the survey occurred, the company that conducted it and the methodology used. The purpose of the survey is to determine whether any NYSDEC-regulated wells are present, and if so, identification of the wells and type, if known. ~~Unless another method was authorized by the Office,~~ If the survey is not able to locate the suspected wells then ~~shall have been done by~~ the use of magnetometers, including aerial platform magnetometers, that are able to locate wells including those lacking surface expressions should be used.~~and~~ Any discovered wells should be recorded in decimal degrees, NAD 83, with six (6) decimal places of accuracy, and presented on the map identified in subdivision (u)(2) of this section.
- (2) A map based on the survey required in subdivision (u)(1) of this section identifying the location of all wells and associated infrastructure (to the extent known), along with the facility boundaries, proposed areas to be disturbed, and proposed facility components. The map should also identify proposed setbacks from permanent structures and buildings of a minimum of one hundred (100) feet from identified well(s) and minimum twenty (20) feet in width from nearest reasonable facility property access point to the well to permit inspections and other regulatory work as may be needed.
- (3) An explanation if the applicant cannot meet the setback and access requirements referenced in subdivision (u)(2) of this section.

§900-2.5 Exhibit 4: Real Property

Exhibit 4 shall be based on the information available to the applicant at the time of application with the complete real property record to be included in the pre-construction compliance filing in 900-10.2(h). and contain:

- (a) A map of the facility site showing property boundaries with tax map sheet, block and lot numbers; the owner of record of all parcels included in the facility site and for all adjacent properties; easements, grants, deed restrictions, and related encumbrances on the parcels comprising the facility site; public and private roads on or adjoining or planned for use as access

to the facility site; zoning and related designations applicable to the facility site and adjoining properties.

(b) A property/right-of-way map of all proposed transmission lines and interconnection facilities and off property/right-of-way access drives and construction lay-down or preparation areas for such interconnections.

(c) A demonstration that the applicant has obtained title to or a leasehold interest in the facility site, including ingress and egress access to a public street, or is under binding contract or option to obtain such title or leasehold interest, or can obtain such title or leasehold interest. State whether the applicant is registered as a transportation corporation and plans to acquire necessary lands for generating or transmission line or other facility-related infrastructure pursuant to New York State Eminent Domain Procedure Law.

(d) A statement that the applicant has obtained, or can obtain (with commercially reasonable certainty), such deeds, easements, leases, licenses, or other real property rights or privileges as are necessary for all interconnections for the facility site. Failure of an applicant to obtain all land controls will not be a reason to determine the application incomplete.

(e) An identification of any improvement district extensions necessary for the facility and a demonstration that the applicant has obtained, or can obtain, such improvement district extensions.

§900-2.6 Exhibit 5: Design Drawings

(a) Drawings to be submitted pursuant to this section shall be prepared by or at the direction of a professional engineer, licensed and registered in New York State, whose name shall be clearly printed on the drawings.

(b) Wind facilities shall meet the setback requirements in Table 1 or manufacturer setbacks, whichever are more stringent. The setback distances shall be measured as a straight line from the centerline or midpoint of the wind turbine tower to the nearest point on the building foundation, property line or feature, as applicable. Compliance with such setbacks (based on the tallest wind turbine model under consideration) shall be shown in the general site plan drawings (or as stand-alone mapping) as required by section 900-2.6(f)(1)(ii) of this Part.

Table 1: Setback Requirements for Wind Turbine Towers

Structure type	Wind Turbine Towers setback*
Substation	1.5 times
Any Above-ground Bulk Electric System**	1.5 times
Gas Wells (unless waived by landowner and gas well operator)	1.1 times
Public Roads	1.1 times
Non-participating Property Lines	1.1 times
Non-participating, non-residential Structures***	1.1 1.15 times
Non-participating Residences	1.1 1.1 times
<p>*1.0 times Wind Turbine Towers setback is equal to the Total Height of the Wind Facility (at the maximum blade tip height). **Operated at 100 kV or higher, and as defined by North American Electric Reliability Corporation Bulk Electric System Definition Reference Document Version 3, August 2018 (see section 90015.1(e)(1)(i) of this Part). <u>Note: the project gen-tie line is not considered a part of the Bulk Electric System.</u> ***<u>Must have a foundation and a valid building permit (unless the building pre-dates local building permit requirements).</u></p>	

(c) The applicant shall provide a table listing rated power, hub height, rotor diameter, and total height of each wind turbine model under consideration for the facility.

(d) Solar facilities shall meet the setback requirements set forth in Table 2. Compliance with such setbacks listed in Table 2 shall be shown in the general site plan drawings required by section 900-2.6(f)(1)(i) of this Part. Fencing, collection lines, access roads and landscaping may occur within the setback.

Table 2: Setback Requirements for Solar Facility Components

Setback Type	Solar Facility Setback
Non-participating residential property lines	100 -50 feet
Centerline of Public Roads	50 feet
Non-participating property lines (non-residential)	50 20 feet
Non-participating occupied residences	250 feet

(e) The maximum height of solar facilities, exclusive of electric collection, transmission or substation/switchyard components, shall not exceed ~~twenty (20)~~ thirty (30) feet from finished grade. The height of arrays shall be measured from the highest natural grade below each solar panel to its maximum potential height.

(f) Exhibit 5 shall contain:

(1) Site plans of the proposed facility, including the following:

(i) For solar facilities, general site plan drawings (utilizing GIS mapping) of all facility components at a legible common engineering scale (using a scale ratio (in feet) of at least 1:200, ~~two (2)~~ one (1) full-size hard copy sets (22" x 34" sheets) shall be provided with the application) including the following proposed and existing features:

(a) Solar panels, inverters, low-medium transformers, property lines, applicable setbacks of Table 2: Setback Requirements for Solar Facility Components and any applicable local setbacks;

(b) Extents of proposed access road travel lanes (including indications of any existing access roads to be utilized) and any turn-around areas/temporary road improvements for component deliveries (may be included in site plans or as a stand-alone map set per the requirements of section 900-2.17 of this Part);

- (c) Electric cable collection line corridors (including an indication of permanent rights-of-way (ROW)) and the approximate locations of any proposed splice vaults; overhead and underground cable routes shall be differentiated; mapping shall identify any locations of proposed trenchless collection line installations, including the approximate lengths of such electric line routes, information can be included in site plans or provided as a stand-alone map set);
 - (d) The existing electric transmission line (which the facility will interconnect to) and any known existing utilities (including pipelines) and associated rights of way within the facility site;
 - (e) Approximate limits of disturbance for all facility components (panels, access roads, electric line corridors, etc.);
 - (f) Approximate clearing limits for all facility components (panels, access roads, buildings, electric lines, shading vegetation, etc.);
 - (g) Extents of collection and interconnection stations and any applicable local setbacks;
 - (h) Any proposed energy storage system(s) and any applicable local setbacks;
 - (i) Site security features, including approximate location of perimeter fencing; and
 - (j) Any berms, retaining walls, fences and other landscaping improvements (included in general site plans or provided as a stand-alone map set).
- (ii) For wind facilities, general site plan drawings (utilizing GIS mapping) of all facility components at a reasonable legible engineering scale (using a scale ratio (in feet) of at least 1:200), two (2) full-size hard copy sets (22" x 34" sheets) shall be provided with the application), including the following proposed and existing features:

- (a) Extents of proposed access roads (including an indication of any existing access roads to be utilized); turn-around areas/temporary road improvements for component deliveries or construction access (may be included in site plans or as a stand-alone map set per requirements of section 900-2.17 of this Part);
- (b) Extents of wind turbines (based on approximate dimensions of foundations) and crane pads;
- (c) Electric collection corridors (including an indication of permanent ROW) and the approximate location of any proposed splice vaults; overhead and underground cable routes shall be differentiated; mapping shall include an identification of proposed trenchless collection line installations, including the approximate lengths of such electric line routes, (this information can be included in site plans or provided as a stand-alone map set);
- (d) Collection substation outline and any applicable local setbacks;
- (e) Extents of the switchyard station and any applicable local setbacks;
- (f) The existing electric transmission line (which the facility will interconnect to) and any known existing utilities (including pipelines) and associated ROW within the facility site;
- (g) Approximate limits of disturbance for all facility components (turbines, access roads, electric line corridors, etc.);
- (h) Approximate clearing limits for all facility components (turbines, access roads, buildings, electric lines, etc.);
- (i) Proposed wind turbines setbacks (based on the tallest wind turbine model under consideration), represented by radii (setback circles) offset from turbine locations, demonstrating compliance with manufacturers' setbacks or those listed in Table 1 above, whichever is more stringent (setback circles can be included in general site plans or provided as a stand-alone map set); participating residences shall also be shown.

(j) Any proposed energy storage system(s) and any applicable local setbacks;

(k) Any proposed berms, retaining walls, fences and other landscaping improvements (included in general site plans or provided as a stand-alone map set); and

(l) Permanent meteorological towers and any applicable local setbacks.

(2) All drawings listed below are to be drawn to scale, or to an exaggerated scale, as appropriate. All such drawings are to be created using computer graphics or computer-aided design software; hand-drawn sketches and drawings may not be used. The following details and plans shall be provided:

(i) Typical elevation drawings indicating the length, width, height, material of construction, color and finish of all buildings, structures, and fixed equipment to be provided for the following:

(a) Wind turbine elevations, for each proposed wind turbine model under consideration, including maximum blade tip height and turbine blade specifications with descriptions of the blade installation process (turbine height and blade detail may be substituted with manufacturer sheets, if documentation includes the required detail);

(b) Switchyard station(s) and interconnection facilities (including fencing, gates, and all station equipment); a general arrangement plan shall be included in the elevation drawing set showing elevation mark pointers (arrows) with reference to associated elevation views (including views of all components of the station);

(c) Collection substation(s) (including fencing, gates, and all substation equipment); a general arrangement plan shall be included in the elevation drawing set showing elevation mark pointers (arrows) with reference to associated elevation views (including views of all components of the substation); and

(d) Energy storage system(s) (including fencing, gates, and buildings); a general arrangement plan shall be included in the elevation drawing set showing elevation mark pointers (arrows) with reference to associated elevation views (including views of all components of the energy storage system).

(ii) Each proposed permanent point of access or access type shall include a typical installation plan view, cross section and side view with appropriate dimensions (temporary and permanent width(s)) and identification of materials to be used along with corresponding material thickness. Where existing accessways will be used, a description of proposed upgrades for facility construction shall be provided. Additionally, typical details of any other proposed access (e.g., helicopter or barge placement) shall be provided.

(iii) Typical underground infrastructure section details including single and multiple circuit layouts with dimensions of proposed depth, trench width, level of cover, separation requirements between circuits, clearing width limits for construction and operation of the facility, limits of disturbance, required permanent ROW and a description of the cable installation process; typical details of any proposed splice vaults shall also be provided, including vault dimensions, level of cover, required trench length, width and depth, clearing width limits for construction and operation of the facility, and limits of disturbance.

(iv) Details for typical overhead electric transmission and collection lines, including a profile of the centerlines at an exaggerated vertical scale and typical elevation plans including height above grade and structure layouts.

(3) ~~Site suitability report from the original equipment manufacturer showing that turbine model(s) are compatible with existing facility conditions (i.e., site specific conditions).~~

(4) A list of engineering codes, standards, guidelines and practices that the applicant has or intends to conform with when planning, designing, constructing, operating and maintaining the wind turbines, solar arrays, electric collection system, substation, transmission line, interconnection, energy storage systems (a summary of correspondence with local fire department representatives shall accompany proposals of such systems), and associated structures.

- (5) Any manufacturer provided information regarding the design, safety and testing information for the turbines, solar panel, inverters, substations, transformers, and battery storage equipment to be installed during construction, or as related to any equipment installed during facility operation.

§900-2.7 Exhibit 6: Public Health, Safety and Security

Exhibit 6 shall contain:

- (a) ~~A statement and evaluation that identifies, describes, and discusses all efforts made to avoid and minimize potential adverse impacts of the construction and operation of the facility, the interconnections, and related facilities on the environment, public health, and safety, other than as already detailed in other relevant Exhibits, at a level of detail that reflects the severity of the impacts and the reasonable likelihood of their occurrence, identifies the current applicable statutory and regulatory framework, and also addresses:~~
- ~~(1) The anticipated gaseous, liquid and solid wastes to be produced at the facility during construction and under representative operating conditions of the facility, including their source, anticipated volumes (excluding estimates for minor waste volumes, such as concrete washout wastes), composition and temperature, and such meteorological, hydrological and other information needed to support such estimates and any studies, identifying the author and date thereof, used in the analysis;~~
 - ~~(2) The anticipated volumes of such wastes to be released to the environment during construction and under any operating condition of the facility;~~
 - ~~(3) The treatment processes to eliminate or minimize wastes to be released to the environment;~~
 - ~~(4) The manner of collection, handling, storage, transport and disposal for wastes retained and not released at the site, or to be disposed of;~~
 - ~~(5) Maps of the study area and analysis showing relation of the facility site to: public water supply resources (to the extent locations are publicly available); community emergency response resources and facilities including police, fire and emergency medical response facilities and plans; emergency communications facilities; hospitals and emergency medical facilities; existing known hazard risks including flood hazard zones, storm surge zones, areas of coastal erosion hazard, landslide hazard areas,~~

~~areas of geologic, geomorphic or hydrologic hazard; dams, bridges and related infrastructure; explosive or flammable materials transportation or storage facilities; contaminated sites; and other local risk factors;~~

~~(6) All significant impacts on the environment, public health, and safety associated with the information required to be identified pursuant to paragraphs (1) through (5) of this subdivision, including all reasonably related short-term and long-term effects;~~

~~(7) Any measures proposed by the applicant to minimize such impacts;~~

~~(8) Any measures proposed by the applicant to mitigate such impacts; and~~

~~(9) Any monitoring of such impacts proposed by the applicant.~~

(b) A Site Security Plan for the operation of proposed facility, including site plans and descriptions of the following site security features:

(1) Access controls including fences, gates, bollards and other structural limitations;

(2) Electronic security and surveillance facilities;

(3) Security lighting, including specifications for lighting and controls to address work-site safety requirements and to avoid off-site light trespass;

~~(4) Lighting of facility components to ensure aircraft safety, which complies with the required showing in section 900-2.9 of this Part; and~~

(5) A description of a cyber security program for the protection of digital computer and communication systems and networks that supports the facility demonstrating compliance with current standards issued by a standards setting body generally recognized in the information technology industry, including, but not limited to, the Federal Department of Commerce's National Institute of Standards and Technology, the North American Electric Reliability Corporation, or the International Organization for Standardization, and providing for periodic validation of compliance with the applicable standard by an independent auditor.

(c) A Safety Response Plan to ensure the safety and security of the local community, including:

(1) An identification of contingencies that would constitute a safety or security emergency;

- (2) Emergency response measures by contingency;
 - (3) Evacuation control measures by contingency;
 - (4) Community notification procedures by contingency;
 - (5) A description of all on-site equipment and systems to be provided to prevent or handle fire emergencies and hazardous substance incidents in compliance with the fire code section of the New York State Uniform Fire Prevention and Building Code adopted pursuant to Article 18 of the Executive Law;
 - (6) A description of all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident; and
 - (7) A requirement to ~~conduct~~ offer training drills with emergency responders at least once per year.
- (d) A statement that the applicant has provided a copy of the plans required in subdivisions (b) and (c) of this section to, and requested review of such plans and comment by, the New York State Division of Homeland Security and Emergency Services.
- (e) If the facility is to be located within any part of a city with a population over one million (1,000,000), a statement that the applicant has provided a copy of the plans required in subdivisions (b) and (c) of this section to, and requested review of such plans and comment by, the local office of emergency management.

§900-2.8 Exhibit 7: Noise and Vibration

This section has been deleted because ACE NY and AWEA separately submitted comments on the sound provisions of the ORES proposal and a redline version of the ORES proposal.

§900-2.9 Exhibit 8: Visual Impacts

Exhibit 8 shall contain:

- (a) A visual impact assessment (VIA) to determine the extent and assess the significance of facility visibility. The components of the VIA shall include identification of visually sensitive

resources, viewshed mapping, confirmatory visual assessment fieldwork, visual simulations (photographic overlays), cumulative visual impact analysis, and proposed Visual Impacts Minimization and Mitigation Plan as outlined in subdivision (d) of this section. The VIA shall address the following issues:

- (1) The character and visual quality of the existing landscape;
- (2) The visibility of the facility, including visibility of facility operational characteristics, such as wind turbine lighting, glare from solar panel arrays;
- (3) The visibility of all above-ground interconnections and roadways to be constructed within the facility as determined by the viewshed analysis;
- (4) The appearance of the facility upon completion, including building/structure size, architectural design, facade colors and texture, and site lighting;
- (5) The proposed facility lighting (including lumens, location and direction of lights for facility site and/or task use, and safety including worker safety and tall structure marking requirements) and similar features;
- (6) Representative views (photographic overlays) of the facility, including relevant front, side and rear views, indicating approximate elevations;
- (7) The nature and degree of visual change resulting from construction of the facility and aboveground interconnections;
- (8) The nature and degree of visual change resulting from operation of the facility; and
- (9) ~~An analysis and description of related operational effects of the facility such as visible plumes, shading, glare, and shadow flicker; and~~
- (10) A description of all visual resources that would be affected by the facility.

(b) The viewshed analysis component of the VIA shall be conducted as follows:

- (1) Viewshed maps depicting areas of facility visibility within ~~two (2)~~ one (1) miles of a solar facility and five (5) miles of a wind facility, as well as any potential visibility from specific significant visual resources beyond the specified study area, shall be prepared and

presented on a 1:24,000 scale recent edition topographic base map. A line of sight profile shall also be done for resources of statewide concern located within the VIA study area. The viewshed maps shall provide an indication of areas of potential visibility based on topography and vegetation, the highest elevation of facility structures and distance zone (foreground, midground and background areas). The potential screening effects of vegetation shall also be shown. Visually-sensitive sites, cultural and historical resources, representative viewpoints, photograph locations, and public vantage points within the viewshed study area shall be included on the map(s) or an overlay. An overlay indicating landscape similarity zones shall be included.

(2) The VIA shall include a description of the methodology used to develop the viewshed maps, including software, baseline information, and sources of data.

(3) The viewshed mapping shall be used to determine the potential visibility from viewpoints to be analyzed (as indicated in the following paragraph (4) of this subdivision) and locations of viewer groups in the vicinity of the facility, as determined pursuant to the pre-application meeting(s) held pursuant to section 900-1.3(a) of this Part. These shall include recreational areas, residential and business locations, historic properties (listed or eligible for listing on the State or National Register of Historic Places), and travelers (interstate and other highway users).

(4) In developing the application, the applicant shall confer with municipal planning representatives, the Office, and where appropriate, OPRHP and/or APA in its selection of important or representative viewpoints. Viewpoint selection is based upon the following criteria:

- (i) Representative or typical views from unobstructed or direct line- of-sight views;
- (ii) Significance of viewpoints, designated scenic resources, areas or features (which features typically include, but are not limited to: landmark landscapes; wild, scenic or recreational rivers administered respectively by either the NYSDEC or the APA pursuant to ECL Article 15 or Department of Interior pursuant to 16 USC Section 1271; forest preserve lands; scenic vistas specifically identified in the Adirondack Park State Land Master Plan; conservation easement lands; scenic byways designated by the Federal or State governments; scenic districts and scenic roads, designated by the Commissioner of Environmental Conservation pursuant to ECL Article 49; scenic areas of statewide significance; State parks; sites listed or eligible for

listing on the National or State Registers of Historic Places; areas covered by scenic easements, public parks or recreation areas; locally designated historic or scenic districts and scenic overlooks; and high-use public areas;

(iii) Level of viewer exposure (i.e., frequency of viewers or relative numbers, including residential areas, or high-volume roadways);

(iv) Proposed land uses; and

(v) Assessment of visual impacts pursuant to the requirements of adopted local laws or ordinances in effect on the date that the application is filed; ~~and~~

(c) Visual Contrast Evaluation.

(1) Photographic simulations of the facility shall be prepared from the representative viewpoints to demonstrate the post-construction appearance of the facility. Where vegetation screening is relied on for facility mitigation, leaf-off and leaf-on simulation shall be provided.

(2) Additional revised simulations illustrating mitigation shall be prepared for those observation points for which mitigation is proposed in the application.

(3) Each set of existing and simulated views of the facility shall be compared and rated and the results of the VIA shall be summarized. Documentation of the steps followed in the rating and assessment methodology shall be provided including results of rating impact panels and a description of the qualifications of the individuals serving on the panels. Where visual impacts from the facility are identified, contrast minimization and mitigation measures shall be identified, and the extent to which they effectively minimize such impact shall be discussed.

(d) Visual Impacts Minimization and Mitigation Plan. The Visual Impacts Minimization and Mitigation Plan shall include proposed minimization and mitigation alternatives based on an assessment of mitigation strategies, including screening (landscaping), architectural design, visual offsets, relocation or rearranging facility components, reduction of facility component profiles, alternative wind or solar technologies as appropriate, facility color and design, lighting options for work areas and safety requirements, and lighting options for FAA aviation hazard lighting. The facility design shall incorporate the following measures for the Visual Impacts Minimization and Mitigation Plan:

- (1) Advertisements, conspicuous lettering, or logos identifying the facility owner, turbine manufacturer, solar module manufacturer, or any other supplier entity, other than warning and safety signs, shall not be allowed;
- (2) The electrical collection system shall be located underground, to the extent practicable. Structures shall only be constructed overhead for portions where necessary based on engineering, construction, or environmental constraints;
- (3) Electric collection and transmission facilities design shall specify use of either wood poles or steel pole structures; steel poles shall be self-weathering (such as Corten or equivalent) or other surface finish in dark brown or green color, non-glare finish;
- (4) Non-specular conductors shall be used for any overhead portions of the transmission line and the electric collection system; and
- (5) For wind facilities, wind turbines, towers and blades shall be Federal Aviation Administration (FAA) approved white or off-white colors to avoid the need for daytime aviation hazard lighting, unless otherwise mandated by FAA, and non-reflective finishes shall be used on wind turbines to minimize reflected glare.
- (6) Shadow Flicker for Wind Facilities. Shadow Flicker shall be limited to thirty (30) hours per year at any non-participating residence, subject to verification using shadow prediction and operational controls at appropriate wind turbines. The Visual Impacts Minimization and Mitigation Plan shall include:
 - (i) Analysis of a full year of hourly potential and realistic receptor-specific predicted flicker based on sunshine probabilities, operational projections, and facility design;
 - (ii) A protocol for monitoring operational conditions and potential flicker exposure at the wind turbine locations identified in the updated analysis, based on meteorological conditions;
 - (iii) Details of the shadow detection and prevention technology that will be adopted for real-time meteorological monitoring and operational control of turbines;

(iv) Schedule and protocol for temporary turbine shutdowns during periods that produce flicker to meet required shadow flicker limits; and

(v) Shielding or blocking measures (such as landscape plantings and window treatments) may also be implemented at receptor locations that exceed the thirty (30)-hour annual limit, with approval by the resident receptor.

(7) Glare for Solar Facilities. Solar panels shall have anti-reflective coatings and the Visual Impacts Minimization and Mitigation Plan shall include an analysis using Sandia National Laboratories Solar Glare Hazard Analysis Tool (SGHAT) methodology or equivalent, that solar glare exposure at any non-participating residence, airport or public roadway will be avoided or minimized, and will not ~~result in complaints,~~ substantially impede traffic movements or create safety hazards.

(8) Planting Plans which shall include the facility substation; energy storage structures; and the POI Switchyard; and for components of solar generating facilities as appropriate to facility setting.

(9) A lighting plan(s), which shall address:

(i) Security lighting needs at substation and switchyard sites, and any exterior equipment storage yards;

(ii) Plan and profile figures to demonstrate the lighting area needs and proposed lighting arrangement and illumination levels to provide safe working conditions at the collection substation site, and any exterior equipment storage yards or other locations;

(iii) Exterior lighting design shall be limited to lighting required for health, safety, security, emergencies and operational purposes and shall be specified to avoid off-site lighting effects as follows:

(a) Using task lighting as appropriate to perform specific tasks; limiting the maximum total outdoor lighting output based on the lowest allowable OSHA limits; task lighting fixtures shall be designed to be placed at the lowest practical height and directed to the ground and/or work areas to avoid being cast skyward or over long distances, incorporate shields and/or louvers where practicable, and capable of manual or auto-shut off switch activation rather than motion detection;

(b) Requiring full cutoff fixtures, with no drop-down optical elements (that can spread illumination and create glare) for permanent exterior lighting, consistent with OSHA requirements and adopted local laws or ordinances, including development standards for exterior industrial lighting, manufacturer's cut sheets of all proposed lighting fixtures shall be provided; and

~~(c) Comply with relevant FAA requirements. For wind facilities, lighting shall be installed on turbines for aviation hazard marking as specified by FAA. The applicant shall file a Notice for a Marking and Lighting Study of Aircraft Detection Lighting System(s) (ADLS) and dimmable lighting options with the FAA/Department of Defense (DOD) seeking a written determination approving the use of ADLS or other dimmable lighting option at the Project. If FAA/DOD determine that ADLS or dimmable lighting options are not appropriate for the project, or if the applicant determines installation of ADLS or dimmable lighting options are not technically feasible, the applicant shall consider other means of minimizing lighting effects, such as use of low intensity lighting, and synchronization of lighting activation with adjoining wind farms.~~

§900-2.10 Exhibit 9: Cultural Resources

Exhibit 9 shall contain:

- (a) A study of the impacts of the construction and operation of the facility, interconnections and related facilities on archeological/cultural resources within the PIA, including:
- (1) A summary of the nature of the probable impact on any archeological/cultural resources identified, addressing how those impacts shall be avoided or minimized;
 - (2) If required, a Phase IA archeological/cultural resources study for the proposed facility;
 - (3) If required pursuant to section 900-1.3(h) of this Part, a Phase IB field study;
 - (4) If required by the Phase I study results, as determined pursuant to section 900-1.3(h) of this Part, the application shall provide a work plan for the a Phase II site evaluation

study to assess the boundaries, integrity and significance of identified cultural resources and the schedule to implement the Phase II study;

- (5) An Unanticipated Discovery Plan that shall identify the actions to be taken in the unexpected event that resources of cultural, historical, or archaeological importance are encountered during the excavation process. This plan shall include a provision for work stoppage upon the discovery of possible archaeological or human remains and be prepared by a professional archaeologist in accordance with the NYAC standards.

(b) A study of the impacts on historic resources within the PIA, including the results of field inspections, a review of the statewide inventory of historic property, and consultation with local historic preservation groups and federal/state-recognized Indian Nations to identify sites or structures listed or eligible for listing in the State or National Register of Historic Places within the PIA, including an analysis of potential impact on any standing structures which appear to be at least fifty (50) years old and potentially eligible for listing in the State or National Register of Historic Places, based on an assessment by a qualified individual.

§900-2.11 Exhibit 10: Geology, Seismology and Soils

Exhibit 10 shall be required for projects that will involve blasting, and shall contain:

- (a) A study of the geology, seismology, and soils impacts of the facility consisting of the identification and mapping of existing conditions, an impact analysis, and proposed impact avoidance and mitigation measures, including:
 - (1) A map delineating existing slopes (0-3 percent, 3-8 percent, 8-15 percent, 15-25 percent, 25-35 percent, greater than 35 percent) on and within the drainage area potentially influenced by the facility site and interconnections;
 - (2) A proposed site plan showing existing and proposed contours at two-foot intervals, for the facility site and interconnections, at a scale sufficient to show all proposed buildings, structures, paved and vegetative areas, and construction areas (features may be provided in stand-alone mapping or included as part of site plans required in 900-2.6(f)(1)(i) and (ii) of this Part);
 - (3) A description of excavation techniques to be employed;
 - (4) A description of the characteristics and suitability for construction purposes of the material excavated for the facility and of the deposits found at foundation level,

including factors such as soil corrosivity (for both steel and concrete), bedrock competence, and subsurface hydrologic characteristics and groundwater levels; analysis should be based on a geotechnical engineering report verifying subsurface conditions at ~~each~~ a representative sample of turbine locations (for wind facilities) or solar array location (for solar facilities). Identify appropriate mitigation measures required in locations with highly corrosive soils, soils with a high frost risk, and soils with high shrink/swell potential. Characterize subsurface conditions where hydraulic horizontal directional drilling is proposed and identify all locations where blasting operations will be required;

- (5) A plan describing all blasting operations including location, minimum blasting contractor qualifications, hours of blasting operations, estimates of amounts of rock to be blasted, warning measures, measures to ensure safe transportation, storage and handling of explosives, use of blasting mats, conduct of a pre-blasting condition survey of nearby buildings and improvements, and coordination with local safety officials, and measures to protect nearby structures and groundwater wells;
- (6) An assessment of potential impacts of blasting to environmental features, above-ground structures and below-ground structures such as pipelines and wells;
- (7) An identification and evaluation of reasonable mitigation measures regarding blasting impacts, including the use of alternative technologies and/or location of structures, and including a plan for securing compensation for damages that may occur due to blasting;
- (8) A description of the regional geology, tectonic setting and seismology of the facility site;
- (9) An analysis of the expected impacts of construction and operation of the facility with respect to regional geology, including analysis of potential impacts in areas of known or anticipated karst, and a description of measures to minimize and/or mitigate risks from construction (including blasting and pile driving) in karst areas;
- (10) An analysis of the impacts of typical seismic activity experienced in the facility site based on current seismic hazards maps, on the location and operation of the facility identifying potential receptors in the event of failure, and if the facility is proposed to be located near a young fault or a fault that has had displacement in Holocene time, demonstration of a suitable setback from such fault;

- (11) A map delineating soil types on the facility site and interconnection sites;
 - (12) A description of the characteristics and suitability for construction purposes of each soil type identified above, including a description of the soil structure, texture, percentage of organic matter, and recharge/infiltration capacity of each soil type and a discussion of any dewatering that may be necessary during construction and whether the facility shall contain any facilities below grade that would require continuous dewatering; and
 - (13) Maps, figures, and analyses delineating depth to bedrock and underlying bedrock types, including vertical profiles showing soils, bedrock, water table, and typical foundation depths on the facility site, based on information to be obtained from available published maps and scientific literature, review of technical studies conducted on the facility site, and on-site field observations, test pits and/or borings as available.
- (b) An evaluation to determine suitable building and equipment foundations, including:
- (1) A preliminary engineering assessment to determine the types and locations of potential foundations to be employed. The assessment shall investigate the suitability of such foundation types as spread footings, caissons, or piles, including a statement that all such techniques conform to applicable building codes or industry standards;
 - (2) If piles are used, a description and preliminary calculation of the number and length of piles to be driven, the daily and overall total number of hours of pile driving work to be undertaken to construct the facility, and an assessment of pile driving impacts on surrounding properties and structures due to vibration;
 - (3) Identification of mitigation measures regarding pile driving impacts, if applicable, including a plan for securing compensation for damages that may occur due to pile driving; and
 - (4) An evaluation of the vulnerability of the facility site and the operation of the facility to an earthquake event and a tsunami event.

§900-2.12 Exhibit 11: Terrestrial Ecology

Exhibit 11 shall contain:

- (a) An identification and description of the type of plant communities present on the facility site, and adjacent properties within one hundred (100) feet of areas to be disturbed by construction, including the interconnections, based upon field observations and data collection.
- (b) An analysis of the temporary and permanent impact of the construction and operation of the facility and the interconnections on the vegetation identified, including a mapped depiction of the vegetation areas showing the areas to be removed or disturbed.
- (c) An identification and evaluation of avoidance measures or, where impacts are unavoidable, minimization measures, including the use of alternative technologies, regarding vegetation impacts identified.
- (d) A list of the species of mammals, birds, amphibians, terrestrial invertebrates, and reptiles that are likely to occur based on ecological communities present at the facility, supplemented as necessary by site surveys, site observations and publicly available sources.
- (e) An analysis of the impact of the construction and operation of the facility and interconnections on wildlife, wildlife habitats, and wildlife travel corridors, other than a NYS threatened or endangered species or species of special concern (which will be addressed pursuant to section 900-2.13 of this Part).
- (f) An identification and evaluation of avoidance measures or, where impacts are unavoidable, minimization measures, including the use of alternative technologies, regarding impacts to wildlife and wildlife habitat.

§900-2.13 Exhibit 12: NYS Threatened or Endangered Species

Exhibit 12 shall contain:

- (a) A wildlife site characterization report prepared pursuant to section 900-1.3(g)(1) of this Part.
- (b) Any reports detailing the results of pre-construction survey(s).
- (c) A copy of the Office's determination pursuant to section 900-1.3(g)(7) of this Part as to the existence of occupied habitat at the facility site.
- (d) If the Office determined that there is confirmed or presumed occupied habitat at the site, an identification and evaluation of avoidance and minimization measures incorporated into the facility design, as well as any unavoidable potential impacts to NYS threatened or endangered species or species of special concern. Adverse impacts shall be summarized by

species impacted and include an assessment of the acreage and/or an estimate number of individual members of each such species affected.

(e) For a facility to be determined to have only de minimis impacts to NYS threatened or endangered grassland birds or their habitat, the applicant shall submit a demonstration that the facility has been designed to meet one or more of the following criteria, as applicable:

(1) The facility has been designed such that the only impacts would be to occupied habitat identified based on records greater than five (5) years old from the time of the wildlife site characterization report, but for which the applicant conducted appropriate surveys as approved by the Office that demonstrate that the species is not present at the facility site; or

(2) Construction of the facility within each mapped area of listed bird occupied habitat (based on the documented area of species' use prior to addition of buffers) will only impact grasslands less than twenty-five (25) acres in size and will not include a recent (i.e., less than five (5) years) confirmed nesting or roosting location; or

(3) The facility has been designed such that the only impacts would be to occupied habitat identified for NYS threatened or endangered species for which the NYSDEC has issued a Notice of Adoption of regulations delisting or downlisting to Special Concern.

(f) For a facility that would adversely impact NYS threatened or endangered species or their habitat, *other than for facilities that have a de minimis impact to any NYS threatened or endangered species*, a copy of a Net Conservation Benefit Plan prepared in compliance with section 900-6.4(o) of this Part.

§900-2.14 Exhibit 13: Water Resources and Aquatic Ecology

Exhibit 13 shall contain:

(a) Groundwater:

(1) Hydrologic information reporting depths to high groundwater and bedrock, including a site map based on publicly available information showing depth to high groundwater and bedrock in increments appropriate for the facility site.

(2) ~~A survey based on publicly available information and the results of a private, active groundwater well survey distributed to non-participating property owners and residents within one thousand (1,000) feet of the facility site.~~ The application shall include information on groundwater quality, and the location, depth, yield and use of all

public and private groundwater wells or other points of extraction of groundwater, and a delineation and description of well head and aquifer protection zones, to the extent such information is publicly available or obtained through the private well survey. Parcel-based maps shall be provided based on publicly available information ~~and the results of the private well survey~~, showing the locations of all identified groundwater wells, delineating all groundwater aquifers and groundwater recharge areas, and identifying groundwater flow direction, and shall distinguish the following features:

- (i) All existing, active water supply wells or water supply intakes located within one hundred (100) feet of any collection lines or access roads;
- (ii) All existing, active water supply wells or water supply intakes located within five hundred (500) feet of horizontal directional drilling operations;
- (iii) All existing, active water supply wells or water supply intakes located within two hundred (200) feet of solar pier/post driving locations and turbine excavations not requiring blasting; and
- (iv) All existing, active water supply wells or water supply intakes located within one thousand (1,000) feet of any blasting operations.

(3) An analysis and evaluation of potential impacts (during normal and drought conditions) from the construction and/or operation of the facility on drinking water supplies, groundwater quality and quantity in the facility area, including potential impacts on public and private water supplies, including private wells within a one (1)-mile radius of the facility site, and wellhead and aquifer protection zones.

(b) Surface Water:

- (1) A map or series of maps showing delineated boundaries of all federal, state , and locally regulated surface waters present on the facility site and within one hundred (100) feet of areas to be disturbed by construction, including the interconnections, as well as federal, state, and locally regulated surface waters within the one hundred (100) foot area beyond the limit of disturbance that may be hydrologically or ecologically influenced by development of the facility site and the surface waters as confirmed by the Office pursuant to section 900-1.3(f) of this Part. For adjacent properties without accessibility, initial surveys may be based on remote sensing data, interpretation of wetlands and soils mapping, observations from adjacent accessible properties, and aerial photography.
- (2) Any reports detailing the results of the stream delineation survey(s).

- (3) For the surface waters depicted on the map required in paragraph (1) of this subdivision, a description of the New York State listed Water Quality Standards and Classification, ambient standards and guidance values, flow, presence of aquatic invasive species and other characteristics of such surface waters, including intermittent streams, based on actual on-site surface water observations conducted pursuant to section 900.1-3(f) of this Part.
- (4) An identification of any downstream surface water drinking-water supply intakes within one mile, or if none within one (1) mile, an identification of the nearest one (giving location of the intakes by longitude and latitude) that could potentially be affected by the facility or interconnections, including characterization of the type, nature, and extent of service provided from the identified source.
- (5) If the Office determines pursuant to section 900-1.3(f) of this Part that there are jurisdictional streams at the site, a demonstration of avoidance and minimization of impacts to such NYS ~~regulated~~ ~~protected~~ waters by siting all components more than fifty (50) feet from any delineated NYS protected waterbody.
- (6) If the applicant cannot avoid all impacts to NYS ~~protected~~ ~~regulated~~ waters, an explanation of all efforts the applicant made to minimize the impacts, including a discussion of all best management practices used during design, including the following:
 - (i) No solar panel racking or perimeter fence shall span a NYS protected waterbody unless it is a first order stream, *i.e., a stream that has no tributaries or branches;*
 - (ii) Excavation, grading, or placement of fill within the bed shall only occur for access roads at locations in compliance with all uniform standards and conditions set forth in Subpart 900-6 of this Part;
 - (iii) Stream crossings are located in the straight sections of the channel/bed and as perpendicular to the direction of flow as practicable;
 - (iv) How the facility design minimizes all tree clearing requirements to the extent practicable in the fifty (50)-foot banks of NYS protected waters;
 - (v) How the facility design takes into account the slopes of the NYS protected waters, as well as surrounding surface slope and erosion potential, when siting within the fifty (50) foot banks of NYS protected waters;

- (vi) How the facility design minimizes surface grading requirements to the extent practicable in the fifty (50)-foot banks of NYS protected waters; and
 - (vii) How the facility will incorporate and maintain low height stabilizing vegetation with fine root biomass and some stream shading potential (e.g., low scrub shrub like willows or dogwood).
- (7) For facilities which require compensatory mitigation as described in Table 1, the applicant shall submit a Stream Restoration and Mitigation Plan pursuant to section 900-10.2(f)(3) of this Part, ~~in accordance with the following, unless determined otherwise by the Office in consultation with the NYSDEC:~~

(i) ~~Implement mitigation at the ratios as set forth in Table 1 below, as follows:~~

~~(a) Category: Prescribed Mitigation Ratio and Type~~

- ~~(1) A: Allowed; no mitigation required~~
- ~~(2) A(M1): Allowed; mitigation required; applicant shall replace one (1) existing substandard culvert for each new crossing with a culvert designed in accordance with section 900-6.4(r)(6) of this Part. Substandard culverts are those with a significant barrier to aquatic organism passage and/or those that cannot pass a four (4) percent design flow event.~~
- ~~(3) A(M2): Allowed; mitigation required; applicant shall replace two (2) existing substandard culverts for each new crossing with a culvert designed in accordance with section 900-6-4(r)(6) of this Part. Substandard culverts are those with a significant barrier to aquatic organism passage and/or those that cannot pass a four (4) percent design flow event.~~

~~(b) Within the same HUC 8 sub-basin; and~~

~~(c) Within a location that is subject to NYSDEC jurisdiction under ECL Article 15 and of the same standard of the impacted water(s) (e.g., (t) and (ts) impacts shall be mitigated for in (t) or (ts) streams).~~

~~(ii) Implement culvert replacement or restoration/enhancement to meet the mitigation requirement.~~

Table 1 Waterbody Mitigation Requirements

	Impact Type	Protected Stream (15-0501)	Navigable Water (15-0505)
Activities Requiring Grading or Filling	Reconstructed road/stream crossing using a single culvert or bridge designed in accordance with section 900-6.4(r)(6) of this Part.	A	A
	New road/stream crossing with a bridge designed to meet the flow and width requirements in section 900-6.4(r)(6) of this Part.	A	A
	New road/stream crossing with a single culvert designed in accordance with section 900-6.4(r)(6) of this Part.	A(M1)	A(M1)
	Below ground stream crossing for transmission/collection lines installed using trenchless methods (e.g., horizontal directional drilling) or installed as part of the construction of a new or replacement road/stream crossing.	A	A
	Below ground stream crossings for transmission/collection lines installed using a dry trench where trenchless methods are not practicable.	A(M2)	A(M2)
Activities Not Requiring Grading or Filling	Above ground stream crossing for transmission/collection lines.	A	A

(c) Stormwater:

- (1) A Stormwater Pollution Prevention Plan (SWPPP) for the collection and management of stormwater discharges from the facility site during construction. The SWPPP will be prepared in accordance with the applicable New York State Pollution Discharge

Elimination System (SPDES) General Permit for Stormwater Discharges from Construction Activity and the New York State Standards and Specifications for Erosion and Sediment Control (see section 900-15.1(i)(1)(i) of

this Part). If the facility is not eligible for coverage under the SPDES General Permit, a completed application for an individual SPDES Permit.

(2) To the extent not covered in paragraph (1) of this subdivision, a preliminary plan, prepared in accordance with the New York State Stormwater Design Manual (see section 900-15.1(i)(1)(ii) of this Part), which identifies the post-construction stormwater management practices that will be used to manage stormwater runoff from the developed facility site. This can include runoff reduction/green infrastructure practices, water quality treatment practices, and practices that control the volume and rate of runoff.

(d) Chemical and Petroleum Bulk Storage:

(1) A description of the spill prevention and control measures to be in place for ammonia storage, fuel oil storage, wastewater storage, and other chemical, petroleum or hazardous substances stored on the facility site, including an evaluation of alternatives and mitigation measures.

(2) An identification whether the storage of ammonia, fuel oil, wastewater, other chemicals, petroleum or hazardous substances, or disposal of solid wastes on the facility site is subject to regulation under the State's chemical and petroleum bulk storage programs, and if so, a demonstration of compliance with such regulations.

(3) An identification whether the storage of ammonia, fuel oil, wastewater, other chemicals, petroleum or hazardous substances on the facility site is subject to regulation under local law (County, City, Town or Village), and if so, a demonstration of the degree of compliance with such local laws.

(e) Aquatic Species and Invasive Species:

(1) An analysis of the impact of the construction and operation of the facility on biological aquatic resources, including species listed as endangered, threatened, or species of special concern in 6 NYCRR Part 182, and including the potential for introducing and/or spreading invasive species listed in 6 NYCRR Part 575.

- (2) An identification and evaluation of reasonable avoidance measures and, where impacts are unavoidable, mitigation measures regarding impacts on such biological aquatic resources, including species and invasive species impacts to be addressed pursuant to the Invasive Species Control and Management Plan to be prepared pursuant to section 900-10.2(f)(4) of this Part (if any) and assure compliance with applicable water quality standards (6 NYCRR Part 703).

(f) Water Quality Certification.

- (1) A request for a Water Quality Certification pursuant to section 900-1.4(b) of this Part, if applicable, indicating that the proposed activity will be in compliance with state water quality standards.
- (2) A copy of all pertinent federal permit applications related to the Water Quality Certification shall be submitted along with the request for the Water Quality Certification.
- (3) A demonstration of compliance with 6 NYCRR Section 608.9.
- (4) Pertinent contact information for the district engineer of the U.S. Army Corps of Engineers or other federal agency to use in contacting the Office as to the applicable time period or any other issue.
- (5) If the request does not accompany the application, the applicant shall provide a statement describing its plan for making such a request, including a timetable.

§900-2.15 Exhibit 14: Wetlands

Exhibit 14 shall contain:

- (a) A map or series of maps showing jurisdictional boundaries of all federal, state and locally regulated wetlands and adjacent areas present on the facility site and within one hundred (100) feet of areas *proposed* to be disturbed by construction, including the interconnections, as confirmed by the Office pursuant to section 900-1.3(e) of this Part, and provide federal jurisdictional determination, if available. For adjacent properties without accessibility, initial surveys may be based on remote-sensing data, interpretation of published wetlands and soils mapping, observation from adjacent accessible properties, and current and historical aerial photography.
- (b) Any reports detailing the results of the delineation survey(s).

- (c) A qualitative and descriptive wetland functional assessment, including seasonal variations, for all delineated wetlands that would be impacted for groundwater recharge/discharge, flood flow alteration, fish and shellfish habitat, sediment/toxicant retention, nutrient removal, sediment/shoreline stabilization, wildlife habitat, recreation, uniqueness/heritage, visual quality/aesthetics, and protected species habitat.
- (d) An analysis of all off-site wetlands within one hundred (100) feet beyond the limit of disturbance that may be hydrologically or ecologically influenced by development of the facility and the wetlands identified on the map required by subdivision (a) of this section, observed in the field where accessible to determine their general characteristics and relationship, if any, to delineated wetlands.
- (e) If the Office has determined pursuant to section 900-1.3(e) of this Part that there are jurisdictional wetlands at the site, a demonstration of avoidance of impacts to such wetlands and their one hundred (100)-foot adjacent areas by siting all components more than one hundred (100) feet from any delineated NYS wetlands.
- (f) If the applicant cannot avoid impacts to all state regulated wetlands and adjacent areas, an explanation of all efforts the applicant made to minimize the impacts to wetlands and adjacent areas identified during wetland surveys. The impact minimization summary shall address the following criteria for each proposed impact area:
 - (1) ~~Why the facility design and siting cannot avoid NYS wetlands and adjacent areas, as applicable~~ **An analysis of the impact of the construction and operation of the facility on such NYS regulated wetlands and adjacent areas and identification and evaluation of reasonable avoidance measures;**
 - (2) How the facility design has minimized proposed impacts to NYS wetlands and adjacent areas, as applicable;
 - (3) How the facility design and siting minimize impacts to NYS wetlands, or portions of the wetlands, from the greatest level of function and values to the least (e.g., forested wetland areas, perennially inundated/saturated areas, seasonally inundated/saturated areas, previously impacted areas, and currently impacted areas); and
 - (4) How the facility design and siting will maximize and/or improve the function and values provided by the remaining adjacent areas surrounding the NYS wetlands.
- (g) For facilities for which compensatory mitigation is required in Table 1, unless determined otherwise by the Office in consultation with the NYSDEC, the applicant shall submit a

Wetland Restoration and Mitigation Plan pursuant to section 900-10.2(f)(2) of this Part, in accordance with the following:

- (1) Purchase of existing wetland mitigation bank credits for unavoidable wetland impacts wherever there is an existing wetland mitigation bank with a service area that includes the location of the facility. The purchase of mitigation banking credits shall occur within the same HUC 8 Watershed within which the facility is located; or
- (2) Implement applicant-responsible wetland and/or adjacent area mitigation at the ratios as set forth in Table 1 below as follows, unless determined otherwise by the Office in consultation with the NYSDEC:

(i) Category: Prescribed mitigation ratio & type

- (a) X: Not an allowable feature or activity.
- (b) A: Allowed; no mitigation or enhancement required.
- (c) A(M1): Allowed, mitigation required (3:1 mitigation ratio by area of impact - creation only, broken down by cover type)
- (d) A(M2): Allowed, mitigation required (2:1 mitigation ratio by area of impact - creation, restoration, and enhancement)
- (e) A(M3): Allowed, mitigation required (1:1 mitigation ratio by area of impact – creation, restoration and enhancement)
- (f) A(E): Allowed, enhancements and/or mitigation required (e.g., planting of adjacent area, mitigating hydrological changes)

(ii) Within the same HUC 8 sub-basin unless determined otherwise by the Office in consultation with the NYSDEC; and

(iii) Within a location that is subject to NYSDEC jurisdiction under ECL article 24, which includes the following:

- (a) Contiguous with an existing NYS-regulated wetland; or
- (b) Within fifty (50) meters (one hundred sixty-four (164) feet) of an existing NYS-regulated wetland;

(iv) Where creation, enhancement, and restoration mean the following:

(a) Creation, in cases of activities requiring fill, means making a new wetland or expanding an existing wetland, usually by flooding or excavating lands that were not previously occupied by a wetland. Creation, in cases of activities not requiring fill, includes planting trees and/or shrubs in an existing wetland currently devoid of trees and shrubs.

(b) Restoration means reclaiming a degraded adjacent area to bring back one or more functions that have been partially or completely lost.

(c) Enhancement means altering an existing functional adjacent area to increase selected functions and benefits that offsets losses of these functions or benefits in another adjacent area or parts of the same wetland adjacent area.

(3) Implement a combination of the mitigation required pursuant to paragraphs (1) and (2) of this subdivision to meet the mitigation requirement.

Table 1 Wetland Mitigation Requirements

Feature/Activity	Class I		Class II		Class III & IV Unmapped >12.4 acres	
	FWW	AA	FWW	AA	FWW	AA
Major Activities						
Wind Turbines	X	A(M3)**	X	A(E)*	A(M3)	A
Solar Panels	X	A(E)**	A(M2)	A(E)*	A(M3)	A
Energy Storage	X	A(M3)**	X	A(E)*	A(M3)	A
Access Roads	A(M1)	A(E)*	A(M2)	A(E)*	A(M3)	A
Power interconnections (including clearing for interconnections)	A(M13)	A(E)*	A(M23)	A(E)*	A(M3)	A
Clearing of forest	X	A(M3)**	A(M2)	A(E)*	A(M3)	A
Other activities and structures integral to the project involving placement of fill	X	A(M3)**	A(M2)	A(E)*	A(M3)	A
Intermediate Activities						

Security fence	X	A(E)*	A(M3)	A	A	A
Clearing and manipulation of undisturbed herbaceous vegetation	X	A(E)*	A(M3)	A	A(M3)	A
Other activities integral to the project involving grading	X	A(E)*	A(M3)	A	A(M3)	A
Minor Activities						
Grading and manipulation of disturbed areas (active hay/row crops, existing commercial/industrial development)	X A(M3)	A(M3)(E)*	A(M3)	A	A(E)	A
Selective cutting of trees and shrubs	A	A	A	A	A	A
*No enhancements or mitigation required with 75 foot or more setback ** 75-foot setback from wetland boundary required in undisturbed adjacent area						

§900-2.16 Exhibit 15: Agricultural Resources

Exhibit 15 shall contain:

- (a) An assessment within the study area, which shall include the following data sets and illustrations:
 - (1) Land in NYS Certified Agricultural Districts by tax parcel;
 - (2) Land receiving Real Property Agricultural Value Assessment by tax parcel;
 - (3) ~~Municipal zoning districts or overlay zones including those designated for renewable energy;~~
 - (4) Most recent United States Department of Agriculture (USDA) National Agricultural Statistics Service (NASS) Cropland Data Layer (CDL), National Landcover Data Base (NLCD) data and/or the results of on-site surveys and mapping identifying plant communities and calculating percentages of agricultural land use compared to non-agricultural land

uses (e.g., disturbed, developed, woodland/forested areas, successional non-agricultural areas, wetlands, etc.);

- (5) Existing energy infrastructure and completed renewable energy facilities; ~~and~~
 - (6) Active agricultural businesses and/or facilities and all related infrastructure;
 - (7) Potential construction impacts and the methods available to facilitate farming activity during construction; and
 - (8) Temporary and/or permanent impacts to agricultural production areas within the proposed facility footprint (including all planned structures, fenced facility areas, etc.), and areas not feasible to continue farming.;
- (b) Maps showing the following within the facility site study area:
- (1) Field-verified or conduct landowner interviews to assess active agriculture land use (including all lands involved in the production of crops, livestock and livestock products for three (3) of the last five (5) years);
 - (2) ~~Potential construction impacts and the methods available to facilitate farming activity during construction;~~
 - (3) ~~Temporary and/or permanent impacts to agricultural production areas within the proposed facility footprint (including all planned structures, fenced facility areas, etc.); and areas not feasible to continue farming;~~
 - (4) All agricultural production acreage proposed to remain in agricultural use;
 - (5) Any agreed upon landowner-imposed development restrictions (e.g., locations within the facility site on which the landowner will not allow facility development);
 - (6) Locations of known or suspected sub-surface drainage systems (including outlets), surface drainages, irrigation lines, or other unique agricultural facilities;
 - (7) USDA soil mapping for the facility site; and

- (8) NYS Agricultural Land Classification Mineral Soil Groups 1 through 10 for impacted agricultural areas within the facility site.
- (c) An Agricultural Plan, consistent with the New York State Department of Agriculture and Markets Guidelines (see sections 900-15.1(m)(1)(i) and (ii) of this Part) to the maximum extent practicable, to avoid, minimize, and mitigate agricultural impacts to active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within NYS Agricultural Land Classified Mineral Soil Groups 1 through 4.
- (d) A remediation plan to address inadvertent damages to surface or sub-surface drainage, including:
- (1) A demonstration of the likelihood of impacts to surface of subsurface drainage and how the interruption of drainage may impact farmland within and outside of the facility site; and
 - (2) An identification of methods of repair for damaged drainage features.
- (e) Any agricultural co-utilization plan for the lifespan of the facility shall demonstrate that the proposed agricultural co-utilization will be feasible. The plan shall be assembled by a ~~qualified or accredited~~ third party agricultural professional. The plan should include an itemization of the investments made by the applicant to facilitate the agricultural co-utilization (e.g., grazing plan, planting pasture species, development of watering facilities, modified access for livestock trailers, panel spacing, additional fencing, access roads, gates, housing, etc.).

§900-2.17 Exhibit 16: Effect on Transportation

Exhibit 16 shall contain:

- (a) A conceptual site plan, drawn at an appropriate scale, depicting all facility site driveway and roadway intersections, showing:
- (1) Horizontal and vertical geometry, the number of approach lanes, the lane widths, shoulder widths, traffic control devices by approaches, and sight distances; and
 - (2) For wind facilities, access road locations and widths, including characterizations of road intersection suitability.

(b) A description of the pre-construction characteristics of the public roadways in the vicinity of the facility, as determined pursuant to the pre-application meeting(s) required pursuant to section 900-

1.3(a) of this Part, including:

- (1) A review of existing data on vehicle traffic, use levels and accidents;
- (2) A review of transit facilities and routes, including areas of school bus service;
- (3) An identification of potential approach and departure routes to and from the facility site for police, fire, ambulance and other emergency vehicles; and
- (4) A review of available load bearing and structural rating information for expected facility traffic routes (existing culverts to be traversed by construction vehicles shall also be considered in the analyses).

(c) An estimate of the trip generation characteristics of the facility during construction, including:

- (1) For each major phase of construction, and for the operation phase, an estimate of the number and frequency of vehicle trips, including an estimation of daily trips (identifying whether trips will occur during day or night) by size, weight and type of vehicle;
- (2) For major cut or fill activity (spoil removal or deposition at the facility site and affected interconnection areas), a separate estimate of the number and frequency of vehicle trips, including time of day and day of week arrival and departure distribution, and including a delineation of approach and departure routes, by size, weight and type of vehicle; and
- (3) An identification of approach and departure routes to and from the facility site for construction workers and employees of the facility.

(d) An analysis and evaluation of the traffic and transportation impacts of the facility, including:

- (1) For wind facilities, a discussion of projected future traffic conditions with and without the facility, the analysis to be conducted separately for the peak construction impacts of the facility and for the typical operations of the completed facility, including in congested urbanized areas a calculation and comparison of the level of service for each representative intersection, giving detail for each turning movement;

- (2) An evaluation of the adequacy of the road system to accommodate the projected traffic, the analysis to be conducted separately for the peak construction impacts of the facility (for both wind and solar facilities) and for the typical operations of the completed facility (analyses to be provided only for operational wind generation) and to include an identification of the extent and duration of traffic interferences during construction of the facility and any interconnections;
 - (3) An assessment of over-size load deliveries, and the adequacy of roadway systems to accommodate oversize and over-weight vehicles, improvements necessary to accommodate oversize or overweight deliveries, impacts associated with such improvements, and mitigation measures appropriate to minimize such impacts; and
 - (4) An identification and evaluation of practicable mitigation measures regarding traffic and transportation impacts, including time restrictions, the use of alternative technologies, the construction of physical roadway improvements, the installation of new traffic control devices, and the repair of local roads or other features due to damage by heavy equipment or construction activities during construction or operation of the facility.
- (e) An analysis and evaluation of the impacts of the facility on airports and airstrips, railroads, buses and any other mass transit systems in the vicinity of the facility, as determined pursuant to the preapplication meeting(s) held pursuant to section 900-1.3(a) of this Part. The analysis and evaluation shall include impacts on military training and frequent military operations in the National Airspace System and Special Use Airspace designated by the FAA.
- (f) ~~If any construction or alteration is proposed that requires a Notice of Proposed Construction to be submitted to the administrator of the FAA in accordance with 14 Code of Federal Regulations Part 77 (see section 900-15.1(h)(1)(i) of this Part):~~
- ~~(1) The application shall include a statement that the applicant has:
 - ~~(i) Received an informal Department of Defense review of the proposed construction or alteration in accordance with 32 Code of Federal Regulations Section 211.7 (see section 900-15.1(f)(1)(ii) of this Part); or~~
 - ~~(ii) Received a formal Department of Defense review of the proposed construction or alteration in accordance with 32 Code of Federal Regulations Section 211.6 (see section 900-15.1(f)(1)(i) of this Part).~~~~
 - ~~(2) If such construction or alteration of a wind facility is proposed to be located:~~

~~(i) Within twelve (12) miles of the nearest point of the nearest runway of a commercial service, cargo service, reliever or general aviation (public use) airport or a military airport with at least one (1) runway more than three thousand two hundred (3,200) feet in actual length; or~~

~~(ii) Within six (6) miles of the nearest point of the nearest runway of a commercial service, cargo service, reliever or general aviation (public use) airport or a military airport with its longest runway no more than three thousand two hundred (3,200) feet in actual length; or~~

~~(iii) Within three (3) miles of the nearest point of the nearest point of the nearest landing and takeoff area of a commercial service, cargo service, reliever or general aviation (public use) heliport or military heliport:~~

~~(a) The application shall include a statement that the applicant has consulted with the operators of such airports and heliports that are non-military facilities, has provided a detailed map and description of such construction or alteration to such operators, and has requested review of and comment on such construction or alteration by such operators; and~~

~~(b) The application shall include a statement that the applicant has provided a detailed map and description of such construction or alteration to the operators (base commanders) of such airports and heliports that are military facilities.~~

~~(3) The application shall include a detailed description of the responses received in such reviews and consultations required in paragraphs (1) and (2) of this subdivision, including specifically whether and why such operators believe such construction or alteration should be:~~

~~(i) Unrestricted;~~

~~(ii) Subject to site-specific requirements; or (iii) Excluded from certain areas.~~

~~§900-2.18 Exhibit 17: Consistency with Energy Planning Objectives~~

Exhibit 17 shall contain a statement of the annual expected megawatt-hours of wind or solar electricity that will be generated by the facility [or delete entire exhibit]

- (a) ~~A statement demonstrating the degree of consistency of the construction and operation of the facility with New York State energy policies, including CLCPA targets and long range energy planning objectives and strategies contained in the most recent State Energy Plan at the time of filing the application, including consideration of the information required by subdivisions (b) through (g) of this section;~~
- (b) ~~A description of the impact the facility would have on reliability in the state;~~
- (c) ~~A description of the impact the facility would have on fuel diversity in the state;~~
- (d) ~~A description of the impact the facility would have on regional requirements for capacity;~~
- (e) ~~A description of the impact the facility would have on electric transmission constraints;~~
- (f) ~~An analysis of the comparative advantages and disadvantages of reasonable and available alternative locations or properties identified for construction of the facility; and~~
- (g) ~~A statement of the reasons why the facility will promote public health and welfare, including minimizing the public health and environmental impacts related to climate change.~~

§900-2.19 Exhibit 18: Socioeconomic Effects

Exhibit 18 shall contain:

- (a) An estimate of the average construction work force, by discipline, for each quarter, during the period of construction; and an estimate of the peak construction employment level.
- (b) An estimate of the annual construction payroll, by trade, for each year of construction and an estimate of annual direct non-payroll expenditures likely to be made in the host municipality(ies) (materials, services, rentals, and similar categories) during the period of construction.
- (c) An estimate of the number of jobs and the on-site payroll, by discipline, during a typical year once the facility is in operation, and an estimate of other expenditures likely to be made in the host municipality(ies) during a typical year of operation.
- (d) An estimate of incremental school district operating and infrastructure costs due to the construction and operation of the facility, this estimate to be made after consultation with the affected school districts.

- (e) An estimate of incremental municipal, public authority, or utility operating and infrastructure costs that will be incurred for police, fire, emergency, water, sewer, solid waste disposal, highway maintenance and other municipal, public authority, or utility services during the construction and operation the facility (this estimate to be made after consultation with the affected municipalities, public authorities, and utilities).
- (f) An identification of all jurisdictions (including benefit assessment districts and user fee jurisdictions) that levy real property taxes or benefit assessments or user fees upon the facility site, its improvements and appurtenances and any entity from which payments in lieu of taxes will or may be negotiated.
- (g) For each jurisdiction, a description of the host community benefits to be provided, including an estimate of the incremental amount of annual taxes (and payments in lieu of taxes, benefit charges and user charges) it is projected would be levied against the post-construction facility site, its improvements and appurtenances, payments to be made pursuant to a host community agreement or other project agreed to with the host community.
- (h) For each jurisdiction, a comparison of the fiscal costs to the jurisdiction that are expected to result from the construction and operation of the facility to the expected tax revenues (and payments in lieu of taxes, benefit charge revenues and user charge revenues) generated by the facility.
- (i) An analysis of whether all contingency plans to be implemented in response to the occurrence of a fire emergency or a hazardous substance incident can be fulfilled by existing local emergency response capacity, and in that regard identifying any specific equipment or training deficiencies in local emergency response capacity (this analysis to be made after consultation with the affected local emergency response organizations).
- (j) A detailed statement indicating how the proposed facility and interconnections are consistent with each of the State smart growth public infrastructure criteria specified in ECL Section 6-0107, or why compliance would be impracticable.
- (k) A statement as to the host community benefit(s) to be provided by the applicant.

§900-2.20 Exhibit 19: Environmental Justice

Exhibit 19 shall contain:

- (a) *If the project site or its impact study area is located in an environmental justice area, the following analysis is required:* An identification and evaluation of significant and adverse

disproportionate environmental impacts of the facility on an Environmental Justice (EJ) area, if any, resulting from its construction and operation, including any studies which were used in the evaluation and identifying the author and dates thereof.

The evaluation shall be conducted consistent with the applicable requirements of 6 NYCRR Part 487.10. The impact study area for purposes of EJ analysis shall be:

- (1) At a minimum, be within a one-half (0.5)-mile radius around the proposed facility; or
 - (2) A greater radius, up to two (2) miles, based on site-specific factors, including the nature, scope and magnitude of the environmental impacts, the projected range of those impacts on various environmental resources, and the geography of the area surrounding the location of the proposed facility.
- (b) If the project site or its impact study area is located in an environmental justice area, separately identified to the fullest extent possible and with sufficient detail, the nature and magnitude of all significant and adverse disproportionate environmental impacts of the facility resulting from its construction and operation required to be identified pursuant to subdivision (a) of this section, a description of:
- (1) The specific measures the applicant proposes to take to avoid such impacts to the maximum extent practicable for the duration of the siting permit, including a description of the manner in which such impact avoidance measures will be verified and a statement of the cost of such measures;
 - (2) If such impacts cannot be avoided, measures the applicant proposes to take to minimize such impacts to the maximum extent practicable for the duration that the siting permit is granted, including a description of the manner in which such impact mitigation measures will be verified and a statement of the cost of such measures; and
 - (3) If such impacts cannot be avoided, the specific measures the applicant proposes to take to offset such impacts to the maximum extent practicable for the duration that the siting permit is in effect, including a description of the manner in which such impact offset measures will be verified and a statement of the cost of such measures.
- (c) If the project site or its impact study area is located in an environmental justice area, a qualitative and, where possible, quantitative analysis demonstrating that the scope of avoidance, mitigation and offset measures is appropriate given the scope of significant and

adverse disproportionate environmental impacts of the facility resulting from its construction and operation.

(d) *If the project site or its impact study area is located in an environmental justice area, a* summary of the applicant's final EJ analysis, including the evaluation of any significant and adverse disproportionate environmental impacts in the impact study area. The statement shall provide a detailed explanation of the rationale for any conclusions made related to EJ issues and identify the individual studies and investigations relied upon in conducting each element of the EJ analysis. The applicant shall articulate the reasons why the proposed measures to avoid, minimize, or offset any disproportionate environmental impacts of the proposed facility will, to the maximum extent practicable, avoid, minimize or offset any identified significant and adverse disproportionate impacts, including a description of the manner in which such measures can be verified and a statement of the cost of such measures.

§900-2.21 Exhibit 20: Effect on Communications

Exhibit 20 shall contain:

- (a) A detailed description of the proposed telecommunications interconnection, including all interconnecting facilities, line route, design details, size, functions, and operating characteristics, *if available from the relevant telecommunications provider,*
- (b) For wind facilities, an identification of all existing broadcast communication sources within a two (2) mile radius of the facility and the electric interconnection between the facility and the point of interconnection, unless otherwise noted, including:
- (1) AM radio;
 - (2) FM radio;
 - (3) Television;
 - (4) Telephone;
 - (5) Microwave transmission (all affected sources, not limited to a two-mile radius);
 - (6) Emergency services;
 - (7) Municipal/school district services;
 - (8) Public utility services;

- (9) Doppler/weather radar (all affected sources, not limited to a two (2)-mile radius);
- (10) Air traffic control (all affected sources, not limited to a two (2)-mile radius);
- (11) Armed forces (all affected sources, not limited to a two (2)-mile radius);
- (12) Global Positioning Systems (GPS); and
- (13) Amateur radio licenses registered to users.

(c) For solar and wind facilities, an identification of all existing underground cable and fiber optic major transmission telecommunication lines within a one (1)-mile radius of the facility and the electric interconnection between the facility and the point of interconnection.

(d) A statement describing the anticipated effects of the facility and the electric interconnection between the facility and the point of interconnection on the communications systems required to be identified pursuant to subdivisions (b) and/or (c) of this section, including the potential for:

- (1) Facility structures to interfere with broadcast patterns by re-radiating the broadcasts in other directions;
- (2) Structures to block necessary lines-of-sight;
- (3) Physical disturbance by construction activities;
- (4) Adverse impacts to co-located lines due to unintended bonding; and
- (5) Any other potential for interference.

(e) ~~An analysis demonstrating that there will be sufficient capacity to support the requirements of the facility.~~

(f) ~~An evaluation of the design configuration of the facility and electric interconnection between the facility and the point of interconnection demonstrating that there shall be no adverse effects on the communications systems required to be identified pursuant to subdivisions (b) and/or (c) of this section.~~

(g) A description of post-construction activities that shall be undertaken to identify and mitigate any adverse effects on the communications systems required to be identified pursuant to subdivisions (b) and/or (c) of this section that occur despite the design configuration of the

proposed facility and electric interconnection between the facility and the point of interconnection.

(h) A description of the status of negotiations, or a copy of agreements that have been executed, with companies or individuals for providing the communications interconnection including any restrictions or conditions of approval placed on the facility imposed by the provider, and a description of how the interconnection and any necessary system upgrades will be installed, owned, maintained and funded.

§900-2.22 Exhibit 21: Electric System Effects and Interconnection

Based on information available from the completed system reliability impact study (SRIS) and subject to changes that may result from the NYISO Class Year Facilities Study, Exhibit 21 shall contain:

(a) A detailed description of the proposed electric interconnection, including:

- (1) The design voltage and voltage of initial operation;
- (2) The type, size, number and materials of conductors;
- (3) The insulator design;
- (4) The length of the transmission line;
- (5) The typical dimensions and construction materials of the towers;
- (6) The design standards for each type of tower and tower foundation;
- (7) For underground construction, the type of cable system to be used and the design standards for that system;
- (8) For underground construction, indicate on a profile of the line the depth of the cable and the location of any oil pumping stations and manholes;
- (9) Equipment to be installed in any proposed switching station or substation including an explanation of the necessity for any such switching station or substation;
- (10) Any terminal facility; and
- (11) The need for cathodic protection measures.

(b) A system reliability impact study, performed in accordance with the Federal Energy Regulatory

Commission-approved open access transmission tariff of the New York Independent System Operator, Inc. (NYISO) (see section 900-15.1(n)(1)(i) of this Part) , that shows expected flows on the system under normal, peak and emergency conditions and effects on stability of the interconnected system, including the necessary technical analyses (thermal, voltage, short circuit and stability) to evaluate the impact of the interconnection. The study shall include the new electric interconnection between the facility and the point of interconnection, as well as any other system upgrades required.

(c) An evaluation of the potential significant impacts of the facility and its interconnection to transmission system reliability at a level of detail that reflects the magnitude of the impacts.

(d) A discussion of the benefits and detriments of the facility on ancillary services and the electric transmission system, including impacts associated with reinforcements and new construction necessary as a result of the facility.

(e) An estimate of the increase or decrease in the total transfer capacity across each affected interface, and if a forecasted reduction in transfer capability across affected interfaces violates reliability requirements, an evaluation of reasonable corrective measures that could be employed to mitigate or eliminate said reduction.

(f) A description of criteria, plans, and protocols for generation and ancillary facilities' design, construction, commissioning, and operation, including as appropriate to generation technology:

(1) Engineering codes, standards, guidelines and practices that apply;

(2) Generation facility type certification;

(3) Procedures and controls for facility inspection, testing and commissioning; and

(4) Maintenance and management plans, procedures and criteria.

(g) For facilities where it is contemplated that a portion of a new interconnection substation to be built will be transferred to the transmission owner:

(1) Describe the substation facilities to be transferred and the contemplated future transaction, including a timetable for the future transfer;

- (2) Describe how the substation-interconnection design will meet the transmission owner's requirements; and
 - (3) Define the operational and maintenance responsibilities for the substation and how they will meet the transmission owner's standards.
- (h) If the applicant will entertain proposals for sharing above-ground infrastructure with other utilities (communications, cable, phone, cell phone relays, and similar facilities), criteria and procedures for review of such proposals.
- (i) A status report on equipment availability and expected delivery dates for major components including towers, turbines, solar panels, inverters, transformers, and related major equipment.

~~§900-2.23 Exhibit 22: Electric and Magnetic Fields~~

~~Exhibit 223 shall contain:~~

- (a) ~~For the entire ROW of the proposed interconnection line, or any collection line rated over sixty-nine (69) kV, providing the electrical interconnection between the facility, and any transmission line between the facility and the existing electric transmission and distribution system: identify every ROW segment having unique electric and magnetic field (EMF) characteristics due to structure types and average heights, ROW widths, and co-location of other transmission facilities in the ROW.~~
- (b) ~~For each identified ROW segment, provide both "base case" and "proposed" cross-sections to scale showing:~~
 - (1) ~~All overhead electric transmission, sub-transmission and distribution facilities including the proposed facility showing structural details and dimensions and identifying phase spacing, phasing, and any other characteristics affecting EMF emissions;~~
 - (2) ~~All underground electric transmission, sub-transmission and distribution facilities;~~
 - (3) ~~All underground gas transmission facilities;~~
 - (4) ~~All right-of-way boundaries; and~~

- (5) ~~Structural details and dimensions for all structures (dimensions, phase spacing, phasing, and similar categories) and include a station number identifying the location.~~
- (c) ~~A set of the aerial photos/drawings enhanced by showing the exact location of each:~~
- (1) ~~Identified ROW segment;~~
 - (2) ~~Cross section; and~~
 - (3) ~~Nearest residence or occupied non-residential building in each identified ROW segment with a stated measurement of the distance between the edge of ROW and the nearest edge of the residence or building.~~
- (d) ~~An EMF study with calculation tables and field strength graphs for each identified ROW segment cross section, as follows:~~
- (1) ~~The study shall be signed and stamped/sealed by a licensed professional engineer registered and in good standing in the State of New York;~~
 - (2) ~~Provide the name of the computer software program used to model the facilities and make the calculations;~~
 - (3) ~~Regarding electric fields, model the circuits at rated voltage and provide electric field calculation tables and field strength graphs calculated at one (1) meter above ground level with five (5) foot measurement intervals depicting the width of the entire ROW and out to five hundred (500) feet from the edge of the ROW on both sides, including digital copies of all input assumptions and outputs for the calculations;~~
 - (4) ~~Regarding magnetic fields, model the circuit phase currents equal to the summer normal, summer short term emergency (STE sum), winter normal, and winter short term emergency (STE win) loading conditions and provide magnetic field calculation tables and field strength graphs calculated at one (1) meter above ground level with five (5) foot measurement intervals depicting the width of the entire ROW and out to five hundred (500) feet from the edge of the ROW on both sides, including digital copies of all input assumptions and outputs for the calculations;~~
 - (5) ~~Regarding magnetic fields, also model the circuit phase currents equal to the maximum average annual load estimated to be occurring on the power lines within ten (10) years after the proposed facility is put in operation and provide magnetic field calculation tables and field strength graphs calculated at one (1) meter above~~

~~ground level with five (5) foot measurement intervals depicting the width of the entire ROW and out to five hundred (500) feet from the edge of the ROW on both sides, including digital copies of all input assumptions and outputs for the calculations;~~

- ~~(6) Regarding magnetic fields, also model a "base case" with the circuit phase currents equal to the maximum average annual load currently estimated to be occurring on the existing power lines within the ROW (without construction or operation of the proposed facility) and provide magnetic field calculation tables and field strength graphs calculated at one (1) meter above ground level with five (5) foot measurement intervals depicting the width of the entire ROW and out to five hundred (500) feet from the edge of the ROW on both sides, including digital copies of all input assumptions and outputs for the calculations; and~~
- ~~(7) Provide a demonstration that the facilities, including interconnection transmission lines, will conform with the Public Service Commission's Interim Policy Standard for Electromagnetic Field levels at the proposed ROW edges.~~

§900-2.24 Exhibit 23: Site Restoration and Decommissioning

Exhibit 23 shall contain:

- (a) A Decommissioning and Site Restoration Plan for site restoration in the event the facility cannot be completed or after end of the useful life of the facility (to be identified) which shall, at a minimum, address the following:
 - (1) Safety and the removal of hazardous conditions;
 - (2) Environmental impacts;
 - (3) Aesthetics;
 - (4) Recycling;
 - (5) Potential future uses for the site;
 - (6) Funding; and
 - (7) Schedule.

(b) For facilities to be located on lands owned by others, a description of all site restoration, decommissioning and security agreements between the applicant and landowner, municipality, or other entity, including provisions for turbines, foundations, and electrical collection, transmission, and interconnection facilities.

(c) A gross and net decommissioning and site restoration estimate, the latter including projected salvage value (including reference to the salvage value data source), with line items (and associated dollar amounts) for decommissioning of all facility components removed four (4) feet below grade in agricultural land and three (3) feet below grade in non-agricultural land and removal and restoration of access road locations, where appropriate, based on the facility layout. The gross cost estimates shall include a ~~fifteen (15)~~ ten (10) percent contingency cost based on the overall decommissioning and site restoration estimate. The net amount shall be allocated between Cities, Towns, or Villages based on the estimated cost associated with the removal and restoration of the facilities located in each City, Town, or Village.

§900-2.25 Exhibit 24: Local Laws and Ordinances

Exhibit 24 shall contain:

(a) A list of all local ordinances, laws, resolutions, regulations, standards and other requirements enacted prior to the submission of an application and applicable to the construction or operation of the facility, which includes interconnection electric transmission lines, that are of a substantive nature, together with a statement that the location of the facility as proposed conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply. Copies of zoning, flood plain and similar maps, tables and/or documents shall be included in the exhibit when such are referenced in such local substantive requirements.

(b) A list of all local ordinances, laws, resolutions, regulations, standards and other requirements applicable to the placement of electric collection ~~interconnection to or use of~~ water, sewer, and telecommunication lines in public rights of way that are of a substantive nature, together with a statement that the location of the facility as proposed conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply.

(c) A list of all local substantive requirements identified pursuant to subdivision (a) or (b) of this section for which the applicant requests that the Office elect to not apply to the facility. Pursuant to Executive Law Section 94-c, the Office may elect to not apply ~~local substantive requirements if it finds that, as applied to the facility, such requirements are unreasonably burdensome~~ in whole or in part, any local law or ordinance which would otherwise be

applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and environmental benefits of the facility. For each local substantive requirement identified by the applicant, a statement justifying the request shall be provided. The statement of justification shall show with facts and analysis the degree of burden caused by the requirement, why the burden should not reasonably be borne by the applicant, ~~that the request cannot reasonably be obviated by design changes to the facility,~~ that the request is the minimum necessary, and that the adverse impacts of granting the request shall be mitigated to the maximum extent practicable consistent with applicable requirements set forth in this Part. The statement shall include a demonstration:

- (1) For requests grounded in the existing technology, that there are technological limitations (including governmentally imposed technological limitations) related to necessary facility component bulk, height, process or materials that make compliance by the applicant technically impossible, impractical or otherwise unreasonable;
 - (2) For requests grounded in factors of costs or economics (likely involving economic modeling), that the costs to consumers associated with applying the identified local substantive requirements would outweigh the benefits of applying such provisions; and
 - (3) For requests grounded in the needs of consumers, that the needs of consumers for the facility outweigh the impacts on the community that would result from refusal to apply the identified local substantive requirements.
 - (4) For requests grounded in the CLCPA targets, that the local law is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.
- (d) A summary table of all local substantive requirements identified pursuant to subdivisions (a) and (b) of this section in two columns listing the provisions in the first column, and a discussion or other showing demonstrating the degree of compliance with the substantive provisions in the second column.
- (e) Identification of the city, town, village, county, or State agency qualified by the Secretary of State that shall review and approve the building plans, inspect the construction work, and certify compliance with the New York State Uniform Fire Prevention and Building Code, the Energy Conservation Construction Code of New York State, and the substantive provisions of any applicable local electrical, plumbing or building code. If no other arrangement can be made, the Department of State should be identified. The statement of identification shall include a description of the preliminary arrangement made between the applicant and the

entity that shall perform the review, approval, inspection, and compliance certification, including arrangements made to pay for the costs thereof including the costs for any consultant services necessary due to the complex nature of such facilities. If the applicable City, Town or Village has adopted and incorporated the New York State Uniform Fire Prevention and Building Code for administration into its local electric, plumbing and building codes, the applicant may request that the Office expressly authorize the exercise of the electric, plumbing and building permit application, inspection and certification processes by such City, Town or Village.

(f) An identification of the zoning designation or classification of all lands constituting the facility site and a statement of the language in the zoning ordinance or local law by which it is indicated that the facility is a permitted use at the facility site. If the language of the zoning ordinance or local law indicates that the facility is a permitted use at the facility site subject to the grant of a special exception, a statement of the criteria in the zoning ordinance or local law by which qualification for such a special exception is to be determined.

§900-2.26 Exhibit 25: Other Permits and Approvals

Exhibit 25 shall contain:

(a) A list of any Federal or federally-delegated permit, consent, approval or license that will be required for the construction or operation of the facility, which shall specify the date on which an application for any such approval was made or the estimated date on which it will be made. The applicant shall notify the Office of any significant change in the status of each such application.

(b) A statement as to whether the applicant knows of others who have any pending federal, state or local applications or filings which concern the facility. If any such applications or filings are identified, the applicant shall indicate whether the granting of any such application or filing will have any effect on the grant or denial of a siting permit, and whether the grant or denial of a siting permit will have any effect upon the grant or denial of any such other application or filing. The applicant shall notify the Office of any significant change in the status of each such application or filing.

Subpart 900-3 Transfer Applications from PSL Article 10 or alternative permitting proceeding

§900-3.1 Transfer Applications for Opt-In Renewable Energy Facilities

(a) Applicants for opt-in renewable energy facilities shall provide the following:

- (1) A copy of the written notice to the lead agency conducting the environmental impact review pursuant to the New York State Environmental Quality Review Act advising of the applicant's election to be subject to Executive Law Section 94-c;
 - (2) A completed transfer of application form;
 - (3) The exhibits set forth in Subpart 900-2 of this Part;
 - (4) Copies of documentation identifying those matters and issues that have been identified and resolved in the alternate permitting process;
 - (5) Any additional information that may be required in order to enable the Office to make the findings and determinations required by law;
 - (6) The fee to be deposited in the local agency account in an amount equal to one thousand dollars for each one thousand (1,000) kilowatts of capacity, which may be adjusted from time to time by the Office to account for inflation; and
 - (7) The ORES fee to recover the costs of reviewing an application in an amount equal to one thousand dollars for each one thousand (1,000) kilowatts of capacity.
- (b) For any matters and issues that have been identified and resolved in the alternate permitting proceeding, the siting permit will reflect such resolution and those provisions will not be the subject of any adjudicatory hearing conducted pursuant to Subpart 900-8 of this Part.
- (c) The applicant shall comply with requirements for filing, service and publication of the application pursuant to section 900-1.6 of this Part.

§900-3.2 Transfer Applications for Pending Article 10 Facilities

- (a) For pending Article 10 facilities for which a completeness determination has been issued pursuant to PSL Article 10:
- (1) The applicant shall provide the following:
 - (i) A copy of the written notice to the Secretary of the PSC advising of the applicant's election to be subject to Executive Law Section 94-c;
 - (ii) A completed transfer of application form;
 - (iii) A copy of the application materials submitted pursuant to the PSL Article 10; and, to the extent the applicant wishes to be subject to a uniform standard or condition set forth in Subpart 900-6 of this Part, an explanation as to how the

PSL Article 10 application materials demonstrate compliance with such permit condition;

- (iv) Copies of documentation identifying those matters and issues that have been identified and resolved in the PSL Article 10 proceeding;
- (v) Any additional information that may be required in order to enable the Office to make the findings and determinations required by law; and
- (vi) The fee to be deposited in the local agency account in an amount equal to one thousand dollars for each one thousand (1,000) kilowatts of capacity, which may be adjusted from time to time by the Office to account for inflation. *The Applicant shall be credited for any amounts incurred by intervenors and for which reimbursement is, or will be sought, prior to transferring pursuant to this section.*

(2) Such applications shall be deemed complete upon filing; provided, however, that if the Office determines that the applicant has not demonstrated compliance with the uniform standards and conditions set forth in Subpart 900-6 of this Part, the Office will develop the necessary site specific conditions to avoid, minimize and mitigate significant adverse environmental impacts to the maximum extent practicable, including requirements for additional compliance filings beyond those set forth in Subpart 900-10 of this Part, as necessary.

(b) Applicants for pending Article 10 facilities for which the application has been filed, but has not yet been deemed to be in compliance with Article 10 application requirements, shall provide the following:

- (1) A copy of the written notice to the Secretary of the PSC of applicant's intent to become subject to this Part;
- (2) A completed transfer of application form;
- (3) The exhibits required in Subpart 900-2 of this Part;
- (4) Copies of documentation identifying those matters and issues that have been identified and resolved in the PSL Article 10 process;
- (5) Any additional information that may be required in order to enable the Office to make the findings and determinations required by law;

- (6) The fee to be deposited in the local agency account in an amount equal to one thousand dollars for each one thousand (1,000) kilowatts of capacity, which may be adjusted from time to time by the Office to account for inflation; and
 - (7) The ORES fee to recover the costs of reviewing an application in an amount equal to one thousand dollars for each one thousand (1,000) kilowatts of capacity.
- (c) For any matters and issues that have been identified and resolved in the PSL Article 10 process, the siting permit will reflect such resolution and those provisions will not be the subject of any adjudicatory hearing conducted pursuant to Subpart 900-8 of this Part.
- (d) The applicant shall comply with requirements for filing, service and publication of the application pursuant to section 900-1.6 of this Part.

Subpart 900-4 Processing of Applications §900-4.1 Office of Renewable Energy Siting Action on Applications

- (a) Applications shall be submitted to the Office pursuant to section 900-1.6(a) of this Part for initiation of review and a determination of completeness. It is the responsibility of the applicant to ensure the Office is notified of all address changes.
- (b) The Office reserves the right in its sole discretion to elect to inspect the site(s) and during an inspection, among other things, measurements may be made, physical characteristics of the site may be analyzed, including without limitation soils and vegetation, and photographs may be taken. Ordinarily, such site visit shall occur between 7:00 a.m. and 8:00 p.m. Monday through Friday. An applicant's failure to allow access to the site can be grounds for, and may result in, a notice of incomplete application or statement of intent to deny.
- (c) The Office shall make its determination of completeness or incompleteness on or before sixty (60) days of receipt of the application and provide notice of such determination to the applicant via electronic mail and regular mail.
- (d) If the application is determined to be incomplete, the notice shall include a listing of all identified areas of incompleteness and a description of the specific deficiencies. *The determination of completeness for a resubmitted application must be based solely on the written list of deficiencies provided by the Office following the previous review, unless changes are proposed for the project, there is newly discovered information, or there is a change in circumstances related to the project.*
- (e) Applications shall remain incomplete until all requested items are received by the Office. A partial submission of the requested material shall not change the incomplete status. The Office shall notify the applicant of the application status within *thirty (30)* ~~sixty (60)~~ days of receipt of all requested material.

(f) Failure of the applicant to respond in writing to the Office's notice of incomplete application may result in the application being deemed withdrawn without prejudice pursuant to the following procedures:

- (1) If the applicant fails to respond to a notice of incomplete application within three (3) months, the Office may send a follow-up notice of incomplete application requesting, by a reasonable date to be identified by the Office, the necessary items for a complete application; and
- (2) If the applicant fails to respond to such follow-up notice of incomplete application by the date identified by the Office, the Office may notify the applicant that the application is deemed withdrawn without prejudice.

(g) If the application is determined to be complete by the Office, a notice of complete application shall be prepared, posted on the Office's website and served upon:

- (1) The applicant, as directed in subdivision (c) of this section;
- (2) The chief executive officer of each municipality in which any portion of the such proposed facility is to be located, via regular mail; and
- (3) Any person who has previously expressed in writing an interest in receiving such notification, via regular mail.

(h) If the Office fails to provide notice of its determination of completeness or incompleteness within the time period set forth in subdivision (c) of this section, the application shall be deemed complete. Nothing in this section waives any applicable statutory requirements to obtain other permits that may be required, including, but not limited to, federal and federally-delegated permits, or precludes the Office from requesting additional information as set forth in this Part.

(i) Time frames and deadlines set forth in this Part are calculated in accordance with the General Construction Law, Article 2, Section 20, where day one is the day after a pertinent time-sensitive event, such as date of receipt or day of publication. Unless indicated otherwise, days are calculated as calendar days.

(j) Unless otherwise specified in this Part, the applicant and Office may extend the time periods for a completeness determination or final determination on the application by mutual consent, provided that the time frame for final determination may only be extended for an additional thirty (30) days.

Subpart 900-5 §900-5.1 Local Agency Account

(a) Local agencies and potential community intervenors seeking funds from the local agency account shall submit a request to the Office, as set forth in subdivision (h) of this section,

within thirty (30) days after the date on which a siting permit application has been filed by the applicant pursuant to section 900-1.6 of this Part.

- (b) Within thirty (30) days after the deadline for requests for funds from the local agency account, the ALJ shall award local agency funds, to local agencies and potential community intervenors whose requests comply with the provisions of subdivision (h) of this section, so long as use of the funds will contribute to a complete record leading to an informed permit decision as to the appropriateness of the site and the facility, and for local agencies, shall include the use of funds to determine whether a proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations.
- (c) A local agency or potential community intervenor (except an applicant) may request funds from the local agency account to defray expenses for experts.
- (d) Local agencies and potential community intervenors are encouraged to consider the consolidation of requests with similar funding proposals.
- (e) Subject to the availability of funds in the local agency account, the Office may fix additional dates for submission of fund requests.
- (f) At the time vouchers are submitted or as otherwise required by the Office, any local agency or potential community intervenor receiving an award of funds shall submit to the Office a report: (1) Detailing an accounting of the monies that have been spent; and
 - (2) Showing:
 - (i) The results of any studies and a description of any activities conducted using such funds; and
 - (ii) Whether the purpose for which the funds were awarded has been achieved; if the purpose for which the funds were awarded has not been achieved, whether reasonable progress toward the goal for which the funds were awarded is being achieved; and if applicable, why further expenditures are warranted.
- (g) Disbursement of funds from the local agency account.
 - (1) All disbursements from the local agency account to any local agency or potential community intervenor shall be made by NYSERDA, at the direction of the Office, on vouchers approved by the Office.
 - (2) The Office shall reserve at least seventy-five (75) percent of the local agency account funds for each project for potential awards to local agencies.

- (3) All vouchers shall be submitted for payment no later than six (6) months after withdrawal of a permit application or the Office's final determination on the application.
 - (4) Any funds that have not been disbursed after the expiration of time for final voucher submittals pursuant to paragraph (3) of this subdivision shall be returned to the applicant.
- (h) Each request for funds from the local agency account shall be completed on an ORES-approved form and contain:
- (1) A statement that the facility falls within the local agency's jurisdiction or that a permit or approval from the local agency would have been required in the absence of Section 94-c of the Executive Law;
 - (2) For individual potential community intervenors, a statement of the number of persons and the nature of the interests the requesting person represents, and proof of residency (e.g., a New York State driver's license, permit or non-driver identification card, a recent bank statement, a recent pay stub or a recent utility bill);
 - (3) for any non-profit organization potential community intervenors, a statement of a concrete and localized interest that may be affected by a proposed facility and that such interest has a significant nexus to its mission;
 - (4) A statement of the availability of funds from the resources of the local agency or potential community intervenor and of the efforts that have been made to obtain such funds;
 - (5) The amount of funds being sought;
 - (6) To the extent possible, the name and qualifications of each expert to be employed, or at a minimum, a statement of the necessary professional qualifications;
 - (7) If known, the name of any other local agency, potential community intervenor or entity who may, or is intending to, employ such expert;
 - (8) A detailed statement of the services to be provided by expert witnesses, consultants, attorneys, or others (and the basis for the fees requested), including hourly fee, wage rate, and expenses, specifying how such services and expenses will contribute to the compilation of a complete record as to the appropriateness of the site and facility;
 - (9) If a study is to be performed, a description of the purpose, methodology and timing of the study, including a statement of the rationale supporting the methodology and timing proposed, including a detailed justification for any proposed methodology that

is new or original explaining why pre-existing methodologies are insufficient or inappropriate;

- (10) A copy of any contract or agreement or proposed contract or agreement with each expert witness, consultant or other person; and
- (11) A completed authorization form for electronic Automated Clearing House payment, or payment instructions for payments by check.

Subpart 900-6 Uniform Standards and Conditions

§900-6.1 Facility Authorization

(a) *Compliance.* The permittee shall implement any impact avoidance, minimization and/or mitigation measures identified in the exhibits, compliance filings and/or contained in a specific plan required under this Part 900, as approved by the Office. If there is any discrepancy between an exhibit or compliance filing and a permit condition, the permittee shall comply with the permit condition and notify the Office immediately for resolution.

(b) *Property Rights.* Issuance of a siting permit does not convey any rights or interests in public or private property. The permittee shall be responsible for obtaining all real property, rights-of-way (ROW), access rights and other interests or licenses in real property required for the construction and operation of the facility.

(c) *Eminent Domain.* Issuance of a siting permit to a permittee that is an entity in the nature of a merchant generator and not in the nature of a fully regulated public utility company with an obligation to serve customers does not constitute a finding of public need for any particular parcel of land such that a condemner would be entitled to an exemption from the provisions of Article 2 of the New York State Eminent Domain Procedure Law (“EDPL”) pursuant to Section 206 of the EDPL.

(d) *Other Permits and Approvals.* Prior to the permittee’s commencement of construction, the permittee shall be responsible for obtaining all necessary federal and federally-delegated permits and any other approvals that may be required for the facility and which the Office is not empowered to provide or has expressly authorized. In addition, the Office expressly authorizes:

(1) The PSC to require approvals, consents, permits, other conditions for the construction or operation of the facility under PSL Sections 68, 69, 70, and Article VII, as applicable, with the understanding that the PSC will not duplicate any issue already addressed by the Office and will instead only act on its police power functions related to the entity as described in the body of this siting permit;

(2) The NYSDOT to administer permits associated with oversized/overweight vehicles and deliveries, highway work permits, and associated use and occupancy approvals as needed to construct and operate the facility; and

(3) The pertinent local agency to implement the New York State Uniform Fire Prevention and Building Code.

(e) *Water Quality Certification*. Prior to commencing jurisdictional activities ~~construction~~, the permittee shall request and obtain from the Office a water quality certification pursuant to Section 401 of the Clean Water Act, if required.

(f) *Host Community Benefits*. The permittee shall provide host community benefits, such as Payments in Lieu of Taxes (PILOTs), other payments pursuant to a host community agreement or other project(s) agreed to by the host community.

(g) *Notice to Proceed with Construction*. The permittee and its contractors shall not commence construction until a “Notice to Proceed with Construction” has been issued by the Office. Such Notice will be issued promptly after all applicable pre-construction compliance filings have been filed by the permittee and approved by the Office. The Notice will not be unreasonably withheld. The Office may issue a conditional “Notice to Proceed with Site Preparation” for the removal of trees, stumps, shrubs and vegetation from the facility site as indicated on Office-approved site clearing plans to clear the facility site for construction, as well as setting up and staging of the laydown yard(s), including bringing in equipment, prior to the submission of all pre-construction compliance ~~and informational~~ filings.

(h) *Expiration*. The siting permit will automatically expire if the facility does not achieve commencement of commercial operation within seven (7) years from the date of issuance.

(i) *Partial Cancellation.* If the permittee decides not to commence construction of any portion of the facility, it shall so notify the Office promptly after making such decision. Such decisions shall not require a modification to the siting permit unless the Office determines that such change constitutes a major modification to the siting permit pursuant to section 900-11.1 of this Part.

(j) *Deadline Extensions.* The Office may extend any deadlines established by the siting permit for good cause shown. Any request for an extension shall be in writing, include a justification for the extension, and be filed at least fourteen (14) business days prior to the applicable deadline.

(k) *Office Authority.* The permittee shall regard NYSDPS staff, authorized pursuant to PSL Section 66(8), as the Office's representatives in the field. In the event of any emergency resulting from the specific construction or maintenance activities that violate, or may violate, the terms of the siting permit, compliance filings or any other supplemental filings, such NYSDPS staff may issue a stop work order for that location or activity pursuant to section 900-12.1 of this Part.

§900-6.2 Notifications

(a) *Pre-Construction Notice Methods.* At least fourteen (14) business days prior to the permittee's commencement of construction date, the permittee shall notify the public as follows:

- (1) Provide notice by mail to host landowners, and to adjacent landowners within one (1) mile of a solar facility and five (5) miles of a wind facility;
- (2) Provide notice by email to local Town and County officials and emergency personnel;
- (3) Publish notice by mail in the local newspapers of record for dissemination, including at least one free publication, if available (e.g., Pennysaver);

(4) Provide notice for display in public places, which shall include, but not be limited to, the Town Halls of the host municipalities, at least one (1) library in each host municipality, at least one (1) post office in each host municipality, the facility website, and the facility construction trailers/offices; and

(5) File notice with the Office for posting on the Office website.

(b) *Proof of Notice to Office.* At least ~~fourteen (14)~~ **ten (10)** business days prior to commencement of construction, the permittee shall file with the Office an affirmation that it has provided the notifications required by subdivision (a) of this section and include a copy of the notice(s), as well as a distribution list.

(c) *Post-Construction Notice.* Prior to the completion of construction, the permittee shall notify the entities identified in paragraphs (a)(1)-(5) of this section with the contact name, telephone number, email and mailing address of the facility operations manager, as well as all information required in subdivision (d) **(1), (2), (4), (5), (6) & (7)** of this section.

(d) *Contents of Notice.* The permittee shall write the notice(s) required in subdivisions (a) and (c) of this section in plain language reasonably understandable to the average person and shall ensure that the notice(s) contain(s):

(1) A map of the facility;

(2) A brief description of the facility;

(3) The construction schedule and transportation routes;

(4) The name, mailing address, local or toll-free telephone number, and email address of the appropriate facility contact for development, construction and operations;

(5) The procedure and contact information for registering a complaint;

(6) Contact information for the Office and the NYSDPS; and

(7) A list of public locations where information on the facility, construction, and the permittee will be posted.

(e) *Notice of Completion of Construction and Restoration.* Within fourteen (14) days of the completion of final post-construction restoration, the permittee shall notify the NYSDPS, with a copy to the Office, that all such restoration has been completed in compliance with the siting permit and applicable compliance filings and provide an anticipated date of commencement of commercial operation of the facility.

§900-6.3 General Requirements

(a) *Local Laws.* The permittee shall construct and operate the facility in accordance with the substantive provisions of the applicable local laws as identified in section 900-2.25 of this Part, except for those provisions of local laws that the Office determined to be unreasonably burdensome, as stated in the siting permit.

(b) *Federal Requirements.* The permittee shall construct and operate the facility in a manner that conforms to all applicable federal and federally-delegated permits identified in section 900-2.26 of this Part. If relevant facility plans require modifications due to conditions of federal permits, the final design drawings and all applicable compliance filings shall be revised accordingly and submitted for review and approval pursuant to section 900-11.1 of this Part.

(c) *Traffic Coordination.* The permittee shall coordinate with State, county, and local highway agencies to respond to and apply applicable traffic control measures to any locations that may experience any traffic flow or capacity issues.

§900-6.4 Facility Construction and Maintenance

(a) *Construction Hours.* Construction and routine maintenance activities on the facility shall be limited to 7 a.m. to 8 p.m. Monday through Saturday and 8 a.m. to 8 p.m. on Sunday and national holidays, with the exception of construction and delivery activities, which may occur during extended hours beyond this schedule on an as-needed basis.

(1) Construction work hour limits apply to facility construction, maintenance, and to construction-related activities, including maintenance and repairs of construction equipment at outdoor locations, large vehicles idling for extended periods at roadside locations, and

related disturbances. This condition shall not apply to vehicles used for transporting construction or maintenance workers, small equipment, and tools used at the facility site for construction or maintenance activities.

(2) If, due to safety or continuous operation requirements, construction activities are required to occur beyond the allowable work hours, the permittee shall notify the NYSDPS, the Office, affected landowners and the municipalities. Such notice shall be given at least twenty-four (24) hours in advance, unless such construction activities are required to address emergency situations threatening personal injury, property, or severe adverse environmental impact that arise less than twenty-four (24) hours in advance. In such cases, as much advance notice as is practical shall be provided.

(b) Environmental and Agricultural Monitoring.

(1) The permittee shall hire an independent, third-party environmental monitor to oversee compliance with environmental commitments and siting permit requirements. The environmental monitor shall perform regular site inspections of construction work sites and, in consultation with the NYSDPS, issue regular reporting and compliance audits.

(2) The environmental monitor shall have stop work authority over all aspects of the facility. Any stop work orders shall be limited to affected areas of the facility. Copies of the reporting and compliance audits shall be provided to the host town(s) upon request.

(3) *The environmental monitor has the authority to review and approve micro-siting changes arising during construction and must notify the Office within three (3) business days of the change.*

~~(3)~~ (4) The permittee shall identify and provide qualifications and contact information for the independent, third-party environmental monitor to the NYSDPS, with a copy to the Office.

~~(4)~~ (5) If the environmental monitor is not qualified, the permittee shall also retain an independent, third-party agriculture-specific environmental monitor as required in section 900-6.4(s) of this Part.

~~(5)~~ (6) The permittee shall ensure that its environmental monitor and agricultural monitor are equipped with sufficient access to documentation, transportation, and communication equipment to effectively monitor the permittee's contractor's compliance with the provisions of the siting permit with respect to such permittee's facility components and to applicable sections of the Public Service Law, Executive Law, Environmental Conservation Law, and Clean Water Act Section 401 Water Quality Certification.

(c) *Pre-Construction Meeting.* At least fourteen (14) days before the commencement of construction, the permittee shall hold a pre-construction meeting with staff of the Office, NYSDPS, NYSDEC, NYSAGM, NYSDOT, municipal supervisors/mayors and highway departments, and county highway departments. The balance of plant (BOP) construction contractor, the agricultural monitor and environmental monitor shall be required to attend the pre-construction meeting.

(1) An agenda, the location, and an attendee list shall be agreed upon between staff of the Office and the NYSDPS and the permittee and distributed to the attendee list at least one (1) week prior to the meeting;

(2) Maps showing designated travel routes, construction worker parking and access road locations and a general facility schedule shall be distributed to the attendee list at least one (1) week prior to the meeting;

(3) The permittee shall supply draft minutes from this meeting to the attendee list for corrections or comments, and thereafter the permittee shall issue the finalized meeting minutes; and

(4) If, for any reason, the BOP contractor cannot finish the construction of the facility, and one (1) or more new BOP contractors are needed, there shall be another pre-construction meeting with the same format as outlined in this section.

(d) *Construction Reporting and Inspections.* During facility construction, the permittee shall report construction status and support inspections as follows:

(1) Every two (2) weeks, the permittee shall provide NYSDPS and Office staff, and the host municipalities with a report summarizing the status of

construction activities, and the schedule and locations of construction activities for the next two (2) weeks.

(2) Prior to entry onto the facility site for on-site inspections, the permittee shall **contact the permittee and** conduct a tailgate meeting to communicate required safety procedures and worksite hazards to site inspectors.

(3) The permittee shall accommodate reviews of any of the following during a monthly inspection and at other times as may be determined by NYSDPS staff:

(i) The status of compliance with siting permit conditions;

(ii) Field reviews of the facility site;

(iii) Actual or planned resolutions of complaints;

(iv) Significant comments, concerns, or suggestions made by the public, municipalities, or other agencies and indicate how the permittee has responded to the public, local governments, or other agencies; and

(v) The status of the facility in relation to the overall schedule established prior to the commencement of construction; and

(vi) Other items the permittee, NYSDPS staff, or Office staff consider appropriate.

(4) After every monthly inspection, the permittee shall provide the municipalities and agencies involved in the inspection with a written record of the results of the inspection, including resolution of issues and additional measures to be taken.

(e) *Flagging.* At least two (2) weeks before tree clearing or ground disturbing activities, the permittee shall stake or flag the planned limits of disturbance (LOD), the boundaries of any delineated NYS-regulated wetlands, waterbodies or streams in the LOD (as identified in the delineations prepared pursuant to sections 900-1.3(e) and (f) of this Part), and any known archeological sites identified in the approved Cultural Resources Avoidance, Minimization and Mitigation Plan required in section 900-10.2(g) of this Part, all on or off ROW access roads, limits of clearing and other areas needed for construction, including, but not limited to, turbine or solar array work areas, proposed

infiltration areas for post-construction stormwater management, and laydown and storage areas. In addition, archeological sites shall be surrounded with construction fencing and a sign stating restricted access.

(f) *Dig Safely NY*. Prior to the commencement of construction, the permittee shall become a member of Dig Safely New York. The permittee shall require all contractors, excavators, and operators associated with its facilities to comply with the requirements of the PSC's regulations regarding the protection of underground facilities at 16 NYCRR Part 753.

(g) *Natural Gas Pipeline Cathodic Protection*. The permittee shall contact all pipeline operators within the facility site and land owners, if necessary, on which facility components are to be located or whose property lines are within the zone of safe siting clearance, if any, and shall reach an agreement with each operator to provide that the facility's collection and interconnection systems will not damage any identified pipeline's cathodic protection system or produce damage to the pipeline, either with fault current or from a direct strike of lightning to the collection and interconnection systems, specifically addressing 16 NYCRR Section 255.467 (External corrosion control; electrical isolation).

(h) *Pole Numbering*. The permittee shall comply with all requirements of the PSC's regulations regarding identification and numbering of above ground utility poles at 16 NYCRR Part 217.

(i) *Fencing*. All mechanical equipment, including any structure for storage of batteries, shall be enclosed by fencing of a minimum height of seven (7) feet with a self-locking gate to prevent unauthorized access.

(j) *Air Emissions*. To minimize air emissions during construction, the permittee shall:

(1) Prohibit contractors from leaving generators idling when electricity is not needed and from leaving diesel engines idling when equipment is not actively being used;

(2) Implement dust control procedures to minimize the amount of dust generated by construction activities in a manner consistent with the Standards and Specifications for Dust Control, as outlined in the New York State Standards and Specifications for Erosion and Sediment Controls (see section 900-15.1(i)(1)(i) of this Part);

(3) Use construction equipment powered by electric motors where feasible, or by ultra-low sulfur diesel; and

(4) Dispose or reuse cleared vegetation in such a way that that minimizes greenhouse gas emissions (e.g., lumber production or composting).

(k) *Construction Noise.* To minimize noise impacts during construction, the permittee shall:

(1) Maintain functioning mufflers on all transportation and construction machinery;

(2) Respond to noise and vibration complaints according to the complaint resolution protocol approved by the Office; and

(3) Comply with all substantive provisions of all local laws regulating construction noise unless they are waived.

(l) *Visual Mitigation.*

(1) *Wind Facilities.* The permittee shall implement the approved Visual Impact Minimization and Mitigation Plan required in section 900-2.9 of this Part, including the following:

(i) Adoption of visual design features requirements;

(ii) Visual contrast minimization and mitigation measures;

(iii) Operational effects minimization measures, including shadow flicker minimization mitigation and other measures necessary to achieve a maximum of thirty (30) hours annually at any non-participating residential receptor, subject to verification using shadow prediction and operational controls at appropriate wind turbines;

(iv) Lighting Plan; and

(v) Screen Planting Plans (if any).

(2) *Solar Facilities.* The permittee shall implement the approved Visual Minimization and Mitigation Plan as required in section 900-2.9 of this Part, including the following:

(i) Visual contrast minimization and mitigation measures;

- (ii) Lighting Plan;
- (iii) Solar glare mitigation requirements; and
- (iv) Screen Planting Plans.

(3) *Screen Planting Plans*. The permittee shall retain a qualified landscape architect, arborist, or ecologist to inspect the screen plantings for ~~two (2)~~ one (1) year following installation to identify any plant material that did not survive, appears unhealthy, and/or otherwise needs to be replaced. The permittee shall remove and replace plantings that fail in materials, workmanship or growth within ~~two (2)~~ one (1) year following the completion of installing the plantings.

(m) *General Environmental Requirements*.

- (1) *Limits of Disturbance (LOD)*. Construction shall not directly disturb areas outside the construction limits shown on the design drawings.
- (2) *Blasting*. Blasting shall be designed and controlled to meet the limits for ground vibration set forth in United States Bureau of Mines Report of Investigation 8507 Figure B-1 (see section 900-15.1(l)(1)(i) of this Part) and air overpressure shall be under the limits set forth in the Conclusion Section in United States Bureau of Mines Report of Investigation 8485 (USBM RI 8507 and USBM RI 8485 (see section 900-15.1(l)(1)(ii) of this Part) to protect structures from damage.
- (3) *Karst*. Blasting operations in locations where geotechnical investigations confirm the presence of subsurface karst features shall be limited or performed under specific procedures recommended for those locations by a geotechnical engineer licensed to practice in the State of New York.
- (4) *E&S Materials*. Permanent erosion control fabric or netting used to stabilize soils prior to establishment of vegetative cover or other permanent measures shall be one hundred (100) percent biodegradable natural product, excluding silt fence. Use of hay for erosion control or other construction-related purposes is prohibited to minimize the risk of introduction of invasive plant species.
- (5) *Spill Kits*. All construction vehicles and equipment shall be equipped with a spill kit. All equipment shall be inspected daily for leaks of petroleum, other fluids, or contaminants; equipment may only enter a stream channel if found to

be free of any leakage. Any leaks shall be stopped and cleaned up immediately. Spillage of fuels, waste oils, other petroleum products or hazardous materials shall be reported to the NYSDEC's Spill Hotline within two (2) hours, in accordance with the NYSDEC Spill Reporting and Initial Notification Requirements Technical Field Guidance (see section 900-15.1(i)(1)(iii) of this Part). The Office and the NYSDPS shall also be notified of all reported spills in a timely manner.

(6) *Construction Debris*. Any debris or excess construction materials shall be removed to a facility duly authorized to receive such material. No burying of construction debris or excess construction materials is allowed.

(7) *Clearing Areas*. Tree and vegetation clearing shall be limited to the minimum necessary for facility construction and operation, and as detailed on final construction plans.

(8) *Clearing Methods*. When conducting clearing, the permittee shall:

(i) Comply with the provisions of 6 NYCRR Part 192, Forest Insect and Disease Control, and ECL Section 9-1303 and any quarantine orders issued thereunder;

(ii) Not create a maximum wood chip depth greater than three (3) inches, except for chip roads (if applicable), nor store or dispose wood chips in wetlands, within stream banks, delineated floodways, or active agricultural fields;

(iii) Not dispose of vegetation or slash by burning anywhere or burying within a wetland or adjacent area; and

(iv) Coordinate with landowners to salvage merchantable logs and fuel wood. Where merchantable logs and fuel wood will not be removed from the facility site during clearing activities, final construction plans shall indicate locations of stockpiles to be established for removal from site or future landowner resource recovery.

(9) *Invasive Insects*. To control the spread of invasive insects, the permittee shall provide training for clearing and construction crews to identify the Asian Longhorn Beetle and the Emerald Ash Borer and other invasive insects of concern as a potential problem at the facility site. If these insects are found, they shall be reported to the NYSDEC as soon as practicable.

(n) *Water Supply Protection*.

(1) For wind facilities:

(i) No wind turbine shall be located within one hundred (100) feet of an existing, active water supply well or water supply intake.

(ii) Blasting shall be prohibited within five hundred (500) feet of any known existing, active water supply well or water supply intake on a non-participating property.

(iii) The permittee shall engage a qualified third party to perform pre- and post-construction testing of the potability of water wells within the below specified distances of construction disturbance before commencement of construction and after completion of construction to ensure the wells are not impacted, provided the permittee is granted access by the property owner:

(a) Collection lines or access roads within one hundred (100) feet of an existing, active water supply well on a non-participating property;

(b) Blasting within one thousand (1,000) feet of an existing, active water supply well on a non-participating property; and

(c) Horizontal Directional Drilling (HDD) operations within ~~five one hundred (5100)~~ five one hundred (5100) feet of an existing, active water supply well on a non-participating property.

(iv) Should the third-party testing, as required by subparagraph (iii) of this paragraph, conclude that the water supplied by an existing, active water supply well met federal (see section 900-15.1(k)(1)(i) of this Part) and state (see section 900-15.1(j)(1)(i) of this Part) standards for potable water prior to construction, but failed to meet such standards after construction as a result of facility activities, the permittee shall cause a new water well to be constructed, in consultation with the property owner, at least one hundred (100) feet from collection lines and access roads, and at least five hundred (500) feet from wind turbines, as practicable given siting constraints and landowner preferences. The results of such tests and reports shall be made available to the relevant municipalities upon request.

(2) For solar facilities:

(i) Pier and post driving activities, except for fence and utility poles, shall be prohibited within one hundred (100) feet of any existing, active drinking water supply well; use of earth screws is permitted.

(ii) If required, blasting shall be prohibited within five hundred (500) feet of any known existing, active water supply well or water supply intake on a non-participating property.

(iii) The permittee shall engage a qualified third party to perform pre- and post-construction testing of the potability of water wells within the below specified distances of construction disturbance before commencement of civil construction and after completion of construction to ensure the wells are not impacted, provided the permittee is granted access by the property owner:

~~(a) Collection lines or access roads within one hundred (100) feet of an existing, active water supply well on a non-participating property;~~

(b) Blasting within one thousand (1,000) feet of an existing, active water supply well on a non-participating property;

(c) Pier or post installations within ~~two~~ one hundred (2100) feet of an existing, active water supply well on a non-participating property; and

(d) HDD operations within ~~five~~ one hundred (5100) feet of an existing, active water supply well on a non-participating property.

(iv) Should the third-party testing conclude that the water supplied by an existing, active water supply well met federal (see section 900-15.1(k)(1)(i) of this Part) and state (see section 900-15.1(j)(1)(i) of this Part) standards for potable water prior to construction, but failed to meet such standards post construction as a result of facility activities, the permittee shall cause a new water well to be constructed, in consultation with the property owner, at least one hundred (100) feet from collection lines and access roads, and at least two hundred (200) feet from all other

facility components. The results of such tests and reports shall be made available to the relevant municipalities upon request.

(o) *Threatened and Endangered Species.*

(1) For facilities that would impact NYS threatened or endangered species other than NYS threatened or endangered grassland birds or their habitat, the permittee shall implement an approved Net Conservation Benefit Plan (NCBP) that shall include the following:

(i) A demonstration that the NCBP results in a positive benefit on each of the affected species;

(ii) Detailed explanation of the net conservation benefit to the species based on the actual location and type of minimization measures to be taken for each of the affected species;

(iii) Full source information supporting a determination as to the net conservation benefit for each of the affected species;

(iv) A consideration of potential minimization and mitigation measures for each of the affected species;

(v) A consideration of potential sites for mitigation measures for each of the affected species;

(vi) The identification and detailed description of the minimization and mitigation actions that will be undertaken by the permittee to achieve a net conservation benefit to the affected species, including, if applicable, payment of a required mitigation fee into the Endangered and Threatened Species Mitigation Fund established pursuant to section 99(hh) of the New York State Finance Law; and

(vii) To the extent that physical mitigation will be performed, a letter or other indication of the permittee's financial and technical capability and commitment to fund and execute such management, maintenance and monitoring for the life of the facility/term of the siting permit.

(2) For facilities that would have de minimis impacts to NYS threatened or endangered grassland birds: (i) If an active nest is identified within the facility site and the facility results in adverse impacts to grasslands twenty-five (25) acres or more in size that were determined to be occupied habitat, the permittee shall coordinate with the NYSDPS and the Office to adjust the limits of

disturbance and/or adjust the construction schedule to avoid work in the area until nesting has been completed or the permittee shall pay into the Endangered and Threatened Species Mitigation Bank Fund the required mitigation fee commensurate with the actual acreage taken.

(3) For facilities that will have more than a de minimis impact on NYS threatened or endangered grassland birds, the permittee shall implement the following as part of the NCBP:

(i) The permittee shall implement environmental monitoring immediately prior to and during construction in the occupied habitat to search for NYS threatened or endangered species occurrence based on the species' seasonal windows for presence.

(ii) If active nests of the NYS threatened or endangered species are found within the occupied habitat, then the permittee shall coordinate with the NYSDPS and the Office to adjust the limits of disturbance and/or adjust the construction schedule to avoid work in the area until nesting has been completed.

(iii) To avoid direct impacts to NYS threatened or endangered grassland bird species, the following work windows apply for all ground disturbance and construction-related activities, including restoration ~~and equipment/component staging, storage, and transportation~~, within occupied habitat:

(a) In NYS threatened or endangered grassland bird occupied breeding habitat, work shall be conducted only between August 16 and April 22;

(b) In NYS threatened or endangered grassland bird occupied wintering habitat, work shall be conducted only between April 1 and November 14;

(c) In areas of the facility where both breeding and wintering occupied habitat occurs, work shall be conducted only between August 16 and November 14, and between April 1 and 22.

(iv) If fields within identified occupied breeding habitat are planted with row crops (e.g., corn, beans, or vegetables) in the farming season prior to the commencement of facility construction and such fields were historically used for row crops during at least one of the prior five (5)

years, these fields will not be subject to the construction timing restrictions set forth in subparagraphs (iii)(a) and (c) of this paragraph.

(v) If the permittee has identified construction activities that must occur between November 15 and March 31 in identified NYS threatened or endangered grassland bird occupied wintering habitat, or between April 23 and August 15 in identified NYS threatened or endangered grassland bird occupied breeding habitat outside of row crop areas described above, the occupied habitat area(s) proposed for active construction shall be assessed by an on-site environmental monitor or biologist who shall conduct surveys for NYS threatened or endangered grassland bird species. The surveys shall occur weekly until construction activities have been completed in the occupied habitat area, unless otherwise agreed to by the Office. If no NYS threatened or endangered grassland bird species are detected during the survey, the area shall be considered clear for seven (7) days, when another survey shall be performed. If NYS threatened or endangered grassland bird species are detected, the permittee shall comply with subdivision (o)(7) of this section.

(vi) All temporary disturbance or modification of established grassland vegetation communities that occurs as a result of facility construction, restoration, or maintenance activities shall be restored utilizing a native herbaceous seed mix or the pre-existing grassland vegetative conditions by re-grading and re-seeding with an appropriate native seed mix after disturbance activities are completed, unless returning to agricultural production or otherwise specified by the landowner. These temporarily disturbed or modified areas include all areas within the facility site that do not have impervious cover, such as temporary roads, material and equipment staging and storage areas, and electric line rights of way.

(vii) The permittee shall implement the avoidance and minimization measures identified in section 900-2.13 of this Part and the other conditions herein to minimize potential take of the species.

(viii) To the extent that the Office has determined that the facility would result in impacts to grassland bird occupied habitat requiring mitigation, the permittee shall pay the required mitigation fee commensurate with the actual acreage of occupied habitat taken into the Endangered and Threatened Species Mitigation Bank Fund with the sole purpose to

conserve habitat of similar or higher quality or otherwise achieve a net conservation benefit to the impacted species.

(ix) If the permittee proposes a NCBP involving permittee-implemented grassland bird habitat conservation in lieu of payment of a mitigation fee pursuant to subparagraph (viii) of this paragraph, the required mitigation ratio shall be 0.4 acres of mitigation for every acre of occupied grassland bird breeding habitat determined to be taken and 0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat determined to be taken.

(4) For facilities that will impact NYS threatened or endangered bat species, the permittee shall implement the following as part of the NCBP:

(i) No facility component shall be sited or located within one hundred fifty (150) feet of any known northern long-eared bat maternity roost, within five hundred (500) feet of any known Indiana bat maternity roost, or one quarter (0.25) mile of any known northern long-eared bat or Indiana bat hibernaculum.

(ii) If at any time during the life of the wind energy facility, an active NYS threatened or endangered bat species maternity colony roost tree (or structure) is discovered within the facility site, the NYSDPS and the Office shall be notified within twenty-four (24) hours of discovery (during construction) and forty-eight (48) hours of discovery (during operation), and the colony site shall be marked. A five hundred (500)-foot radius around the colony shall be posted and avoided until notice to continue construction, ground clearing, grading, non-emergency maintenance or restoration activities, as applicable, at that site is granted by the NYSDPS or the Office. Power generation at an operating facility may continue. A re-evaluation of the potential impacts of the Project on listed bat species shall be provided to the NYSDPS and Office.

(iii) *Tree Clearing Limitations for Northern Long-eared Bats*

(a) No tree clearing activities shall occur at any time within one hundred fifty (150) feet of any known maternity roost or one quarter (0.25) mile of any known hibernaculum.

(b) All tree clearing activities (except for hazard tree removal to protect human life or property) occurring within one and a half (1.5) miles of a maternity roost site or five (5) miles of a

hibernaculum site, but not subject to clause (a) of this subparagraph, shall be conducted during the hibernation season (between November 1 and March 31) without further restrictions unless otherwise approved by the Office. This limitation does not include trees less than or equal to four (4) inches in diameter at breast height (DBH).

(c) From April 1 to October 31, the following restrictions shall be implemented for all tree clearing activities in ~~the facility site~~ in occupied habitat, unless otherwise agreed by the Office:

(1) The permittee shall leave uncut all snag and cavity trees, as defined under the NYSDEC Program Policy ONRDLF-2 Retention on State Forests, unless their removal is necessary for protection of human life and property. This restriction pertains to trees that are greater than or equal to four (4) inches DBH. When necessary, snag or cavity trees may be removed after being cleared by an environmental monitor who shall conduct a survey for bats exiting the tree. This survey shall begin thirty (30) minutes before sunset and continue until at least one (1) hour after sunset or until it is otherwise too dark to see emerging bats. Unoccupied snag and cavity trees in the approved clearing area shall be removed within forty-eight (48) hours of observation.

(2) If any bats are observed flying from a tree, or from a tree that has been cut, tree clearing activities within distances required in clause (a) of this subparagraph, depending on the potential species present, shall be suspended and the NYSDPS and the Office shall be notified as soon as possible. The permittee shall have an environmental monitor present on site during all tree clearing activities. If any bat activity is noted, a stop work order will immediately be issued and

shall remain in place until such time as the NYSDPS and the Office have been consulted and authorize resumption of work.

(iv) *Tree Clearing Limitations for Indiana Bats.*

(a) No tree clearing activities shall occur at any time within five hundred (500) feet of any known maternity roost or one quarter (0.25) mile of any known hibernaculum.

(b) All tree clearing activities (except for hazard tree removal to protect human life or property) occurring within two and a half (2.5) miles of a maternity roost site or hibernaculum site, but not subject to clause (a) of this subparagraph, shall be conducted during the hibernation season (between November 1 and March 31), without further restrictions unless otherwise approved by the Office. This limitation does not include trees less than or equal to four (4) inches in DBH or locations above three hundred (300) meters in elevation.

(c) From April 1 to October 31, tree clearing within two and a half (2.5) miles of a maternity roost site or hibernaculum site is limited to trees less than or equal to four (4) inches in DBH or locations above three hundred (300) meters in elevation.

(d) Tree clearing may not reduce forest habitat below thirty-five (35) percent of the landcover within two and a half (2.5) miles of the maternity roost site or hibernaculum site.

(v) To minimize impacts to bats from wind facilities, the permittee shall comply with the following requirements:

(a) Curtailment is required for all wind facilities from July 1 – October 1 when wind speeds are at or below five and a half (5.5) m/s and temperatures are at or above ten (10) degrees Celsius (fifty (50) degrees Fahrenheit) from thirty ~~ten (10) (30) minutes~~ before sunset to ~~ten (10) thirty (30)~~ minutes after sunrise. Curtailment shall be on an individual turbine basis and shall be determined by weather conditions as measured by each individual weather station on the turbine nacelle.

(b) The permittee shall submit a review of curtailment operations to the Office as part of the post-construction bat mortality monitoring requirements set forth in the NCBP or every five (5) years (or sooner if requested by the permittee). The review may ~~shall~~ assess if changes in technology or knowledge of impacts to bats supports modification of the existing curtailment regime. Modifications to the existing curtailment regime that ~~further decrease mortality~~ result in the same or less mortality at the same or less cost to the operator may be proposed or negotiated. Any such modifications shall not be costlier than the existing curtailment regime, unless voluntarily supported by the permittee.

(5) For each applicable NCBP, the permittee shall either design and successfully implement a species-specific mitigation plan or pay the required mitigation fee into the Endangered and Threatened Species Mitigation Bank Fund commensurate with the anticipated number of individuals taken with the sole purpose to achieve a net conservation benefit to the impacted species.

(6) To avoid and minimize impacts to bald eagles, the permittee shall implement the following:

(i) If, at any time during construction and operation of the facility, an active bald eagle nest or roost is identified within the facility site, the NYSDPS and the Office shall be notified within forty-eight (48) hours of discovery and prior to any disturbance of the nest or immediate area. An area ~~one quarter (0.25) mile for nests without a visual buffer and~~ six hundred sixty (660) feet in radius for a wind facility and five hundred (500) feet in radius for a solar facility ~~for nests with a visual buffer from the nest tree~~ shall be posted and avoided to the maximum extent practicable until notice to continue construction at that site is granted by the NYSDPS ~~and or~~ the Office. Power generation at an operating facility may continue.

(ii) Tree removal is not allowed:

(a) Within six hundred sixty (660) feet from an active nest during breeding season (January 1 – September 30);

(b) Within one quarter (0.25) mile from an important winter roost during the wintering period (December 1 – March 31); or

(c) Of overstory trees within three hundred thirty (330) feet of an active nest at any time.

(iii) Operational Impacts from Wind Facilities. If at any time during the operation of the facility a bald eagle is injured or killed due to collision with project components, the permittee shall pay the required mitigation fee into the Endangered and Threatened Species Mitigation Bank Fund commensurate with number of eagles taken with the sole purpose to achieve a net conservation benefit to the impacted species.

(7) *Record All Observations of NYS Threatened or Endangered Species.* During construction and restoration of the facility and associated facilities, the permittee shall maintain a record of all observations of NYS threatened or endangered species as follows:

(i) *Construction.* During construction, the on-site environmental monitor shall be responsible for recording all occurrences of NYS threatened or endangered species within the facility site. All occurrences shall be reported in a biweekly monitoring report submitted to the NYSDPS, with a copy to the Office, and such reports shall include the information described in subparagraph (iii) of this paragraph. If a NYS threatened or endangered bird species is demonstrating breeding behavior, it shall be reported to the NYSDPS and the Office within forty-eight (48) hours.

(ii) ~~Restoration~~ *Observation.* After construction is complete, incidental observations of any NYS threatened or endangered species shall be documented and reported to the NYSDPS, with a copy to the Office, in accordance with the reporting requirements in subparagraph (iii) of this paragraph.

(iii) *Reporting Requirements.* All reports of NYS threatened or endangered species shall include the following information: species; number of individuals; age and sex of individuals (if known); observation date(s) and time(s); Global Positioning System (GPS) coordinates of each individual observed (if operation and maintenance staff do not have GPS available, the report shall include the nearest turbine number or solar panel array and cross roads location); behavior(s) observed; identification and contact information of the observer(s); and the nature of and distance to any facility construction, maintenance or restoration activity.

(8) Discovery of Nests or Dead or Injured NYS Threatened or Endangered Bird Species

(i) Excluding Bald Eagles, if an active nest of a federal or NYS threatened or endangered bird species is discovered (by the permittee's environmental monitor or other designated agents) within the facility site, the following actions shall be taken:

(a) The NYSDPS and the Office shall be notified within forty-eight (48) hours of discovery and prior to any further disturbance around the nest, roost, or area where the species were seen exhibiting any breeding or roosting behavior;

(b) An area at least five hundred (500) feet in radius around the active nest shall be posted and avoided until notice to continue construction, ground clearing, grading, maintenance or restoration activities are granted by the Office (Power generation at an operating facility may continue).; and

(c) The active nest(s) or nest tree(s) shall not be approached under any circumstances unless authorized by the Office.

(ii) If any dead or injured federal or NYS threatened or endangered bird species, or eggs or nests thereof, are ~~discovered~~ *identified* by the permittee's on-site environmental monitor or other designated agent at any time during the life of the facility, the permittee shall immediately (within 24 hours) contact the NYSDEC and the United States Fish and Wildlife Service (USFWS) for federally listed species, to arrange for recovery and transfer of the specimen(s). The NYSDPS and the Office shall also be notified. The following information pertaining to the find shall be recorded:

(a) Species;

(b) Age and sex of the individual(s), if known;

(c) Date of discovery of the animal or nest;

(d) Condition of the carcass, or state of the nest or live animal;

(e) GPS coordinates of the location(s) of discovery;

(f) Name(s) and contact information of the person(s) involved with the incident(s) and find(s);

(g) Weather conditions at the facility site for the previous forty-eight (48) hours;

(h) Photographs, including scale and of sufficient quality to allow for later identification of the animal or nest; and

(i) An explanation of how the mortality/injury/damage occurred, if known.

Electronic copies of each record, including photographs, shall be kept with the container holding the specimen(s) and given to the NYSDEC or the USFWS at the time of transfer. If the discovery is followed by a non-business day, the permittee shall ensure all the information listed above is properly documented and stored with the specimen(s). Unless otherwise directed by the NYSDEC or the USFWS, after all information has been collected in the field, the fatality specimen(s) shall be placed in a freezer, or in a cooler on ice until transported to a freezer, until it can be retrieved by the proper authorities.

(9) The provisions of this subdivision (o) of this section shall remain in effect for as long as the relevant species is listed as endangered or threatened in New York State.

(p) *Wetlands, Waterbodies, and Streams*. The permittee shall implement the following procedures for construction within wetlands and adjacent areas subject to ECL Article 24, and waterbodies and streams regulated pursuant to ECL Article 15 (as identified in the delineations approved by the Office pursuant to sections 900-1.3(e) and (f) of this Part):

(1) *Environmentally Sensitive Area (ESA) Flagging*. Prior to performing construction in an ESA, defined herein any NYS-regulated wetlands, waterbodies or streams and associated adjacent areas identified in the delineations approved by the Office pursuant to sections 900-1.3(e) and (f) of this Part, the permittee shall mark the boundaries of the ESA with colored flagging, “protected area” signs, or erosion and sediment control measures specified by the SWPPP. As necessary to prevent access by motorized vehicles into ESAs where no construction is planned, the permittee shall install additional markers or signs stating, “No Equipment Access.”

(2) *Equipment Maintenance and Refueling.* Equipment storage, refueling, maintenance, and repair shall be conducted and safely contained more than one hundred (100) feet from all wetlands, waterbodies, and streams and stored at the end of each workday unless moving the equipment will cause additional environmental impact. Dewatering pumps operating within one hundred (100) feet of wetlands, waterbodies, or streams may be refueled in place and shall be within a secondary containment large enough to hold the pump and accommodate refueling. All mobile equipment, excluding dewatering pumps, shall be fueled in a location at least one hundred (100) feet from wetlands, waterbodies and streams unless moving the equipment will cause additional environmental impact.

(3) *Fuel Storage.* Fuel or other chemical storage containers shall be appropriately contained and located at least three hundred (300) feet from wetlands, waterbodies, and streams.

(4) *Clean Fill.* All fill shall consist of clean soil, sand and/or gravel that is free of the following substances: asphalt, slag, fly ash, demolition debris, broken concrete, garbage, household refuse,

tires, woody materials, and metal objects. Reasonable efforts shall be made to use fill materials that are visually free of invasive species based on onsite and source inspections. The introduction of materials toxic to aquatic life is expressly prohibited.

(5) *Turbid Water.* Turbid water resulting from dewatering operations shall not be allowed to enter any wetland, waterbody, or stream. Water resulting from dewatering operations shall be discharged directly to settling basins, filter bags, or other approved device. All necessary measures shall be implemented to prevent any substantial visible contrast due to turbidity or sedimentation downstream of the work site.

(6) *Truck Washing.* Washing of trucks and equipment shall occur one hundred (100) feet or more from an ESA, and waste concrete and water from such activities shall be controlled to avoid it flowing into a wetland or adjacent area, waterbody or stream. If runoff from such activities flows into any wetlands and adjacent areas subject to ECL Article 24, or waterbodies and streams regulated pursuant to ECL Article 15, the NYSDEC Regional Supervisor of Natural Resources shall be contacted within two (2) hours.

(7) *Concrete Washouts*. Concrete washouts and batch plants, or concrete from truck cleanout activity, any wash water from trucks, equipment, or tools, if done on site, shall be located and installed to minimize impacts to water resources. Locations should be at least one hundred (100) feet from any wetland, waterbody or stream, and located outside wetland adjacent areas to the maximum extent practicable. Disposal of waste concrete or wash water shall be at least one hundred (100) feet from any wetland, waterbody or stream.

(8) *Use of Horizontal Direction Drilling*. Installation of underground collection lines across wetlands, waterbodies and streams shall be performed via HDD to the maximum extent practicable.

(9) *Trenching*. Open cut trenching in wetlands, waterbodies and streams shall be conducted in one continuous operation and shall not exceed the length that can be completed in one (1) day.

(10) *Inadvertent Return Flows*. HDD under wetlands, waterbodies and streams shall be performed in accordance with the inadvertent return flow plan required pursuant to section 900-10.2(f)(5) of this Part.

(11) *Discharge Notice and Response*. The permittee shall notify the NYSDEC, the Office and the NYSDPS within two (2) hours if there is a discharge to an area regulated under Articles 15 or 24 of the ECL resulting in a violation of New York Water Quality Standards at 6 NYCRR Section 703. The permittee shall immediately stop work until authorized to proceed by the Office.

(q) *Wetlands*. The permittee shall implement the following requirements for freshwater wetlands and adjacent areas subject to ECL Article 24:

(1) *Construction in Wetlands and Adjacent Areas*. All construction activities completed within wetlands and/or adjacent areas shall adhere to the following requirements:

~~(i) In breeding areas for NYS threatened or endangered amphibian species, construction should not occur during the peak amphibian breeding season (April 1 to June 15) unless additional measures are implemented to prevent impacts or exclude species from the workspace, such as silt fences. Deviations to the work window may be allowed if approved on-site by a regional DEC biologist~~

(ii) Work should be conducted during dry conditions without standing water or when the ground is frozen, where practicable.

(iii) Excavation, installation, and backfilling in wetlands shall be performed in one continuous operation.

(iv) Temporary construction matting shall be used as necessary to minimize disturbance to the wetland soil profile during all construction and maintenance activities. All temporary construction matting shall be removed as soon as practicable but no later than four months following installation from the wetland and cleaned of any invasive species (seed, plant materials, insects, etc.) after construction/maintenance activities are completed and removal shall be verified with the on-site environmental monitor after construction. Matting shall be removed by equipment stationed on a mat or areas outside the wetland or adjacent area.

(v) In the event that construction results in an unanticipated alteration to the hydrology of a wetland (i.e., lowering), the breach shall be immediately sealed, and no further activity shall take place until the NYSDPS and the Office is notified and a remediation plan to restore the wetland and prevent future dewatering of the wetland has been approved.

(vi) Before trenching occurs, upland sections of the trench shall be backfilled or plugged to prevent drainage of possible turbid trench water from entering the wetland.

(vii) Trench breakers/plugs shall be used at the edges of wetlands as needed to prevent wetland draining during construction.

(viii) In wetland areas, the topsoil shall be removed and stored separate from subsoil. The top twelve (12) inches of wetland topsoil shall be removed first and temporarily placed ~~onto a geo-textile blanket~~ adjacent to the trench.

(ix) Only the excavated wetland topsoil and subsoil shall be utilized as backfill, with the exception of clean bedding material for electrical collection lines and/or conduits, provided there is no change to the pre-construction contours upon restoration; and trench-breakers are used to prevent draining the wetland.

(x) Subsoil dug from the trench shall be side cast on the opposite side of the trench ~~on another geo-textile blanket running parallel to the trench, if necessary.~~

(xi) Trenches shall be backfilled with the wetland subsoil and the wetland topsoil shall be placed back on top. All excess materials shall be completely removed to upland areas more than one hundred (100) feet from the wetland and suitably stabilized.

(xii) When backfilling occurs, the subsoil shall be replaced as needed, and then covered with the topsoil, such that the restored topsoil is the same depth as prior to disturbance.

(xiii) All disturbed soils within wetlands and adjacent areas shall be seeded with an appropriate native wetland seed mix, shrubs, live stakes, or tree planting as site conditions and design allow, as appropriate for existing land uses. Straw mulch shall be maintained until the disturbed area is permanently stabilized. Hay shall not be used for mulching of wetlands or adjacent areas.

(xiv) In agricultural or farmed wetlands, crop covers consistent with existing agricultural uses shall be utilized in all areas of soil disturbance.

(xv) Installation of underground collection lines in wetlands shall be performed using the following methods:

(a) The permittee shall implement best management practices to minimize soil compaction;

(b) During excavation, all topsoil shall be stripped and segregated from subsoils. The permittee shall consolidate trenching areas to the maximum extent practicable to minimize impacts to agricultural soils;

(c) All reasonable efforts shall be made to backfill open trenches within the same workday if rain is predicted and as soon as practicable otherwise; and

(d) All excess materials shall be completely removed from wetlands to upland areas. Excess topsoil from agricultural areas shall be spread within the immediate agricultural areas within the approved LOD, or within other nearby areas that will still be used for agricultural production.

(2) Wetland Restoration.

(i) Wetland restoration shall be completed according to the approved Wetland Restoration and Mitigation Plan submitted pursuant to section 900-10.2(f)(2) of this Part.

(ii) The permittee shall restore disturbed areas, ruts, and rills within of NYSDEC-regulated wetlands and adjacent areas to original grades and conditions with permanent native re-vegetation and erosion controls appropriate for those locations.

(iii) Restoration of temporary impacts to NYS-regulated wetlands and adjacent areas (as delineated pursuant to section 900-1.3(e) of this Part) to pre-construction contours shall be completed within forty-eight (48) hours of final backfilling of the trench/excavated areas and restored to pre-construction contours as soon as practicable.

(iv) Immediately upon completion of grading, and as consistent with existing land use/land cover, the area shall be seeded with an appropriate native species mix for wetlands and upland areas adjacent to wetlands, except that adjacent areas may be reseeded differently at the request of the landowner. (v) The permittee shall attain eighty (80) percent vegetative cover across all disturbed soil areas by the end of the first full growing season following construction. Overall vegetative cover in restored areas shall be monitored for a minimum of five (5) years. Post-construction monitoring shall continue until an eighty (80) percent survivorship of native woody species or eighty-five (85) percent absolute cover of native herbaceous species appropriate wetland indicator status has been reestablished over all portions of the replanted area, unless the invasive species baseline survey indicates a smaller percentage of survivorship or cover of appropriate native species exists prior to construction.

(3) *Cut Vegetation.* Cut vegetation in wetlands, with the exception of invasive species, may be left in place (i.e., drop and lop or piled in dry or seasonally saturated portions of wetlands and adjacent areas to create wildlife brush piles).

(4) *Access Roads Through Wetlands.* Installation of access roads through wetlands shall be performed using the following methods:

(i) Temporary access roads shall use timber/construction matting that is completely removed after construction/maintenance activities are completed and removal shall be verified with the NYS DPS by the on-site

environmental monitor after construction, or by the facility operator after maintenance work is completed.

(ii) Permanent access roads shall use a layer of geotextile fabric and a minimum of six (6) inches of gravel shall be placed in the location of the wetland crossing after vegetation and topsoil is removed. Access roads shall be designed and constructed to adequately support the type and frequency of the anticipated vehicular traffic and include suitable culverting or other drainage infrastructure as needed to minimize the impact to wetland hydrology.

(5) *Solar Panel Support Installation.* Installation and construction techniques shall minimize the disturbance of the wetland soil profiles (e.g., the use of helical screws and driven H-pile with no backfilling for solar arrays sites in wetlands).

(6) *Tree Clearing.* Tree clearing shall be minimized to the extent practicable in wetlands and adjacent areas.

(7) *Fill Placement.* The placement of fill in wetlands shall be designed to maintain pre-construction surface water flows/conditions between remaining on- or off-site waters and to prevent draining of the wetland or permanent hydrologic alteration. This may require the use of culverts and/or other measures. Construction activity and final design shall not restrict or impede the passage of normal or expected high flows.

(8) *Concrete Use.* For activities involving the placement of concrete into regulated wetlands, watertight forms shall be used. The forms shall be dewatered prior to the placement of the concrete. The use of tremie-supplied concrete is allowed if it complies with NYS water quality standards.

(9) *Stormwater Setback.* Any new stormwater management infrastructure shall be located outside of the wetland and adjacent area to the extent practicable.

(10) *Mitigation.* The permittee shall implement the approved Wetland Restoration and Mitigation Plan submitted pursuant to section 900-10.2(f)(2) of this Part.

(r) *Work in NYS-protected waters.* The permittee shall implement the following:

(1) *Dry Conditions*. In-stream work shall only occur in dry conditions, using appropriate water handling measures to isolate work areas and direct stream flow around the work area. Any waters accumulated in isolated work areas shall be discharged to an upland settling basin, field, or wooded area to provide for settling and filtering of solids and sediment before water is return to the stream. If measures fail to divert all flow around the work area, in-stream work shall stop until dewatering measures are functioning properly.

(2) *In-Water Work Windows*. In-stream work shall be prohibited from September 15 through May 31 in cold water fisheries and March 15 through July 15 in warm water fisheries unless the permittee receives site-specific approval from the Office or the deviation is approved on-site by a regional DEC biologist.

(3) *Stream Channels*. The restored stream channel shall be equal in width, depth, gradient, length and character to the pre-existing stream channel and tie in smoothly to the profile of the stream channel upstream and downstream of the disturbance. The planform of any permanent stream shall not be changed, unless dictated by restoration or mitigation objectives. All disturbed stream banks shall be mulched within two (2) days of final grading, stabilized with one hundred (100) percent natural or biodegradable fiber matting, and seeded with an appropriate riparian seed mix.

(4) *Felled Trees in an ESA*. Trees shall not be felled into an ESA stream or its stream bank. Snags which provide shelter in streams for fish shall not be disturbed unless they cause serious obstructions, scouring or erosion.

(5) *Culvert Repairs*. If a culvert is blocked or crushed, or otherwise damaged by construction or maintenance activities, the permittee shall repair the culvert or replace it with alternative measures appropriate to maintaining proper drainage, embedment and aquatic connectivity.

(6) *Access Road Crossings of Streams*. The creation, modification or improvement of any permanent road crossing of a NYS-protected waterbody shall meet the following requirements:

- (i) New culvert pipes that the permittee is required to install shall be designed to safely pass the one (1) percent annual chance storm event;
- (ii) Culvert pipes shall be embedded beneath the existing grade of the stream channel;

(iii) Width of the structure shall be a minimum of one and a quarter (1.25) times the width of the mean high-water channel, as practicable; and

(iv) The culvert slope shall remain consistent with the slope of the adjacent stream channel. For slopes greater than three (3) percent, an open bottom culvert shall be used.

(7) *Overhead Lines Across NYSDEC-Protected Streams.* If construction of overhead power line crossings requires cutting of trees or shrubs within fifty (50) feet of a NYS-protected waterbody:

(i) Cut materials shall be left on the ground; and

(ii) Stumps and root systems shall not be damaged to facilitate stump sprouting.

(8) *Stream Flows.* During periods of work activity, flow immediately downstream of the work site shall equal flow immediately upstream of the work site. If measures fail to divert all flow around the work area, in-stream work shall stop until dewatering measures are functioning properly.

(9) *No Aquatic Impediments.* In-stream work, including the installation of structures and bed material, but excluding dewatering associated with dry trench crossings, shall not result in an impediment to aquatic organisms. All fish trapped within cofferdams shall be netted and returned, alive and unharmed, to the water outside the confines of the cofferdam, in the same stream.

(10) *Drop Height.* Any in-stream structures placed in a stream shall not create a drop height greater than six (6) inches.

(11) *Restoration and Mitigation.* The permittee shall implement the approved Stream Restoration and Mitigation Plan submitted pursuant to section 900-10.2(f)(3) of this Part.

(s) *Agricultural Resources.*

(1) In all instances in which the applicant for a solar facility proposes to permanently or temporarily impact active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within NYS Agricultural Land Classified Mineral Soil Groups 1 through 4, the permittee shall:

(i) Construct the facility consistent with the NYSAGM “Guidelines for Solar Energy Projects-Construction Mitigation for Agricultural Lands”, dated

10/18/2019 (see section 900-15.1(m)(1)(i) of this Part), to the maximum extent practicable; and

(ii) Hire an independent, third-party agricultural monitor to oversee compliance with agricultural conditions and requirements, including the approved Agricultural Plan required pursuant to section 900-2.16(c) of this Part, the approved Remediation Plan required pursuant to section 900-2.16(d) of this Part and any approved co-utilization plan prepared according to section 900-2.16(e). The Office, in consultation with the NYSAGM, shall verify and approve the qualifications required to fulfill the role of the agricultural monitor have been met. If the Office, in consultation with the NYSAGM, agrees that the independent third-party monitor is qualified on agricultural issues, one monitor can act as both the general environmental monitor as well as the agricultural-specific environmental monitor.

(2) In all instances in which the applicant for a wind facility proposes to permanently or temporarily impact active agricultural lands (i.e., land in active agriculture production defined as active three (3) of the last five (5) years) within NYS Agricultural Land Classified Mineral Soil Groups 1 through 4, the permittee shall:

(i) Construct the facility consistent with the NYSAGM “Guidelines for Agricultural Mitigation for Wind Power Projects”, revised 4/19/2018 (see section 900-15.1(m)(1)(ii) of this Part), to the maximum extent practicable; and

(ii) Hire an independent, third-party agricultural monitor to oversee compliance with agricultural conditions and requirements, including the approved Agricultural Plan required pursuant to section 900-2.16(c) of this Part and the approved Remediation Plan required pursuant to section 900-2.16(d) of this Part. The Office, in consultation with the NYSAGM, shall verify and approve the qualifications required to fulfill the role of the agricultural monitor have been met. If the Office, in consultation with the NYSAGM, agrees that the independent third-party monitor is qualified on agricultural issues, one monitor can act as both the general environmental monitor as well as the agricultural-specific environmental monitor.

(t) *Hazardous Materials*. The permittee shall comply with the NYSDEC-approved Site Management Plan for the facility site, or any portion thereof, if applicable.

(u) *Cultural Resources Avoidance, Minimization and Mitigation Plan*. The permittee shall implement the approved Cultural Resources Avoidance, Minimization and Mitigation Plan required in section 900-10.2(g) of this Part.

§900-6.5 Facility Operation

(a) *Noise Limits for Wind Facilities and (b) Noise Standards for Solar Facilities*:
Recommended changes to the sound provisions of the ORES proposal are being submitted by ACE NY to ORES in a separate document.

(c) *Operational Compliance*. The permittee shall operate the facility to abide by applicable rules and regulations of the PSL and 16 NYCRR with respect to matters such as enforcement, investigation, safety and reliability. The permittee shall abide by standard Good Utility Practice, and abide by all rules, guidelines and standards of the serving utilities, the New York Independent System Operator (NYISO), the Northeast Power Coordinating Council (NPCC), the New York State Reliability Council (NYSRC), the North American Electric Reliability Corporation (NERC) and successors. When applied to the permittee, the term “Good Utility Practice” shall mean the standards applicable to an independent power producer connecting to the distribution or transmission facilities or system of a utility.

(d) *Annual Inspection*. The permittee shall have an annual inspection program for its facilities. An annual inspection report shall summarize maintenance and inspection activities performed and include details of any repairs undertaken. Reports shall identify any major damage, defects or other problems, or indicate that no such damage, defect or problem was found. Reports shall be made readily available upon request by the NYSDPS or the Office.

(e) *Equipment Replacement*. Replacement of major facility components with different make, model, size, or other material modification, shall be subject to review and approval of the Office pursuant to section 900-11.1 of this Part.

(f) *Interconnection Changes*. Throughout the life of the facility, the permittee shall provide a copy of the following interconnection documents to the secretary of the NYSDPS, with a copy to the Office:

- (1) Any updates or revisions to the Interconnection Agreement or Facility Agreements between the permittee, the serving utilities and NYISO; and

(2) Any System Reliability Impact Study (SRIS) required as part of a future facility modification or update, performed in accordance with the NYISO Open Access Transmission Tariff (OATT) (see section 900-15.1(n)(1)(i) of this Part).

(g) Facility Transmission Interconnection Related Incidents.

(1) The permittee shall contact the NYSDPS Emergency Line within one (1) hour to report any transmission related incident on its owned and operated interconnection facilities which affects the operation of the facility, or that poses a public safety concern, and shall provide notification to the Office within twenty-four (24) hours.

(2) The permittee shall file with the secretary of the NYSDPS a report on any such incident, upon request within seven (7) days, and provide a copy of the report to the serving utility and the Office. The report shall contain, when available, copies of applicable drawings, descriptions of the equipment involved, a description of the incident and a discussion of how future occurrences will be prevented.

(h) Facility Malfunction

(1) In the event of any catastrophic incident, including but not limited to blade failure, fire, tower collapse or other catastrophic event involving the facility and its associated equipment, the permittee shall notify the Office and the NYSDPS no later than twelve (12) hours following such an event.

(2) In the event of a malfunction of the facility or facility components which causes a significant reduction in the capability of such facility to deliver power for an extended duration (i.e., expected to last longer than one (1) month), the permittee shall promptly file with the NYSDPS, and provide to the serving utility and the Office, copies of all notices, filings, and other substantive written communications with the NYISO as to such reduction, any plans for making repairs to remedy the reduction, and the schedule for any such repairs.

900-6.6 Decommissioning

(a) The permittee shall implement the approved Decommissioning Plan as required by section 900-2.24 of this Part. The permittee shall adhere to all state laws and regulations in effect at the time of decommissioning regarding the disposal and recycling of components.

(b) The financial security regarding decommissioning and site restoration activities shall be in the form of a letter of credit (LOC) or other financial assurance approved by the Office, and shall be established by the permittee to be held by each City, Town, or Village hosting facility

components. The total amount of the financial security created for the Cities, Towns, or Villages shall be equal to the net decommissioning and site restoration estimate; the net decommissioning and site restoration estimate is equal to the gross decommissioning and site restoration estimate (which is the overall decommissioning and site restoration estimate plus a ten (10) fifteen (15) percent contingency cost) less the total projected salvage value of facility components; reference to salvage value data shall also be included in the Decommissioning and Site Restoration Plan required at 900-2.24 of this Part. If the permittee and the host municipalities cannot come to an agreement as to the appropriate amount of financial security to be provided, the Office shall make the final determination. The financial security shall remain active until the facility is fully decommissioned. The LOC shall be irrevocable and state on its face that it is expressly held by and for the sole benefit of the specific Town, City, or Village.

(c) Fifty (50) percent of the financial security or bond is due prior to construction (based on the results of the initial decommissioning study), and fifty (50) percent is due in year 10. The second installment is contingent on an updated decommissioning plan to ensure that salvage and removal costs are accurate.

Subpart 900-7

§900-7.1 Amendment of an application

- (a) Pending applications may only be amended pursuant to this section. Pending applications may be supplemented prior to issuance of the recommended decision or within 30 days of the issues determination if there are adjudicable issues. ~~prior to issuance of a notice of complete application. In addition, a major amendment to the application may only be filed with the express written permission of the Office, as set forth in this section.~~
- (b) Requests regarding an application change ~~for Permission to Submit an Amendment~~
- (1) An applicant wishing to amend or supplement a pending application shall submit a written request to the Office, setting forth:
 - (i) The proposed change to the application;
 - (ii) A justification as to why such changes are required; and
 - (iii) An anticipated timeframe for resubmission (if not already included with the request).
 - (2) The Office shall review the request and, within fifteen (15) days of receipt thereof, inform the permittee as to its determination as to whether such changes constitute a minor amendment to be processed by the Office without change to the statutory timeframes; ~~or~~ a major amendment subject to subdivisions (c), (d) and (e) of

this section; ~~or an application supplement which shall be submitted to the record of the proceeding.~~

(c) Submission of a Major Amendment to an Application

- (1) An applicant shall submit only those application materials that reflect changes from the original submission, including a redlined version of the relevant materials.
- (2) If the applicant proposes to increase the nameplate capacity of the facility, the applicant shall submit any additional required payment to the local agency account simultaneously with its request for a major amendment.
- (3) The applicant shall publish notice of the major amendment, clearly identifying the changes from the original application and notice thereof, in accordance with section 900-1.6 of this Part.

(d) The time for the Office to make its completeness determination on the original application shall be suspended while the ORES is reviewing a request to amend a pending application.

(e) All applicable statutory time frames for completeness determination, publication of draft permit conditions and final determination on the application shall run from the submission of a major amendment in accordance with subdivision (c) of this section.

Subpart 900-8 Hearing process

§900-8.1. Publication of draft siting permit.

(a) No later than sixty (60) days following the date upon which an application has been deemed complete ~~and following consultation with any relevant state agency or authority,~~ the ORES shall publish on its website for public comment *a combined notice of availability of draft permit conditions, public comment period and public comment hearing, and issues determination, as defined in section 900-8.2(d) of this Part* ~~draft permit conditions prepared by the Office~~ or a statement of intent to deny.

(b) ~~No later than sixty (60) days following the date upon which an application has been deemed complete, a combined notice of availability of draft permit conditions or statement of intent to deny, public comment period and public comment hearing, and issues determination, as defined in section 900-8.2(d) of this Part, shall be published on the ORES website.~~

§900-8.2 Notice of hearing.

(a) *When notice is required.* Unless otherwise provided by statute or regulation, the Office of Hearings shall publish notice of a public comment hearing (as set forth in section 900-8.1~~(b)~~ (a) of this Part) ~~or adjudicatory hearing~~ on the Office's website and provide notice to the applicant and to persons who have made written request to participate. The applicant shall

provide for and bear the cost of publication of the notice in a newspaper having general circulation in the area within which the proposed project is located. The notice shall be published at least once, and not less than twenty-one (21) days prior to the hearing date. These requirements are minimums and the assigned ALJ shall direct the applicant to provide additional notice or to provide the notice further in advance of the hearing where the ALJ finds it necessary to do so in order to adequately inform the potentially affected public about the hearing. Where the ALJ finds that a large segment of the potentially affected public has a principal language other than English, the ALJ shall direct the publication of the notice in a foreign language newspaper(s) serving such persons. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in this Part without the applicant's consent.

(b) *Required contents of notice.* The notice shall be in the form specified by the Office and shall contain the following information:

- (1) The date of issuance of the notice of hearing, the date of the notice of complete application, and the date of publication of the draft siting permit conditions or statement of intent to deny;
- (2) The date, time, location and purpose of the hearing and any pre-hearing conference, if scheduled. The location shall be in the Town, Village or City in which the project is located, as reasonably near the project site as practicable, depending upon the availability of suitable venues. However, another location may be selected based on the convenience of parties and witnesses at the discretion of the ALJ;
- (3) The name and address of the applicant or permittee;
- (4) That the application is seeking a siting permit, with citations to applicable Section 94-c of the Executive Law and this Part 900;
- (5) A description of the project;
- (6) The accessibility and location for review of the available application materials, and the draft siting permit conditions or statement of intent to deny.

(c) *Optional contents.* The notice may also specify the issues of concern to the ORES and the public.

(d) *Combined notice of availability of draft permit conditions or statement of intent to deny, public comment period and public comment hearing, and issues determination.* In addition to the contents of a notice required by subdivision (b) and (c) of this section, the combined notice shall contain the following information:

- (1) The deadline and instructions for filing public comments on the draft permit conditions or statement of intent to deny by mail or at a public comment hearing,

and of the provisions for their review. The period for filing public comments shall be a ~~maximum~~ minimum of sixty (60) days from the date of issuance of the combined notice;

- (2) The date, time, and location of the public comment hearing scheduled pursuant to section 900-8.3(a) of this Part;
- (3) Notice of commencement of the issues determination procedure required by section 9008.3(b) of this Part and instructions for filing a petition for party status pursuant to section 9008.4 of this Part. The period for filing a petition for party status shall be a minimum of sixty (60) days from the date of issuance of the combined notice; and
- (4) The deadline and instructions to municipalities to file the statement of compliance with local laws and regulations required by section 900-8.4(d) of this Part.

(e) *Service on specific persons.* Not less than twenty-one (21) days prior to the hearing date, individual copies of the notice shall be sent to the chief executive officer of any municipality in which any part of the project is located, or municipality which may be adversely impacted by the project and such other persons as the Office deems to have an interest in the application. The ALJ shall direct the applicant to provide notice further in advance of the hearing to those persons specified in this subdivision where the ALJ finds it necessary to do so in order to adequately inform them about the hearing. Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in this Part without the applicant's consent.

§900-8.3 Public comment hearing and issues determination.

(a) *Public comment hearing.*

- (1) Not less than sixty (60) days from the date of issuance of the combined notice required by section 900-8.2(d) of this Part, a public comment hearing shall be convened to hear and receive the unsworn statements of parties and non-parties relating to the siting permit application. A stenographic transcript of such statements shall be made but shall not be part of the record of the hearing, as defined by section 900-8.11 of this Part.
- (2) The ALJ may require that lengthy statements be submitted in writing and summarized for oral presentation.
- (3) The statements made at the public comment hearing shall not constitute evidence, but may be used by the ALJ as a basis to inquire further of the parties and potential parties at the issues determination stage.

(b) *Issues determination.*

- (1) In the combined notice required by section 900-8.2(d) of this part, the mandatory parties identified in section 900-8.4(b) and any ~~prospective potential~~ parties shall be provided with the opportunity to file papers concerning potential substantive and significant issues, which shall be determined in advance of the adjudicatory hearing. The issues determination procedure shall be conducted solely on papers, unless the ALJ, in their sole discretion, determines that oral argument is necessary to fully understand the issues proposed by the parties and ~~prospective potential~~ parties. At the ALJ's discretion, an issues determination may be revisited at any time prior to the issuance of a final decision in order to consider issues based on new information upon a showing that such information was not reasonably available at the time of the issues determination. Upon a demonstration that such information raises a new significant and substantial issue that must be adjudicated, ~~the public review period for the application prior to the issues determination was insufficient to allow prospective potential parties to adequately prepare for the issues determination procedure~~, the ALJ may adjourn the issues determination, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the ~~prospective~~ parties.
- (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 set forth in subdivision (c) of this section;
 - (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.
- (3) The ALJ shall preside over the issues determination procedure. Participants shall include Office Staff, staff from other involved State agencies, the applicant, and any person who has filed a petition for party status pursuant to section 900-8.4(c) of this Part.

(4) Thirty (30) days from the Notice of Draft Permit, parties must submit their issues statement. The applicant shall have fifteen (15) days to submit their responses to filed issues statements, and the ALJ's shall make an issues determination no later than 30 days after the Public Comment Hearing. Within fifteen (15) days after the close of the public comment period, the filing of petitions for party status, or the filing of a statement of compliance with local laws and regulations, whichever event occurs later:

- (i) Office Staff may file and serve a response to any petitions for party status, any statement of issues by applicant, and the statement of compliance with local laws and regulations.
- (ii) The applicant may file and serve a response to any petition for party status or statement of compliance with local laws and regulations. In addition, the applicant shall file and serve on Office Staff a response to public comments received during the public comment period, including any supplemental information.

(5) In no event later than thirty (30) days after the date of receipt of written submissions for issues determination and responses thereto, the ALJ shall:

- (i) Determine which persons will be granted party status;
- (ii) Determine which issues satisfy the requirements for being adjudicable issues as set forth in subdivision (c) of this section, and define those issues as precisely as possible;
- (iii) Rule on the merits of any legal issue where ruling does not depend on the resolution of disputed issues of fact;
- (iv) Decide any pending motions to the extent practicable; and
- (v) Summarize comments received on the application and draft permit conditions or intent to deny.

(c) *Standards for adjudicable issues.*

(1) *Generally applicable rules.* Subject to the limitations set forth in paragraphs (6) and (7) of this subdivision, 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.
- (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. In determining whether such a demonstration has been made, 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.
- (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.
- (4) In situations where Office Staff has reviewed an application and finds that a component of the applicant's 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.
- (5) If the ALJ determines that there are no adjudicable issues, the ALJ shall direct that no adjudicatory hearing be held and that Office Staff continue processing the application to issue the requested siting permit, including issuance of a written summary and assessment of public comments received during the public comment period on issues not otherwise addressed in the ALJ's ruling.
- (6) The completeness of an application, as defined in this Part, shall not be an issue for adjudication.
- (7) ORES-initiated modifications. The only issues that may be adjudicated are those related to the basis for modification cited in the Office's notice to the permittee. Whenever such issues are proposed for adjudication, the determination to require adjudication shall be made according to the standards set forth in paragraph (1) of this subdivision.

§900-8.4 Hearing participation.

- (a) Participation in the adjudicatory hearing may be as a full party or as *amicus*, depending upon the demonstrated compliance with the criteria set forth in subdivisions (b) through (e) of this section. Nonparties who wish to have their comments recorded shall be permitted to submit oral or written comments during the public comment portion of the proceedings, or as otherwise provided by the ALJ, as set forth in this Part. Such public statements shall not constitute evidence in the adjudicatory hearing but may be used by the ALJ as a basis to inquire further of all parties and potential parties at the issues determination stage.
- (b) *Mandatory parties.* The applicant and assigned Office Staff are full parties to the proceeding. Other State and local agencies are full parties to the proceeding if they were consulted during the preapplication or application process, or if issues related to the jurisdiction or authority of those agencies are joined for adjudication in the rulings on issues provided for in section 900-8.3(c) of this Part.
- (1) *Applicant's statement of issues:* No later than the date set in the combined notice provided for in section 900-8.2(d) of this Part for the filing of petitions for party status, or an earlier date set in the exercise of the ALJ's discretion, the applicant shall file and serve on Office Staff a statement of issues the applicant intends to raise with respect to any determination of the Office. The applicant shall serve the statement of issues on persons filing petitions for party status within five (5) days of such filing. The applicant's statement of issues shall:
- (i) identify an issue for adjudication which meets the criteria of section 900-8.3(c) of this Part; and
 - (ii) present an offer of proof specifying the witness(es), the nature of the evidence the applicant expects to present and the grounds upon which the assertion is made with respect to that issue.
- (c) *Other parties.* By the date set in the combined notice provided for in section 900-8.2(d) of this Part, a person desiring party status shall file a petition in writing which includes the requirements of either paragraphs (1) and (2) or paragraphs (1) and (3) of this subdivision.
- (1) Required contents of petition for party status:
- (i) demonstrate that the proposed party is a resident of the community in which the proposed facility will be located or is a resident located within one (1) mile of a proposed solar facility or within five (5) miles of a proposed wind facility or is a non-profit organization that can demonstrate a concrete and localized interest that may be

affected by the proposed facility and that such interest has a significant nexus to their mission;

- (ii) Identification of the proposed party together with the name(s), address, telephone number and email address of the person or persons who will act as representative of the party;
 - (iii) Statement of the petitioner's interest related to the standards and conditions established by the ORES for the siting, design, operation, and construction of the project;
 - (iv) Identification of any interest relating to statutes administered by other State agencies or the ORES relevant to the project;
 - (v) Statement as to whether the petition is for full party or *amicus* status;
 - (vi) Identification of the precise grounds for opposition or support.
- (2) Additional contents required for petitions for full party status:
- (i) Identification of an adjudicable issue(s) which meets the criteria set forth in section 900-8.3(c) of this Part; and
 - (ii) 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 each issue identified.
- (3) Additional contents required for petitions for *amicus* status:
- (i) identify the nature of the legal or policy issue(s) to be briefed which meets the criteria of section 900-8.3(c) of this Part; and
 - (ii) provide a statement explaining why the proposed party is in a special position with respect to that issue.
- (4) Inadequate petition. If a potential party fails to file a petition in the form set forth in this subdivision, the ALJ may deny party status or may require additional information from the petitioner.
- (5) Supplementation of petitions. Where the ALJ finds that a prospective party did not have adequate time to prepare its petition for party status, the ALJ shall provide an opportunity for supplementation of the petition.
- (d) *Statement of compliance with local laws and regulations.* No later than the date set in the combined notice provided for in section 900-8.2(d) for the filing of petitions for party status, or an earlier date no less than sixty (60) days from the issuance of the combined notice set in the exercise of the ALJ's discretion, any municipality, political subdivision or an agency

thereof that has received notice of the filing of an application shall file and serve on Office Staff and the applicant a statement indicating whether the proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations, if any, concerning the environment, or public health and safety. The applicant shall serve the municipality's statement on persons filing petitions for party status within five (5) days of such filing. Any municipality, political subdivision or an agency thereof that proposes to adjudicate any issues related to a facility's compliance with local laws and regulations shall file a petition for party status as provided for in subdivision (c) of this section, and shall include the statement of compliance with local law and regulation in the petition. *If the municipality, political subdivision or an agency proposes to adjudicate an issue regarding compliance with a local law or regulation that is addressed by a uniform standard and condition, the burden of establishing the need for a more stringent standard is borne by the party raising the issue.*

(e) *Late filed petitions for party status.*

(1) Petitions filed after the date set in the combined notice provided for in section 900-8.2(d) of this Part shall not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision.

(2) In addition to the required contents of a petition for party status, a petition filed late shall include the following in order to receive any consideration:

- (i) A demonstration that there is good cause for the late filing;
- (ii) A demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
- (iii) A demonstration that participation will materially assist in the determination of adjudicable issues raised in the proceeding.

(f) *Rulings on party status.* Rulings on party status shall be made by the ALJ after the deadline for receipt of petitions for party status and responses thereto and shall be set forth in the rulings on issues provided for in section 900-8.3(c) of this Part.

(1) Full party status. The ALJ's ruling of entitlement to full party status shall be based upon:

- (i) A finding that the petitioner has filed an acceptable petition pursuant to subdivisions (c)(1) and (2) of this section;
- (ii) *A finding that the petitioner has a sufficient local nexus to the proposed facility, and resides within one mile of a proposed solar facility or five miles of a proposed wind facility, or represents individuals who reside within one mile of a proposed solar facility or five miles of a proposed wind facility;*

- (iii) 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; and
- (iv) A demonstration of adequate interest related to the standards and conditions established by the ORES for the siting, design, operation, and construction of the project.

(2) Amicus status. The ALJ's ruling of entitlement to *amicus* status shall be based upon:

- (i) A finding that the petitioner has filed an acceptable petition pursuant to subdivisions (c)(1) and (3) of this section;
- (ii) A finding that the petitioner has identified a legal or policy issue which needs to be resolved by the hearing; and
- (iii) A finding that the petitioner has a sufficient interest in the resolution of such issue and through expertise, special knowledge or unique perspective may contribute materially to the record on such issue.

(g) *Rights of parties.*

(1) A full party has the right to:

- (i) Engage in and conduct disclosure of any other party to the proceeding;
- (ii) Participate at the hearing in person or through an authorized representative;
- (iii) Present relevant evidence and cross-examine witnesses of other parties;
- (iv) Present argument on issues of law and fact;
- (v) Initiate motions, requests, briefs or other written material in connection with the hearing, and receive all correspondence to and from the ALJ and to and from all other parties which is circulated to the parties generally;
- (vi) Appeal adverse rulings of the ALJ; and
- (vii) Exercise any other right conferred on parties by this Part or the SAPA.

(2) A party with *amicus* status has the right to file a brief and, at the discretion of the ALJ, present oral argument on the issue(s) identified in the ALJ's ruling on its party status but does not have any other rights of participation or submission.

(h) *Loss of party status.* Upon determining that the party or its representative has failed to comply with the applicable laws, rules or directives of the ALJ and has substantially disrupted the hearing process or prejudiced the rights of another party to the proceeding, the ALJ may revoke the party status of the offending party.

§900-8.5 General rules of practice.

(a) *Service.*

(1) CPLR 2103 governs service of papers except that papers may be served by a party and service upon the party's duly authorized representative may be made by the same means as provided for service upon an attorney. Notwithstanding any other rule to the contrary, service may be made by transmission of papers by electronic transmission, such as email or facsimile, if agreed to in advance by the parties or authorized by the ALJ.

(2) Proof of service shall be made in the same manner as under the CPLR. Any required filing or proof of service shall be filed with the ALJ.

(3) When service of papers by electronic transmission, such as facsimile or email, is agreed to in advance by the parties or authorized by the ALJ, the parties shall ~~simultaneously~~ send a copy of the papers transmitted electronically ~~to the recipient~~ by first class mail to any party without electronic access or capability.

(b) *Computation of time limits.*

(1) The rules of New York State General Construction Law Sections 20 and 25-a govern the computation of time limits.

(2) If a period of time prescribed under this Part is measured from the date of service of a paper or the date of the issuance of a ruling, decision or other communication instead of the date of service,

(i) five (5) days are added to the prescribed period if service or issuance is by first class mail;

(ii) one (1) day is added to the prescribed period if service or issuance is by overnight delivery;

(iii) if service or issuance is by facsimile transmission only, as agreed to or authorized pursuant to subdivision (a)(1) of this section, the service is complete upon the receipt by the sender of a signal from the equipment of the party served that the transmission was received; and

(iv) if service or issuance is by email only, as agreed to or authorized pursuant to subdivision (a)(1) of this section, the service is complete upon transmission. Service by email is not complete upon transmission if the serving party receives notification that the papers sent by email did not reach the person to be served.

(c) *Motion practice.*

- (1) Motions and requests made at any time are part of the record. Motions and requests prior to any hearing shall be in writing. All motion papers shall be filed by ~~personal delivery or first-class mail~~ electronic transmission with the ALJ, together with proof of service of the motion on all parties. In addition to filing by electronic means ~~personal delivery or mail~~, an ALJ may authorize the parties to file additional copies of motions by personal delivery or mail ~~electronic means to any party without electronic access or capability~~. During the course of the adjudicatory hearing, motions may be made orally except where otherwise directed by the ALJ. If no ALJ has been assigned to the proceeding, the motion shall be filed by personal delivery or first-class mail with the Deputy Executive Director of the Office.
- (2) Every motion shall clearly state the relief requested, and the legal arguments and any facts on which the motion is based.
- (3) All parties have five (5) days after a motion is served to serve a response. Thereafter no further responsive papers shall be allowed without permission of the ALJ. All responsive papers shall be filed by personal delivery or first-class mail with the ALJ, together with proof of service on all parties. An ALJ may authorize the parties to file additional copies of the responsive papers by electronic means.
- (4) The ALJ should rule on a motion within five (5) days after a response has been served or the time to serve a response has expired. The ALJ shall rule on all pending motions prior to the close of any adjudicatory hearing. Any motion not ruled upon prior to the close of an adjudicatory hearing shall be deemed denied.
- (5) Where a standard of review applicable to a motion or request is not otherwise provided for in this Part, other sources of standards, including statutory law such as SAPA and the CPLR, case law, and administrative precedent, may be consulted.

(d) *Office of Hearings.*

- (1) Prior to the appointment of an ALJ to hear a particular proceeding, the Executive Director of the Office may take any action which an ALJ is authorized to take.
- (2) The Executive Director of the Office may establish a schedule for hearing pretrial motions and other matters for proceedings that have no assigned ALJ.

(e) ~~Expedited Appeals. The time periods for expedited appeals filed pursuant to section 900-8.7(d)(2) of this Part are as follows:~~

- (1) ~~Expedited appeals pursuant to section 900-8.7(d)(2)(i) of this Part shall be filed with the Executive Director and ALJ in writing within five (5) days of the date of the~~

~~disputed ruling. All parties have five (5) days after a notice of expedited appeal is served to serve a response to the appeal. Only the Executive Director shall determine whether further responsive pleadings after the responses will be allowed. The parties shall file one (1) original and three (3) copies of any papers filed pursuant to this paragraph.~~

~~(2) Motions for permission to appeal pursuant to section 900-8.7(d)(2)(ii) of this Part shall be filed with the Executive Director and ALJ in writing within five (5) days of the date of the disputed ruling. All parties have five (5) days after a motion for permission to appeal is served to serve a response to the motion. The parties shall file one (1) original and three (3) copies of any papers filed pursuant to this paragraph.~~

~~(3) Upon being granted permission to appeal, appellant shall file and serve the appeal in writing within five (5) days of permission being granted. Thereafter the other parties may file a response in support of or in opposition to the appeal within five (5) days of service of the appeal.~~

- (f) Video recording or televising the adjudicatory hearing for rebroadcast is prohibited by Section 52 of the New York State Civil Rights Law.
- (g) All rules of practice involving time frames may be modified by direction of the ALJ or the Executive Director and, for the same reasons, any other rule may be modified by the Executive Director upon recommendation of the ALJ or upon the Executive Director's own initiative.

§900-8.6 Disclosure.

- (a) *Prior to the issues determination.* Discovery is limited to what is afforded under the Freedom of Information Law (New York Public Officers Law – Access to Records). In the absence of extraordinary circumstances, the ALJ shall not grant petitions for further disclosure. This provision does not alter the rights of any person under the Freedom of Information Law, nor does it limit the ability of any party to seek disclosure after the issues determination is made.
- (b) *Without permission of the ALJ.* Within ten (10) days after service of the final designation of the issues, any party has the right to serve a disclosure demand for any adjudicable issue upon any other party demanding that party provide:
 - (1) Documents, in general conformance with CPLR Section 3120(a)(1)(i);
 - (2) A list of witnesses to be called, their addresses, and the scope and content of each witness's proposed testimony, and the qualifications and published works of each, in general conformance with CPLR Section 3101(d)(1), except that disclosure of fact witnesses as well as expert witnesses may be demanded;

- (3) Upon a showing of need, ~~A~~ an inspection of property, in general conformance with CPLR Section 3120(a)(1)(ii), except that drilling and other intrusive sampling and testing is not provided as of right;
- (4) A request for admission, in general conformance with CPLR Section 3123; or
- (5) Lists of documentary or physical evidence to be offered at the hearing.
- (6) Upon a showing of need, ~~E~~electronically stored information (ESI). Unless authorized by the ALJ, disclosure of ESI is limited only to ESI that is located in a computer's memory or in storage media (including servers, desktop or laptop computers, tablets, cellphones, hard drives, flash drives, compact discs, digital video discs, and portable media players) that is immediately available in the normal course of business.

(c) *By permission*. With permission of the ALJ, a party may:

- (1) Obtain discovery prior to the issues conference;
- (2) Use discovery devices from the CPLR not provided for in subdivision (b) of this section;
- (3) Submit late requests for discovery or vary the time for responding to requests; and
- (4) Access real property in the custody or control of another for the purpose of conducting drilling or other sampling or testing. In such instance, all parties shall be given notice of such activities and be allowed to observe and to take split samples or use other specified methods of verification.
- (5) Upon motion of any party demonstrating substantial prejudice, the ALJ may order additional disclosure of ESI beyond that provided for in subdivision (b) of this section, subject to any terms and conditions deemed appropriate by the ALJ. Such a motion shall be accompanied by an affirmation of an attorney, or an affidavit of the moving party if not represented by an attorney, describing the good faith efforts to resolve the dispute without resort to a motion.

(d) *Protective order and motion to compel*.

- (1) A party against whom disclosure is demanded may make a motion to the ALJ for a protective order, in general conformance with CPLR 3103 to deny, limit, condition or regulate the use of any disclosure device in order to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice. Such a motion shall be submitted within ten (10) days of the disclosure demand and shall be accompanied by an affidavit of counsel, or by the moving party or other authorized representative if not represented by counsel, reciting good faith efforts to resolve the dispute without resort to a motion.

(2) If a party fails to comply with a disclosure demand without having made a timely objection, the proponent of the disclosure demand may apply to the ALJ to compel disclosure. The ALJ may direct that any party failing to comply with disclosure after being directed to do so by the ALJ suffer preclusion from the hearing of the material demanded. Further, a failure to comply with the ALJ's direction will allow the ALJ or the Executive Director to draw the inference that the material demanded is unfavorable to the noncomplying party's position.

(e) *Pre-filed testimony.* The ALJ shall require the submission of pre-filed written testimony for fact and expert witnesses in advance of an adjudicatory hearing. Such testimony shall be attested to at the hearing and the witness shall be available to be cross-examined on the testimony, unless otherwise stipulated by the parties and directed by the ALJ. Pre-filed written testimony shall provide, or shall be accompanied by, a technical report which provides, a full explanation of the basis for the views set forth therein, including data, tables, protocols, computations, formulae, and any other information necessary for verification of the views set forth, as well as a bibliography of reports, studies and other documents relied upon. Upon ten (10) days notice (which time may be shortened or extended by the ALJ), the party submitting pre-filed written testimony may also be required to make available all raw data, laboratory notes, and other basic materials, as well as all items on the bibliography provided. **The ALJ is permitted to allow the filing of rebuttal testimony at his or her discretion.**

~~(f) *Subpoenas.* Consistent with the CPLR, any attorney of record in a proceeding has the power to issue subpoenas. A party who is not represented by an attorney admitted to practice in New York State may request the ALJ or if no ALJ has been assigned to the proceeding, the Executive Director, to issue a subpoena, stating the items or witnesses needed by the party to present its case. The service of a subpoena is the responsibility of its sponsor. In addition, the sponsor shall be responsible for all costs arising from the issuance of or compliance with the subpoena. A subpoena shall give notice that the ALJ may quash or modify the subpoena pursuant to the standards set forth under CPLR Article 23. This Part does not affect the authority of an attorney of record for any party to issue subpoenas under the provisions of CPLR Section 2302.~~

§900-8.7 Conduct of the adjudicatory hearing

(a) *Order of events.* The ALJ has discretion to determine and adjust the order of events and presentation of evidence, and to establish procedures to promote the conduct of a fair and efficient hearing. In general, the order of events at a hearing shall be as follows:

(1) Formal opening. The ALJ shall convene the hearing by opening the record, identifying the applications involved, and making appropriate procedural announcements.

- (2) Noting appearances. The ALJ shall call the name of each person who has been granted status as a party.
- (3) Opening statements. Prior to the commencement of the adjudicatory sessions, each party may, at its option, offer a brief opening statement of position on the application.
- (4) Admission of evidence. The applicant shall present its direct case first and shall start by identifying all documents which constitute the application, any supplements to the application, and all supporting documents which are relevant to the issues to be adjudicated. A panel of witnesses may be used for presenting testimony or for cross-examination at the ALJ's discretion. Cross-examination shall be conducted by parties in a sequence to be established by the ALJ, which normally will be the sequence in which the parties will present their direct cases. The evidence shall be confined to that which is relevant to issues identified in the ALJ's written issues determination.
- (5) Close of record. Closing statements of position will be dealt with in the same manner as opening statements. At the concluding session of the hearing, the ALJ shall determine whether to allow the submission of written post-hearing briefs. The hearing record shall be officially closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, ~~or the submission of briefs and reply briefs,~~ conclusions of law, memoranda, and exceptions, if any, by the various parties, whichever occurs last. The ALJ shall notify the applicant by certified mail, and all other parties by regular mail, immediately upon official closing of the hearing record.
- (6) Where the ALJ permits the filing of briefs, the ALJ shall also determine page limits for said briefs and whether replies will be permitted and the schedule for filing. Simultaneous filing shall normally be required. A party shall give specific reference to the portions of the record, whether transcript or otherwise, relied upon in support of the respective statements of fact made throughout the brief. Briefs shall be considered only as argument and shall not refer to or contain any evidentiary material outside of the administrative record.

(b) *The ALJ.*

- (1) In proceedings pursuant to this Part, the ALJ has power to:
 - (i) Rule upon all motions and requests, including those that decide the ultimate merits of the case;
 - (ii) Set the time and place of the hearing, recesses and adjournments;
 - (iii) Administer oaths and affirmations;

- (iv) Issue subpoenas upon request of a party not represented by counsel admitted to practice in New York State. Subpoenas issued by the ALJ are regulated by the Civil Practice Law and Rules;
- (v) Upon the request of a party, quash and modify subpoenas except that in the case of a non-party witness the ALJ may quash or modify a subpoena regardless of whether or not a party has so requested;
- (vi) Summon and examine witnesses;
- (vii) Establish rules for and direct disclosure at the request of any party or upon the ALJ's own motion pursuant to the procedures set out in section 900-8.6 of this Part;
- (viii) Admit or exclude evidence including the exclusion of evidence on grounds of privilege or confidentiality;
- (ix) Hear and determine arguments on fact or law;
- (x) Preclude irrelevant, immaterial or unduly repetitious, tangential or speculative evidence, argument, examination or cross-examination;
- (xi) Direct the consolidation of parties with similar viewpoints and input;
- (xii) Limit the number of witnesses;
- (xiii) Utilize a panel of witnesses for purposes of direct testimony or cross-examination;
- (xiv) Allow oral argument, so long as it is recorded;
- (xv) Take any measures necessary for maintaining order and the efficient conduct of the proceeding;
- (xvi) Issue orders limiting the length of cross-examination, the form, length and content of motions and briefs and similar matters;
- (xvii) Order a site visit, on notice to all parties; and
- (xviii) Exercise any other authority available to ALJs under this Part or to presiding officers under SAPA Article 3.

(2) Impartiality of the ALJ and motions for recusal.

- (i) The ALJ shall conduct the proceeding in a fair and impartial manner.
- (ii) An ALJ shall not be assigned to any proceeding in which the ALJ has a personal interest.

(iii) Any party may file with the ALJ a motion in conformance with section 900-8.5(c) of this Part, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause. Such motions shall be determined as part of the record of the proceeding.

(3) The designation of an ALJ as the Executive Director's representative shall be in writing and filed in the Office of Hearings.

(c) Appearances.

(1) A party may appear in person or be represented by an attorney licensed in New York State or any other jurisdiction, or by a non-attorney chosen by the party. Any representative of a party who is other than an attorney licensed to practice in New York State shall disclose his or her qualifications to the party. All persons appearing before the ALJ shall conform to the standards of conduct required of attorneys appearing before the courts of the State of New York. Any person signing any papers submitted in or entering an appearance in any proceeding shall be considered to have agreed to conform to those standards. A failure to conform to those standards shall be grounds for exclusion from that and any later proceeding. Nothing in this paragraph authorizes a non-lawyer to engage in the practice of law.

(2) Any person appearing on behalf of a party in a representative capacity may be required by the ALJ to show and state on the record the person's authority to act in such capacity and to file a notice of appearance with the ALJ.

(3) If there is a change or withdrawal of a party's attorney or authorized representative, the party shall provide notice of the change or withdrawal to the ALJ and the attorneys or authorized representatives of all other parties, or, if a party appears without an attorney or authorized representative, to the party within ten (10) days of the change or withdrawal.

(d) Appeals of ALJ rulings.

(1) Any ALJ ruling may be appealed to the Executive Director after the completion of all testimony as part of a party's final brief or by notice of appeal and appeal where no final brief is provided for. Where no final brief is provided for, the appellant shall file the notice of appeal and appeal within five (5) days after service of the notice of the official closing of the hearing record.

(i) An ALJ ruling pursuant to section 900-8.3(c)(5) that finally resolves all issues in a proceeding may be appealed to the Executive Director by notice of appeal and appeal. The appellant shall file the notice of appeal and appeal within five (5) days of the ALJ's ruling.

- (ii) The notice of appeal and appeal shall be served on all parties and filed with the Executive Director and the ALJ. All parties have five (5) days after an appeal is served to serve and file a response to the appeal. Only the Executive Director shall determine whether further responsive pleadings after the responses will be allowed. The parties shall file one original and three copies of any papers filed pursuant to this paragraph.
 - (2) During the course of the proceeding, in conformance with section 900-8.5(e) of this Part, the following rulings may be appealed to the Executive Director on an expedited basis:
 - (i) Any ruling in which the ALJ has denied a motion for recusal; and
 - (ii) Any other ruling of the ALJ that does not finally resolve all issues in the proceeding, by seeking permission to file an expedited appeal upon a demonstration that the failure to decide such an appeal would be unduly prejudicial to one of the parties or would result in significant inefficiency in the hearing process. In all such cases, the Executive Director's determination to entertain the appeal on an expedited basis is discretionary.
 - (3) A motion for permission to file an expedited appeal shall demonstrate that the ruling in question falls within the criteria set forth in subparagraph (2)(ii) of this subdivision.
 - (4) The Executive Director may review any ruling of the ALJ on an expedited basis upon the Executive Director's determination or upon a determination by the ALJ that the ruling should be appealed.
 - (5) Whenever the Executive Director grants permission to file an expedited appeal, the parties shall be notified. The appellant shall be provided the opportunity to file a brief on appeal and the other parties shall be provided with the opportunity to file a response to the appeal.
 - (6) Failure to file an expedited appeal or the denial of permission to file an expedited appeal shall not preclude an appeal from the ruling to the Executive Director after the hearing.
 - (7) The hearing shall not be adjourned while an appeal or motion for permission to appeal is pending except by permission of the ALJ or the Executive Director.
- (e) *Expedited Appeals*. The time periods for expedited appeals filed pursuant to section 900-8.7(d)(2) of this Part are as follows:
- (1) Expedited appeals pursuant to section 900-8.7(d)(2)(i) of this Part shall be filed with the Executive Director and ALJ in writing within five (5) days of the date of the

disputed ruling. All parties have five (5) days after a notice of expedited appeal is served to serve a response to the appeal. Only the Executive Director shall determine whether further responsive pleadings after the responses will be allowed. The parties shall file one (1) original and three (3) copies of any papers filed pursuant to this paragraph.

(2) Motions for permission to appeal pursuant to section 900-8.7(d)(2)(ii) of this Part shall be filed with the Executive Director and ALJ in writing within five (5) days of the date of the disputed ruling. All parties have five (5) days after a motion for permission to appeal is served to serve a response to the motion. The parties shall file one (1) original and three (3) copies of any papers filed pursuant to this paragraph.

(3) Upon being granted permission to appeal, appellant shall file and serve the appeal in writing within five (5) days of permission being granted. Thereafter the other parties may file a response in support of or in opposition to the appeal within five (5) days of service of the appeal.

§900-8.8 Evidence, burden of proof and standard of proof.

(a) Evidence.

- (1) All evidence submitted shall be relevant and all rules of privilege shall be observed. However, other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if it falls within one or more of the exceptions provided by CPLR Article 45 or other law, ~~or is shown to be reasonably reliable, relevant and probative.~~ Any admissible hearsay must be shown to be reasonably reliable, relevant and probative. The burden of establishing an exception rests upon the proponent of the statement.
- (2) Although relevant, evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, waste of time or needless presentation of repetitious or duplicative evidence.
- (3) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence.
- (4) Each witness shall be sworn or make an affirmation before testifying. Opening, closing and other unsworn statements are not evidence but shall be considered as arguments bearing on evidence.
- (5) The ALJ or the Executive Director may take official notice of all facts of which judicial notice could be taken and of other facts within the specialized knowledge of the Office. When official notice is taken of a material fact not appearing in the evidence in the record and of which judicial notice could not be taken, every party shall be

given notice thereof and, on timely request, be afforded an opportunity, prior to the final decision of the Executive Director, to dispute the fact or its materiality.

(b) *Burden of proof.*

- (1) The applicant has the burden of proof to demonstrate that its proposal shall be in compliance with all applicable laws and regulations administered by the Office.
- (2) Where the Office has initiated a permit modification, the Office Staff bears the burden of proof to show that the modification is supported by the preponderance of the evidence.
- (3) Where an application is made for permit modification, the permittee has the burden of proof to demonstrate that the modified permitted activity is in compliance with all applicable laws and regulations administered by the Office. A demonstration by the permittee that there is no substantive change in the originally permitted activity, environmental conditions or applicable law and regulations constitutes a prima facie case for the permittee.
- (4) The burden of proof to sustain a motion shall be on the party making the motion.

(c) *Standard of proof.* Whenever factual matters are involved, the party bearing the burden of proof shall sustain that burden by a preponderance of the evidence unless a higher standard has been established by statute or regulation. This subdivision does not modify or supplement the questions that may be raised in a proceeding brought pursuant to CPLR Article 78.

§900-8.9 Ex parte rule.

- (a) Except as provided below, an ALJ shall not directly or through a representative, communicate with any person in connection with any issue that relates in any way to the merits of the proceeding without providing notice and an opportunity for all parties to participate.
- (b) An ALJ may consult on questions of law or procedures with supervisors or other staff in the Office of hearings, provided that such supervisors or staff have not been engaged in investigative or prosecutorial functions in connection with the adjudicatory proceeding under consideration or a factually related adjudicatory proceeding.
- (c) An ALJ and the Chief ALJ may communicate with any person on ministerial matters, such as scheduling or the location of a hearing.
- (d) Parties or their representatives shall not communicate with the ALJ, the Chief ALJ or the Executive Director, or any person advising or consulting with any of them, in connection with any issue without providing proper notice to all the other parties.

§900-8.10 Payment of hearing costs.

- (a) Within thirty (30) days of the last day at which testimony is taken, the applicant shall pay for the cost of: physical accommodations, if not held in Office or department facilities; publishing any required notices; and any necessary stenographic transcriptions. Except that, when a hearing is held pursuant to an Office initiated modification, suspension or revocation, the Office shall be responsible for the costs listed above.
- (b) The ALJ may require that the applicant post a bond or other acceptable financial guarantee for the costs of the hearing. Such guarantee shall be provided to the Office prior to commencing the hearing or the hearing shall be adjourned until the guarantee is made available.
- (c) If the applicant has not paid the costs of the hearing referred to in subdivision (a) of this section by the date on which the final siting permit is issued, a requirement to submit such payment shall be included as a pre-construction requirement in the final siting permit.

§900-8.11 Record of the hearing.

- (a) All proceedings at a hearing shall be stenographically reported. The ALJ may arrange for a certified reporter to produce a stenographic transcript of the hearing or may permit the applicant to make such arrangements. When a stenographic transcript is made, an original and two (2) copies of the transcript shall be delivered to the ALJ at the expense of the applicant. At the ALJ's discretion, part or all of the transcripts may also be required in electronic or other form.
- (b) The record of the hearing shall include the application (including any supplements to the application) and all notices (including the notice of hearing) and motions; conditions; any affidavit of publication of the notice of hearing; the transcript of the testimony taken at the hearing, the exhibits entered into evidence; any motions, appeals or petitions; any admissions, agreements or stipulations; a statement of matters officially noticed; offers of proof, objections thereto and rulings thereon; proposed findings; and the recommended decision and hearing report; and briefs as may have been filed including any comments on the recommended decision and hearing report filed pursuant to section 900-8.12 of this Part.
- (c) As soon as the record becomes available, the ALJ shall assure that a complete and current copy of the record is placed in an accessible location for the parties' reference and/or copying.

§900-8.12 Final decision.

- (a) *Recommended decision and hearing report.*

(1) The ALJ shall issue a recommended decision and hearing report to the Executive Director and the parties within forty-five (45) days after the close of the record. The report shall include findings of fact, conclusions of law and recommendations on all issues before the ALJ.

(2) All parties to the proceeding have fourteen (14) days after receipt of the recommended decision and hearing report to file comments with the Executive Director. The Executive Director has the sole discretion to authorize responses to comments and any further responsive filings.

(3) Office Staff has fourteen (14) days after receipt of the recommended decision and hearing report to submit to the Executive Director a written summary and assessment of public comments received during the public comment period on issues not otherwise addressed in the recommended decision and hearing report.

(b) *Stipulations.* A stipulation executed by all parties resolving any or all issues removes such issue(s) from further consideration in the proceeding. Within five (5) days of the execution of a stipulation, the applicant shall serve a copy of the fully executed stipulation on all parties and file a copy of the fully executed stipulation with the ALJ. Upon receipt of an executed stipulation that resolves all issues in the proceeding, the ALJ shall close the proceeding and remand the matter to Office Staff to continue processing the application to issue the requested siting permit.

(c) *Final decision.* The final decision of the Executive Director shall be issued within thirty (30) days after receipt of all comments on the recommended decision and hearing report.

(d) *Reopening the record.* At any time prior to issuing the final decision, the Executive Director or the ALJ may direct that the hearing record be reopened to consider significant new evidence.

Subpart 900-9 §900-9.1 Final determination on applications

(a) The Office shall mail to the applicant and its representative, if applicable, a determination in the form of: a permit, including all applicable uniform standards and conditions and any site-specific conditions, or a statement that the permit applied for has been denied, with an explanation for the denial, as follows:

(1) Within six (6) months of the Office deeming the application complete for major renewable energy facilities in which the proposed site is a repurposed site as defined by this Part; or

(2) Within one (1) year of the Office deeming the application complete for all other major renewable energy facilities.

(3) *Within 8 months of the completeness determination if no adjudicatory hearing is held and all permit conditions have been agreed to by the applicant.*

(b) Upon mutual consent of the applicant and the Office, the time periods set forth in subdivision (a) of this section may be extended up to an additional thirty (30) days.

Subpart 900-10 Compliance Filings §900-10.1 Office decisions on compliance filings

(a) Compliance filings required pursuant to section 900-10.2 shall be submitted to the Office. The Office shall review the filing and, within ~~sixty (60)~~ thirty (30) days of receipt thereof, inform the permittee as to whether the compliance filing has been approved. The Office shall not issue a Notice to Proceed with Construction until each such filing is received and approved, as necessary.

(1) If the Office determines that a compliance filing cannot be approved, it shall detail all deficiencies identified and any additional information that shall be provided by the permittee.

(2) The permittee shall resubmit the compliance filing within sixty (60) days of receipt of a notice of deficiency. If the permittee believes it will take more than sixty (60) days to address the deficiencies, it shall request an extension of the time to resubmit within thirty (30) days of receipt of the notice of deficiency.

(3) The Office shall review the revised filing and, within ~~sixty (60)~~ fifteen (15) days thereof, inform the permittee as to whether the revised filing has been approved.

(b) Compliance filings required pursuant to section 900-10.3 of this Part shall be submitted to the NYSDPS. The NYSDPS shall review the filing and, within ~~sixty (60)~~ thirty (30) days of receipt thereof, inform the permittee whether the compliance filing has been approved.

(1) If the NYSDPS determines that a compliance filing cannot be approved, it shall detail all deficiencies identified and any additional information that shall be provided by the permittee.

(2) The permittee shall resubmit the compliance filing within sixty (60) days of receipt of a notice of deficiency. If the permittee believes it will take more than sixty (60) days to address the deficiencies, it shall request an extension of the time to resubmit within thirty (30) days of receipt of the notice of deficiency.

(3) The NYSDPS shall review the revised filing and, within ~~sixty (60)~~ fifteen (15) days thereof, inform the permittee as to whether the revised filing has been approved.

§900-10.2 Pre-Construction Compliance Filings

(a) Copies of all federal and federally-delegated permits and approvals required for construction ~~and operation~~ of the facility.

(b) Final Decommissioning.

(1) Final Decommissioning and Site Restoration Plan, including a decommissioning and site restoration estimate (for site restoration and decommissioning of all proposed Facility components removed four (4) feet below grade in agricultural land and three (3) feet below grade in non-agricultural land and removal and restoration of access road locations, where appropriate) and proof that the letter(s) of credit (or other financial assurance approved by the ORES) have been obtained in the decommissioning and site restoration estimate amount, as calculated pursuant to 900-6.6(b) of this Part.

(2) Letter(s) of credit (or other financial assurance approved by the ORES) and copies of agreements between the permittee and the Towns, Cities, and Villages, establishing a right for each municipality to draw on the letters of credit dedicated to its portion of the facility shall be provided to the Office of Renewable Energy Siting after one year of facility operation and updated every fifth year thereafter specifying changes (due to inflation or other cost increases) to the structure of the letters of credit (or other financial assurance approved by the ORES).

(c) Plans, Profiles, and Detail Drawings.

(1) A statement shall be provided indicating that a professional engineer has reviewed facility details and attests to the accuracy of the final design as reflected in revised and initially filed (unaffected material) maps, site plans, profile figures, and environmental controls and construction details in accordance with sections 900-2.6 and 900-2.17 of this Part.

(2) Foundation drawings, including plan and sections details, to be used for wind turbines or solar facility installations; if multiple foundation designs are to be utilized for the facility, the foundation type at each location will be specified on foundation plans (listed in a table or indicated on corresponding site plans). Applicable criteria

regarding foundation design and installation shall be listed and described in the drawings. Foundation drawings shall be stamped and signed by a professional engineer, licensed and registered in New York State.

- (3) Copies of any agreements entered with the owners/operators of existing high-pressure gas pipelines regarding the protection of those facilities.

(d) Wind Turbine Certifications.

- (1) A design verification, confirming that the wind turbines were designed in accordance with International Electrotechnical Commission (IEC) 61400-1 (see section 900-15.1(b)(1)(i) of this Part). Confirmation must be submitted prior to the pouring of foundations.

(e) Construction Management.

- (1) A Quality Assurance and Control Plan, which shall include job titles and qualifications necessary, demonstrating how the permittee will monitor and assure conformance of facility design, engineering and installation, including general concrete testing procedures with a plan outlining the monitoring and testing of concrete procedures in conformance with and reference to all applicable codes and standards.
- (2) A Construction Operations Plan, which shall indicate all material lay-down areas, construction preparation areas, temporary concrete batch location, major excavation and soil storage areas, and construction equipment.
- (3) ~~A Facility Maintenance and Management Plan, which shall include plans, procedures and criteria specifically addressing the following topics:~~
 - (i) ~~Inspections, maintenance, and repairs of turbines, solar panels, inverters, and associated equipment, including conformance with manufacturer's required maintenance schedules, safety inspections, and tower integrity; and~~
 - (ii) ~~Electric collection, transmission, and interconnect line inspections, maintenance, and repairs.~~
- (4) ~~A Vegetation Management Plan, which shall include, at a minimum, the following:~~

- (i) ~~Vegetation management practices for switchyard and substation yards and for transmission and interconnection facilities, including danger trees (trees that due to location and condition are a particular threat to fall on and damage electrical equipment) around transmission and interconnection facilities, specifications for clearances, inspection and treatment schedules, and environmental controls to avoid off-site effects;~~
- (ii) ~~Vegetation management recommendations, based on on-site surveys of vegetation cover types and growth habits of undesirable vegetation species;~~
- (iii) ~~Planting of native vegetation, based on on-site surveys of vegetation cover types and growth habits of undesirable vegetation species;~~
- (iv) ~~Restoration of disturbed areas, ruts, and rills to original grades and conditions with permanent re-vegetation and erosion controls appropriate for those locations;~~
- (v) ~~All proposed chemical and mechanical techniques for managing undesirable vegetation. Herbicide use and limitations, specifications, and control measures shall be included;~~
- (vi) ~~Substation fence line clearances, and overhead wire security clearance zone specifications, indicating applicable safety, reliability and operational criteria;~~
- (vii) ~~Inspection and target treatment schedules and exceptions;~~
- (viii) ~~Standards and practices for inspection of facilities easements for erosion hazard, failure of drainage facilities, hazardous conditions after storm events or other incidents;~~
- (ix) ~~Review and response procedures to avoid conflicts with future use encroachment or infrastructure development; and~~
- (x) ~~Host landowner notification procedures.~~

- (5) Facility Communications Plan, which shall include the permittee's construction organizational structure, contact list, and protocol for communication between parties. The permittee shall provide to NYSDPS staff, Office staff and the municipalities the names and contact information of all individuals responsible for facility oversight.
- (6) Environmental Monitoring Plan, including names and qualifications of companies that will serve as environmental monitors (including agricultural monitor).
- (7) A Complaint Management Plan, which shall describe, at a minimum, the following:
 - (i) Methods for registering a complaint, which shall include a phone number, email address, mailing address, and a form to report complaints;
 - (ii) Notification to the public of the complaint procedures;
 - (iii) Process for responding to and resolving complaints in a consistent, timely, and respectful manner;
 - (iv) Logging and tracking of all complaints received and resolutions achieved, with records of the following for each complaint containing:
 - (a) The name and contact information of the person filing the complaint;
 - (b) Location and owner of the property where the complaint originated;
 - (c) Date and time of the underlying event causing the complaint;
 - (d) Description of the complaint; and
 - (e) Current status and description of measures taken to resolve complaint.
 - (v) Reporting to the Office and the NYSDPS any complaints not resolved within thirty (30) days of receipt;
 - (vi) Mediating complaints not resolved within sixty (60) days; and

(vii) Providing annual reports of complaint resolution tracking to the Office staff and NYSDPS staff, which shall also be filed with the Executive Director of the Office and Secretary of the NYSDPS.

(8) A Traffic Control Plan shall be in effect during facility construction, to ensure safety and minimize potential delays to local traffic during construction, which shall describe, at a minimum, the following:

(i) Maps and plans showing final haul routes developed in consultation with the host municipalities and NYS, County and municipal highway officials in coordination with the turbine manufacturer. Final haul routes shall be accurately depicted in drawings submitted with the Traffic Control Plan.

(ii) Copies of all necessary transportation permits from the affected State, County, and municipal agencies for such equipment and/or materials on such route. Such permits shall include but not be limited to: Highway Work Permits to work within the ROW, permits to exceed posted weight limits, Highway Utility Permits to construct facilities within ROW, Traffic Signal Permits to work within ROW, Special Haul Permits for oversize/overweight vehicles, and Divisible Load overweight Permits.

(iii) Copies of all necessary agreements with utility companies for raising or relocating overhead wires where necessary to accommodate the oversize/overweight delivery vehicles, if applicable.

(iv) A copy of all road use and restoration agreements, if any, between the permittee and landowners, municipalities, or other entities, regarding repair of local roads damaged by heavy equipment, construction or maintenance activities during construction and operation of the facility.

(f) Environmental.

(1) Proof that the required payment was made into the Endangered and Threatened Species Mitigation Bank Fund, if required.

(2) A copy of the Wetland Restoration and Mitigation Plan, if required.

(3) A copy of the Stream Restoration and Mitigation Plan, if required.

(4) A copy of the Invasive Species Control and Management Plan (ISCMP), prepared in compliance with 6 NYCRR Part 575, which shall include the following information:

(i) Baseline mapping of all invasive species within the facility area and for one hundred (100) feet beyond the facility's limit of disturbance (LOD). The baseline mapping and data shall include the relative abundance and distribution of each invasive species prior to the commencement of any construction activities;

(ii) Identification of specific control, removal, and disposal measures to be implemented for each identified and mapped invasive species/plant community during construction activities. The ISCMP shall include a detailed sequence and schedule for all mechanical and chemical control measures to be implemented during construction activities;

(iii) A detailed monitoring plan and specific sampling protocols for each identified and mapped invasive species/plant community within the facility area and for one hundred (100) feet beyond the LOD;

(iv) Identification of specific control contingency measures to be implemented as part of the ISCMP for each identified and mapped invasive species for the duration of the facility adaptive management and monitoring period (i.e., 5 years, unless extended). The ISCMP shall include a detailed sequence and schedule for all contingency mechanical and chemical control measures to be implemented during the monitoring period;

(v) Specific contingency measures to be implemented (i.e., regrading, re-planting of native species etc.) to achieve the final site restoration criteria (i.e., eighty (80) percent survivorship of appropriate native species reestablishment over all portions of the replanted areas, unless the baseline survey indicates a smaller percentage of appropriate species exists prior to construction);

(vi) Details regarding the responsible party or parties designated to implement the

ISCMP and what financial assurances exist to ensure successful monitoring and ISCMP implementation; and

(5) A copy of an Inadvertent Return Flow Plan containing the following requirements:

- (i) Erosion and sediment control shall be used at the point of HDD, so that drilling fluid shall not escape the drill site and enter NYS-regulated wetlands, waterbodies and streams (as delineated pursuant to section 900-1.3(e) and (f) of this Part). The disturbed area shall be restored to original grade and reseeded upon completion of HDD;
- (ii) Drilling fluid circulation shall be maintained to the extent practical;
- (iii) If inadvertent returns occur in upland areas, the fluids shall be immediately contained and collected; and
- (iv) If the amount of drilling fluids released is not enough to allow practical collection, the affected area shall be diluted with freshwater and allowed to dry and dissipate naturally.

(g) A copy of a Cultural Resources Avoidance, Minimization and Mitigation Plan, providing:

(1) ~~A demonstration that impacts of construction and operation of the facilities on cultural resources (including archeological sites and any stone landscape features, and historic resources) will be avoided or minimized to the extent practicable by selection the proposed facility's location, design and/or implementation of identified mitigation measures.~~

(2) A Cultural Resources Mitigation and Offset Plan, either as adopted by federal permitting agency in subsequent National Historic Preservation Act (NHPA) Section 106 review, or as proposed in the Application Supplements and as revised in further consultation with New York State Historic Preservation Office (SHPO) in the event that the NHPA Section 106 review does not require that the mitigation plan be implemented, or as further supplemented pending any negotiations among parties. Proof of mitigation funding awards for offset facility implementation to be provided within two (2) years of the start of construction of the facility shall be included.

(h) Real Property Rights.

(1) A copy of all necessary titles to or leasehold interests in the facility, including ingress and egress access to public streets, and such deeds, easements, leases, licenses, or

other real property rights or privileges as are necessary for all interconnections for the facility.

- (2) Map of survey of facility site properties with property lines based on metes and bounds survey.
- (3) Notarized memos or similar proof of agreement for any participating property whose owner has signed a participation agreement or other type of addressing potential facility impacts (e.g., noise, shadow flicker, setback, etc.).

(i) A copy of any Interconnection Agreements (IA).

(j) Documentation of all host community benefits to be provided by the permittee.

§900-10.3 Post-Construction Compliance Filings.

(a) Any updated information regarding the design, safety and testing for the wind turbines, solar panel, inverters, substation, transformer, and battery storage equipment to be installed during construction as well as information regarding the design, safety, and testing for any equipment installed during facility operation as a replacement of failed or outdated equipment shall be filed within fourteen (14) days of completion of all final post-construction restoration.

(b) As-built plans in both hard and electronic copies shall be filed within nine (9) months of the commencement of commercial operations of the facility and shall include the following:

- (1) GIS shapefiles showing all components of the facility (wind turbine locations, solar panel array locations, electrical collection system, substation, buildings, access roads, met towers, point of interconnection, etc.);
- (2) Collection circuit layout map; and
- (3) Details for all facility component crossings of, and co-located installations of facility components with, existing pipelines: showing cover, separation distances, any protection measures installed, and locations of such crossings and co-located installations.

- (c) A Facility Maintenance and Management Plan, which shall include plans, procedures and criteria specifically addressing the following topics:
- (1) Inspections, maintenance, and repairs of turbines, solar panels, inverters, and associated equipment, including conformance with manufacturer's required maintenance schedules, safety inspections, and tower integrity; and
 - (2) Electric collection, transmission, and interconnect line inspections, maintenance, and repairs.
- (d) A Vegetation Management Plan, which shall include, at a minimum, the following:
- (1) Vegetation management practices for switchyard and substation yards and for transmission and interconnection facilities, including danger trees (trees that due to location and condition are a particular threat to fall on and damage electrical equipment) around transmission and interconnection facilities, specifications for clearances, inspection and treatment schedules, and environmental controls to avoid off-site effects;
 - (2) Vegetation management recommendations, based on on-site surveys of vegetation cover types and growth habits of undesirable vegetation species;
 - (3) Planting of native vegetation, based on on-site surveys of vegetation cover types and growth habits of undesirable vegetation species;
 - (4) Restoration of disturbed areas, ruts, and rills to original grades and conditions with permanent re-vegetation and erosion controls appropriate for those locations;
 - (5) All proposed chemical and mechanical techniques for managing undesirable vegetation. Herbicide use and limitations, specifications, and control measures shall be included;
 - (6) Substation fence-line clearances, and overhead wire security clearance zone specifications, indicating applicable safety, reliability and operational criteria;
 - (7) Inspection and target treatment schedules and exceptions;
 - (8) Standards and practices for inspection of facilities easements for erosion hazard, failure of drainage facilities, hazardous conditions after storm events or other incidents;

(9) Review and response procedures to avoid conflicts with future use encroachment or infrastructure development; and

(10) Host landowner notification procedures.

Subpart 900-11 Modifying, transferring or relinquishing permits

§900-11.1 Permit modifications requested by Permittee

(a) An application by the permittee to modify an existing permit including an approved compliance filing shall contain:

(1) A statement, including supporting information, setting forth the proposed permit or approved compliance filing modifications, identifying the existing condition(s) the permittee is requesting to be modified and whether the permittee considers such change to be a minor or major modification; and

(2) A statement that there are no outstanding permit violations at the facility.

(b) The Office shall review the request and inform the permittee with thirty (30) days as to its determination as to whether such changes constitute a minor modification to be processed by the Office or a major modification subject to subdivision (c) of this section.

(c) Minor Modifications.

(1) Minor modifications arising during construction that do not involve a change to an existing permit standard or condition and are not likely to result in a material increase in any identified adverse environmental impact or any significant adverse environmental impact not previously addressed by a uniform or site-specific standard or condition can be reviewed and approved by the on-site Environmental Monitor.

(2) The Environmental Monitor must provide notice of the minor modification to the Office within three (3) business days of the determination.

(3) If the Environmental Monitor determines that the proposed modification arising during construction may be a major modification the proposed modification must be sent to the Office for their review, approval or rejection.

(d) Major Modifications.

(1) A request for a major modification to an existing permit or an approved compliance filing shall be noticed, filed and served in the same manner as an application.

- (2) A major modification to the permit or approved compliance filing may require the permittee to supplement the local agency account to the extent that the permittee is seeking to increase the base nameplate capacity of the facility.
- (3) Major modifications shall be subject to a minimum sixty (60) day public comment period in which comments regarding the proposed modification will be accepted by the Office. In determining whether a major modification should be approved, the Office shall only accept and consider comments with respect to the changes proposed by the permittee.
- (4) The permittee shall provide a response to public comments within fifteen (15) days of close of the public comment period.
- (5) Major modifications may be subject to an adjudicatory hearing pursuant to Subpart 900-8 of this Part. Such hearing would be limited to only those changes proposed by the permittee for which significant and substantive issues have been identified.
- (6) The Office shall mail to the permittee a decision in the form of a modified permit, revised compliance filing requirement, or a statement that the major permit modification applied for has been denied, with an explanation for the denial.

§900-11.2 Transfers of Permit and Pending Applications

- (a) A permit in effect may only be transferred to a person, as defined by section 900-1.2(be) of this Part, who agrees in writing to comply with the terms, limitations, or conditions contained in the permit, and upon the approval of the Office.
- (b) Applications for the transfer of permits in effect, or pending permit applications, to a different permittee or applicant, or to change the name of the permittee or applicant, shall be submitted to the Office and shall contain:
 - (1) A statement of the reasons supporting the transfer;
 - (2) A statement showing the transferee is qualified to carry out the provisions of the permit or any pending permit application and requirements of this Part;
 - (3) A verification by all parties to the proposed transfer;
 - (4) If required by the Office, a copy of the proposed transfer agreement; and
 - (5) Name, address, telephone number and electronic mail address of an employee or representative of the permittee or applicant from whom further information may be obtained.

- (c) Applications for transfer of permits in effect, or pending permit applications, should be submitted to the Office at least thirty (30) days prior to transfer, unless a different time period is authorized by the Office.
- (d) An application for a permit transfer shall not include or cause a significant change in the design or operation of the project as approved by the Office in a siting permit issued pursuant to Section 94-c of the Executive Law or as described in an application pending before the Office.
- (e) The new permittee, or applicant, shall satisfy any required financial obligations and insurance coverage prior to approval of a transfer of an issued permit or pending application.
- (f) A new permittee, or applicant, may be subject to a record of compliance review before a decision on permit or application transfer is rendered by the Office.
- (g) Any noncompliance by the existing permittee, associated with a permit proposed to be transferred, shall be resolved to the Office's satisfaction prior to transfer of such permit.

§900-11.3 Relinquishments

- (a) A person may relinquish a permit by sending a written notification to the Office. The notification shall:
 - (1) Identify the permit to be relinquished by its permit number;
 - (2) State why the permit is being relinquished;
 - (3) Describe how the provisions and conditions of the permit have been satisfied; and
 - (4) Provide an explanation of any remaining actions required at the site or facility prior to terminating the permit.
- (b) In reviewing a request to relinquish a permit, the Office shall confirm whether or not permit provisions and conditions have been satisfied, including post-operational and decommissioning requirements as set forth in section 900-2.24 of this Part. The Office shall provide written verification of its concurrence with permit relinquishment or provide reasons why the permit shall remain in effect.

§900-11.4 Permit Modifications by the Office

- (a) Permits may be modified on the basis of any of the following:
 - (1) Materially false or inaccurate statements in the permit application, compliance filings or supporting papers;

- (2) Failure by the permittee to comply with any terms or conditions of the permit conditions, orders of the Executive Director, or any provisions of law or regulations related to the permitted activity;
 - (3) Exceeding the scope of the project as described in the permit application; or
 - (4) Newly discovered material information or a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit.
- (b) The Office shall send a notice of intent to modify a permit to the permittee by certified mail return receipt requested or personal service and publish notice on the Office's website. The notice shall state the alleged facts or conduct which appear to warrant the intended action and shall state the effective date, contingent upon administrative appeals, of the modification.
- (c) Within fifteen (15) days of mailing a notice of intent, the permittee may submit a written statement to the Office, as directed, giving reasons why the permit should not be modified or requesting a hearing, or both. Failure by the permittee to timely submit a statement shall result in the Office's action becoming effective on the date specified in the notice of intent.
- (d) Where the Office proposes to modify a permit and the permittee requests a hearing on the proposed modification, the original permit conditions or permit status shall remain in effect until a decision is issued by the Executive Director pursuant to subdivision (f) of this section. At such time, the permit conditions or permit status supported by the Executive Director's decision shall take effect.
- (e) Within fifteen (15) days of receipt of the permittee's statement, the Office shall either:
- (1) Rescind or confirm the notice of intent to modify based on a review of the information provided by the permittee, if a statement without a request for a hearing is submitted; or
 - (2) Notify the permittee that a hearing shall be held at a date and place to be established by the Office of hearings, if a statement with a request for a hearing has been submitted. The provisions of Subpart 900-8 of this Part apply to hearings conducted pursuant to this section, except that the time periods provided for in section 900-8.1 of this Part shall be measured from date of receipt of the permittee's request for a hearing.
- (f) In the event such a hearing is held, the Executive Director shall, within thirty (30) days of receipt of the complete record, issue a decision which:

- (1) Continues the permit in effect as originally issued; or
 - (2) Modifies the permit.
- (g) Notice of such decision, stating the findings and reasons therefor, shall be provided to the applicant pursuant to the procedures set forth in Subpart 900-9 of this Part.

ACE NY does not have comments on the Subparts listed below and thus they have been deleted from this redline document.

Subpart 900-12 §900-12.1 Enforcement

Subpart 900-13 §900-13.1 Severability

Subpart 900-14 §900-14.1 Effective date

Subpart 900-15 §900-15.1 Material Incorporated by Reference



Comments on the Office of Renewable Energy Siting Proposed Regulations for the
Review and Permitting of Renewable Energy Projects
Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 — 900.14

Submitted by:

The Alliance for Clean Energy New York, the American Wind Energy Association,
and the Solar Energy Industries Association.

December 7, 2020

On behalf of the Alliance for Clean Energy New York (ACE NY), the American Wind Energy Association (AWEA), and the Solar Energy Industries Association (SEIA), please accept these comments on the New York State Office of Renewable Energy Siting's (ORES) proposed draft rules for permitting new wind and solar energy projects, Chapter XVIII, Title 19 of NYCRR Part 900, Subparts 900-1 — 900-14.

I. Introduction

The Renewable Energy Industry welcomes New York's timely efforts to implement the Accelerated Renewable Energy Growth and Community Benefit Act (the "Act") through the release of this regulatory proposal. We also strongly feel that the effort to simplify and improve the process for issuing permits for the construction of wind and solar facilities is sorely needed, and will be a benefit to the public, municipalities, and renewable energy companies. By establishing the rules and operating conditions in advance, facilities can be designed to meet these standards from the earliest stages of development. A workable permitting process is imperative for the Renewable Energy Industry to achieve the goal of driving New York's economic recovery through investment and job creation. We recognize that renewable energy development will always need to be balanced with natural resource protections in New York and welcome the certainty of knowing these specific requirements up front.

ACE NY is a not-for-profit membership organization with a mission to promote the use of clean, renewable electricity technologies and energy efficiency in New York State, in order to increase energy diversity and security, boost economic development, improve public health, and reduce air pollution. ACE NY members include numerous companies that currently, or will in the future, own and operate major renewable energy facilities in New York communities. ACE NY members

have significant experience developing and building major wind and solar energy generating facilities in New York and elsewhere. We, along with our national counterparts AWEA and SEIA, welcome the opportunity to provide input on the proposed regulations and look forward to a constructive dialogue with ORES to ensure that more renewable energy facilities are built quickly and efficiently, while protecting the environment and benefitting host communities.

In these Comments, ACE NY, AWEA, and SEIA are collectively referred to as the “Renewable Energy Industry,” “we,” or “our organizations.”

II. Summary of Priority Recommendations

The Renewable Energy Industry strongly supports the reform of wind and solar permitting, and generally supports this ORES proposal. The process laid out by these regulations strikes the right balance between the need to achieve the State’s renewable energy mandates, the need to maintain electric system adequacy and reliability, protection of the environment, and public input on decision-making. Our comments reflect the guiding principle that siting and permitting a wind or solar facility should be no harder than for comparable land uses with comparable impacts. That is, the environmental review and protection requirements should be on par with other proposed projects, especially given the important policy goal of transitioning to renewable energy. As an example, the construction of wind and solar projects involves typical construction processes. As such, it poses de minimis and non-unique risks to wells. Survey and testing of private wells should not be required for a land use that is low risk, is more than 100 feet from any wells, and doesn’t involve toxic chemicals. In another example, requiring the replacement of offsite culverts to mitigate the temporary stream impacts of construction activities is also not typically required in other permitting processes. These aspects of the regulations should be modified to be more consistent with typical state and local permitting requirements.

We also note that we have detailed suggested modifications to the sound provisions, which are addressed in a separate document and will be filed with the ORES under separate cover.

In Part III, we provide detailed comments on most sections of the proposed regulations. Here, we want to highlight four high priority recommendations:

A. THE PROCESS FOR POST-PERMIT COMPLIANCE FILINGS SHOULD BE STREAMLINED.

One critical issue is post-permit compliance filings and the timeliness of construction. We are concerned that the currently proposed framework for submittal and review of the sixteen different compliance filings – although more efficient than Article 10 – still has the potential to delay construction, especially given the narrow construction windows established elsewhere in various provisions of the regulations. We strongly suggest that the regulations be modified to further reduce the time from permit issuance to construction. This can be accomplished by (1)

allowing applicants the option to include compliance filings in their application with approval of those plans included in the Permit; (2) allowing applicants the option to submit compliance filings when their Draft Permit is published; and (3) providing a 30-day timeframe for ORES to respond to compliance filings rather than 60 days. Further, we strongly urge ORES to consider allowing the onsite Environmental Monitor to approve minor changes to, or deviations from, the approved compliance plans, as long as they do not involve an adverse environmental impact, in order to efficiently address the inevitable changes that emerge during any typical construction project.

B. THE REGULATIONS SHOULD FURTHER CLARIFY LOCAL LAW PROVISIONS.

It is well known that the issue of waiving local law has been both a feature of Article 10 and its predecessors, and a controversial aspect of the permitting process. To further clarify and improve this new permitting process, and to avoid disputes regarding the application of local law, we recommend four changes to the proposal with respect to local laws. First, the regulations need to clarify that the local laws in effect at the time of the application are those that either apply or need to be the subject of a waiver, but that subsequently enacted local rules do not. This is an approach that will provide fairness and certainty and is appropriate considering that project changes are more limited under 94C and that uniform standards and conditions will be known prior to an application. These proposed regulations should not apply new local laws enacted after the pre-application meeting with municipal officials has been conducted (900-1.3(a)) or at the latest after an application has been filed (900-1.6.). This change is an opportunity to avoid future uncertainty and disputes.

A second issue with respect to local law is the basis by which ORES could waive a local requirement, which should be both abundantly clear and consistent with the language in the Accelerated Renewable Energy and Community Benefit Act. Section 900-2.25 requires the application to identify local laws applicable to the project that are of a substantive nature and of those, the laws that an applicant seeks ORES to override due to the unreasonable burdens they would impose based on technological limitations, factors of costs or economics, or needs of consumers. This language is identical to that found in the Article 10 regulations (6 NYCRR 1001.31). By retaining this Article 10 language, the proposed regulations are not consistent with the new Executive Law § 94-c(5)(e), which states, *“the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”* The ORES regulations need to be more consistent with the underlying 94(c) statute.

A third issue regarding local law is the interaction with the new uniform standards and conditions of Subpart § 900-6. The Accelerated Renewable Energy Growth and Community Benefit Act requires the establishment of uniform standards and conditions and the ORES is undergoing this lengthy and comprehensive process to establish these new standards, grounded in the avoid-minimize-mitigate framework. It then follows that these uniform standards are reasonable and stricter standards should be presumed to be unreasonably burdensome. The goal of promulgating uniform, default conditions regarding setbacks, noise, operational curtailment for bat protection,

and other aspects of construction and operation is to provide appropriate natural resource and community protection, and to provide certainty to project applicants, neighbors, and municipalities. If a jurisdiction applies stricter standards or additional rules, then the jurisdiction should have the obligation to prove why these new rules are necessary and reasonably burdensome. In the alternative, it should be presumed by ORES that the stricter standards are unreasonably burdensome. The ORES regulations should indicate that the uniform standards and conditions represent a reasonable approach for municipal jurisdictions for the issues they address.

Fourth, if the project is the subject of a special exception to zoning and that exception has been granted by local officials, there should not also be a requirement to obtain a local law variance from ORES. It is appropriate that one be required (i.e., the special exception or the variance from ORES) but not both. The regulations should make this clear.

C. **APPLICANTS SHOULD NOT BE REQUIRED TO CONDUCT DUPLICATIVE OR IRRELEVANT STUDIES THAT ORES WILL NOT BE USING FOR DECISION-MAKING.**

This proposal requires a great many studies in the pre-application phase, as exhibits in the application, or as compliance filings. Most of the requirements are relevant and will help inform the ORES decision-making. In some cases, the studies are superfluous. Part 900 – 2.1 mentions that exhibits that are irrelevant for the technology may be omitted but offers no particular guidance for that determination. And elsewhere, it appears that certain unnecessary studies are explicitly required. We provide the following examples of studies that should not be required:

- Electric and Magnetic Fields (Exhibit 22) and System Effects and Interconnection (Ex. 21) filings should be simplified or eliminated in recognition that they are already required by the NYISO interconnection processes;
- Exhibit 16 Part f(2) which is duplicative of the analysis the applicant would undergo with the U.S. Department of Defense and the Federal Aviation Administration and is adequately covered in Part f(1);
- Exhibit 10, which is irrelevant unless blasting will be occurring during construction;
- Field verifying agricultural activities within a five-mile radius of the project is excessive and need not be required;
- An ambient noise study when the uniform standard for sound is already established is not necessary;
- A detailed study of wastes and emissions for a wind and solar facility, including “studies, identifying the author and date thereof, used in the analysis” is not relevant;
- Exhibit 17: Consistency with Energy Planning, with the details in (a) through (g), when the only necessary information is how many megawatt-hours per year of pollution free power the proposed project will produce. As these regulations only apply to wind and solar, it

should be presumed that they comply with the state’s energy planning and renewable energy goals.

D. THE PROCESS FOR AMENDING A PERMIT APPLICATION NEEDS TO BE MORE PRACTICAL

Section 900-7.1 addresses amendments of an application. The Renewable Energy Industry respects ORES’s desire to discourage changes to applications, but still feels that this section needs to be simplified. The change we request can make the process more efficient and avoid discouraging changes that are requested by ORES or stakeholders and agreeable to the applicant. As discussed in more detail in Part III, we specifically suggest that when an applicant requests an amendment to their application, ORES shall review the request and, within fifteen days, inform the permittee whether the requested change is a minor amendment to be processed by the Office without change to the statutory timeframes; a major amendment subject to additional information requests that will suspend and extend review timeframes; or an application supplement which shall be submitted to the record of the proceeding.

III. Comments on Specific Provisions

Subpart 900-1

§900-1.1 Purpose and Applicability: We do not have any comments on this section.

§900-1.2 Definitions

- Definition (ab) for “local agency” does not seem to contemplate a nexus between a local agency and the project area. Can an uninvolved town participate in another location’s project permitting, by virtue of it being a municipality? The Renewable Energy Industry suggests that definition (ab) be revised to read *“Local agency means any local agency, board, district, commission or governing body, including municipalities, and other political subdivision of the state within one (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility.”*
- Definition (ad) for major amendment does not recognize that in order for an amendment to be major, it should have an adverse impact. We suggest that this definition be revised to read *“... likely to result in any material increase in any identified adverse environmental impact...”* The same change is recommended for (ae).
- Definition (af) for a major renewable energy facility states that transmission lines less than 10 miles in length and less than 125kV are included within the definition of a major renewable energy facility. However, the definition of a Major Renewable Energy Facility contained in Section 94-c of the New York State Executive Law does not limit the interconnect lines to those under 125kV. The Renewable Energy Industry believes that

since the law did not limit the voltage of transmission lines, gen-tie lines less than 10 miles in length of any voltage should be included.

- Definition (ao) for non-participating property includes a parcel of real property owned by a person (as defined in subdivision (be) of this section) who has not executed an agreement with the applicant related to the facility. But definition (ba) for participating property specifies that the agreement is an executed lease, easement or other agreement. We recommend that these two definitions be revised to be consistent.
- Definition (bv) for study area appears to have a typographical error or missing word. Second, we believe the one mile and five-mile radii should be from the facility (i.e., turbines or solar panels) and interconnections, but not from all property boundaries or public access roads. Further, the proposed definition of study area is too large. For a solar facility the study area should be 1 mile from the facility with a 2-mile visual study area. There is no probative value of showing existing land uses for 5 miles from a low profile, non-air/water pollutant emitting solar facility. For a wind facility the study area should be 1 mile with a 5-mile visual study area. Lastly, the inclusion of “facility site” in the definition of study area (bv) is confusing, and the phrases “study area” and “facility site” are both used throughout the regulations. We recommend that “facility site” also be defined in the regulations.

§900-1.3 Pre-application Procedures

- If the project is the subject of a special exception to zoning and that exception has been granted, there should not also have to be a local law variance obtained from ORES. It is appropriate that one be required (i.e., the special exception or the variance from ORES) but not both.
- We recommend that (a) be revised to only apply to new applications. It now says “*Consultation with Local Agencies*. No less than sixty (60) days before the date on which an applicant files an application, or files a transfer application other than for a pending Article 10 facility for which the Article 10 application has been deemed complete...” Given the PIP requirements, this will have already been completed for all Article 10 transfer applications therefore these should only apply to new applications and not to transfer applications.
- (a)(3) We suggest that this provision be revised to add decommissioning “*A summary of the substantive provisions of local laws applicable to the construction, operation, maintenance, and decommissioning of the proposed facility.*”
- (b) There is no reason to have to achieve such a narrow window for publication of the notice, especially when you consider that some local newspapers only run weekly. We recommend deleting the requirement that notice cannot be provided sooner than 21 days prior to the meeting.

- (e)(1) Preapplication requires delineations within 100 feet of limit of disturbance (LOD). Reference to a LOD suggests that design will be final during delineations, which is inherently contrary to how these projects are developed. Resource identification needs to be completed so that the design can incorporate avoidance and minimization measures. Conducting a field delineation based on the LOD, then preparing a report and conducting a site visit prior to filing an application does not work from a normal development perspective. We suggest that this provision be slightly revised to read “...*within one hundred (100) feet of areas proposed to be disturbed by construction...*”
- (e)(2) The Renewable Energy Industry supports the preparation and submission of a “draft” wetland delineation report at this stage of pre-application.
- (e)(4) We suggest that the word “provide” be deleted from the phrase “...*at the request of the Office to ~~provide~~ assist in determining which wetlands are regulated...*”
- (e)(5) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the final jurisdictional determination, but it should be clarified that federally regulated wetlands will not have a jurisdictional determination until the Army Corps of Engineers (ACOE) acts.
- (e)(5) The possible delay in the preparation of the final jurisdictional determination on wetlands due to weather can significantly delay a project resulting in the potential loss of a construction season. This is critical given the restrictive work windows in place for the protection of T&E species that appear elsewhere in the ORES proposal. Provision should be made for a tentative jurisdictional determination to be made based on remote sensing data, interpretation of existing wetland and soils mapping and current and historical aerial imagery with subsequent field verification when weather permits. This is the process that is proposed for wetland delineations for adjacent properties when access to the property has been denied by the landowner.
- (f)(1) requires an applicant to conduct a stream delineation survey to identify all federal and state waters regulated pursuant to ECL Article 15, and locally regulated surface waters present on the facility site and within one hundred (100) feet of areas to be disturbed by construction, including the interconnections, as well as federal, state, and locally regulated surface waters within one hundred (100) feet beyond the limit of disturbance (LOD) that may be hydrologically or ecologically influenced by development of the facility site. At the time these draft delineations are conducted, the LOD may not have been determined. Also, there needs to be clear criteria to assist an applicant in determining if a stream may be hydrologically or ecologically influenced by development of the facility site. We recommend that the term ‘hydrologically or ecologically influenced’ be defined in this regulation.

- (f)(4) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the DEC to review the draft stream delineation report and make a final determination on impact to streams.
- (f)(4) The possible delay in the preparation of the final jurisdictional determination on stream delineations due to weather can significantly delay a project resulting in the potential loss of a construction season. This is critical given the restrictive work windows in place for the protection of T&E species. Provision should be made for a tentative jurisdictional determination to be made based on remote sensing data, interpretation of existing wetland and soils mapping and current and historical aerial imagery with subsequent field verification when weather permits. This is the process that is proposed for delineations for adjacent properties when access to the property has been denied by the landowner.
- (g) The Renewable Energy Industry supports the inclusion of the additional guidance/detail provided on the elements of the wildlife site characterization process and the inclusion of timeframes for the review of a plan and agency response.
- There is no provision for mediation or resolution of a disagreement between the applicant and ORES or NYSDEC on the characterization. Applicants have disagreed with the NYSDEC on these issues before, and this section would appear to require that we reach agreement on an approved report before we can submit an application to ORES. Applicants need the opportunity to submit evidence controverting an assertion that an area is occupied habitat – for example, grassland bird habitat which is not of sufficient size to support the species identified. In order to improve upon the process of Article 10, it is critical that the preapplication processes do not unduly delay the application process.
- (g)(1)(vi) We agree that it is important to recognize that certain listed bird (and other) species are threatened by climate change. The National Audubon Society climate change report¹ identifies renewable energy as a key component of addressing the underlying causes of climate change. A great many bird species are listed in the Audubon study, and therefore a great many species could be positively affected by the operation of wind and solar energy facilities in New York and elsewhere. The Renewable Energy Industry believes renewable energy should not be seen as an additional stressor for those species, but as contributing to the provision of a potentially critical habitat for the species across its range.
- (g)(2)(iv) We understand the need for a desktop study to characterize the occurrence of bats species on a project site for a proposed solar energy facility. But, given the proposed work windows, tree clearing restrictions and setbacks for the protection of bat species (that would apply in any case), there are no circumstances where there would be a need for preconstruction bat surveys. The Renewable Energy Industry strongly believes that preconstruction bat surveys for a proposed solar energy facility are not necessary, due to

¹ *Survival by Degrees: 389 Bird Species on the Brink, 2020.* <https://www.audubon.org/climate/survivalbydegrees>

the costs involved and the fact that the data generated would not inform the decision-making process when the work windows and tree cutting provisions are followed.

- (g)(2)(iv) The Renewable Energy Industry supports the provision that limits field surveys to one year. Given the large amount of existing data, any additional surveys should be able to be completed within one season/one year.
- (g)(2)(iv) Mist net surveys to sample bat populations have commonly been used in SEQR and Article 10 reviews. Mist net surveys are expensive and of questionable value considering that presence of Northern Long-Eared Bats is assumed everywhere in the state, regardless of the results of mist net surveys. They should not be a required element for all bat surveys, especially if the results will not be used for decision-making.
- (g)(5) Six (6) weeks is too short a time to prepare and submit draft reports after completion of the required surveys. The Renewable Energy Industry recommends that this be changed to eight weeks.
- (g)(5) We do not believe that there is a need or rationale for requiring that the sighting of a threatened and endangered (T&E) species be reported before the submission of the draft T&E surveys report. This will cause confusion and seems unnecessarily burdensome to require a report before the report. Unless there is a specific, compelling reason for this early report, this requirement should be deleted and all information should be reported in the same time frame, in one report.
- (g)(7) For clarity the word “written” should be inserted in this provision to read: “...the Office shall provide its *written* draft determination regarding whether occupied habitat...”
- (g)(7) Would projects that are determined to have a de minimis impact to NYS T&E grassland birds or their habitat still be required to submit a net conservation benefit plan? Presumably no, but the regulations are not clear. We recommend that the regulations clarify that projects with de minimis impacts do not require a net conservation benefit plan.
- (g)(7) The formula to determine mitigation fees for impact to NYS threatened and endangered species and for wetland impacts that cannot be avoided or mitigated is not included in the proposed regulation. While this may be appropriate, wind and solar project developers are going to need to know additional information on the mitigation bank credits in order to make informed decisions regarding the direction they will go, such as cost per credit, availability across the state, or only available in certain watersheds. The ORES regulations should specify that ORES will be the responsible entity for determining the formula(s) for mitigation fees. We also recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.

- (g)(7) This section provides that ORES' draft determination will, provide "if applicable, the amount of mitigation funding that may be necessary if impacts cannot be avoided or mitigated." However, because this determination will be appropriately based on desktop studies, it is possible that the amount of mitigation funding would exceed actual existing conditions. A provision should be added allowing an Applicant to request a revision to the mitigation funding amounts, if subsequent actual field studies demonstrate conditions different than those forming the basis of the draft determination.
- The Renewable Energy Industry believes that a de minimis (or other impact assessment) determination should be considered for all NYS T&E species. Even when a net conservation benefit plan is required, an impact assessment is necessary to establish what level of mitigation may be needed to achieve a net conservation benefit.
- (h) The terms Phase 1A, Phase 1B, & Phase II are not contained in any regulation. These terms are elements of an OPRHP guidance document "Standards for Cultural Resource Investigations and the Curation of Archaeological Collections in New York State." Paragraph (h) should be revised to eliminate the possibility that the inclusion of these terms in Part 900 establishes a new regulatory requirement.
- (h)(2) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the review of a submitted Phase IA archaeological/cultural resources report by the Office and OPRHP.

§900-1.4 General Requirements for Applications

- The Renewable Energy Industry recommends that a new provision be added to the application requirements. An applicant should be authorized to have the option to include any of the preconstruction compliance filings as part of the application. Many of the plans listed in 900-10.2 will be based on generic, formulaic plans with minimal need for project specific details to be incorporated. An applicant should be allowed to include these plans, as modified by project specific details in their application thereby eliminating the need for these plans to be submitted as compliance filings.
- (b) The prohibition on commencing construction should be limited to areas requiring a permit. Suggest the phrase "in jurisdictional areas" be inserted so the provision reads "...prior to commencing construction in jurisdictional areas, obtain a Water Quality Certification..."
- (b)(3) If a request for a Water Quality Certification is filed after the issuance of the siting permit it should always constitute a minor modification under Part 900-11.1. It is unreasonable to add a 60-day public comment period, plus a responsiveness summary plus a possible hearing when a Water Quality Certification is filed following the issuance of a

siting permit. This should either be deleted or specifically recognized as a minor modification.

§900-1.5 Office of Renewable Energy Siting Review Fee

- (a) This fee, which is to recover the costs incurred by ORES in the review of the application is a new cost for renewable energy projects. If the intent for the fee is to allow ORES to hire consultant services to assist in the conduct of the project review, ORES should account for the expenditures and return any unspent funds to the applicant. We do however, support ORES having the necessary resources to hire staff and/or consultants to complete the work necessary to efficiently implement this program.
- The Renewable Energy Industry notes that this new fee, combined with the intervenor fee; the fees for costs of holding hearings; the mitigation fees for wetlands, and for threatened and endangered species, and for historic and cultural resources mitigation; the fees for agricultural mitigation now included in NYSERDA's solicitations; the host-community benefit fees proposed by NYSDPS; and the increased contract deposits required by NYSERDA are all contributors to the ultimate cost of renewable resource development in New York State. These added expenses make it more costly to develop resources in New York State than in other jurisdictions and then it otherwise would be. While we do not oppose this particular fee per se, we implore ORES and the State of New York to consider the cumulative impact of these fees on the cost of achievement of the CLCPA goals.

§900-1.6 Filing, Service and Publication of an Application

- (a)(7) seems both broad and vague. While we are not opposed to this provision, we wonder what agencies would be covered under this provision that would not have already received a copy of the application under earlier provisions.
- (c)(3) Providing a written notice to all persons residing within one (1) mile of the proposed solar facility or within five (5) miles of the proposed wind facility will be costly. We request that the regulations specify that this can be a postcard notification and not the lengthy and technical language included in the newspaper publication, in recognition that a neighbor is more likely to read a shorter and informal postcard with links to the public website shown.

Subpart 900-2 Application Exhibits

- The Renewable Energy Industry supports the proposed reduction in the number of required exhibits from 41 to 25. This revision will reduce the redundancy in information, consolidate common material in one exhibit and result in a more efficient review process. However, we believe that certain of the exhibits are still redundant to other information supplied and reviewed in other processes, such as the NYISO/utility interconnection

process. We recommend deleting from these regulations any provisions that duplicate existing requirements in DPS and NYISO law. For example, exhibit 22 Electric and Magnetic Fields should be deleted.

§900-2.1 Filing Instructions

- (a) States that “Exhibits not relevant to the particular facility’s technology or proposed location may be omitted from the application.” We support this approach but, in the regulations, it is not at all clear how and when this determination will be made. We recommend that (1) under each exhibit section, language be included regarding when it would not be required and (2) the regulations also specify that ORES can notify an applicant during the pre-application phase if a particular exhibit would not be required because it is not relevant to a particular facility’s technology or proposed location.
- (d) states, *“In collecting, compiling and reporting data required for the application, the applicant shall establish a basis for a statistical comparison with data which shall subsequently be obtained under any program of post-permit monitoring.”* This section is not clear, and we inquire about what obligation it will place on developers?

§900-2.2 Exhibit 1: General Requirements, §900-2.3 Exhibit 2: Overview and Public Involvement

- We do not have any comments on this section.

§900-2.4 Exhibit 3: Location of Facilities and Surrounding Land Use

- (b) The phrase “ancillary features” used in this provision should be defined.
- (f) Are the ancillary features noted in this provision just permanent features? Would this include temporary traffic modifications such as increasing a turning radius to accommodate turbine delivery?
- (l) Requiring a qualitative assessment of the compatibility of the facility, including any off-site staging and storage areas, with existing, proposed and allowed land uses, and local and regional land use plans, located within a one (1)-mile radius of the facility site is excessive. What is the basis for the one-mile radius and should it be identical for wind and solar facilities?
- (m) Requiring even a qualitative assessment of the compatibility of proposed above-ground transmission lines, collection lines, and interconnections and related facilities with existing, potential, and proposed land uses within the study area is excessive. Given that the size study area as defined in this part could extend to 5 miles this would require developers an extensive outlay of time and money to complete the assessment. The Renewable Energy Industry suggests that the radius selected for paragraphs (l) & (m) should be consistent and set at 300 feet.

- (p) & (q) These provisions appear to be duplicative. Paragraph (q) should satisfy both needs. Paragraph (r) should also be incorporated into a revised (p).
- (s) The term “social environment” needs to be defined.
- (u)(1) What is the basis for requiring the use of magnetometers for all oil & gas well surveys in NYS DEC regions 7, 8 & 9? This is a costly requirement and should only be required when available records indicate the likely presence of an oil/gas well on the proposed site.

§900-2.5 Exhibit 4: Real Property

- (a) Conducting title searches and an American Land Title Association (ALTA) survey is a major expense for a developer. Most developers do not conduct such detailed surveys until well into the process. This exhibit should be based on the information available to the applicant at the time of application with the completed real property record be included in the pre-construction compliance filing in 900-10.2(h). Further, we request clarification if a title search for every parcel along a public road is required since the town typically has that information.
- (d) The regulations should preserve the ability of a developer to file a permit application without having all 100% of land controls in hand. For example, in some cases it would be appropriate for the applicant to have control of all land necessary for the main structures and components of a solar project, but not yet have all the easements in place for the interconnection routes. Allowing some flexibility in the rules for some amount less than 100% control is important.

§900-2-6 Exhibit 5: Design Drawings

- The Renewable Energy Industry supports the use of general site plan drawings rather than construction-ready drawings in the design drawing requirements. This provision will provide flexibility to developers and not automatically require requests for amendments when siting of facilities matures through the planning process and locations are shifted but the change is not a significant one.
- (b) Table 1 -Clarify that the project gen-tie line is not considered a part of the Bulk Electric System.
- (b) Table 1 – Clarify that non-participating residential structures must have foundations and valid building permits (unless the building pre-dates building permit requirements).
- (b) Table 1 - A 1.5X setback from non-participating, non-residential structures and a 2X setback from non-participating occupied residences is excessive. A setback of 1.1 X tip

height from non-participating, non-residential structures and non-participating occupied residences is the common setback requirement in other states. Excessive setbacks place undue restrictions on the siting of a wind energy facility and can reduce the generation of power due to a reduction in turbines to meet excessive setbacks. Further, in (b) Table 1, the 1.1X setback to “property lines” – should be clarified as applying only to non-participating owners. The only setback that should apply to adjacent participating property owners should be the manufacturer’s required setback.

- (d) Table 2 - The Renewable Energy Industry supports that there is no minimum setback between participating landowners for a solar energy facility. But we also question the inclusion of a 100 ft setback from non-participating residential property boundaries. The combination of 250 ft. from a non-participating residence and 50 ft. from a non-participating property boundary is sufficient, rather than also having 100 ft. setback from a non-participating residential property line. A 100-foot setback from a non-participating residential property line would not be required for other types of land uses, like building construction for example. Further, for a setback from non-residential non-participating property lines, 20 feet is adequately protective, and 50 feet is not necessary in these circumstances.
- (e) What is the basis for limiting the height of solar facilities to 20 feet from finished grade? This could limit certain technology of solar panels in the future especially when considering tracking technology. We recommend this limitation be eliminated or revised to 30 feet.
- (f)(1) Requires the applicant to submit two copies of the general site plan drawings. Five copies of the application are already being provided to ORES. We question the rationale for the provision of two full sets of plan drawings.
- (f)(3) There is no basis for requiring a site suitability report from the equipment manufacturer at the application phase. These reports can involve an extraordinary detailed engineering analysis. Requiring them to be complete before an application can be determined complete, for every turbine under consideration, would limit the ability of developers to maintain competition among manufacturers. Most projects do not obtain site suitability reports until equipment has been purchased. The purchase of equipment happens post-application. Therefore, we request that this requirement be changed.

§900-2.7 Exhibit 6: Public Health, Safety and Security

- (a) This provision requires detailed information on waste streams that are not associated with renewable energy projects. We suggest this provision be deleted.
- (b)(4) This is already addressed in Exhibit 8 and so should be deleted here.

- (c)(7) This provision should be revised to require that the applicant must “offer” to conduct training drills with emergency responders at least once per year. An applicant cannot require emergency responders to participate.

§900-2.8 Exhibit 7: Noise and Vibration

- The Renewable Energy Industry supports the inclusion of design goals for sound. Setting these design goals early in the planning process will allow developers to optimize the layout of the facility. ACE NY and AWEA are submitting detailed comments to ORES on the noise and vibration provisions in a separate filing.

§900-2.9 Exhibit 8: Visual Impacts

- (b) Most solar projects are lower profile than many other local development projects. As with other development projects, the visual impact assessment should focus on designated federal and state resources where the view from the site is part of the designation criteria. This is the approach taken for SEQRA.
- (b)(4)(v) Recommend that the phrase “in effect on the date that the application is filed” be added to the end of this provision. Currently it is too vague and can result in pressure on local authorities to continually raise the bar as a means to delay the completion of a visual impact analysis.
- (d) What would be considered an alternative technology that would be assessed? Would it include alternative models or fuel sources or tracking vs. fixed tilt panels? This is unclear.
- (d)(7) The phrase “will not result in complaints” is simply not achievable and should be deleted. It is impossible to guarantee that all complaints will be avoided. The standard for glare should be “no visible red glare to any adjacent non-participating residence.”
- (d)(7) The phrase “impede traffic movements” is ambiguous and does not provide a metric which “not result in” can be measured.
- (d)(9)(iii)(c) Requirements for lighting should be left to the Federal Aviation Administration (FAA) and the developer should comply with those requirements. If the FAA deems that an aircraft lighting system is not necessary, then the developer should not be required to construct one.

§900-2.10 Exhibit 9: Cultural Resources

- (a)(4) We suggest that this provision be revised to read: (4) *If required by the Phase I study results, as determined pursuant to section 900-1.3(h) of this Part, the application shall provide a work plan for the Phase II site evaluation study to assess the boundaries, integrity*

and significance of identified cultural resources and the schedule to implement the Phase II study.

§900-2.11 Exhibit 10: Geology, Seismology and Soils

- This Exhibit should only be required if construction is going to use blasting.
- (a)(4) Are geotechnical boring samples required at every turbine and solar array location for the application? This was not required for Article 10 applications and can be onerous for site design purposes, as projects often finalize design based on these reports, which would require multiple geotechnical investigations if project components shift based on preliminary results. Requiring completion of a representative sample of turbine locations would be sufficient.

§900-2.12 Exhibit 11: Terrestrial Ecology: We do not have any comments on this section.

§900-2.13 Exhibit 12: NYS Threatened or Endangered Species

- (d) This subsection contains a presumption that adverse impacts would occur anywhere there is confirmed or presumed presence of a NYS endangered or threatened species, regardless of any avoidance and minimization measures incorporated into the facility design. In fact, for renewable energy facilities, the incorporation of fairly basic avoidance and minimization measures could remove nearly all adverse impacts.
- (d) Identification and evaluation of avoidance and minimization measures incorporated into the facility design would be more appropriately described in the context of a net conservation benefit plan, which is referenced in subsection (f) of this section. We recommend this part (d) be removed to avoid any confusion.
- (f) Suggest that the phrase “Other than for facilities that have a de minimis impact, to...” be inserted at the beginning of this provision to clarify that a Net Conservation Benefit Plan is only required when impacts are determined to exceed the de minimis threshold.

§900-2.14 Exhibit 13: Water Resources and Aquatic Ecology

- (a)(2) The requirement to send out a survey of private wells within 1,000 feet of the facility site is likely to provoke unnecessary fear and opposition to projects as it causes neighbors to needlessly worry that their wells will be impacted. The Renewable Energy Industry does not believe that well testing requirements are necessary or appropriate. In general, the industry is opposed to testing because it is unnecessary, and it is not typically required by NYSDEC for similar type land uses and there is no rationale for this requirement to applied for these types of land uses.

- (b)(5) & (6) In these two provisions, any reference to NYS water should be revised to read “NYS regulated water(s).”
- (b)(6)(i) The term 1st order streams appears in the discussion of placing solar racks or fencing. This term should be defined, or a reference should be provided where that information can be found, such as *(i) No solar panel racking or perimeter fence shall span a NYS protected waterbody unless it is a first order stream, i.e., stream that has no tributaries or branches.*
- (b)(7)(i)(a) The requirement to replace “existing substandard culvert(s)” is unprecedented as a regulatory requirement for stream mitigation in the state. Generally, the impacts described in Table 1 are temporary in nature (e.g., trenched installation of cable or installation of new culverts). To date, mitigation, has never been required for trenched installation of cables through streams. The installation of culverts designed in accordance with the requirements in 900-6.4(r)(6) and the requirements of the 2017 Nationwide Permit Regional Conditions attached to the US Army Corps of Engineers 2017 Nationwide Permits (Condition G-B.) generally result in only temporary impacts to streams, as these culverts are designed to function as bridges (embedded 20% below the existing stream bed and spanning 1.25 times the width of the stream). The design criteria for culverts themselves result in an effective deterrent for crossing large, high value streams due to the cost of the large, precast concrete culverts required to meet these criteria. Mitigation for culverts should only be required if the design criteria cannot be met and, aside from restoration of temporary impacts associated with trenching activities, no mitigation should be required for cable installation. It should be noted that boring of cables may not be practical or preferred in all instances (e.g., unsuitable soils, small intermittent streams) and horizontal directional drilling (HDD) operations can have additional impacts resulting from mobilization of boring equipment (drill rigs, excavators, water trucks, vacuum trucks, etc.) that may be minimized by use of trenching machines. In addition, the absolute requirement to replace “existing substandard culvert(s)” raises other potential concerns such as identification of “substandard” culverts on non-participating parcels and the need to get permits (from USACE or NYSDEC) for replacement of those culverts that may not be identified until after permits are issued for construction of the Project and may raise additional environmental concerns (e.g., cultural resources or threatened/endangered aquatic species). We believe that replacement of culverts is an option that an applicant can and should consider, however alternate methods should also be recognized. For instance, USACE often allows for the calculated square footage of impacts of the stream (e.g., a 100-foot impact in a 5-foot-wide stream would be 500 square feet) to be included in the overall wetland impact acreage and mitigated as such. This allowance is generally in recognition that installation of a culvert crossing does not result in actual loss of a stream and stream function, as opposed to impacts from rerouting, filling, or otherwise modifying stream channels.
- (b)(7)(ii) If this requirement for the replacement of 2 culverts for each new crossing is retained it raises several issues for implementation. If no substandard culverts are

available for replacement within the sub-basin onsite will ORES be approving culvert replacements at offsite locations? A provision for looking outside the subbasin or implementing alternative mitigation methods is necessary for this circumstance. How are these culverts going to be identified if they aren't on site? Is replacement of an existing culvert for construction of an access road sufficient mitigation (it is for the USACE). What about alternative mitigation such as other stream restoration work?

§900-2.15 Exhibit 14: Wetlands

- (a) Insert the word “proposed” into this provision so that it reads: *(a) A map or series of maps showing jurisdictional boundaries of all federal, state mapped, and locally regulated wetlands and adjacent areas present on the facility site and within one hundred (100) feet of areas proposed to be disturbed by construction...* This revision will clarify that at this stage of application process the precise limits of construction are not fully established.
- (d) Reference to off-site wetlands that may be “hydrologically or ecologically influenced” is way too subjective. Additional guidance or criteria needs to be provided by ORES.
- (f) For clarity insert the phrase “mapped state regulated” into this provision so that it reads: *(f) If the applicant cannot avoid impacts to mapped state regulated wetlands and adjacent areas...* Without this edit, this requirement is confusing and suggests that ORES will make determinations regarding minimization of impacts to non-regulated and federal waters as part of this decision.
- (f)(1) This provision suggests a prohibition rather than a need to demonstrate reasonable avoidance. We suggest this section be revised to state: *An analysis of the impact of the construction and operation of the facility on such NYS regulated wetlands and adjacent areas and identification and evaluation of reasonable avoidance measures;*
- (g) Adjacent area mitigation largely means removing current agricultural activities. Further, adjacent area mitigation is possibly more difficult than wetland mitigation as opportunities for doing so are limited. Adjacent area mitigation should not be required in the case of displacement of an active agricultural activity.
- (g)(1) The formula to determine mitigation fees for impact to wetlands that cannot be avoided or mitigated is not included in the proposed regulation. While it may be appropriate to not include this formula in the regulations, we note that these amounts are important both from a cost standpoint, and in their influence of avoidance and design decisions. At a minimum, the ORES regulations should specify that ORES will be the responsible entity for determining the formula(s) for mitigation fees. We also recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.

- (g)(2)(ii) Requiring mitigation in the same Hydrologic Unit Code (HUC) 8 as a rule is problematic but an improvement from Article 10 cases. HUC 8's are still relatively small. We suggest that the regulations allow for flexibility in the cases where there are no opportunities for mitigation within the same HUC 8.
- Table 1 - Mitigation ratios contained in Table 1 seem to exceed the requirements applied to other construction projects under Article 24 of the ECL and certain energy projects that have received a certificate under Article 10. Renewable energy projects should not be held to a higher standard than other construction projects and mitigation ratios that exceed those found in Article 10 projects are not consistent with the goals of the CLCPA.
- Table 1 - If an applicant wants to propose an activity in an area where, according to the table, it is not allowed (X), would they request a project specific permit condition from ORES in the application? The process to address this should be clarified in the regulations.
- Table 1 – Grading and manipulation of areas in a Class 1 wetland that have been previously disturbed by agricultural or commercial industrial development is prohibited according to the table. We suggest that the reuse of a previously disturbed wetland for renewable energy would be no more destructive and provide a greater societal benefit.
- Table 1 - Why is mitigation required for temporary impacts from the installation of transmission lines and collection lines? Generally, mitigation is only required for those if tree clearing is involved. The project developer should be able to reseed the area and not have to do mitigation because there is no permanent impact. Same with mowing of herbaceous vegetation. Generally mowing during operations is done only occasionally to keep woody vegetation out of a transmission line right-of-way. Mowing of herbaceous vegetation should not require mitigation.

§900-2.16 Exhibit 15: Agricultural Resources

- (a)(3) This provision is duplicative of Exhibit 3(g) and we suggest that it be deleted from Exhibit 15.
- (b) This requirement is appropriate for the facility site but not for a larger study area. We recommend this be changed to be for “*maps showing the following within the facility site*” But if this subparagraph is applied to non-participating landowners in the study area, which we oppose, it must be limited to “if available” because verification may not be available if landowners are unwilling to talk with the developer.
- (b)(1) If the study area is 5 miles, this would require an applicant to potentially field verify over 50,000 acres of land outside of the facility site and therefore not subject to potential disturbance. This would be extremely burdensome and costly and likely not provide

information relevant to the decision-making process. (b)(1) should be limited to the facility site and also allow landowner interviews in addition to field verification.

- (b)(2) & (3) These are not elements of the review that can be mapped even though they appear under (b) *Maps showing the following within the study area*. This information should be required under section (a).
- (e) The Renewable Energy Industry supports the co-utilization of agriculture with solar energy. A well-designed and executed co-utilization plan will preserve the land for 25-45 years (at the end of the lease the facility is removed) and can allow for agricultural uses that will support the local farm economy (seed companies, farm equipment providers, veterinary services, etc.) while potentially allowing the growth of local food markets. However, the concept of co-utilization is a relatively new topic so finding an accredited third party to develop a plan may be difficult. We suggest that the phrase “or accredited third party” be deleted from this provision.

§900-2.17 Exhibit 16: Effect on Transportation

- The Renewable Energy Industry supports that the requirements for a traffic assessment for solar energy facilities have been scaled back compared with the requirements for a wind energy facility. Equipment and materials for the construction of a solar facility are similar to other local construction projects.
- (f) Since a Department of Defense review is included in the FAA process, (f)(2) is not necessary and should be deleted.

§900-2.18 Exhibit 17: Consistency with Energy Planning Objectives

- Because all of 94c applies only to wind and solar projects, this Exhibit is not necessary and will not be used by ORES in any decision-making regarding permit conditions. All of the elements of this exhibit are requiring the developer to make an assessment of how the proposed project will meet energy planning requirements that are mandates of the CLCPA or are planning obligations of the NYISO. This required Exhibit should either be completely eliminated or changed to simply be a statement of the expected megawatt-hours of electricity generation that will result from the construction of this facility.

§900-2.19 Exhibit 18: Socioeconomic Effects: We do not have any comments on this section.

§900-2.20 Exhibit 19: Environmental Justice

- For clarity, this section should be divided into two analyses. The first should be whether the facility is in, adjacent to, or within a half mile of an Environmental Justice area as defined in 900-1.2(u). If it is not, then additional analyses should not be required. If it is,

then the analysis described in 900-2.20 must be undertaken. For the second analyses, a geographic cap of 2 miles should be placed on the requirement for an expanded environmental justice analysis cited in 900-2.20(a)(2).

§900-2.21 Exhibit 20: Effect on Communications

- The Renewable Energy Industry supports that the requirements for an assessment on telecommunications for solar energy facilities has been scaled back compared with the requirements for a wind energy facility.
- (a) It is unlikely that the telecommunications provider would be capable or willing to provide this information so long before a facility begins to take service.
- (e) & (f) The evaluation and assessment required by (e) & (f) are already required as part of the NYISO review and should be deleted here.

§900-2.22 Exhibit 21: Electric System Effects and Interconnection

- Section 900-2.22 should be revised to account for the NYISO Facilities Study timing. In addition to requiring that applications include an approved System Reliability Impact Study, as does Article 10, Section 900-2.22 (Exhibit 21) requires details concerning the interconnection and system upgrade facilities that are subject to change during the Class Year Facility Studies that are outside of developers' control. Developers face unavoidable challenges timing and sequencing the development processes posed by State permitting on the one hand and NYISO interconnection approvals on the other hand. These challenges are compounded by the fact that the two processes are interrelated with each requiring identified progress in one before progressing in the other. Through no fault of developers, the NYISO interconnection approval process can and frequently does lag behind the permitting process. Moreover, it is logical to expect that once the ORES rules go into effect, NYISO will need to amend its tariff to account for differences between the ORES and Article 10 rules leaving lingering uncertainty in the interrelationship in the interim.

Therefore, The Renewable Energy Industry recommends that the opening sentence of Subpart 900-2.22 be revised to read "Based on information available from the completed SRIS and subject to changes that may result from the NYISO Class Year Facilities Study, Exhibit 21 shall contain:"

§900-2.23 Exhibit 22: Electric and Magnetic Fields

- While we do not believe that provision of this material as part of the ORES application is necessary, we also not that it appears that the electric and magnetic fields exhibit should be exhibit 22 not 23.

§900-2.24 Exhibit 23: Site Restoration and Decommissioning

- (c) The Renewable Energy Industry supports the proposed language that allows salvage value to be taken into account when estimating decommissioning and site restoration costs. This is a significant improvement over the current practice in Article 10 and will reduce costs incurred by developers while still providing adequate resources for full decommissioning. We also support the specificity provided regarding the decommissioning of all facility components removed four (4) feet below grade in agricultural land and three (3) feet below grade in non-agricultural land.
- (c) The Renewable Energy Industry proposes that the contingency be reduced to 10 percent. A 10 percent contingency should be sufficient to ensure that adequate resources will be available for full decommissioning and site restoration to be undertaken.

§900-2.25 Exhibit 24: Local Laws and Ordinances

- (a) This provision currently does not contain a timeframe for the enactment of local laws that could apply to a project. The Renewable Energy Industry believes that any local law/ordinance that would apply to the facility under review must have been adopted prior to the date that the application is submitted to ORES. We ask that this requirement be reflected in the Exhibit 24 requirements.
- (b) We suggest this provision be amended. It should read *(b) a list of all local ordinances, laws, resolutions, regulations, standards and other requirements applicable to the placement of electric collection, water, sewer, and telecommunication lines in public rights of way that are of a substantive nature, together with a statement that the location of the facility as proposed conforms to all such local substantive requirements, except any that the applicant requests that the Office elect not to apply.* But limiting the waiver of unreasonably burdensome local laws in this section to only those laws that apply to the interconnection in public rights of way is unnecessarily restrictive. NY Executive Law 94-c(e) provides that “the office may elect not to apply, in whole or in part, *any* local law or ordinance which would otherwise be applicable...” (emphasis added). Collection lines invariably cross local roads and a municipality should not be in a position to block an ORES-approved renewable energy project by refusing to enter into a reasonable road use agreement or grant another local approval for placement of collection lines in a municipal road.
- (c) This provision should be modified to conform to section 94-c(5)(e). The language currently proposed is identical to that found in the Article 10 regulations. By retaining the text found in Article 10 ,the draft regulations do not conform to the standards established in Executive Law section 94-c(5)(e). In order to meet the goal of streamlining the siting process ORES has an obligation to adopt regulations that are in harmony with the statute. We suggest that this provision be revised to read “*(c) A list of all local substantive requirements identified pursuant to subdivision (a) or (b) of this section for which the*

applicant requests that the Office not apply to the facility. Pursuant to Executive Law Section 94-c, the office may elect not to apply, in whole or in part, any local law or ordinance which would otherwise be applicable if it makes a finding that, as applied to the proposed major renewable energy facility, it is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.” Another option would be to add a provision 900-2.25(c)(4), “For requests grounded in the CLCPA targets, that the local law is unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”

- (c) The phrase “...reasonably be obviated by design changes to the facility” in the determination of what constitutes a burden will cause problems with interpretation and application. If it is a height restriction or setback or a zoning restriction, having an applicant cost out the deletion of one or more turbines or use of a smaller/shorter turbine, or having a smaller solar facility will always be raised. In every case, the design can be changed to make a project smaller and less profitable, but the applicant shouldn’t have to prove that every time. It should be adequate to provide a justification regarding why the burden cannot be reasonably borne by the applicant and how the requirement is different and more burdensome than what is in ORES’s uniform conditions. Compliance with the ORES uniform standards and conditions should carry significant weight and in those cases the burden of proof should be on the intervenor.

§900-2.26 Exhibit 25: Other Permits and Approvals: We do not have any comments on this section.

Subpart 900-3 Transfer Applications from PSL Article 10 or Alternative Permitting Proceeding

§900-3.1 Transfer Applications for Opt-in Renewable Energy Facilities: We do not have any comments on this section.

§900-3.2 Transfer Applications for Pending Article 10 Facilities

- (a)(1)(vi) For projects that transfer into the 94-c process from Article 10, the fee to be deposited into the local agency account should reflect the remaining balance of intervenor funds already paid under Article 10. (See 900-3.2(vi)) Additionally, if parties will be required to reapply for funding, the process should be explicit in the regulations, so that local agencies and community parties understand they have to reapply, and that any Article 10 rulings will not transfer over to the 94-c process. Further, we suggest that the following sentence be added at the end of existing provision: *“The Applicant shall be credited for any amounts incurred by intervenors and for which reimbursement is, or will be sought, prior to transferring pursuant to this section.”*

Subpart 900-4 Processing of Applications, §900-4.1 Office of Renewable Energy Siting Action on Applications

- (c) The Renewable Energy Industry supports the inclusion of a 60-day timeframe for the review of a submitted application and the issuance of a determination of completeness.
- (d) The Renewable Energy Industry supports the requirement that a notice of incomplete application include "...a listing of all identified areas of incompleteness and a description of the specific deficiencies." But it is not clear if new issues can be identified when the application is resubmitted. There should be specific regulatory language that all incompleteness issues have to be identified in the first 60 days and there should not be multiple rounds of identifying new issues. This has been an issue in Article 10 and has also been an issue in SEQR for large projects with multiple notices of incomplete application. Title 19 of NYCRR Part 900 should prohibit multiple notices in the new regulations to set that bar right from the start.
- (e) Since the review of a resubmitted application should be more focused, it should not require 60 days to determine the completeness of a resubmitted application. ACE NY supports a 30-day limit on the review of a resubmitted application.
- (h) The Renewable Energy Industry supports the default determination of completeness should the Office fail to provide notice of completeness or incompleteness within 60 days.

Subpart 900-5, §900-5.1 Local Agency Account

- (a) Requires that parties seeking funds from the local agency account must submit a request to the Office within 30 days after the date on which a siting permit application has been filed. (b) Requires that within 30 days following the request, the ALJ shall award local agency funds to those entities that comply with the provisions of subdivision (h). This approach seems to allow the possibility that someone who does not meet party status requirements can still get local intervenor funding. Party status should be a precondition to getting local intervenor funding. Further, in Subpart 900-8(4)(5), the window for party status appears to be running at the same time as the identification of issues for adjudication. This may not work. Parties frequently need confirmation of party status before they spend time and money reviewing the application and identifying potential issues for adjudication.

Subpart 900-6

§900-6.1 Facility Authorization, §900-6.2 Notifications, §900-6.3 General Requirements: We have no comments on these sections.

§900-6.4 Facility Construction and Maintenance

- (b) The Renewable Energy Industry strongly recommends that the on-site environmental/agricultural monitors be given the authority to approve minor project changes that typically arise during construction. The environmental monitor would then be required to document the change and inform ORES of the change within a specified timeframe. Empowering the Environmental Monitor to approve these minor project changes during construction without seeking prior ORES approval will limit construction delays.
- (l)(3) Requiring a qualified landscape architect, arborist, or ecologist to inspect the screen plantings for two (2) years following installation to identify any plant material that did not survive, appears unhealthy, and/or otherwise needs to be replaced is very costly. Overall, this type of post-construction monitoring is a new requirement, and we recommend the requirement be reduced to one year unless the inspection in the first year identifies the need for replacement plantings.
- (n)(1)(iii)(c) and (n)(2)(iii)(d). It is not necessary, nor is there a rationale, for well testing within 500 ft of a horizontal directional drill (HDD). The disturbance from HDD is no greater than trenching. There should be no impact from HDD to wells and testing should not be required within 500 feet. 100 feet would be more reasonable.
- Similarly, in (n)(2)(iii)(a), what is the rationale for well testing within 100 feet from construction of access roads and collection lines? Construction of roads and collection lines does not impact well water quality, nor is this required for other road construction, other types of economic development or land uses. Also, this does not take into account agreements with participating landowners. We recommend that this requirement be deleted. If retained, this provision should only apply to non-participating landowners.
- (o)(1)(ii) Net conservation benefit should not only factor in location and minimization measures. There are a number of other factors, such as level of impact and conservation/mitigation actions that could also contribute to a net benefit.
- (o)(1)(i)(iv),(v) and (vi) all include requirements for information about any mitigation measures that might be taken. We recommend that these three points be combined into one: *The identification and detailed description of the minimization and mitigation actions that will be undertaken by the permittee to achieve a net conservation benefit to the affected species, including, if applicable, payment of a required mitigation fee into the Endangered and Threatened Species Mitigation Fund established pursuant to section 99(hh) of the New York State Finance Law; and ...*
- (o)(2) It is unclear why a path to determining de minimis impacts should only be provided for NYS threatened or endangered grassland birds. A de minimis impact to other NYS threatened and endangered species may also occur, and a more efficient treatment of those species would help the overall goals of renewable energy deployment.

- (o)(3)(iii) The work windows for construction in grassland habitat are not practical. They could result in the construction of a renewable energy facility across two construction seasons resulting in dramatically increased construction costs and a delay in bringing the facility online. We recommend that these windows get modified. ORES should explore if the seasonal restrictions for grassland birds could be tailored to the specific region of the state. Experts have suggested that work windows could differ by region.
- (o)(3)(iii) In addition to modification of the work windows, the Renewable Energy Industry recommends that the types of work be defined more clearly. For example, it is not feasible to restrict staging, storage and transportation of equipment and components during the defined windows. Those activities are typical to everyday work at a renewable energy facility and such restrictions could be interpreted to effectively halt construction altogether during those timeframes.
- 900-6.4(o)(3)(ix) We note that although this provision is written to inform the applicant about mitigation options other than contributing to the Species Mitigation Bank Fund, it is not possible to determine the number of acres that would be required for a permittee implemented grassland bird habitat conservation plan without disclosure of the full formula for making that determination. For example, will a buffer be placed around the locations where grassland birds are displaying essential behaviors? How large a buffer? Will the calculation take into consideration the expected amount of time it would take, absent management, for grassland habitat in the area to transition to a condition that is predominately unsuitable for use by the target species and the number of years the project will be considered to be operational? These details of the formula are essential before one can determine if the ratios are acceptable or will they serve as a deterrent to permittee-initiated grassland bird habitat conservation plans being developed in lieu of paying the mitigation fee. We recommend that a stakeholder workgroup be formed to develop and periodically review these formulas, assuming they are established in an ORES guidance document.
- (o)(4)(a) Increased cut-in speeds can have a significant impact on energy generation, reducing the amount of carbon emissions that are offset from other sources of generation, and increasing the REC prices needed to support a project's financing. There is no data that demonstrates a cut-in speed of 5.5 m/s minimizes impacts to bats more significantly than lower cut-in speeds. The effectiveness of minimization depends on a number of factors, such as location relative to known or unknown hibernacula or maternity colonies, bat activity in the area, equipment type, suitability of surrounding habitat. The Renewable Energy Industry strongly recommends a lower cut-in speed be adopted. The five years will present an opportunity to consider new technology, knowledge and other information to further inform more practicable approaches to minimize bat impacts, without the significant costs of a 5.5 m/s cut-in speed.

- (o)(4)(ii), & (o)(6) & (o)(8) Please clarify that the cessation of activities around an identified nest when a facility is operating does not include cessation of power generation.
- (o)(4)(v)(b) Requiring each developer to conduct and submit a review of curtailment operations every 5 years or sooner, if requested, seems unnecessary. Further, we ask if DEC really wants to receive a different report from each site operator regarding changes in technology or knowledge of impacts to bats. We suggest that this be an *option* for site operators. Also, this could be viewed as an agency responsibility to stay current on the research and to know if new mitigation or avoidance techniques become available in order to work with the project sites to implement those techniques that will decrease mortality at the same or reduced cost. In any case, it seems like it should be to achieve “the same or less mortality at the same or less cost to the operator”, or “to achieve the same mortality while producing more pollution-free power.” This would at least provide the operator the option to demonstrate that they could protect bats just as much with a new and improved (and potentially cheaper) methodology and/or contribute more to NYS’s renewable energy goals.
- (o)(6) Measures to avoid or reduce impact to eagles and other listed wildlife species taken during project site design should be given weight by the resource agencies when determining the need for additional mitigation in a Net Conservation Benefit Plan (NCBP).
- (o)(6)(i) Doubling the avoidance/disturbance distance for eagle nests without a visual buffer has no evidentiary basis and is inconsistent with USFWS requirements.
- (o)(8)(ii) Requires that if any dead or injured federal or NYS threatened or endangered bird species, or eggs or nests thereof, are discovered by the permittee’s on-site environmental monitor or other designated agent at any time during the life of the facility the permittee shall immediately (within 24 hours) contact the NYSDEC and the United States Fish and Wildlife Service (USFWS). The Renewable Energy Industry believes that the word “discovered” should be changed to “identified” so that the notification would be required within 24 hours after the species has been positively identified by an expert.
- (q)(1)(i) “Amphibian breeding areas” adds another work window (April 1 to June 15) that will further complicate planning and conduct of site construction. This provision should be deleted. It is addressed by prohibitions regarding work in wetlands. If it is retained, which we oppose, in-field deviations should be allowed if approved on-site by a regional DEC biologist.
- (q)(1)(viii) & (x) Placement of soil on geotextile when trenching is problematic. It is almost impossible to cleanly replace soil without incorporating geotextile. While this sounds good in theory, in practice it is very difficult to implement. In addition, it provides limited to no environmental value but increases cost of construction. We suggest this requirement be eliminated.

- (r)(2) Allowing work windows for in-stream work to be modified (September 15 through May 31 in cold water fisheries and March 15 through July 15 in warm water fisheries) with site-specific approval from the Office is a practical provision but in-field deviations should also be allowed if approved on-site by a regional DEC biologist or the on-site Environmental Monitor.
- (s) The Renewable Energy Industry is pleased that the proposed regulations no longer contain an agricultural mitigation fee and understands that any fee to mitigate the impact on agricultural resources will be addressed during the NYS Energy Research & Development Authority (NYSERDA) Tier 1 solicitation under the Clean Energy Standard.
- (s)(1)(i) & (s)(2)(i) The Renewable Energy Industry supports the inclusion of the phrase “to the maximum extent practicable” into the requirement to follow the “Guidelines for Solar Energy Projects-Construction Mitigation for Agricultural Lands”, dated 10/18/2019 and the “Guidelines for Agricultural Mitigation for Wind Power Projects”, revised 4/19/2018. Strict compliance to all the provisions is often not practical.

§900-6.5 Facility Operation: We do not have any comments on this section.

§900-6.6 Decommissioning

- (b) The Renewable Energy Industry supports the proposed language that allows salvage value to be taken into account when estimating decommissioning and site restoration costs. This is a significant improvement over the current practice in Article 10 and will reduce costs incurred by developers. However, there are additional ways that the upfront costs to developers can be reduced. ACE and its members suggest that the bond could be spread over the first 10 years of operation with 50% due prior to construction (based on the results of the initial decommissioning study), and 50% due in year 10. The second installment would be contingent on an updated decommissioning plan to ensure that salvage and removal costs are accurate. This change would also be beneficial for local government and landowners because it would give them confidence that the project bond will be adequately funded.

Subpart 900-7, §900-7.1 Amendment of an Application

- We recognize that ORES is trying to balance the imperative for a fast, efficient, and predictable process with the need for it to be workable in the real world, i.e., the need for flexibility as projects change through the development process. For the developers of wind and solar projects, this is a difficult issue: how modifications and amendments are handled and the required level of finality in the application in terms of site and project design. We have the following recommendations regarding how to strike this difficult balance.

- Provision (a) states that a major amendment to the application may only be filed with the express written permission of the ORES. While we understand that this is meant to discourage amendments and encourage applicants to have mature projects, this specific approach doesn't make sense and includes unnecessary steps (or, at least, steps in the wrong order). In (b)(1), applicants are directed to submit a written request to amend an application. But an applicant should not be required to first ask ORES if they can file a major amendment, and then subsequently ask the Office if the desired amended t is major or minor, especially because (a) apparently only applies to "major" amendments. Thus, the first step should be to file a requested amendment with the ORES, and the Office will then determine if the change constitutes a minor or major amendment.
- Further, the fact that part (a) states that there cannot be major amendments even requested without permission seems exceedingly restrictive and will act as a disincentive to applicants to make changes to address a concern raised after the application is filed, because it automatically extends the statutory timeframe for decision and requires re-noticing. The Renewable Energy Industry suggests that this provision should not apply to changes proposed by the applicant in a genuine effort to resolve issues or address concerns raised by stakeholders in response to the application.
- Second, if ORES notifies the applicant within 15 days that an amendment is minor, the regulations do not specify what happens next. Would ORES also notify the applicant at that time if the minor amendment is accepted? The regulations should clarify this question.
- Next, if ORES determines that the amendment is major, and the statutory timeframes are extended accordingly, why would ORES not grant permission for the applicant to submit that amendment? And, if a request for an amendment is denied, does the applicant start again at the application stage or the pre-application stage? In general, if the submission of a major amendment re-sets the timeframes for ORES review and action, it seems appropriate that the major amendment would be accepted. Said another way, a minor amendment should be acceptable to ORES without changing the timeframes, but a major amendment should appropriately change the timeframes and be reviewed with the rest of the application.
- Another solution to this conundrum would be to have the include a separate "application supplement" category, to be defined as "a change in the siting permit application likely to reduce any identified adverse environmental impact or made to address a substantive and significant issue raised in the proceeding." Application supplements should be permitted up and until the ALJ makes a recommended decision or determines there are no issues for adjudication in the proceeding. ORES could review application supplements within fifteen days, just as they review amendments. This would permit applicants to make project changes to address adverse environmental impacts and substantive and significant issues without creating the need for any additional process or review. Without this change, all potential changes would have to wait until a permit has been issued (assuming a major amendment would not be allowed) and that just doesn't make sense.

- Given all of the above concerns, the Renewable Energy Industry suggests that this section be revised to read:

§900-7.1 Amendment or Supplement of an application

(a) Pending applications may only be amended pursuant to this section. Pending applications may be supplemented prior to the issuance of the recommended decision or within 30 days of the issues determination if there are no adjudicable issues.

(b) Requests regarding an application change

(1) An applicant wishing to amend or supplement a pending application shall submit a written request to the Office, setting forth:

(i) The proposed change to the application;

(ii) A justification as to why such changes are required; and

(iii) An anticipated timeframe for resubmission (if not already included with the request).

(2) The Office shall review the request and, within fifteen (15) days of receipt thereof, inform the permittee as to its determination as to whether such changes constitute a minor amendment to be processed by the Office without change to the statutory timeframes; a major amendment subject to subdivisions (c), (d), and (e) of this section; or an application supplement which shall be submitted to the record of the proceeding.

Subpart 900-8, §900-8.1 Publication of Draft Siting Permit

- (a) & (b) The Renewable Energy Industry supports the inclusion of a 60-day timeframe following the completeness date for the publication by ORES of the draft permit conditions and the combined notice. We note that the way that this is currently drafted, [*“No later than sixty (60) days following the date upon which an application has been deemed complete and following consultation with any relevant state agency or authority, ...”*] leaves open the possibility that a failure of ORES to consult with the relevant state agency could be used as a rationale to delay issuance of the Draft Permit. This 60-day time period should not be allowed to be exceeded if the required consultations with state agencies have not occurred. That is, a failure of the agencies should not be used to delay the issuance of a draft permit. The language should be modified to prohibit this.
- (b) All notices should be in one section, so this should either be consolidated or moved to 900-8.2. It is confusing whether the notice identified in (b) is the same as notice in 8.2(a).

§900-8.2 Notice of Hearing

- (a) In conjunction with the previous comment, the use of the term “or” an adjudicatory hearing is confusing because the public comment hearing is held prior to issues determinations - this does not seem like an or – unless this section only addresses

adjudicatory hearing notices with the previous comment about (b) being the notice for public comment. There should clearly be a Combined Notice section and an Adjudicatory Hearing section, the two appear to have different timing and content requirements.

- (a) The Renewable Energy Industry supports the provision that any delay of the commencement of the hearing beyond the deadlines established in Part 900 requires the applicant's consent.
- Part (c) Optional Contents seems like it would not yet be possible if the issues determination hearing has not occurred and issues have not been submitted, unless this is only referring to the adjudicatory hearing notice and not the public comment period notice.
- (d) should specify how is this notice is different from the hearing notice, if it is. There are multiple timeframes and content all under the same section and it would be simpler to break this out or reorganize this.
- Provision (d)(1) states that the minimum public comment period on draft permit conditions will be 60 days. This should be the maximum public comment period. With the use of the standard conditions, it would be possible to have a 30-day review period. Further, as written in (d)(1) it appears that there would potentially be a comment period longer than 30 days, and a maximum comment period is not defined nor is it defined what would trigger a longer comment period. This level of uncertainty will make it difficult for planning. Therefore, we recommend a maximum public comment period of 60 days.

§900-8.3 Public Comment Hearing and Issues Determination

- Based on direct experience with Article 10, wind and solar project developers have a keen interest in a fair, efficient, and timely process for the hearings and the issues determination. While these aspects of the permitting process may not seem to be the most critical to some, this is the segment of the process that is prone to contention and delays.
- Provision (a) discusses a public comment hearing. As a clarifying question, will a public comment hearing be required for all projects? Section 94-c section 4(5)(c)(ii) of the Executive Law states that a public hearing is only required when a municipality has provided a statement "...that a proposed facility is not designed to be sited, constructed, or operated in compliance with local laws and regulations and the office determines not to hold an adjudicatory hearing on the application, the department shall hold [a] non-adjudicatory public hearing..."
- Part (b)(1) refers to a "prospective party" which is not a defined term and this section should most likely refer to a "potential party" which is a defined term.

- Also, in (b)(1), the process for submission of issues is confusing. This language makes it sound like there is a separate process for issue submission, but our understanding is that parties submit their issues with their party status request. Would the submission of issues statements be made during the 60-day public comment period? It would make sense that the parties submit their issues during this time, then there is the public comment hearing, and then the ALJs issue their determination, but it is not clear that is the intended process.
- (b)(1) This provision gives broad discretion to the ALJ to reopen the issues determination process with only generalized standards and no obvious means for avoiding placing applicants in the untenable position of choosing between denial and a “voluntary” extension of the ORES deadline. We proposed the following edits to the text to limit the reason for reopening the issues determination to the availability of new information raising significant and substantive issues: *Upon a demonstration that such information raises a new significant and substantial issue that must be adjudicated, ~~the public review period for the application prior to the issues determination was insufficient to allow prospective parties to adequately prepare for the issues determination procedure,~~ the ALJ may adjourn the issues determination, extend the time for written submittals or make some other fair and equitable provision to protect the rights of the prospective parties.*
- Lastly, (b)(1) is not specific as to what kind of showing would be required to demonstrate the public review period was insufficient. Guidance should be provided on this issue.
- Provision (b)(4) is quite confusing as written. For example, it is hard to know when the close of the public comment period occurs and when the filing of petitions for party status or the filing of a statement of compliance with local laws are due. A process for submission of issues statements and responses should be spelled out, such as: *Thirty (30) days from the Notice of Draft Permit, parties must submit their issues statement. The applicant shall have fifteen (15) days to submit their responses and the ALJ’s shall make an issues determination no later than 30 days after Public Comment Hearing.*
- Even though provision (b)(4) states “within fifteen (15) days”, because provision (b)(4)(i) says “may,” it is not at all clear when exactly ORES is required to issue the responses to requests for party status, or responses to the statement of issues of the applicant, or the responses to the statement of compliance with local laws. This section should be clear that all of these responses will happen in the mandatory 60-day comment period.
- (c)(7) Since this provision applies to post permit modifications it should be moved to 900-11.4.

§900-8.4 Hearing Participation

- (c)(1) The Renewable Energy Industry believes that a party should have a local nexus to the proposed facility in order to qualify for party status. We propose that existing (i) through

(v) be renumbered (ii) through (vi) and a new (i) added to read (i) *demonstrate that the proposed party is a resident of the community in which the proposed facility will be located or is a resident located within one (1) mile of a proposed solar facility or within five (5) miles of a proposed wind facility or is a non-profit organization that can demonstrate a concrete and localized interest that may be affected by the proposed facility and that such interest has a significant nexus to their mission.* This is especially appropriate given that there are procedures specified for non-parties as well.

- (d) Unlike Article 10, the proposed 94-c regulations already include uniform standards addressing potential impacts and design criteria (e.g. setbacks, sound, and shadow flicker). By adopting the uniform standards, the ORES is making a determination regarding the appropriateness of the standards in meeting the objectives of 94-c and that the standards are appropriate to protect human health and the environment. The Renewable Energy Industry requests that the regulations should be clear that a party proposing a site specific standard, even if it is a provision of a local law that is different than a uniform standard, carries the burden of showing the appropriateness of the standard in the particular context of the project. It should not be the applicant's burden to oppose more stringent local laws in each proceeding upon the adoption of the uniform standards. ORES should be explicit that the municipalities bear the burden of establishing the need for more stringent standards they seek to enforce than the regulations.
- (f)(1)(ii) This is a more permissive requirement than is currently in Article 10. The Renewable Energy Industry suggests that this provision be revised to read "(ii) *A finding that the petitioner has a sufficient local nexus to the proposed facility, and resides within (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility or represents individuals who reside within (1) mile of a proposed solar facility or five (5) miles of a proposed wind facility;* Then, (f)(1)(iii) would be the current (ii): "(iii) *A finding that the petitioner has raised a substantive and significant issue or ...*" We acknowledge that this change would be moot if our recommendation with respect to Part 900-8.4©(1) is adopted by ORES.

§900-8.5 General Rules of Practice

- Regarding provision (a) on Service, the Renewable Energy Industry believes that there should be a system in place like DMM or the court e-filing system so parties can see all papers and consent to electronic service. As written here, it could be that it would be the burden on the Applicant to get all parties to agree to electronic service and even then, per (a)(3) to send everything by mail. This section should be modified.
- Per provision (a)(3), email service should be the default method and should be encouraged. Simultaneous mailing should not be required. Mail service should be reserved only for parties without email capability.

- (c)(1) Filing and service of motion papers should be by email, not be personal delivery or first-class mail as in this proposal.
- (e) This section (Expedited Appeals) may be easier to follow if it was moved to section 900-8.7 Conduct of the Adjudicatory Hearing.

§900-8.6 Disclosure

- The reference to FOIL is confusing since private applicants are not subject to FOIL. Presumably the intention is to allow members of the public access to documents in the possession of ORES, but FOIL already affords that access. This reference should be deleted or explained more.
- In provision (b), the language should clearly specify that the discovery scope is limited to adjudicable issues and limited to material that is relevant to issues in dispute.
- (b)(3) This provision is very burdensome and impractical and typically developers would not have the access rights to accommodate this request. Therefore, Parties should only have this right upon making a showing of the need for it.
- (b)(6) Again, this provision is very burdensome. Parties should only have this right upon making a showing of the need for it.
- (c)(4) This seems unreasonable especially given the time periods for decisions and hearings and the issue raised in comment on (b)(3) above.
- (e) Is there a process for filing direct and rebuttal testimony or is pre-filed testimony the only testimony permitted? We would recommend that the ALJ be permitted to allow the filing of rebuttal testimony at his or her discretion.
- (f) This civil litigation vehicle is not a reasonable or necessary tool in a permitting procedure which benefits from the direct involvement of agency technical experts.

§900-8.7 Conduct of the Adjudicatory Hearing

- Provision (a)(5) addressed the close of the record. Our opinion is that the Hearing Record should be closed upon the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, and not include post hearing briefs. Or, a distinction should be made between the Evidentiary Record and the Hearing Record. Briefs are not appropriate for submitting factual material not in evidence.

§900-8.8 Evidence, Burden of Proof and Standard of Proof

- Provision (a)(1) What are the reasons supporting the allowance of hearsay evidence into the record? What weight is hearsay evidence and which party bears the burden of proof when hearsay evidence is contradicted by other testimony or data? We recommend that hearsay evidence not be admissible unless it falls within an exception to the hearsay rule as provided in New York Civil Practice Law (CPLR) Article 45 or other law. Any admissible hearsay must be shown to be reasonably reliable, relevant and probative. The burden of establishing an exception rests upon the proponent of the statement.

§900-8.9 Ex Parte Rule: We do not have any comments on this section.

§900-8.10 Payment of Hearing Costs: We do not have any comments on this section.

§900-8.11 Record of the Hearing

- In provision (b), the regulation should clearly distinguish between the evidentiary record (i.e., the record developed during the adjudicatory hearings with sworn testimony) and the entire record (which includes all the documents listed in 900-8.11 (b)). Factual issues should only be determined based on the evidentiary record.

§900-8.12 Final Decision: We do not have comments on this section.

Subpart 900-9, §900-9.1 Final Determination on Applications

- The renewable energy industry requests that an additional provision 9.1(a)(3) be added that requires ORES to issue its final determination on a permit within 8 months of the completeness determination if no adjudicatory hearing is held and all permit conditions have been agreed to by the applicant.

Subpart 900-10

§900-10.1 Office Decisions on Compliance Filings

- One of the flaws of the Article 10 system has been that even after a Certificate was issued, it still takes many months, even years, before construction can begin. This has largely been due to the filing and review of a great variety of compliance filings. This process needs to be dramatically improved in 94-C. Currently, Subpart 900-10 identifies sixteen plans to be filed after a siting permit is granted as compliance filings. The ORES has 60 days to notify the permittee if each of the plans are acceptable and a Notice to Proceed with Construction will not be issued until all are approved. This approach is setting the stage for potential significant delay and there is, in fact, no reason to mandate that the 16 plans only be filed after the permit is issued. The proposed regulations could be changed to authorize applicants to include any of the listed plans in its application at their option or filed with

ORES within a specified time period before permit issuance. With those plans included in the application, or subsequent thereto, the draft permit issued could include approved versions of those plans, thereby eliminating the need for those plans to be resubmitted as compliance filings. One of those filings could be detailed clearing and grading plans to allow the applicant to begin those activities shortly after permit issuance. Most of the plans will be based on generic, formulaic plans with minimal need for project-specific details to be incorporated. Applicants will be able to - and should be given the option to - include these plans, as modified with project-specific details, in their applications, especially given the greater degree of project development required by the ORES proposal for an application to be deemed complete as compared to Article 10. This change will reduce the time needed to prepare, review and approve the post-certificate compliance filings. An additional solution to this issue is to change the rules to allow applicants to submit compliance filings for ORES review once a draft permit is issued. In anticipation that a draft permit will in many respects be substantially the same as the final permit, applicants should be free to expedite construction schedules by submitting compliance filings once a draft permit is issued. ORES staff could then begin its review. Further, the rules should provide for a shorter period for review and approval of compliance filings than the 60 days proposed, such as 30 days. ORES will have sixty (60) days to review an application to determine if it is complete and another sixty (60) days to issue a draft permit. Applications will describe project plans much closer to final than in Article 10. Furthermore, the fact that there will be standard conditions applying to every project will greatly reduce the number of project-tailored conditions. Therefore, a month to review compliance filings would be adequate.

- The issue of moving from permit issuance to the commencement of construction is critical for wind and solar developers, especially given that elsewhere in the proposed regulations there are narrow construction windows related to species protection and other environmental resources. Navigating these various construction windows and restriction in a way that complies with all of these requirements is complex. To expedite the process from permit issuance to construction we make these three recommendations (1) allow the inclusion of compliance filings in the application, (2) allow compliance filings to be filed with ORES after the Draft Permit is issued, and (3) Provide ORES 30 days to approve of compliance filings. These three recommendations will help facilitate timely and safe construction, and not one of them reduces environmental review or weakens or changes any of the conditions to protect communities or the environment.
- The proposed regulations should be clarified to specify that work can begin on an approved compliance filing, which may be filed as one of many, as allowed under Article 10 currently. Allowing compliance filings to be made (and approved) in stages would allow an applicant to commence construction on the portion of the site covered by the approved compliance filing and not be delayed until the entire compliance filing package is approved, substantially expediting, and adding flexibility to the construction process. This is especially needed given the required work windows for T & E species and water resources.

§900-10.2 Pre-Construction Compliance Filings

- We recommend that in (a), the words “and operation” be deleted. The permits and approvals required for construction are appropriate pre-construction filings, but the permits and approvals for operation should be provided for information only and should not be a compliance filing that needs to be approved by ORES before construction can begin.
- In provision (b) on Final Decommissioning, the Renewable Energy Industry supports the proposed language that, in addition to a letter of credit, other means of financial assurance will be allowed if approved by ORES. This proposal will provide site operators with additional flexibility in complying with the requirement while also providing local municipalities with the assurance that site decommission and restoration costs will be covered.
- (b)(1) Requires that the Final Decommissioning and Site Restoration Plan contain proof that the letter(s) of credit (or other financial assurance approved by the ORES) have been obtained but in (b)(2) it states that the letters of credit can be submitted after one year of facility operation. This should be clarified.
- Provision (d) Wind Turbine Certifications requires a verification that turbines were designed accordance with International Electrotechnical Commission (IEC) 61400-1. In fact, this certification can be time-consuming to obtain and is not in the project developer’s control, but rather the turbine supplier and the entity providing the certification. The Renewable Energy Industry suggests that ORES should tie this requirement to the pouring of foundations for turbines and not to the initial start of construction or have the ability to approve the construction conditioned upon the verification being submitted prior to the pouring of foundations as has been approved in some Article 10 cases.
- (e)(3) & (4) The Facilities Management Plan and the Vegetation Management Plan should be post-construction compliance filings. These plans cover facility inspections, maintenance, and vegetation management during facility operation. Approval of this plan should not delay construction.
- (e)(7)(vi) Retaining a third party mediator can be a cumbersome process, whereas the Department of Public Service already has a consumer dispute resolution process detailed in its regulations, and which can be employed in the event the complaint remains unresolved following the procedures in the Complaint Management Plan. This system has been employed in several Article 10 proceedings. At the very least, an applicant should be given the choice of including one or the other process.
- Provision (g)(1) addresses the Cultural Resources Avoidance, Minimization, and Mitigation Plan. The demonstration required by (g)(1) is redundant to application materials. This need

should be able to be satisfied by the cultural resources analysis done for the issuance of the permit, and it should not have to be done again. This compliance filing should be just the Cultural Resources Mitigation and Offset Plan required by (2) and should only be required when applicable.

§900-10.3 Post-Construction Compliance Filings: We do not have any additional comments on this section.

Subpart 900-11 Modifying, Transferring or Relinquishing Permits

§900-11.1 Permit Modifications Requested by Permittee

- This section of the regulations is quite critical to efficient project construction, and we strongly urge you to make it more efficient. Changes in the field during construction are common and normal and should not constitute a permit modification or require review/approval from ORES. The onsite Environmental Monitor should be empowered to review and approve these micro siting decisions to allow construction to proceed efficiently. The renewable energy industry urges ORES to modify the regulatory proposal to empower the Environmental Monitor to designate a modification as minor and approve of minor modifications. A major modification, according to the definition in Part 900-1.2 (ae), *“means a change to an existing permit standard or condition likely to result in any material increase in any identified environmental impact or any significant adverse environmental impact not previously addressed by uniform or site-specific standard or condition or otherwise involves a substantial change to an existing permit standard or condition.”* The Environmental Monitor should be able to apply this definition and designate a modification as minor, as well as approve of the minor modification and inform the ORES. If the Environmental Monitor decides that the modification is major, or if the permittee recognizes that it will be designated as major, the modification should be sent to ORES for their review and approval or rejection.
- The current proposal for permit modifications is not practical. For each change, even if it is minor, the permittee would have to wait 30 days for a decision from ORES whether it is major or minor, and then wait an additional unspecified time period for the process described in 900-11.1[c]. We note that per (a) of this Part, this process would apply not just to the permit but also to all approved compliance filings. Therefore, it is quite conceivable – especially based on experience with projects permitted under Article 10 – that there would be numerous changes to the compliance filings based on occurrences that happen in the normal course of construction. We strongly recommend that a simpler and more time-efficient process be allowed under these regulations for minor changes to approved compliance filings.

§900-11.2 Transfers of Permit and Pending Applications, §900-11.3 Relinquishments, and §900-11.4 Permit Modifications by the Office. We do not have any comments on these sections.

Subpart 900-12, §900-12.1 Enforcement; Subpart 900-13, §900-13.1 Severability; Subpart 900-14, §900-14.1 Effective Date; We do not have any comments on this section.

IV. Conclusion

The Renewable Energy Industry appreciates the opportunity to comment on these proposed regulations. We recognize the considerable amount of work that ORES conducted to draft these comprehensive rules which completely re-design wind and solar energy project review and permitting. We urge ORES to consider our four high priority comments in Part II: (1) streamline post-permit compliance filings to reduce the risks of construction delays, (2) further clarify several local law provisions to avoid future disputes, (3) eliminate duplicative and irrelevant studies that will not be used by the ORES in its decision-making given the establishment of uniform standards and conditions that will be applied to all projects, and (4) improve the application amendment process to allow limited flexibility for changes to applications that are common and outside the control of developers. We also appreciate the ORES's willingness to review the entirety of the recommendations in Part III and consider this suite of small modifications to the regulations to improve their overall clarity, certainty, and consistency. We note that we have developed a complete redlined version of 900-1 through 900.14 which we will also be submitting to ORES. Finally, under separate cover we are submitting comments on the sound provisions of the ORES regulatory proposal.



December 7, 2020

Submitted via email: General@Ores.ny.gov

Mr. Houtan Moaveni
Deputy Executive Director
New York State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

Re: AWEA and ACE NY Comments on the Sound Components of the ORES Proposal

Dear Mr. Moaveni,

The American Wind Energy Association (AWEA) and the Alliance for Clean Energy New York (ACE NY) are submitting these comments on the New York State Office of Renewable Energy Siting's (ORES) proposed draft rules for permitting new wind and solar energy projects, Chapter XVIII, Title 19 of NYCRR Part 900. This set of comments is focused on sound-related requirements.

AWEA and ACE NY established a working group of acoustical consultants to review and comment on the sound portions of the proposed rule. The individuals in this group collectively have worked on every project permitted through the existing Article 10 process.

It is our professional opinion that our recommendations included in these comments – and expressed in Appendix 1 as a red-lined version of the applicable portions of the ORES regulatory proposal – will strengthen these regulations with respect to methods to predict and analyze sound impacts from proposed wind and solar projects. These recommendations represent best professional practice and will streamline and simplify the regulations without sacrificing community protection or reducing an operator's obligations to comply with the sound standards established in 900-6, Uniform Standards and Conditions.

We appreciate the opportunity to comment on these portions of the regulations and would welcome the opportunity to review our submittal with you at any time.

Respectfully submitted,

Hilary Clark, AWEA
Anne Reynolds, ACE NY

AWEA and ACE NY Comments on Chapter XVIII, Title 19 of NYCRR Part 900 Wind and Solar Energy Permitting Requirements Regarding Sound

900-2.8 Exhibit 7 (Noise and Vibration); Subpart 900-6.1 (Facility Authorization); Subpart 900-6.5 (Facility Operation); Subpart 900-6.4 (Facility Construction and Maintenance)

December 7, 2020

I. Introduction

The American Wind Energy Association (AWEA) and the Alliance for Clean Energy New York (ACE NY) submit these comments and recommendations regarding the New York State Office of Renewable Energy Siting's (ORES) proposed draft rules for permitting new wind and solar energy projects, Chapter XVIII, Title 19 of NYCRR Part 900.

This set of comments is focused on sound-related requirements, specifically Subpart 900-2.8 (Exhibit 7: Noise and Vibration) and Subparts 900-6.1 (Facility Authorization), 900-6.4 (Facility Construction and Maintenance) and 900-6.5 (Facility Operation). Our comments on the remaining portion of the ORES regulatory proposal will be submitted in a separate document.

Overall, there is broad agreement and support among renewable energy companies for establishing uniform standard conditions for sound and modeling methodologies used to assess renewable energy project compliance with such conditions during the permitting phase. Our recommendations are primarily focused on improving clarity and reducing duplication, especially between §900-2.8 and Subpart 900-6.5.

In Part II we identify our priority issues, in Part III we provide a narrative discussion of all recommendations, and in Appendix 1 (below) we have provided a ~~strikeout~~/underline version of the sound portions of the ORES regulatory proposal.

These comments have been developed by the AWEA and ACE NY in consultation with member companies and acoustical consultants familiar with the existing Article 10 process.

II. Priority Recommendations

- 1. Clarify Uniform Standards are Project-only.** A cumulative impacts study is required by 900-2.8[c]. While the renewable energy industry does not object to this requirement, the proposed language in Part 900-6 should be modified to clarify that the noise standard applies to all components of the project, not to other facilities outside of the permittee's control. Given the potential site-specific complexities associated with a cumulative assessment, it is expected that potential cumulative conditions would be developed on a project specific basis.
- 2. One post-construction sound study should be required.** We support the use of a single operational sound survey rather than the two studies required in §900-6.5 (a)(2) of the proposal. The single study should be performed during the conditions with the best signal to noise ratio (i.e. in leaf-off conditions). This has proven to be best practice. Therefore, we recommend that one study be required and that the timing of the survey be adjusted to allow for testing during

leaf-off conditions. In the unlikely event that this is not sufficient, the change we propose provides for a second survey at the discretion of the ORES.

3. **Modify the proposal to simplify and clarify.** The remainder of our recommended changes to the regulatory proposal are designed to avoid confusion, reference the best standards, and avoid duplication between Part 900-2.8 and 900-6.5. While each of these recommended changes may be minor, taken together we believe they will greatly improve the regulations and avoid future conflicts.
4. **An ambient sound study should not be required.** The renewable energy industry urges ORES to eliminate the requirement to do an ambient sound study, currently required in the proposal at Part 900-2.8(i). Because all permit applicants will be subject to the same sound standard that is established in Part 900-6, the ambient sound study will not be used by ORES in any decision-making. Therefore, it should not be required.

III. Explanation of All Recommended Changes

Each of the recommended changes outlined in this part are reflected in the redlined version of the ORES regulatory proposal which is included as Appendix 1.

§900-2.8 Exhibit 7: Noise and Vibration

§900-2.8 (b). Modifications to this part are proposed because the concept of a “design goal” appears to be the same as limit, therefore one can consolidate all limits in Subpart 900-6.5 to simplify the regulations.

§900-2.8 (c). This part is related to one of our priority requested changes (please refer to our comment on §900-6.5 (a)(1)). The change we recommend to §900-2.8 (c) in Appendix 1 is designed to clarify that the purpose of the cumulative analysis is not to evaluate compliance of facilities outside of the permittee’s control with noise standards in §900-6.5 (a)(1), rather it is to identify if potential cumulative sound levels warrant additional analysis or site-specific permit conditions.

§900-2.8 (d). The modeling means and methods required by Exhibit 7 result in predicted sound levels that are independent of duration. That is, the predictions outlined are based on all equipment capable of operating simultaneously being included in the model at its highest sound level, thus the reference to durations may be an inadvertent source of confusion. For clarity, the IEC standard for determining the apparent sound power level is added.

§900-2.8 (e). The standard referenced for tones has been revised as the reference in the proposal, ASA S12.9 Part 3, can result in a finding of tonality for a steadily decreasing spectrum where there is no tonal spike.

§900-2.8 (i). This is another of our priority recommendations. The sound limits are clearly defined in Uniform Standards and Conditions, Subpart 900-6.5 and do not require the determination of baseline sound levels to enable a finding of compliance. That is, the ambient sound study required in Part 900-2.8(i) [“an evaluation of ambient pre-construction baseline noise conditions”] will not be used in ORES decision-making and should not be required.

§900-2.8 (j). As proposed, this section requires an “evaluation of future noise levels during construction...including predicted A-weighted/dBA sound levels using computer noise modelling as follows:...” Yet the equipment used to construct wind and solar facilities is the same or very similar to that used on other common major infrastructure programs. The development of construction noise contours for wind and solar projects is not consistent with construction noise evaluations for other, typically more intensive, infrastructure projects. The United States Department of Transportation has evaluated sound levels from construction equipment and NYSDOT establishes requirements for a construction noise analysis. Alternatively, the General Assessment method outlined in Federal Transit Administrations 2018 *Transit Noise and Vibration Impact Assessment Manual* can be considered. For these reasons, the current proposed requirement in [j] is excessive and we urge ORES to not require the noise contours for the construction phase.

§900-2.8 (m). As discussed in the comment on §900-2.8 (j), sound levels associated with construction of wind and solar facilities are not extraordinary and Exhibit 10 addresses potential for damage from blasting or pile driving. Therefore, we suggest that the entirety of (m) be deleted. At the very least, (m)(2) should be deleted because Exhibit 10 already addresses this issue.

§900-2.8 (o). Projects should not be artificially restricted in their ability to deploy the best available technology, including noise reduced operation (NRO) strategies. Subpart 900-6.5 establishes the applicable limits which the permittee has an obligation to satisfy.

§900-2.8 (p). We believe the level of detail in this part may be overly prescriptive and this information may not always be necessary in all cases. Accordingly, we request that “upon request” be added to the first sentence of this section.

§900-2.8 (q). Would the definition/glossary discussed here be appropriate for inclusion in the regulations themselves rather than or in addition to inclusion in the application?

§900-6.1 Facility Authorization

§900-6.1 (k). There is broad agreement for the best practices identified with respect to typical construction noise. Compliance with existing construction noise regulations is expected to be reasonable. In the event unreasonably restrictive local laws are developed, it is expected the Office has the ability to waive them. Alternatively, add “to the extent reasonable and feasible” to the end of (k)(3). [NOTE: This point is also relevant to (k)(3) under §900-6.4 (Facility Construction and Maintenance).]

§900-6.4 Facility Construction and Maintenance

§900-6.4 (m)(2). There is broad agreement with referencing the U.S. Bureau of Mines criteria and that blasting should be addressed separately in Exhibit 10, rather than in Exhibit 7.

§900-6.5 Facility Operation

§900-6.5 (a)(1). In Appendix 1, we propose a reordering of the Uniform Standards and Conditions in §900-6.5 (a)(1). This recommended reordering will improve the clarity and flow by identifying

the criteria in (i) and (ii) and adjustments to that criteria in (iii). We suggest that the presence of tones is clarified to be a five (5) dBA penalty rather than a prohibition. (While it would be preferred to have uniform criteria, it is understood that Article VII proceedings utilize criteria similar to (ii) and (iii) for substations.) We suggest the deletion of 16 Hz in (iv) because the concerns regarding airborne induced vibration are addressed in (v). In fact, there is lack of evidence supporting these concerns, nonetheless, it is agreed that (v) is expected to yield reasonable resolution in the event of such complaint. It is also anticipated that similar to the existing Article 10 process, project modifications that do not result in material different effects can be addressed in supplemental analysis. For example, projects can implement the latest turbine technology prior to construction by providing the Office with enough evidence that it is similarly predicted to comply with the applicable criteria.

We also note that (a)(1) as currently proposed says “Noise levels by all noise sources from wind facilities” which to be abundantly clear should state, “Noise levels by all noise sources from the permittee’s wind facilities shall:”. This is one of our priority changes, because wind facilities permitted outside of Article 10/94-c have different noise standards. It is recognized that potential cumulative concerns would be addressed in site specific, rather than uniform, permit conditions.

§900-6.5 (a)(2). This is the third of our priority issues. This Part, as proposed, requires “at least two sound compliance tests” but we support the use of a single operational sound survey during the conditions with the best signal to noise ratio (leaf-off conditions). This has proven to be best practice. We recommend that the timing of the survey be adjusted to allow for testing during leaf-off conditions. In the unlikely event that this is not sufficient, the changes we proposed provide for a second survey at the discretion of the Office.

§900-6.5 (a)(3). In the unlikely event of an exceedance, we recommend that the resolution is developed based on the facts of the individual case. We consider the current level of detail unnecessary and speculative. A competent acoustical professional will be able to tailor a minimization plan to address the site-specific concerns and work with the ORES on developing a reasonable and feasible implementation plan.

§900-6.5 (a)(4). We recommend that Items (iii) and (v) be consolidated – this will help to simplify and clarify the requirement. Evidence documenting substantial amplitude modulation identified in (iv) at operating wind projects in New York or elsewhere in the nation is lacking thus the potential implementation challenges including false positives and false negatives is unknown. A more thorough discussion of this would be prudent and subsection (iv) has been deleted until such a discussion occurs.

§900-6.5 (b)(1). For enhanced clarity and consistency, we recommend that the standards for solar (which are expected to also apply to energy storage) be addressed here rather than Section 900-2.8. Moreover, we suggest that additional flexibility regarding daytime sound level limits may be prudent. A 45 dBA requirement for facilities that are expected to emit their highest sound levels during the daytime hours has the potential to limit the viability of some projects.

Further, in consideration that solar projects are operational generally only during the day, we propose introducing the concept of daytime and nighttime periods for the noise limits. This concept is included in the noise guidelines for other jurisdictions and has been considered in most of the noise impact assessments for solar projects in New York under the Article 10 process. Therefore, a 5 dBA adjustment for daytime is proposed, for a noise limit of 50 dBA for non-participating residences during the daytime, with ‘daytime’ defined as the start of twilight to the end of twilight. This limit is

used for other proposed solar projects in New York (e.g.: Morris Ridge Solar – Pre-Construction Noise Impact Assessment, page 6). We believe that, by recognizing the operational realities of solar projects (that the inverters and substation are running during the daytime), this amendment to the regulations will provide flexibility for solar development while continuing to be consistent with precedent, and accounting for the greater sensitivity to nighttime noise.

IV. Conclusion

We appreciate the opportunity to offer these recommendations. Further, it is appropriate that the detailed methodology for the post-construction monitoring is not fully incorporated into this regulatory proposal, and our organizations would welcome the opportunity to join an advisory work group to help inform ORES’s development of guidance on appropriate compliance monitoring for sound compliance.

Appendix 1 to Follow

APPENDIX 1: Recommended Changes to ORES Sound Proposal

§900-2.8 Exhibit 7: Noise and Vibration

Exhibit 7 shall contain:

(a) A study of the noise impacts of the construction and operation of the facility. The name(s) of the preparer(s) of the study and qualifications to perform such analyses shall be stated. If the study is prepared by certified member(s) of a relevant professional society or state, the details of such certification(s) shall be stated.

~~(b) Design Goals: The study shall demonstrate document predicted noise levels from the facility as specified in this section and compare the predicted sound levels to the Subpart 900-6.5 (a) and/or (b) Uniform Standards and Conditions, Facility Operations, Noise Limits for Wind Facilities, Noise Standards for Solar Facilities. that noise levels from noise sources at the facility will comply with the following:~~

~~(1) For wind facilities:~~

~~(i) A maximum noise limit of forty five (45) dBA Leq (8 hour), at the outside of any existing non participating residence, and fifty five (55) dBA Leq (8 hour) at the outside of any existing participating residence;~~

~~(ii) A prohibition on producing any audible prominent tones, as defined by using the constant level differences listed under ANSI S12 .9 2005/Part 4 Annex C (sounds with tonal content) (see section 900 15.1(a)(1)(iii) of this Part), at the outside of any existing non participating residence. Should a prominent tone occur, the broadband overall (dBA) noise level at the evaluated non participating position shall be increased by 5 dBA for evaluation of compliance with subparagraph (i) and (v) of this paragraph;~~

~~(iii) A maximum noise limit of sixty five (65) dB Leq (1-hour) at the full octave frequency bands of sixteen (16), thirty one and a half (31.5), and sixty three (63) Hertz (Hz) outside of any existing non participating residence in accordance with Annex D of ANSI standard~~

~~S12.9 2005/Part 4 Section D.2.(1) (Analysis of sounds with strong low frequency content) (see section 900-15.1(a)(1)(iii) of this Part);~~

~~(iv) Not producing human perceptible vibrations inside any existing non-participating residence that exceed the limits for residential use recommended in ANSI/ASA Standard S2.71 1983 (R August 6, 2012) "Guide to the evaluation of human exposure to vibration in buildings" (see section 900-15.1(a)(1)(i) of this Part);~~

~~(v) A maximum noise limit of forty (40) dBA Leq (1 hour) at the outside of any existing non-participating residence from the collector substation equipment; and~~

~~(vi) A maximum noise limit of fifty five (55) dBA Leq (8-hour), short term equivalent continuous average nighttime sound level from the facility across any portion of a non-participating property except for portions delineated as NYS-regulated wetlands pursuant to section 900-1.3(e) of this Part and utility ROW. The applicant shall demonstrate compliance with this design goal through the filing of noise contour drawings and sound levels evaluated at the worst-case discrete locations. No penalties for prominent tones will be added in this assessment.~~

~~(2) For solar facilities:~~

~~(i) A maximum noise limit of forty five (45) dBA Leq (8-hour), at the outside of any existing non-participating residence, and fifty five (55) dBA Leq (8-hour) at the outside of any existing participating residence;~~

~~(ii) A maximum noise limit of forty (40) dBA Leq (1 hour) at the outside of any existing non-participating residence from the collector substation equipment;~~

~~(iii) A prohibition on producing any audible prominent tones, as defined by using the constant level differences listed under ANSI S12.9 2005/Part 4 Annex C (sounds with tonal content) (see section 900-15.1(a)(1)(iii) of this Part), at the outside of any existing non-participating residence. Should a prominent tone occur, the broadband overall (dBA) noise level at the evaluated non-participating position shall be increased by 5 dBA for evaluation of compliance with subparagraph (i) and (ii) of this paragraph; and~~

~~(iv) A maximum noise limit of fifty five (55) dBA Leq (8-hour), short term equivalent continuous average sound level from the facility across any portion of a non participating property except for portions delineated as NYS-regulated wetlands pursuant to section 900 1.3(c) of this Part and utility ROW to be demonstrated with modeled sound contours drawings and discrete sound levels at worst case locations. No penalties for prominent tones will be added in this assessment.~~

(c) Radius of Evaluation: Evaluation of the ~~maximum~~ predicted noise levels to be produced during operation of the facility shall be conducted for all sensitive receptors within the sound study area, defined as follows:

1) For wind facilities, the evaluation shall include, at a minimum, all sensitive receptors in a one (1)-mile radius from any wind turbine or substation proposed for the facility. For the cumulative noise analysis, the modeling shall include noise from any wind turbine and substation existing and proposed by the time of filing the application and any existing sensitive receptor within a two (2)-mile radius from any wind turbine or substation proposed for the facility. The purpose of the cumulative analysis is to provide a complete environmental review record and not to evaluate compliance of facilities outside of the permittee's control with noise standards in §900-6.5 (a)(1).

(2) For solar facilities, the evaluation shall include, at a minimum, all sensitive receptors within a one thousand five hundred (1,500) foot radius from any noise source (e.g., substation transformer(s), medium to low voltage transformers, inverters) proposed for the facility ~~or within the thirty (30) dBA noise contour, whichever is greater.~~ For the cumulative noise analysis, the modeling shall include noise from any solar facility and substation existing and proposed by the time of filing the application and any existing sensitive receptors within a three thousand (3,000)- foot radius from any noise source proposed for the facility ~~or within the thirty (30) dBA noise contour, whichever is greater.~~ The purpose of the cumulative analysis is to provide a complete environmental review record and not to evaluate compliance of facilities outside of the permittee's control with noise standards in §900-6.5 (a)(1).

(d) Modeling standards, input parameters, and assumptions:

(1) For both wind and solar facilities, the evaluation shall use computer noise modeling software that follows the ANSI/ASA S12.62-2012/ISO 9613-2:1996 (MOD) (see section 900-15.1(a)(1)(v) of this Part) or the ISO-9613-2:1996 propagation standards (see section 900-15.1(g)(1)(i) of this Part) with no meteorological correction (Cmet) added. The model shall:

(i) Set all noise sources which can operate~~ing~~ simultaneously at maximum sound power levels;

(ii) Use a ground absorption factor of no more than $G=0.5$ for lands and $G=0$ for water bodies;

(iii) Use a temperature of ten (10) degrees Celsius and seventy (70) percent relative humidity;

(iv) Report, at a minimum, the ~~maximum~~ predicted: A-weighted dBA Leq ~~(1-hour or 8-hour)~~ sound pressure levels ~~in a year~~, and the ~~maximum~~ linear/unweighted/Z dB ~~(Leq 1-hour)~~ sound pressure levels ~~in a year from~~ in the thirty-one and a half (31.5) Hz and sixty-three (63) up to the eight thousand ~~(8,000)~~ Hz full-octave band, at all sensitive sound receptors within the radius of evaluation;

(v) Report the ~~maximum-predicted~~ A-weighted dBA Leq sound pressure levels ~~in a year (Leq (8-hour))~~ at the most critically impacted external property boundary lines of the facility site (e.g., non-participating boundary lines);

(vi) Report the information in tabular and spreadsheet compatible format as specified herein and in subdivisions (f)(3) and (q)(2) of this section. A summary of the number of receptors exposed to sound levels greater than thirty-five (35) dBA will also be reported in tabular format grouped in one (1)-dB bins; and

(vii) Report ~~noise impacts with~~ sound level contours (specified in subdivision (k) of this section) on the map described in subdivision (h) of this section.

(2) For wind facilities, the model shall:

(i) Be performed at a minimum for the turbine model with the highest apparent broadband A-weighted sound power level per IEC 61400-11 at any wind speed condition;

(ii) Use a one and a half (1.5) meter assessment point above the ground and the addition of a minimum ~~uncertainty~~ adjustment factor of two (2) dBA, or a four (4) meter assessment point above the ground and the addition of an ~~uncertainty~~ minimum adjustment factor of zero (0) dBA ~~or greater~~.

(3) For solar facilities, the model shall use a one and a half (1.5) meter assessment point above the ground and the addition of an uncertainty factor of zero (0) dBA or greater.

(e) Evaluation of prominent tones for the design:

(1) For wind and solar facility noise sources: The evaluation shall be conducted by using manufacturer sound information, the ANSI/ASA S12.62-2012/ ISO 9613-2:1996 (MOD) (see section 900-15.1(a)(1)(v) of this Part) or the ISO 9613-2:1996 propagation standard (see section 900-15.1(g)(1)(i) of this Part) attenuations (Adiv, Aatm, Agr, and Abar), and the "prominent discrete tone" constant level differences (Kt) specified in ANSI /ASA S12.9-2013 ~~Part 3 Annex B-2005 Part 4 Annex C, Section B.1~~ (see section 900-15.1(a)(1)(ii) of this Part), as follows: fifteen (15) dB in low-frequency one-third-octave bands (from twenty-five (25) up to one hundred twenty-five (125) Hz); eight (8) dB in middle-frequency one-third-octave bands (from one hundred sixty (160) up to four hundred (400) Hz); and five (5) dB in high-frequency one-third-octave bands (from five hundred (500) up to ten thousand (10,000) Hz).

(2) For ~~substation transformers and other solar facility noise sources (such as inverters/medium to low voltage transformers)~~ where no manufacturer's information or pre-construction field tests are available, the sound emissions will be assumed to be tonal ~~and prominent~~.

(f) Evaluation of low frequency noise for wind facilities: If other wind turbines considered for the facility have lower (or equal) broadband A-weighted sound power levels than the turbine modeled in the application, but greater maximum un-weighted sound power levels at the thirty-one and a half (31.5) Hz, or sixty-three (63) Hz full-octave bands, the estimate of low frequency noise levels at the thirty-one and a half (31.5) Hz, or sixty-three (63) Hz bands shall be based on:

(1) Computer noise modeling that uses the maximum sound power levels at the thirty-one and a half (31.5) and sixty-three (63) Hz frequency bands at any wind speed among all turbines considered for each turbine location.

(2) Alternatively, if the noise modeling uses only one (1) wind turbine model across the site and if noise reduction operations are not used in the design, the noise levels at the thirty-one and a half (31.5) and sixty-three (63) Hz full octave bands can be estimated by applying corrections to the low-frequency band sound pressure results from the computer noise modeling for the turbine with the maximum overall broadband sound power level. These corrections will be equivalent to the differences between the maximum sound power levels at the thirty-one and a half (31.5) and sixty-three (63) Hz bands at any wind speed for all turbines considered for the facility and the sound power levels for the turbine used for computer noise modeling at the thirty-one and a half (31.5) and sixty-three (63) Hz full-octave bands respectively.

(3) The maximum linear/unweighted/Z Leq (1-hour) sound pressure levels (dB) ~~in a year~~ at the sixteen (16), thirty-one and a half (31.5) and sixty-three (63) Hz full octave bands for all receptors within the radius of evaluation shall be reported in tabular and spreadsheet compatible format. A list of all sound sensitive receptors with sound pressure levels (SPLs) equal to or greater than sixty-five (65) dB at sixteen (16), thirty-one and a half (31.5) or sixty-three (63) Hz, shall be provided along with their SPLs. The number of receptors exceeding sixty (60) dB at sixteen (16), thirty-one and a half (31.5) or sixty-three (63) Hz shall also be reported, grouped in one (1)-dB bins.

(g) Evaluation of infrasound for wind facilities: Infrasound levels at the sixteen (16) Hz full-octave band can be based on computer noise modeling software with such capabilities or, by using extrapolated SPL data down to sixteen (16) Hz. The extrapolation estimates can be based on corrections applied to the sound pressure results at thirty-one and a half (31.5) Hz to obtain the sound pressure results at sixteen (16) Hz at each receptor as follows:

(1) If no information from the manufacturer is available for the sixteen (16) Hz full-octave frequency band for any turbine models considered for the facility, at a minimum four (4) dB shall be added to the SPLs at thirty-one and a half (31.5) Hz, to obtain SPLs at sixteen (16) Hz.

(2) If computer noise modeling uses only one (1) wind turbine model across the site, noise reduction operations are not used in the design, and the sound power levels at sixteen (16) Hz are available for all turbine models considered for the facility, the correction shall be equivalent to the difference between the highest manufacturer's sound power level at sixteen (16) Hz at

any wind speed and the sound power level at thirty-one and a half (31.5) Hz used for computer noise modeling, and it shall be applied to the sound pressure results at thirty-one and a half (31.5) Hz to obtain the sound pressure results at sixteen (16) Hz.

(3) If computer noise modeling uses only one (1) wind turbine model across the site, noise reduction operations are not used in the design, and the sound power level information at sixteen (16) Hz is available for some but not all turbines considered for the facility, at a minimum four (4) dB, or the difference between the maximum sound power level at sixteen (16) Hz at any wind speed known for any turbines considered for the facility and the sound power level for the thirty- one and a half (31.5) Hz full-octave frequency band used for computer modeling, whichever is greater, shall be applied to the sound pressure results at thirty-one and a half (31.5) Hz to obtain the sound pressure results at sixteen (16) Hz.

(4) The procedures indicated above, do not restrict the applicant from using additional corrections that provide more conservative (i.e., higher) SPLs at the receptors than as obtained as indicated above.

(h) A map of the study area showing the location of sensitive sound receptors in relation to the facility (including any related substations), as follows.

(1) The sensitive sound receptors shown shall include all residences, outdoor public facilities and public areas, hospitals, schools, libraries, parks, camps, summer camps, places of worship, cemeteries, any historic resources listed or eligible for listing on the State or National Register of Historic Places, any public (federal, state and local) lands, cabins and hunting camps identified by property tax codes, and any other seasonal residences with septic systems/running water within the Sound Study Area.

(2) All residences shall be included as sensitive sound receptors regardless of participation in the facility (e.g., participating, potentially participating, and non-participating residences) or occupancy (e.g., year-round, seasonal use).

(3) Only properties that have a signed contract with the applicant prior to the date of filing the application shall be identified as "participating." Other properties may be designated either as "non-participating" or "potentially participating." Updates with ID-tax numbers may be filed after the application is filed.

(i) An evaluation of ambient pre-construction baseline noise conditions by using the L90 statistical and the Leq energy based noise descriptors, and by following the recommendations for ANS-weighting included in ANSI/ASA S3/SC 1.100 -2014-ANSI/ASA S12.100-2014 American National Standard entitled Methods to Define and Measure the Residual Sound in Protected Natural and Quiet Residential Areas (see section 900-15.1(a)(1)(iv) of this Part) is optional. If conducted, the sound surveys shall be conducted for, at a minimum, a seven (7) day-long period for wind facilities and a four (4) day-long period for solar facilities.

(j) An evaluation of future noise levels during construction of the facility consistent with "Construction Noise Analysis" requirements of New York State Department of Transportation (Section 4.4.18.5.5 of NYSDOT's "The Environmental Manual") ~~including predicted A weighted/dBA sound levels using computer noise modeling as follows:~~

~~(1) The model shall use the ANSI/ASA S12.62-2012/ISO9613-2:1996 (MOD) (see section 900-15.1(a)(1)(v) of this Part) or the ISO 9613-2:1996 propagation standard (see section 900-15.1(g)(1)(i) of this Part) for the main phases of construction, and from activities at any proposed batch plant area/laydown area;~~

~~(2) The model shall include, at a minimum, all noise sources and construction sites that may operate simultaneously to meet the proposed construction schedule for the most critical timeframes of each phase;~~

~~(3) For wind and solar facilities, the operational modeling requirements included in subdivisions (d)(1)(i) through (d)(1)(iii), and (d)(3) of this section shall be used for modeling of construction noise; and~~

~~(4) Sound impacts shall be reported with sound level contours (specified in subdivision (k) of this section) on the map described in subdivision (h) of this section and sound levels at the most critically impacted receptors in tabular format (as specified in subdivision (q)(2) of this section).~~

(k) Sound Levels in Graphical Format:

(1) The application shall include legible sound contours rendered above the map specified in subdivision (h) of this section.

(2) Sound contours shall include all sensitive sound receptors and boundary lines (differentiating participating and non-participating) and all noise sources (e.g., wind turbines for wind facilities, substation(s), transformers, HVAC equipment, energy storage systems and emergency generators for wind and solar facilities; and inverters and medium to low voltage transformers for solar).

(3) Sound contours shall be rendered at a minimum, until the thirty (30) dBA noise contour is reached, in one (1)-dBA steps, with sound contours multiples of five (5) dBA differentiated.

(4) Full-size hard copy maps (22" x 34") in 1:~~12,000~~
24,000 scale shall be submitted, upon request.

(1) A tabular comparison between maximum sound impacts predicted sound levels and any design goals, noise limits subpart 900-6.5 (a) and/or (b) Uniform Standards and Conditions, Facility Operations, Noise Limits for Wind Facilities, Noise Standards for Solar Facilities, and local requirements for the facility, and the degree of compliance at all sensitive sound receptors and at the most impacted non-participating boundary lines within the facility site.

~~(m) An evaluation as to whether any of the following potential community noise impacts will occur:~~

~~(1) Hearing loss for the public, as addressed by the World Health Organization (WHO) Guidelines for community noise published in 1999 (see section 900 15.1(d)(1)(i) of this Part). The requirements for the public are not to exceed an average sound level of seventy (70) dBA from operation of the facility and one hundred twenty (120) dB peak for children and one hundred forty (140) dB peak for adults for impulsive sound levels (e.g., construction blasting).~~

~~(2) The potential for structural damage from some construction activities (e.g., blasting, pile driving, excavation, horizontal directional drilling or rock hammering, if any) to produce any cracks, settlements, or structural damage on any existing proximal buildings, including any residences, historical buildings, and public or private infrastructure.~~

(n) An identification and evaluation of reasonable noise abatement measures for construction activities.

(o) An identification and evaluation of noise abatement measures for the design and operation of the facility to comply with the design limits set forth in subdivision (b) of this section.

(1) For wind facilities:

~~(i) If noise reduction operations (NROs) are used to demonstrate conformance with any limit, or local law on noise in computer noise modeling or any filing, the design shall use less than half of the maximum NRO available for each turbine model. In this case, the application shall report both "unmitigated" and "mitigated" results.~~

(ii) If noise reduced operations (NROs) are necessary for the design, those NROs shall be implemented at the start date of operations.

(2) For solar facilities: If noise mitigation measures are necessary for the design, those mitigation measures shall be implemented no later than the start date of operations.

(p) The software input parameters, assumptions, and associated data used for the computer modeling shall be provided upon request as follows:

(1) GIS files used for the computer noise modeling, including noise source and receptor locations and heights, topography, final grading, boundary lines, and participating status shall be delivered by digital means upon request;

(2) Computer noise modeling files shall be submitted by digital/electronic means;

(3) Site plan and elevation details of substations, as related to the location of all relevant noise sources (e.g., transformers, emergency generator, HVAC equipment, and energy storage systems, if any); specifications, any identified mitigations, and appropriate clearances for sound walls, barriers, mufflers, silencers, and enclosures, if any.

(4) In addition, for wind facilities, the application shall contain sound information from the manufacturers for all wind turbines, transformers and any other relevant noise sources. Sound power levels from the turbines shall follow these provisions:

(i) Sound power levels from the turbines selected for the facility shall be documented with information from the manufacturer(s) following the International Electrotechnical Commission (IEC) 61400-11 standard (see section 900-15.1(b)(1)(ii) of this Part) and IEC TS 61400-

14 Technical Specification (see section 900-15.1(b)(1)(iii) of this Part) to the extent this information is available.

(ii) Sound power level information shall be reported associated with wind speed magnitudes, and with angular speed of the rotor, and rated power to the extent this information is available. Turbine dimensions to include hub height and diameter of the rotor shall be reported.

(iii) The sound power level information shall include specifications for normal operation, noise reduced operations and low-noise or serrated trailing edges, or any other noise reduction measures, if these are available or required to meet the noise limits indicated in subdivision (b)(1) of this section.

(5) For energy storage or solar facilities, the application shall contain:

(i) The locations of all noise sources (e.g., substation transformer(s), medium to low voltage transformers, inverters, storage system, HVAC equipment, emergency generators, if any) identified with GIS coordinates and upon request, GIS files.

(ii) Sound information from the manufacturers for all noise sources as listed above, and any other relevant noise sources.

(q) Miscellaneous:

(1) The application shall include a glossary of terminology, definitions, and abbreviations used throughout this section 900-2.8 and references mentioned in the application.

(2) Information shall be reported in tabular, spreadsheet compatible or graphical format as follows:

(i) Data reported in tabular format shall be clearly identified to include headers and summary footer rows. Headers shall include identification of the information contained on each column, such as noise descriptors (e.g., Leq, L90, etc.); weighting (dBA, linear, dB, dBZ) duration of evaluation (e.g., 1-hour, 8-hour), time of the day (day time, nighttime); whether the value is a maximum or average value and the corresponding time frame of evaluation (e.g., maximum 8-h-Leq-nighttime in a year, etc.);

(ii) Titles shall identify whether the tabular or graphical information correspond to the "unmitigated" or "mitigated" results, if any mitigation measures are evaluated, and "cumulative" or "non-cumulative" for cumulative noise assessments;

(iii) Columns or rows with results related to a specific design goal, noise limit or local requirement, shall identify the requirement to which the information relates;

(iv) Tables shall include rows at the bottom summarizing the results to report maximum and minimum values of the information contained in the columns. For this purpose, sound receptors shall be separated in different tables according to their use (e.g., participating residences, non-participating residences, non-participating boundary lines, schools, parks, cemeteries, historic places, etc.); and

(v) The application shall report estimates of the absolute number of sensitive sound receptors that will be exposed to noise levels that exceed any ~~design goal or~~ noise limit (in total as well as grouped in one (1)-dB bins).

§900-6.5 Facility Operation

(a) Noise Limits for Wind Facilities

(1) Noise levels by all noise sources from the permittee's wind facility shall:

(i) Comply with a ~~maximum~~ regulatory noise limit of forty-five (45) dBA Leq (8-hour) at the outside of any non-participating residence, and fifty-five (55) dBA Leq (8-hour) at the outside of any participating residence existing as of the issuance date of the siting permit;

(ii) Comply with a noise limit of forty (40) dBA Leq (1-hour) at the outside of any non-participating residence existing as of the issuance date of the siting permit from the collector substation equipment;

(iii) Should a prominent tone occur, the broadband overall (dBA) noise level at the evaluated non-participating position shall be increased by five (5) dBA for evaluation of compliance with subparagraphs (i) and (ii) of this

~~paragraph. Not produce any audible p~~Prominent tones, as are
defined by using the constant level differences listed under
ANSI S12.9 2005/Part 4 Annex C (sounds with tonal content) (see
section 900-15.1(a)(1)(iii) of this Part) at the outside of any
non-participating residence existing as of the issuance date
of the siting permit. ~~Should a prominent tone occur, the~~
~~broadband overall (dBA) noise level at the evaluated non-~~
~~participating position shall be increased by five (5) dBA for~~
~~evaluation of compliance with subparagraphs (i) and (v) of this~~
~~paragraph;~~

~~(iii)~~(iv) Comply with a maximum noise limit of sixty-five (65)
dB Leq (1-hour) at the full octave frequency bands of ~~sixteen~~
~~(16)~~, thirty-one and a half (31.5), and sixty-three (63) Hertz
outside of any non-participating residence existing as of the
issuance date of the siting permit, in accordance with Annex
D of ANSI standard S12.9-2005/Part 4 Section D.2.(1) (Analysis
of sounds with strong low-frequency content) (see section 900-
15.1(a)(1)(iii) of this Part);

~~(iv)~~ Not produce human perceptible vibrations inside any non-
participating residence existing as of the issuance date of
the siting permit that exceed the limits for residential use
recommended in ANSI/ASA Standard S2.71-1983 (R August 6, 2012)
"Guide to the evaluation of human exposure to vibration in
buildings" (see section 900-15.1(a)(1)(i) of this Part); and

~~(iv)~~ ~~Comply with a noise limit of forty (40) dBA Leq (1-hour)~~
~~at the outside of any non-participating residence existing as~~
~~of the issuance date of the siting permit from the collector~~
~~substation equipment; and~~

(vi) Emergency situations are exempt from the limits
specified in this subdivision.

(2) *Post-Construction Noise Compliance and Monitoring for Wind
Facilities.* To evaluate compliance with noise-related
conditions, the permittee shall comply with the following
requirements:

(i) Compliance with subparagraphs (1)(i)-(iv) of this
section for the facility shall be evaluated by the permittee
by implementing a sound testing compliance protocol that shall
follow the provisions and procedures for post-construction
noise performance evaluations approved by the Office and stated
in the siting permit;

(ii) ~~At least two~~ A sound compliance tests conforming to the sound testing compliance protocol shall be performed by the permittee after the commercial operation date of the facility: ~~one during the "leaf-off" season and one during the "leaf-on" season;~~

(iii) Within ~~seven (7)~~ thirteen (13) months after the commercial operation date of the facility, the permittee shall perform and complete the first sound compliance test and the results shall be submitted by filing a report from an independent acoustical or noise consultant, no later than ~~eight (8)~~ fourteen (14) months after the commercial operation date, specifying whether or not the facility is found in compliance with subparagraphs (1)(i)-(iv) of this section ~~all siting permit conditions on noise during the "leaf on" or "leaf off" season as applicable;~~ and

(iv) ~~The~~ A second sound compliance test shall be performed if requested by the Office. ~~and results shall be submitted subject to the same provisions contained in subparagraph (iii) of this paragraph, but no later than thirteen (13) months after the commencement of commercial operation of the facility.~~

(3) *Noise Exceedances from Wind Facilities.* If the results of the ~~first or second post construction sound compliance testing, or any subsequent test, or any compliance or violation test, indicate~~ determine that the facility does not comply with subparagraphs (1)(i)-(iv) of this section ~~siting permit conditions on noise and vibration,~~ the permittee shall:

(i) Present minimization options to the NYSDPS, with a copy to the Office, within sixty (60) days after the filing of a non-compliance test result or the finding of a noncompliance or a violation of siting permit conditions on noise, ~~as follows:~~ This plan shall outline a timeline for implementation which is subject to the approval of the Office.

~~(a) Operational minimization options related to noise or vibrations caused by the wind turbines that shall be considered, including, at a minimum, modifying or reducing times or duration of turbine operation, incorporating noise reduced operations, shutting down relevant turbines, and modifying operational conditions of the turbines;~~

~~(b) Physical minimization options related to noise or vibration caused by the wind turbines that shall be~~

~~considered, including installation of serrated edge trails on the turbine blades, replacement or maintenance of noisy components of the equipment, and any other measures as feasible and appropriate; and~~

~~(c) If applicable, any minimization measures related to noise from transformers (such as walls or barriers), emergency generators (such as installation of noise walls or barriers, adding or replacing enclosures or silencers to the emergency generator), or any other noise sources (such as HVAC equipment or energy storage systems), shall be considered, as well as any other mitigation measures as feasible and appropriate.~~

~~(ii) Upon approval from the NYSDPS and the Office, the permittee shall implement any operational noise or vibration mitigation measures within ninety (90) days after the finding of a non compliance or siting permit violation, as necessary to achieve compliance.~~

~~(iii) Upon approval from the NYSDPS and the Office, the permittee shall implement any physical noise or vibration mitigation measures within one hundred fifty (150) days after the finding of a non compliance or siting permit violation, as necessary to achieve compliance.~~

~~(iiiv) If the permittee cannot meet the timelines agreed to by the Office for implementation of mitigation measures set forth in subparagraphs (ii) and (iii) of this paragraph, the permittee shall cease operation of the turbines of the facility that caused the non compliance or siting permit violation exceedance until the operational or physical agreed to minimization measures that are presented and approved by the NYSDPS and the Office have been implemented. Once implemented, the permittee shall not operate the facility without the mitigation measures presented and approved by the NYSDPS and the Office.~~

~~(iiiv) Test, document and present results of any minimization measures and compliance with all siting permit conditions on noise, Conduct additional post-construction sound compliance testing to document that the exceedance has been resolved no later than ninety (90) days after the minimization measures are implemented.~~

(4) *Noise and Vibration Complaints from Wind Facilities.* The permittee shall adhere to the following conditions regarding noise complaints:

(i) The permittee is required to maintain a log of complaints received relating to noise and vibrations caused by the operation of the facility. The log shall include name and contact information of the person that lodges the complaint, name of the property owner(s), address of the residence where the complaint was originated, the date and time of the day underlying the event complained of, and a summary of the complaint.

(ii) The permittee shall provide the host municipalities with a phone number, email address, and mailing address where complaints can be notified.

(iii) All complaints received shall be reported to the NYSDPS staff, with a copy to the Office, monthly during the first year of commercial operations and quarterly thereafter, by filing during the first ten (10) days of each month (or the first ten (10) days of each quarter after the first year). Reports shall include copies of the complaints ~~and, if available, a description of the probable cause (e.g., outdoor or indoor noise, tones, low frequency noise, amplitude modulation, vibrations, rumbles, rattles, etc., if known); the status of the investigation, summary of findings and whether the facility has been tested and found in compliance with applicable siting permit conditions on noise or minimization measures have been implemented. If no noise or vibration complaints are received, the permittee shall submit a letter indicating that no complaints were received during the reporting period.~~ The permittee shall investigate all noise and vibration complaints by following the complaint resolution protocol approved by the Office, and consistent with the limits imposed by the siting permit.

~~(iv) Should complaints related to excessive and persistent amplitude modulation occur at any non-participating residence existing as of the issuance date of the siting permit, with measured or modeled sound levels exceeding forty (40) dBA Leq (1 hour), the permittee shall investigate and measure amplitude modulation at the affected receptors during the time frame when the worst conditions are known, or, if not known, expected to occur. If the L90 10 minute noise levels (dBA), including any amplitude modulation and prominent tone penalties exceed a noise level of forty five (45) dBA and amplitude modulation is in excess of a five (5) dB modulation depth at the evaluated~~

~~receptor(s) for more than five (5) percent of the time during the identified time frame of evaluation (which shall not exceed eight consecutive hours), the permittee shall continue with the investigation, identify frequency of occurrence and the conditions that may be favorable for its occurrence, and propose minimization measures to avoid or minimize the impacts. Minimization measures that avoid, minimize, resolve, or mitigate the amplitude modulation impacts shall be identified and reported by filing the identified minimization measures and implementing such measures after, and consistent with, review and approval. Compliance with this requirement shall be finally demonstrated by conducting a test that shows that the L90 10-minute sound levels (dBA), including a five (5) dBA penalty for amplitude modulation (if amplitude modulation depth is in excess of five (5) dB for more than five (5) percent of the time in any eight (8) consecutive hours) at that particular location and any additional prominent tone penalties, are lower than or equal to forty five (45) dBA. For any complaints that do not exceed the limits established in the foregoing, the permittee shall handle those complaints under the complaint resolution protocol approved by the Office. Amplitude Modulation depth will be evaluated as indicated in the document entitled "A method for Rating Amplitude Modulation in Wind Turbine Noise", 09 August 2016, Version 1 (see section 900-15.1(e)(1)(i) of this Part).~~

~~(v) The permittee shall investigate all other noise and vibration complaints by following the complaint resolution protocol approved by the Office, and consistent with the limits imposed by the siting permit.~~

(5) *Facility Logs for Wind Facilities.* The permittee is required to maintain a log of operational conditions of all the turbines with a ten (10)-minute time interval to include, at a minimum, wind velocity and wind direction at the hub heights, angular speed of the rotors, generated power, and notes indicating operational conditions that could affect the noise levels (e.g., maintenance, shutdown, etc.). A schedule and log of noise-reduced operations for individual turbines shall also be kept and updated as necessary. These records shall be maintained by the permittee for five (5) years from occurrence.

~~(b) *Noise Standards for Solar Facilities.* The permittee shall implement the approved design as required by section 900-2.8 of this Part.~~

(1) Noise levels from solar or energy storage facilities shall comply with the following:

(i) A maximum noise limit of fifty (50) dBA Leq (8-hour) during the daytime and forty-five (45) dBA Leq (8-hour) during the nighttime, at the outside of any existing non-participating residence, where daytime is defined as the start of twilight to the end of twilight, and fifty-five (55) dBA Leq (8-hour) at the outside of any existing participating residence;

(ii) A maximum noise limit of forty (40) dBA Leq (1-hour) at the outside of any existing non-participating residence from the collector substation equipment;

(iii) Should a prominent tone occur, the broadband overall (dBA) noise level at the evaluated non-participating position shall be increased by five (5) dBA for evaluation of compliance with subparagraphs (i) and (ii) of this paragraph. Prominent tones, as are defined by using the constant level differences listed under ANSI S12.9 2005/Part 4 Annex C (sounds with tonal content) (see section 900-15.1(a)(1)(iii) of this Part) at the outside of any non-participating residence existing as of the issuance date of the siting permit.;

(iv) A maximum noise limit of fifty-five (55) dBA Leq (8-hour), short-term equivalent continuous average nighttime sound level from the facility across any portion of a non-participating property except for portions delineated as NYS-regulated wetlands pursuant to section 900-1.3(e) of this Part and utility ROW. No penalties for prominent tones will be added in this assessment.

(v) The permittee shall demonstrate compliance prior to construction with an updated filing consistent with Exhibit 7 requirements.

Audubon New York

Good afternoon,

Attached, please find the comments of Audubon New York and locally-affiliated Audubon chapters on the renewable energy regulations being proposed by the Office. We appreciate this opportunity to offer comments and thank you for consideration of these requests.

Best,

—

Erin McGrath

Policy Manager

518.860.4296

Pronouns: she, her, hers

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December 7, 2020

VIA ELECTRONIC DELIVERY

Houtan Moaveni
Deputy Executive Director
State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

RE: Comments on Draft Regulations to Chapter XVIII, Title 19 of NYCRR Part 900 – Office of Renewable Energy Siting Permits for Major Renewable Energy Facilities

Deputy Executive Director Moaveni,

On behalf of Audubon New York, the state program of the National Audubon Society with a membership of 93,000 New Yorkers, I thank you for the opportunity to comment on the proposed regulations, as authorized by the Accelerated Renewable Energy Growth and Community Benefit Act (“the Act”) and for the Office of Renewable Energy Siting’s (“the Office”) leadership and commitment to providing New York State with a greener future. New York State is a national leader in its approach to combatting climate change, and we are pleased to assist the State in achieving carbon neutrality by 2050.

Audubon strongly supports the development of renewable energy and transmission infrastructure that is sited and operated to avoid, minimize, and effectively mitigate impacts on birds and other wildlife. Wind and solar power are clean, renewable sources of energy with few negative environmental impacts and are essential components in our fight against climate change. However, renewable energy projects and the development of new transmission infrastructure can negatively affect birds and other wildlife through direct mortality, displacement, and habitat degradation and loss if developers do not take proper precautions.

Fortunately, many of these impacts are avoidable. Our ongoing work with New York State’s agencies has proven that the development of renewable energy and the protection of New York State’s birds are not mutually exclusive. We have partnered with the New York State Department of Environmental Conservation (“the Department”), the New York State Energy and Research Development Authority (“NYSERDA”), and other state agencies to develop responsible siting guidelines for renewable energy and to create best management practices (“BMPs”) for protecting at-risk birds – all of which should be incorporated into the State’s regulatory program for approving renewable energy projects.

We appreciate the Office's attention to the need to protect endangered and threatened species and grassland birds in both of these regards, but the State needs to ensure that the protection of endangered and threatened species is not diminished by the urgency of our fight against climate change. The regulations need to include stronger language that requires applicants and permittees to avoid and minimize adverse environmental impacts to the maximum extent practicable, provide adequate time for the development of actions that will provide a net conservation benefit for impacted species, make greater use of the guidance and recommendations for wind and solar developers that have already been developed by New York State, and conduct compensatory mitigation with the same vigor and oversight as any other project component.

New York State is a leader in protecting vulnerable wildlife – bringing back species like the Bald Eagle and Peregrine Falcon from the brink of extinction – and now has the opportunity to develop a siting process that will allow us to abate climate change and protect wildlife at the same time. We are confident that the State can develop a sufficient number of renewables to meet the goals of the CLCPA while also protecting our wildlife and natural lands. We urge the Office to ensure that these regulations will allow New York State to continue to uphold its strong legacy of environmental stewardship.

To achieve those ends, we respectfully submit the following comments for your consideration. As you will read, we have focused our comments primarily on the issues relating directly to Audubon's mission to protect birds and their habitats.

Avoidance, Minimization, and Mitigation of Adverse Environmental Impacts. Even in a best-case scenario, following the State's leadership in implementing the Climate Leadership and Community Protection Act, it will be years before we can stabilize atmospheric greenhouse gases and the global climate. In the interim, temperatures will continue to rise and force us to confront climate change's immediate impacts. The long-term survival of threatened and endangered bird species requires that we ensure their short-term survival by continuing to protect occupied habitat to the maximum extent possible and ensuring that appropriate mitigation takes place where that is impracticable – as we do our utmost to contribute to solving the global climate crisis. A suitable climate does not help birds that are lacking a suitable habitat. We must maintain or increase population levels while we wait for the benefits of climate mitigation efforts to have a positive impact on our currently projected global warming.

Pursuant to the Act, renewable energy projects must avoid and then minimize significant adverse environmental impacts to the "maximum extent practicable" before being allowed to proceed with site-specific compensatory mitigation, otherwise known as the mitigation hierarchy. Applying the mitigation hierarchy, efforts should be sequenced with a preference for avoiding and minimizing habitat impacts before resorting to compensatory mitigation. There are areas in the state that should be avoided, in particular sites that regularly support highly at-risk species, like state-listed endangered and threatened species. Moreover, there are also many minimization strategies and BMPs that can reduce adverse environmental impacts on the site.

We appreciate the Office's efforts to afford protections to threatened and endangered species and grassland birds in particular. Still, we are concerned that the regulations emphasize mitigation over avoiding and minimizing impacts and set up a dual standard for the treatment of endangered and threatened species both within the regulations proposed by the Office and as compared to the State's existing permitting process under Part 182 of Title 6 of the NYCRR. This issue can be resolved by aligning the requirements for threatened and endangered species and utilizing BMPs developed by the State.

Parity in Endangered Species Protections. While the regulations do include some specific measures that avoid or minimize impacts to grassland birds – such as the wildlife characterization report, preconstruction surveys, and uniform standards and conditions – the regulations also create a standard for endangered and threatened grassland birds that is different from the requirements for other threatened or endangered species. Under §900-6.4(o)(1), applicants must develop a NCBP that includes detailed determinations of the net conservation benefits that will result for each threatened and endangered species based on the location of the site and the exact strategies to be used, including source information that supports that determination, among other requirements. These requirements are not included in the NCPB for grassland birds; instead, the applicant is directed to implement avoidance and minimization measures identified in §900-2.13. We are unclear as to why applicants are not required to make the same determinations for grassland birds and ask the Office to ensure that applicants take the same level of care in avoiding impacts to grassland birds as they would to any other threatened or endangered species.

Additionally, while the statute intends to streamline the process for siting and constructing renewable energy, we must ensure that the new application process has the same rigor used to assess other human activities and development under the laws governing threatened and endangered species. While the process set out in §900-1.3(g) follows the permitting guidelines and structure set out in Part 182 of Title 6 of the NYCRR, there are still significant differences when it comes to the treatment of grassland birds, and particularly those that would only suffer de minimis impacts. It is important to maintain consistency in determinations regarding threatened and endangered species. There should not be different regulatory structures and resulting standards of protection based on species or the size of occupied habitat.

Grassland Bird Management Plan and Conservation Centers. Grassland bird populations are in rapid decline, making it even more critical to protect the places where they are currently found. According to research published in *Science* in 2019, North America has lost one in four birds since 1970, with the most significant loss observed in grassland birds, which experienced a 53% decline in population. In the northeast United States, grassland birds are declining faster than any other group of birds, and several are included on New York's threatened and endangered species list. The declines tell us that we need additional quality habitat to ensure populations are maintained and rebound. Conserving the remaining grasslands that provide suitable nesting, foraging, and roosting habitat should be a priority of the Office and the Department.

While the regulations do include provisions for protecting and conserving grassland birds if a project site contains occupied habitat as identified by the Office, we believe that the Office needs to make additional efforts to avoid or disincentivize development in suitable and occupied habitat. In New York State, the Office can accomplish this by advising applicants to avoid the Grassland Bird Conservation Centers identified by the Department. The New York State Grassland Bird Conservation Centers, which provide grassland birds with the greatest chance of sustaining their populations, should be prioritized for conservation by the State and should be avoided when siting projects. To accomplish this, we urge the Department to approve and release the *NYSDEC Strategy for Grassland Bird Habitat Management and Conservation*. The plan's release would help the Office and Department further refine what conservation actions are needed within the grassland focus areas and other areas that support the occupied habitat of grassland birds.

Other areas that have consistently supported highly vulnerable state-listed grassland bird species should be avoided as well. The Henslow's Sparrow, Upland Sandpiper, and Short-eared Owl are all rare species

that have consistently struggled in New York State. If they are present in a particular area, it will be difficult to achieve successful mitigation that provides a net conservation benefit in other locations. The Office and Department should advise applicants that these areas will be subject to heavy restrictions if a project moves forward and suggest relocation of the project.

Identifying Least Conflict Sites. As the new regulations are finalized, we ask that the State identify least-conflict sites and prioritize them for development. Responsible siting is the most powerful tool we have in mitigating adverse environmental impacts, and identifying areas of least conflict for renewable energy would be beneficial to stakeholders, applicants, and the State. The assessment could examine factors such as renewable resources (e.g., wind), access to transmission lines, and natural resources like state-listed species, critical habitats (e.g., grassland focus areas, contiguous blocks of forest, wetlands. Etc.), and other environmental considerations. Ultimately, the process to identify least conflict areas could help the State achieve its energy goals and more efficiently reduce costs to companies and protect our critical natural resources.

Best Management Practices. The preapplication and uniform standards and conditions both contain procedures and specific requirements for avoiding and minimizing adverse impacts to endangered and threatened grassland birds, some of which are dependent on whether or not the impacts are considered de minimis. We appreciate these considerations but believe that there should be baseline actions that applicants and permittees are required to take regardless of whether the project affects threatened or endangered species or whether the impacts are considered de minimis. Each applicant or permittee should be required to use appropriate BMPs to decrease the adverse impacts caused by the project, including the Department's *Best Management Practices for Grassland Birds*, the *2016 Guidelines for Conducting Bird and Bat Studies at Commercial Wind Projects*, and the U.S. Fish and Wildlife Service's *Land-based Wind Energy Guidelines*, among others.

For example, the application states that "For wind facilities, wind turbines, towers and blades shall be Federal Aviation Administration (FAA) approved white or off-white colors to avoid the need for daytime aviation hazard lighting, unless otherwise mandated by FAA, and non-reflective finishes shall be used on wind turbines to minimize reflected glare." There is substantial evidence of avian attraction and disorientation to white artificial lights, particularly those that are steady. Only a portion of the turbines should be lighted with a non-white color that blinks, and all pilot warning lights should fire synchronously.

While the Department and other agencies are certainly well-equipped to advise on these practices, the State could also accomplish this work by convening a working group that can advise on the development and refinement of BMPs for wind and solar sites. This model has proved to be very successful during the development of the procurements for offshore wind, and it would also benefit the State's push for additional land-based renewables.

Involvement of the Department in Surveys and Habitat Assessments. The Office should defer to the Department's expertise and experience in reviewing projects for potential impacts to threatened and endangered species. This is particularly important when considering if additional habitat assessments or surveys are needed. Existing data sources are often inadequate, especially on private land, meaning assessments or surveys are often the only way to gather current information on the presence of suitable habitat or vulnerable species. Habitat assessments should note state-listed federal and threatened species, as well as special concern species and critical habitats like grasslands, contiguous blocks of forest, and other unique natural habitats so they can be avoided.

Additionally, habitat assessments should be evaluated by a technician or biologist with knowledge of the habitat variables and needs of various bird species, especially grassland birds. All grassland birds rely on herbaceous cover for nesting or foraging, but each species or group of species has different preferences, such as differences in cover requirements. Also, landscape context and surrounding land use should be a critical component of the habitat assessment.

Site-specific Requirements. In addition to the uniform standards and conditions, the statute requires the Office to develop site-specific requirements for impacts that are not adequately addressed by the uniform standards and conditions. We presume that any site-specific impacts would be addressed in the NCBP. Some species, such as the Upland Sandpiper, need large uninterrupted areas of space in order to achieve reproductive success. The Upland Sandpiper prefers large grassland-associated landscapes (250 acres or more) with low levels of human disturbance, has specific habitat requirements, is highly sensitive to habitat fragmentation, and may exhibit avoidance of renewable energy infrastructure. This means that while a particular installation may only infringe on a small portion of grassland, it can provide a disturbance significant enough to displace sensitive species from the surrounding area. Individual projects will have to consider these impacts based on the species that are present in the project area, and the Office and Department will need to be ready to assist developers with creating site-specific requirements for avoiding and minimizing impacts to these species.

Definition of De Minimis. The regulations rely on the concept of “de minimis” impacts when considering whether applicants or permittees will be subject to additional or baseline requirements in the uniform conditions and standards. Based on our reading of the regulations, it appears that an applicant would be subject to the requirements in §900-6.4(o)(3) if the Office determines that the occupied habitat of an endangered or threatened grassland bird is present on the site and that the impacts would be more than de minimis. Those additional actions would include, among others, monitoring before and during construction, limits on construction if there is an active nest, breeding, or wintering on the site, requirements to replace grassland vegetation following construction, and requirements regarding mitigation ratios for onsite conservation.

The regulations do not provide a definition of what is considered a de minimis impact. However, Article 12 of the preapplication infers that an action is de minimis if:

- §900-2.13(e)(1) The facility has been designed such that the only impacts would be to occupied habitat identified based on records greater than five (5) years old from the time of the wildlife site characterization report, but for which the applicant conducted appropriate surveys as approved by the Office that demonstrate that the species is not present at the facility site; or
- §900-2.13(e)(2) Construction of the facility within each mapped area of listed bird occupied habitat (based on the documented area of species’ use prior to addition of buffers) will only impact grasslands less than twenty-five (25) acres in size and will not include a recent (i.e., less than five (5) years) confirmed nesting or roosting location; or
- §900-2.13(e)(3) The facility has been designed such that the only impacts would be to occupied habitat identified for NYS threatened or endangered species for which the NYSDEC has issued a Notice of Adoption of regulations delisting or downlisting to Special Concern.

Additionally, per §900-6.4(o)(2)(i) of the uniform standards and conditions, if impacts are determined to be de minimis, and an active nest is later identified on a facility site that contains twenty-five or more

acres of occupied habitat, then the permittee will have to consult with the NYS Department of Public Service and the Office as to whether they need to adjust the construction schedule or their operations until nesting is complete or the permittee has to pay into the Threatened and Endangered Species Mitigation Bank Fund.

We have several concerns with the above language and the structure of the requirements.

Occupied Habitat. The first concern relates to §900-2.13(e)(2), which states that a project's impacts are de minimis if the identified occupied habitat is less than twenty-five acres in size and does not have a confirmed nesting or roosting location in the last five years. Pursuant to 6 CRR-NY 182.2, occupied habitat is a "geographic area in New York within which a species listed as endangered or threatened in this Part has been determined by the department to exhibit one or more essential behaviors." Those essential behaviors include "behaviors associated with breeding, hibernation, reproduction, feeding, sheltering, migration and overwintering." Under the current permitting system for incidental takes, the Department determines whether they have jurisdiction over habitat by ascertaining whether there are verified reports of a species engaging in one more essential behaviors on the project site. By excluding consideration of these other essential behaviors, such as feeding and migration, these regulations would create a standard for the treatment of threatened and endangered grassland bird species that is different from Part 182 of Title 6 of the NYCRR, which does not limit the consideration of essential behaviors or provide for differing treatments based on the size of the occupied habitat.

§900-6.4(o)(2) is similarly problematic because it relieves applicants of the duty to develop a NCBP if the applicant's proposed actions are de minimis. We believe that any habitat that supports a state-listed species engaging in one or more essential behaviors should be considered occupied habitat and that allowing permittees to engage in an action that adversely impacts that individual or habitat is a take as defined in NYS law and regulations. Based on this understanding, applicants must be required to follow the mitigation hierarchy and develop appropriate avoidance and minimization strategies regardless of the occupied habitat's size.

Additionally, §900-6.4(o)(2) states that if an active nest is identified on occupied habitat that is more than twenty-five acres in size, then the permittee is required to work with the Office and DPS to limit disturbances or adjust the construction schedule. We recommend that the Department be consulted as well to ensure that the measures being taken are appropriate given the species that are determined to be nesting on the project site.

We are also concerned that the de minimis construct only considers occupied habitat for grassland birds and not the buffers and larger landscapes that are needed for highly sensitive species. As discussed above, species such as the Upland Sandpiper and Henslow's Sparrow require large acreages of contiguous habitat with few disturbances. This means that so-called de minimis actions as defined in §900-2.13(e)(2), which requires consideration of the habitat in use without the addition of needed buffers, will result in a take if the active use is in less than twenty-five acres.

Conflicting Definitions of De Minimis. The second concern is that Exhibit 12 of the preapplication and the uniform standards and conditions appear to create conflicting definitions of de minimis based on whether an active nest is discovered before or after the start of construction. According to the language in Exhibit 12, §900-2.13(e)(2), impacts will be considered de minimis if they affect occupied habitat that is less than twenty-five acres in size AND do not have a recent confirmed nesting or roosting location.

But according to §900-6.4(o)(2)(i), if there is an active nest and the impacts are to occupied habitat that is less than twenty-five acres in size, than the permittee does not have to coordinate with the Office and NYS DPS to limit disturbance to the nest and/or adjust the construction schedule. This appears to set up a conflict for occupied habitat that is less than twenty-five acres in size, where Exhibit 12 states that nesting and roosting locations must not be present, and where the uniform standards and conditions state that a nest may be present as long as the occupied habitat is less than twenty-five acres in size. This should be clarified as the loss of even one active nest can be significant for some especially rare grassland bird species.

Avoidance, Minimization, and Mitigation. Additionally, the language in §900-6.4(o)(2) states that permittees must make adjustments to the construction schedule or facility operations until either the nesting has been completed or a payment has been made into the Endangered and Threatened Species Fund Bank. It should be made clear that the Office and NYS DPS will review the anticipated impacts and then employ the mitigation hierarchy, and compensatory mitigation will only be allowed if avoidance or minimization are not feasible.

Uniform Application of Best Management Practices. Our last concern is that many of the actions in §900-6.4(o)(3) are considered BMPs for a project site regardless of whether the actions are de minimis or whether they impact threatened and endangered species. Adherence to those practices should be a uniform standard or condition for all projects that may impact birds and other wildlife, regardless of vulnerability. It should not be an additional requirement that is solely aimed at threatened and endangered grassland birds that will suffer more than de minimis harm.

Based on this assessment, we conclude that the de minimis construct will actively harm grassland birds and state-listed species and create different standards for renewable energy projects and other human development. We ask that the Office remove the de minimis construct and require all projects to adhere to BMPs for grassland birds if there is occupied habitat present on the site.

Endangered Species List. We appreciate that the Department has moved forward with updating the Endangered and Threatened species list by issuing its preproposal on October 25, 2019. As you know, the list was last updated in 1999, and since then, many species have experienced significant changes in their populations as well as new threats, which justify a review of and updates to the state list. As we accelerate the development of renewable energy, it is even more critical that the updates to the list be made as soon as possible to ensure that each species has the proper listing status and that the Office and applicants are acting on current information. Recognizing the list's significance, we again ask the Department to conduct a thorough, consistent, inclusive, and transparent review of species to determine the appropriate current listing for each species. This will ensure that the list is optimized to meet the preapplication needs of the Office, Department, and applicants. Without these updates, the protections that are provided for threatened and endangered species and the associated efforts of applicants will be skewed towards species that may no longer be properly listed.

Public Engagement. As an organization with 93,000 members located throughout the state, we believe that the engagement of local communities and stakeholders is critical to the success of any action. We appreciate that the regulations include requirements for meetings with the public and a website to disseminate information regarding projects. Still, we believe that some additional requirements could be built in without sacrificing the need to streamline the preapplication process.

The regulations currently require the applicant to meet with the community no less than sixty days before their application is submitted to the Office. We would recommend increasing this timeframe to at least 120 days in order to ensure that communities have as much notice as possible and have the opportunity to provide feedback on the project. This will also offer potential intervenors the opportunity to identify whether they have the capacity to review project actions and to request initial funding. Additionally, the website required by §900-1.3(a)(7) should also provide a mechanism for receiving input from the public and requests for additional meetings. This will ensure there is a channel for both disseminating and receiving information, which is critical to building buy-in for projects.

Preapplication Timeline. We appreciate that the regulations urge developers to consult with the Office and Department regarding impacts to threatened and endangered species, “At the earliest point possible in the applicant’s preliminary project planning.” Reviewing the proposed project site for potential adverse environmental impacts early in the process is a critical step that will allow the Office and applicants to determine whether the site is appropriate for the proposed facility and will ensure that applicants have adequate time to develop actions to avoid or minimize adverse impacts to the maximum extent practicable.

However, we are concerned that the timelines set forth in the regulations for the review of the wildlife site characterization report, habitat assessments, and surveys may prove to be insufficient for a thorough and adequate review, especially as the submission of applications increases to meet both demand and the goals set forth by the CLCPA. As we’ve stated in other letters on the topic of the DEC’s current staffing, we believe that additional conservation biologists and technicians are needed in the Division of Fish and Wildlife in order to ensure both timely and adequate review of applications with permitting requirements. This is particularly true for applications for siting permits, which we agree should be issued in an expeditious manner. However, if tight timelines are imposed, they should be accompanied by the resources that make such review possible; otherwise, the timelines should be adjusted to reflect current staffing levels and workloads.

Additionally, the regulations do not appear to provide guidance as to what will happen if the Office, Department, or applicant fails to meet the timelines for producing, reviewing, or making a determination regarding these documents. We would be concerned if any items were considered automatically approved, or removed from consideration, due to a failure to meet these deadlines. There absolutely should be no automatic approvals of projects if the Office or Department is unable to respond by a deadline.

National Audubon Society Climate Models. The regulations refer to Audubon’s Climate Report, but it isn’t clear how that information is being used. Many bird species are in decline and vulnerable to climate change, but Audubon’s Climate Report and associated list of climate threatened species should not be used to justify the destruction of critical habitats or unnecessary trade-offs. If renewable energy development contributes to population declines and species are extirpated, it doesn’t matter how climate change impacts them in the future.

Uniform Standards and Conditions. As discussed in the section on de minimis impacts, we believe that the uniform standards for grassland birds in §900-6.4 (o)(3) should apply to all projects regardless of whether the impacts are considered de minimis, the acreage meets a certain threshold, or the impact is to vulnerable species or not. We do, however, concur with the Office’s recommendations on monitoring prior to and during construction, the windows for construction based on impacts to nesting and wintering species, replanting native vegetation, and implementing avoidance and minimization

measures as identified in Exhibit 12 of the permit application, and ask that the Office consider the following concerns as they review the regulations.

Row Crops. The uniform standards and conditions state that “If fields within identified occupied breeding habitat are planted with row crops... in the farming season prior to the commencement of facility construction and such fields were historically used for row crops during at least one of the prior five (5) years, these fields will not be subject to the construction timing restrictions.” We are concerned that this exception could create an incentive for property owners to plant row crops for the years preceding entering a lease with a renewable energy company and bypass restrictions that would apply to the prior landscape features, such as grasslands or forests.

Additionally, some “row crop” land is within the core geographical areas of the grassland focus areas, and development could work to break up these critical blocks of suitable habitat. As discussed above, many grassland bird species need additional undisturbed grassland areas beyond their immediate occupied habitat to achieve reproductive success. Due to these considerations, current field surveys must be used to inform the review of applications rather than relying on the designation of the current land cover.

Post-Construction Monitoring. The regulations state that monitoring must occur prior to and during construction, but do not mention monitoring post-construction. Monitoring is a critical component of responsible renewable energy development. Adequate monitoring before, during, and after project construction will help explain whether and how a project impacts its surrounding environment and the degree to which efforts taken to avoid, minimize, and mitigate harm have been successful, while also enabling the adaptive management of environmental impacts that may occur. Determining the exact protocols, including the number of years required to survey, should be done in consultation with the Department and other experts to ensure the surveys answer the questions being posed. We would anticipate that post-construction monitoring would be needed for at least two years, but possibly up to ten depending on the project. Monitoring should be conducted in a collaborative and transparent manner, and the results should be publicly available. Post-construction monitoring is a key element of ensuring that siting is developed and operated responsibly and should be included in the uniform standards and conditions, especially for sites that require a NCBP.

Ratios for Mitigation. Compensatory mitigation is intended to compensate for the loss of known, occupied habitat by protecting or enhancing potential habitat elsewhere to replace or offset the specific habitat and species impacted. However, there is no guarantee that proposed mitigation will be successful and replace the lost habitat and impacted species. For example, reviews of both published literature and agency reports on wetland mitigation found that permit-linked mitigation projects' success rate is low overall (Race and Fonseca 1996). Because of this, the compensatory mitigation ratio should be above 1:1 to address the uncertainty of success and desire to achieve a net conservation benefit. In § 900-6.4 (o)(3)(ix) a developer can forego payment to the Endangered Species Fund in the event of a take and instead propose mitigation at ratios of 1:0.4 acres of mitigation habitat for every acre of occupied grassland bird breeding habitat taken and 1:0.2 acres of mitigation for every acre of occupied grassland bird wintering habitat taken; it is very doubtful that these ratios will result in a net conservation benefit.

In addition to requiring larger mitigation areas than the area impacted, mitigation areas could target areas with higher resource value than the acres impacted (e.g., support multiple nesting species or threatened species), and mitigation should begin before the Office grants a siting permit in order to

ensure compliance. As mentioned above, there needs to be a monitoring mechanism in place to ensure compliance and evaluate whether mitigated habitats compensate for the lost habitat. In particular, if a solar project impacts Upland Sandpiper nesting habitat, the areas that are part of the mitigation should be monitored to confirm they ultimately support nesting Upland Sandpipers. If there is a long lag between when mitigation is implemented and those efforts prove unsuccessful, New York State will be at serious risk of losing state-listed species that already have relatively small populations. We recommend emphasizing strong NCBPs that include adequate mitigation acreage and a monitoring scheme to ensure that there is not a net loss over time from renewable energy, especially from cumulative impacts of multiple projects.

Protection of Wetlands. Wetlands are critical for bird health and population stability and provide numerous benefits to people and communities – illustrating the need to protect the state’s freshwater wetlands to the greatest extent possible. Approximately one-third of North American bird species use wetlands for food, shelter, or breeding, and one hundred thirty-eight species and subspecies of birds in the U.S. are designated as “wetland dependent,” including the Black Rail, Pied-billed Grebe, and Least Bittern, which are listed as threatened or endangered in New York State. Protecting these birds’ habitats is absolutely essential to their future survival.

We appreciate the protections offered to freshwater wetlands by the regulations and that they advise applicants to delineate any wetlands as early in the process as possible. Identifying wetlands early in the process and then receiving input from the Office and Department will allow applicants to avoid critical wetlands and plan for appropriate minimization or mitigation actions. We concur with the regulation’s recommendation that Class I wetlands provide unique ecological values and should be avoided and prioritized for conservation, and that all other wetlands should be subject to mitigation as outlined in Table 1 of § 900-2.15.

In addition to the aforementioned protections, we recommend that the Office revise the regulations to incorporate the following recommendations.

Unmapped Wetlands. Currently, the Department can only regulate wetlands if they are delineated on jurisdictional maps, which has left more than 50,000 acres of wetlands unprotected. Unless the Department expands its authority, it will not be able to protect critical wetlands that provide food and shelter for our birds and improved water quality and flood management for our communities. Until their authority is expanded, we would strongly encourage the Office and the Department to recognize all wetlands over 12.4 acres as jurisdictional for the purposes of siting wind and solar facilities, for the purposes of both parts § 900-1.3(e), §900-2.15, and § 900-1.3(g)(1)(v). Additionally, we would strongly encourage the Governor to advance the language from the SFY 2020-21 Executive Budget (S7508-B TED Part TT) again this coming year in order to resolve this issue permanently. Applicants and interested stakeholders should have a consistent framework for identifying wetlands on project sites and determining what mitigation measures need to be undertaken.

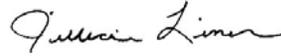
Involvement of the Department. According to § 900-1.3(e)(4) and (5), the Office may request that the Department review the draft wetland delineation and provide a determination as to whether the project components will impact regulated wetlands. While we appreciate that the Office intends to rely on the Department’s expertise, we would recommend that the Department’s involvement be required for the review of each application and be conducted within the 60-day review window currently in the regulations. This will ensure that all wetlands present on the project site are identified promptly and that applicants have the maximum amount of time available to resolve any conflicts.

Thank you again for considering these comments and for your commitment to developing renewable energy while upholding environmental protections. If you have any questions regarding this letter, please contact our Policy Manager, Erin McGrath, at 518-860-4296 or erin.mcgrath@audubon.org, or Jillian Liner at jillian.liner@audubon.org or 607-262-0006.

Sincerely,



Erin McGrath
Policy Manager
Audubon New York



Jillian Liner
Director of Conservation
Audubon New York

We are joined in this letter by the following Audubon Chapters:

Audubon Community Nature Center
Bedford Audubon Society
Bronx River – Sound Shore Audubon Society
Buffalo Audubon Society
Central Westchester Audubon
Chemung Valley Audubon Society
Eastern Long Island Audubon
Four Harbors Audubon Society
Genesee Valley Audubon Society
Hudson River Audubon Society
Huntington-Oyster Bay Audubon Society
New York City Audubon
North Shore Audubon Society
Northern Catskills Audubon Society
Northern New York Audubon Society
Onondaga Audubon Society
Orange County Audubon Society
Putnam Highland Audubon Society
Saw Mill River Audubon Society
South Shore Audubon Society
Southern Adirondack Audubon Society

CC:

Deputy Secretary Ali Zaidi

Commissioner Basil Seggos
Senator Todd Kaminsky
Senator Kevin Parker
Assemblymember Steven Englebright
Assemblymember Michael Cusick

independent Power Producers of NY

Please find attached IPPNY's comments on ORES' Siting and Uniform Standards and Conditions Rules.

Thank you for the opportunity to provide these comments.

Regards,

Rad

Radmila P. Miletich

Legislative & Environmental Policy Director

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December 7, 2020

Via email to General@Ores.ny.gov

Houtan Moaveni
Deputy Executive Director
New York State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

Re: Proposed Chapter XVIII, Title 19 of NYCRR Part 900 - Office of Renewable Energy Siting and Subpart 900-6 - Uniform Standards and Conditions

Dear Mr. Moaveni:

Pursuant to the September 16, 2020 issue of the New York State Register, the New York Office of Renewable Energy Siting (“ORES”) is seeking comments on draft Part 900, which addresses the operations of ORES and provides details for the renewable energy siting process under Section 94-c of the Executive Law; on November 13, 2020, the comment deadline was extended on ORES’ website from November 16 until December 7, 2020. ORES also is requesting comments on its draft Subpart 900-6, which would establish Uniform Standards and Conditions that are common to projects and are intended to streamline the siting and permitting process, reflect the environmental benefits of renewable energy facilities, and minimize impacts to the surrounding community and environment.

The Independent Power Producers of New York (“IPPNY”) offers the following comments in support of these draft regulations and offers recommendations to clarify some of their provisions to further improve the process for siting renewable energy facilities to meet the goals of the Climate Leadership and Community Protection Act (“CLCPA”). On draft Part 900, our comments pertain to suggested improvements, in the areas of: compliance filings; further date certainty for completeness of applications; applicability of local laws; the size and content of the study area; notice provisions; refund of unused fee monies; jurisdiction over wetlands mitigation; consistency with precedent; decision timeframe for non-controversial projects; information on interconnection; safety plans; and avoiding a couple of duplicative requirements. Regarding draft Subpart 900-6, our comments offer suggestions to resolve duplicative requirements related to environmental and agricultural monitoring and construction guidelines, given the role of the Department of Public Service (“DPS”) and requirements for mitigation payments through Index REC contracts with the New York State Energy Research and Development Authority (“NYSERDA”).

IPPNY supports the siting of renewable energy facilities in this state to meet the goals of the CLCPA. We also supported the development of Section 94-c of the Executive Law and offered helpmate improvements. Our Member companies operate wind, solar and energy storage facilities, among other highly efficient and low- or non-emitting technologies. IPPNY Members currently are undergoing the review of their solar and wind projects under the Article 10 siting law. Our Members have received more than half of the contract awards for the purchase of renewable energy credits (“RECs”) by NYSERDA and will continue to make investments to meet the State’s goals.

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Eastern Generation | Entergy | Exelon Generation | Invenergy, LLC | JERA USA | Lockport Energy Associates | LS Power | Morgan Stanley Infrastructure Partners
NextEra Energy Resources, LLC | NRG Energy, Inc. | PSEG Power New York LLC | Selkirk Cogen Partners, LP | Talen Energy | Valcour Wind, LLC | Vistra Energy

Draft Part 900: Office of Renewable Energy Siting

Compliance Filings

Draft Subpart 900-10, dealing with Compliance Filings, should allow one or more filings to be submitted at any time before permit issuance, including with the application itself, and to be approved in stages, at the same time ORES issues a permit for the facility, or shortly thereafter. This flexibility would allow an applicant to commence clearing, grading, and construction on the portion of the site covered by the approved compliance filing, as allowed under Article 10 currently, in order to expedite meeting the CLCPA's goals. ORES should begin its review of the filings as soon as they are submitted.

Between the fall of 2018 and spring of 2019, agencies involved in the Article 10 siting process led the way to identify administrative improvements to make the siting process more effective and worked with IPPNY to host two symposiums to discuss possible adjustments to the siting process. Suggestions from those forums for compliance filings are applicable to the siting of renewable energy projects under the draft rule. IPPNY urges the inclusion of the following recommendations on compliance filings:

- Model conditions for compliance filings at the permit stage should be provided.
- The number of post-permit filings should be reduced.
- Agency staff should be encouraged to respond within a 21-day period for comments and share comments with the applicant to allow for discussion on disagreement on compliance filings and for expeditious review of compliance filings, taking into consideration any comments from the applicant on agency staff comments.
- The review period for compliance filings should be reduced from 60 to 30 days.
- Agency staff should be discouraged from attempting to change language and requirements that were in an application and/or permit approval.
- Applications should be allowed to include final design information and other filings.

Application Completeness

In the spirit of the expedited siting process, ORES should have 21 days to determine if an updated application, which contains additional requested information by ORES, is complete. This 21-day period is consistent with one of the recommendations identified by the Article 10 State agency forums, and IPPNY urges its inclusion within Subpart 900-4 on the Processing of Applications.

The draft rule contains provisions that ORES will make its determination of completeness or incompleteness, on or before 60 days of receipt of the application, and request from applicants information to address a listing of all identified areas of incompleteness and a description of the specific deficiencies. The draft regulation states that ORES would notify the applicant of the application status "within sixty (60) days *of receipt of all requested material.*" This additional 60-day period extends the original 60-day decision-making period from ORES' receipt of the application.

Instead, IPPNY urges that, *within 21 days of ORES receiving a revised application that contains the information requested by ORES* for the application to be deemed complete, ORES should notify the applicant that the application now has been deemed to be complete; this 21-day period would be within the 60 days that ORES has to decide if an application is complete, and ORES should not start another 60-day clock to review submitted material it requested for completion.

Local Laws

Section 900-2.25, which addresses Exhibit 24: Local Laws and Ordinances, should better conform to the standard under Section 94-c of the Executive Law regarding the applicability of law laws. Specifically, the text of 900-2.25(c) should be replaced with the language from 94-c(5)(e), which notably states that ORES may issue a permit, upon its finding that the project and permit would comply with applicable laws and regulations and based upon this statutory authority to decide not to apply local laws that are “unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility.”

Additionally, the draft rule should clarify that, once ORES’ jurisdiction has attached to a major renewable energy facility (which is no later than the date by which an application has been served and filed and properly noticed), local governments would participate in the hearing process pursuant to Subpart 900-8, including filing the statement of compliance with local laws prescribed in Section 900-8.4(d), and should not seek to enforce new laws enacted after that point. Also, a presumption should be created that standards set by the Uniform Standards and Conditions Rule override inconsistent local laws.

Furthermore, the ability of ORES to decide to waive unreasonably burdensome local laws should not be limited to those laws that apply to *interconnection* in public rights-of-way, and, instead, that ability should apply to the *placement* of electric collection, water, sewer, and telecommunication lines in public rights-of-way. The limitation to interconnection is unnecessarily restrictive, as Section 94-c of the Executive Law allows ORES to decide whether to waive *any* unreasonably burdensome local law or ordinance.

Given that ORES has the jurisdiction to decide that only local laws that are not unreasonably burdensome would be applied, additional provisions of the draft rule need to be tailored to be consistent in regards to applicability of “substantive” local laws with others provisions of the draft rule, in order to avoid unnecessary delays and costs. For example, the following sections of the draft rule specifically refer to *substantive* aspects of local laws. §900-1.3 Pre-Application Procedures requires the applicant to provide “a summary of the *substantive* provisions of local laws applicable to the construction, operation and maintenance of the proposed facility” and “an explanation of all efforts by the applicant to comply with such *substantive* local law provisions through the consideration of design changes to the proposed facility, or otherwise.” Also, §900-2.25 Exhibit 24: Local Laws and Ordinances requires the exhibit to contain a “summary table of all local *substantive* requirements.”

As a result and to ensure consistency and specificity and to avoid unnecessary costs and delays, Section 900-2.9(b)(4)(v), which requires the viewshed analysis component of the Visual Impact Assessment (as part of Exhibit 8: Visual Impacts) to include an “[a]ssessment of visual impacts pursuant to the requirements of adopted local laws or ordinances,” should be narrowed to only include “consideration” of “substantive” requirements of local laws. Similarly, Section 900-2.9(d)(9)(iii)(b) requires exterior lighting design plans, as part of the Visual Impacts Minimization and Mitigation Plan, to include full cutoff fixtures consistent with OSHA requirements and adopted local laws or ordinances, and the word “substantive” should be inserted before “local.” Also, Section 900-8.4(d), involving hearing participation, includes a requirement of a Statement of Compliance with Local Laws and Regulations, and this provision should be amended to require that any statement filed by a municipality address the proposed facility’s compliance with “substantive” applicable local laws and regulations.

Study Area

In relation to Section 900-1.2(bv), IPPNY recommends that the study area for solar facilities should be explicitly defined at 1 mile, with a 2-mile visual study area; this 1 mile distance is consistent with other areas of the proposed regulations that mention distances for solar projects, such as: Section 900-2.4(l) providing that existing and proposed land uses within 1 mile of the project site will be assessed for compatibility; Section 900-1.6(c)(3) stating that a notice of the filing of an application must be provided “to all persons residing within one (1) mile of the proposed solar facility;” and 900-2.9(b)(1) defining the visual study area for solar facilities as 2 miles. This clarification will create certainty for developers and eliminate the potential for unnecessary disagreements over the study area and associated confusion, needless work and costs.

Section 900-2.16(b), involving Exhibit 15: Agricultural Resources, requires maps to include a field verification of active agriculture land use within the study area. The study area from the proposed facility (as contemplated by the draft regulation) could require field verification of over 50,000 acres of land, which is extremely burdensome and unnecessary. In the alternative, the draft rule could include a provision for information obtained from NYS Department of Agriculture and Markets (“Ag & Markets”) on active agriculture land use within agricultural districts within the one mile study area for solar facilities. For example, the [website](#) of Ag & Markets contains information about how Ag & Markets partners with Cornell University to actively maintain and update geospatial map data, including agricultural activities.

Notice Provisions

Section 900-1.6(c)(3) should be clarified to state that written notice should be provided to all “mailing addresses” or “property owners, based on County tax rolls” (instead of “all persons”) residing within one mile of the proposed solar facility or within five miles of the proposed wind facility. Positive identification of “all persons” residing in a certain area is practically impossible for a developer, and this alternative approach would achieve the goal of the section without creating an unreasonable burden on developers.

Refund of Unused Fee Monies

The amount of fees under the draft Siting Rule is higher than under Article 10. Under §900-1.4 on General Requirements for Applications, an applicant is required to submit the following fees: an application fee of \$1,000 per MW; and a local agency account fee in the same amount.

Article 10 (paragraph (a) of subdivision 6 of Section 164) states that: “Any moneys remaining in the intervenor account after the board's jurisdiction over an application has ceased shall be returned to the applicant.” IPPNY suggests that the draft rule be updated similarly to allow unused amounts from the local agency account fee to be returned to the applicant.

The renewable energy siting law (paragraph (d) of subdivision 7 of Section 94-c of the Executive Law) does not specify the amount of the application review fee. The law allows ORES to recover the *costs it incurs* related to reviewing and processing an application. It may be the case that not all applications would require ORES to use the entire amount of the application review fee. IPPNY suggests that ORES keep track of its *actual costs* to review the application and return any unused amount back to the applicant.

Wetlands Mitigation Jurisdiction

Section 900-2.15, involving Exhibit 14: Wetlands, includes Table 1 on Wetland Mitigation Requirements, within which the last column indicates that Class III & IV Unmapped >12.4 Acres Wetlands require mitigation. This provision assumes that all wetlands >12.4 acres are state jurisdictional and, therefore, is inconsistent with Article 24 of the Environmental Conservation Law (“ECL”). A wetland must proceed through the regulatory mapping process to be subject to state jurisdiction under the ECL. The last column of the Table should be changed to “mapped” wetlands or deleted in its entirety.

Consistency with Precedent

Section 900-10.2(e)(7)(vi) requires a Complaint Management Plan to include mediation of unresolved complaints. Retaining a third-party mediator can be a cumbersome process, whereas the DPS already has a consumer dispute resolution process detailed in its regulations. Consistent with several Article 10 proceedings, this DPS process can be employed in the event the complaint remains unresolved following the procedures in the Complaint Management Plan. At the very least, an applicant should be given the choice of including one or the other process.

Section 900-2.9(d)(7) requires the avoidance or minimization of solar glare exposure, so as to not result in complaints; however, it is impossible to guarantee that all complaints will be avoided. The “no complaints” standard should be replaced with the mitigation or avoidance of red glare, as determined through use of the Sandia National Laboratories Solar Glare Hazard Analysis Tool analysis or its equivalent, and with the limitation of green or yellow glare to a 60 hour annual standard. This approach has been proposed in an Article 10 proceeding and supported by DPS.

Decision Timeframe for Non-Controversial Projects

A provision should be added to Section 900-9.1 on Final Determination on Applications to require ORES to issue its final determination on a permit within eight months of an application completeness determination, if no adjudicatory hearing is held and all permit conditions have been agreed to by the applicant.

Information on Interconnection

Section 900-2.22, involving Exhibit 21: Electric System Effects and Interconnection, requires information from the interconnecting Transmission Owner on the proposed interconnection at a level of detail that is unlikely to be available at the application stage. The information is developed in the New York Independent System Operator’s (“NYISO”) interconnection process, typically takes many months to develop and is not within the control of the applicant.

Instead, IPPNY recommends that the required information for interconnection mirror that of the Article 10 process. Article 10’s regulations (1001.34 Exhibit 34: electric interconnection) include substantively identical provisions to those of the draft rule (§900-2.22 (a)), but the Article 10 rule recognizes that the information is a preliminary description of the proposed electric interconnection and that the final design will be available at the conclusion of the NYISO interconnection process.

Safety Plans

Section 900-2.7(c)(7), involving the contents of Exhibit 6: Public Health, Safety and Security, requires a Safety Response Plan to include “[a] requirement to conduct training drills with emergency responders at least once per year.” This language should be revised to state that the applicant will “offer” to

conduct training drills with emergency responders at least once per year, since an applicant cannot require emergency responders to participate.

Duplicative Requirements

Unintended duplicative requirements for documents, their content, and meetings should be avoided or minimized. Ensuring the most efficient use of time and resources would be beneficial, in order to meet the State's goals.

For example, within §900-1.3 on Pre-Application Procedures, an applicant is required to publish a notice of intent to file an application; however, the applicant already is required to conduct pre-application meetings in which information that would be contained in the notice is being discussed. The applicant also is required to conduct pre-application meetings for transfer applications other than those under Article 10 that have been deemed complete; yet, pre-application meetings also may have occurred already under Article 10 and under SEQRA before applications are transferred to ORES. Transferred applications could be required to include information learned from those meetings, without the need to conduct additional meetings.

Draft Subpart 900-6: Uniform Standards and Conditions

Environmental and Agricultural Monitoring

Section 900-6.4 on Facility Construction and Maintenance contains provisions, within paragraph (b), on Environmental and Agricultural Monitoring, which would require the permit applicant to: hire an independent, third-party environmental monitor (and also potentially an agriculture-specific environmental monitor) to inspect construction work sites and to oversee compliance with siting permit requirements, in consultation with DPS; and to issue regular reporting and compliance audits and provide them to the host town(s) upon request. The draft rule also would allow the environmental monitor to have stop-work authority over the facility.

These provisions are unnecessarily duplicative and expensive, as the DPS already is accorded stop-work authority, under paragraph (k) of Section 900-6.1 on Facility Authorization, and is allowed to issue a stop-work order on specific construction or maintenance activities that contravene requirements of the siting permit and compliance filings. Additionally, paragraph (d) of Section 900-6.4 already would require the permit applicant to report, every two weeks, to DPS, ORES, and the host municipalities on the status, schedule, and location of construction activities for the next two weeks.

Ag & Markets Construction Guidelines

The provisions of paragraph (s) of Section 900-6.4 are onerous and more expensive than traditional construction practice. Applicants already are providing mitigation payments through Index REC contracts to address compliance with construction guidelines. NYSERDA's [website](#) states that, under its 2020 solicitation, contract "awardees may be responsible for making an agricultural mitigation payment to a designated fund based on the extent to which the solar project footprint overlaps with New York's highest quality agricultural soils." The fund would be administered by NYSERDA, in consultation with Ag & Markets, to "support ongoing regional agricultural practices."

Thank you in advance for your consideration and inclusion of these helpmate improvements to the draft regulations. We appreciate the work of ORES in developing the draft rules and providing them for timely public review. IPPNY and our Members look forward to continuing to work with you on further enabling private sector renewable energy investment to meet the State's goals and on realizing the

environmental and economic benefits that investment will bring. If you have any questions or need additional information, please feel free to contact me.

Sincerely,

/s/Radmila P. Miletich

Radmila P. Miletich
Legislative & Environmental Policy Director

From: [BCCR Anne Lawrence](#)
To: [Moaveni, Houtan \(ORES\)](#)
Subject: Unable to attend hearing today for health reasons / Please call me regarding discussion with article 10 public parties regarding improving public participation
Date: Friday, November 20, 2020 12:02:00 PM

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Dear Mr. Moaveni,

I had been planning to come out today for the public comment opportunity in Albany, not only to deliver my comments in person, but mostly in hopes of seeing you there and to ask you if we could set up some kind of 'dialogue' with public parties that have participated in the Article 10 process, to discuss REAL Public participation solutions. Unfortunately I have to cancel my trip today due to health concerns, but I'm still hoping you will be able to talk to me to discuss these ideas to help streamlining siting procedures **without doing away with essential public input** and to create a large(r) base of support and a 'social license to operate' for renewable energy projects.

I've become an active public advocate for responsible siting as grassroots leader and Co-chair of BCCR, Broome County Concerned Residents, party to the Bluestone Wind case (16-F-0559), when I was made aware of this project being planned for my own town. I consider myself an environmentalist and I'm a strong believer in our democratic system - which means one needs to speak up and make a constructive contribution when confronted with a situation where policy fails.

Not only did I actively participate in our Article 10 process, raising funds and local awareness, I have also literally BEGGED every public official involved in our case to sit down with me, and possibly some others, to have an honest and open exchange on how to improve the public participation process.

For example, I traveled to Albany in May 2019 to attend the IPPNY spring conference. Much to my surprise, this was a big industry event, where energy developers had an 'open forum' chaired and moderated by DPS staff on how to streamline the siting of renewable projects. But there was nobody from any 'public parties' invited! I was literally the ONLY one that tried to present concerns from a public opinion point of view. Sarah Osgood, who is very dismayed that people keep quoting her for wanting to make utility siting 'friction less' (whereby the local 'resistance' is considered the 'friction') spoke to me afterwards and said she couldn't talk about our specific case, but she understood my frustration about being deliberately kept in the dark early on, and therefore missing the window of being able to effectively participate in the process. She seemed to agree that 'ramming these projects through communities that don't want them' was a recipe for disaster. I also talked to attending members of NYSERDA, all of whom understood and "applauded" my efforts to try and have an honest debate on how to improve the siting procedures and make sure the public would be able to participate in a meaningful way. But this all seemed to be just 'lip service' as nobody followed up on it.

As our case developed and breaches in the mandatory public outreach / PIP became evident, Jim Denn, who I had been communicating with over the phone, was basically sidelined and received a 'slap on his wrist' when he tried to discuss some of my concerns with our ALJ. Instead of embracing the opportunity to right what was wrong, our ALJ basically told Mr Denn he was 'out of line'. Even though his very JOB was supposedly to help the public participate in the article 10 process.

On December 16, 2019, myself and a number of other BCCR members piled in a bus and drove to Albany to attend the hearing of the Siting Board for the Bluestone Wind certificate. It was painful to see that none of the actual Siting Board members were there and all but Chair Rhodes had sent alternates. After less than 15 minutes discussion, they voted to award the certificate, despite the fact that both ad-hoc members had passionately pleaded for a re-evaluation of some discrepancies and irregularities in our process. Afterwards, John Rhodes sat down with us and listened to our concerns. He was clearly moved and later confirmed he heard us loud and clear but 'his hands were tied' as he was still the chair of the Siting Board on our active case. In other words: no action, no remediation, no further dialogue happened.

Finally, on February 27, 2020, just before the COVID lock-downs, I went to Albany again, this time for the ACENY legislative breakfast, to participate in the discussion about upcoming changes to article 10. I met Jennifer Maglienti, counsel to the Governor, and I spoke with Julie Tighe from NYLCV. Julie was beaming with enthusiasm about the need for 'public input' and my ideas to have a forum with 'public advocates' and we exchanged cards. She claimed to be a big believer and proponent of public participation, so I was excited to follow up with her. She picked up the phone, but when she realized who I was she asked if she could call me back later. She never did. Sadly, Ann Reynolds from NYSERDA has only given me the 'cold shoulder' and likes to paint our group, and other critical voices, as 'the small vocal minority' or worse, 'NIMBY sayers'. (this is factually not true, the large majority of local residents is adamantly against the Bluestone Wind project). Under your proposed new regulations, NYSERDA is getting more and more 'power' and liberty to negotiate on 'the public's behalf' - but she can't be bothered to have an honest dialogue and listen to public concerns!

Participating in this process has been the most disheartening activity I've ever been involved in my whole life. The word 'unfair' doesn't begin to describe being sidelined and silenced in the name of some 'higher political goal'. It is extremely painful to be ridiculed and diminished for trying to protect our natural environment and your own homes and health, as well as our rights as citizens to have input in our own fate and for our real concerns to be taken into account. People are actually dying of stress-related inflections in our community over this, before anything has even been built! Bending over backwards to cater to a profit-driven industry the State wants to promote, by providing 40% of their costs in funding while promising ever-more 'lightened regulations', is also setting dangerous precedents and it is threatening the protection of the same natural environment that renewable energy projects claim to save.

So, today I'm asking you, Mr Moaveni, what does 'meaningful public participation' in the siting process mean to YOU?

You are being tasked with developing new rules and procedures and the DPS has spend millions of dollars to meet the renewable energy providers' demands, and has had meetings upon meetings to see how to make them happy so they 'will come here and build'. Is it too much to ask to simultaneously have a much needed dialogue with 'the other side'? With the residents and constituents whose taxpayer dollars are being used to pay for all of this, no less? What can we do to make sure public concerns are being heard and where necessary are being remediated early on and with the honest intention to make NYS a better place to live for all of us?

Again I'm very sorry not to have an opportunity to come in person today. While I'm not 100% sure you would be there yourself today, I think it's a sure bet you would try to attend. I can't find your phone number, so I'm sending you this email in hopes you will call me back and maybe we can even meet in person on a later date.

I'm not giving up hope there will be a way to ensure the State's energy goals could be met WHILE creating a larger platform for support and not leaving poor upstate communities bereft. YOU can make this happen! Please, take the time to set up this much needed dialogue. Please look at how other countries have handled their renewable energy siting and learn from their mistakes when it comes to handling host communities and creating a 'social license to operate'. I'm counting on you to call me and see how we can do more than recording and filing all of our 3 minute speeches that are pleading for more meaningful public input.

Regarding my own public comments for the record, I request for my speaking slot today to be moved to the November 24 virtual hearing if possible (Monday Nov 30 will be problematic for me) .

Thank you very much for your consideration!

Anne Lawrence
Co-chair BCCR
Broome County Concerned Residents

917 407 3976

On Nov 17, 2020, at 8:54 AM, Moaveni, Houtan (ORES) <Houtan.Moaveni@ores.ny.gov> wrote:

Hello Ms. Lawrence,

This email is to confirm receipt of your request to speak at the ORES public statement hearing to be held in Albany on November 20, 2020. As outlined on the ORES website, all hearing attendees must comply with the Office of Renewable Energy Siting public hearings procedures and complete a health screening form as well as a speaker card either in advance of or upon entry to the facility. An Administrative Law Judge will use a registration list to call each person who has requested to provide a statement. The hearing will continue until everyone wishing to speak has been heard or other reasonable arrangements have been made to include their comments in the record.

Please let me know if you have any questions.

Sincerely,
Houtan Moaveni
Executive Deputy Director

New York State Office of Renewable Energy Siting

99 Washington Avenue
Albany, New York 12231-0001

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From: BCCR Anne Lawrence <bccrwind@gmail.com>
Sent: Tuesday, November 17, 2020 8:34 AM
To: ores.sm.General <General@Ores.ny.gov>
Subject: Fwd: speaking nov 20, Albany - confirmation? in person or virtual?

ATTENTION: This email came from an external source. Do not open attachments or click on links from unknown senders or unexpected emails.

Good morning,

It seems that several of the in-person hearings this week have been moved to virtual hearings.
Is the meeting in Albany for Friday still anticipated to be in person?

Will we get confirmation that the speakers requests are received and that we will be called?
The meeting is scheduled from 5-9
Is there any way to know how far down the list I would be?

Thank you kindly for providing a bit more information.

Anne Lawrence
917 407 3976

Begin forwarded message:

From: Anne Lawrence <bccrwind@gmail.com>
Subject: speaking nov 20, Albany
Date: November 13, 2020 at 4:11:43 PM EST
To: general@Ores.ny.gov

On behalf of BCCR

I'm registering as a speaker for the Nov 20, Albany public hearings 5-7 regarding proposed regulations

please confirm you are receiving this email before 5pm on Friday nov 13,2020.

Thank you.

Anne Lawrence
917 407 3976

<[ores-public-hearing-speaker-card.pdf](#)><[ores-public-hearings-health-assessment-screening_0.pdf](#)><[ores-in-person-public-statement-hearings-procedures.pdf](#)>

Concerned Citizens for Rural Preservation

The Zoghlin Group PLLC represents the Concerned Citizens for Rural Preservation ("CCRP"). Attached for filing on behalf of the CCRP, please find a cover letter, as well as the following appendices, all of which constitute comments on the draft regulations:

- Appendix 1 is CCRP's Comprehensive Public Comment, drafted by this office on behalf of CCRP, which provides general and specific commentary on the Draft Regulations. Please note there is also a separately filed Exhibit 1 to Appendix 1, which is the testimony of Dr. James D. Palmer.
- Appendix 2 is a Joint Comment Joint Comment document raising general concerns about the proposed Draft Regulations. The comment is signed by, and submitted at the direction of, more than 40 municipalities, public officials and interest groups. The comment contains two parts, each with unique signature pages.
- Appendix 3 includes additional commentary on the Draft Regulations provided by specific members of CCRP.

If there are any questions about this submission please contact Benjamin E. Wisniewski, legal counsel for the CCRP. Thank you for your consideration of these comments.



300 State Street, Suite 502
Rochester, New York 14614
585.434.0790 *phone*
585.563.7432 *fax*
www.zoglaw.com

VIA <http://ores.ny.commentinput.com/>

December 7, 2020

Houtan Moaveni
Executive Deputy Director
Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001

RE: COMMENTS ON THE DRAFT REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 – 900-5; 900-7 – 900-15)

Dear Deputy Director Moaveni:

The Zoghlin Group, PLLC represents the Concerned Citizens for Rural Preservation (“CCRP”). We write today to submit written comments on the draft Office Renewable Energy Siting (“ORES”) regulations, Chapter XVIII Title 19, Subparts 900-1 – 900-5; 900-7 –900-15) (the “Draft Regulations”), on behalf of our client. This commentary is distinct from the filing letter and appendices separately filed today in the rulemaking proceeding for Subpart 900-6 of the proposed regulations.

Enclosed please find three appendices containing CCRP’s and/or its members’ commentary:

- **Appendix 1** is CCRP’s Comprehensive Public Comment, drafted by this office on behalf of CCRP, which provides general and specific commentary on the Draft Regulations.
- **Appendix 2** is a Joint Comment Joint Comment document raising general concerns about the proposed Draft Regulations. The comment is signed by, and submitted at the direction of, more than 40 municipalities, public officials and interest groups. The comment contains two parts, each with unique signature pages.
- **Appendix 3** includes additional commentary on the Draft Regulations provided by specific members of CCRP.

In addition to the enclosed commentary, CCRP notes that, in drafting these rules, it appears ORES failed to consult with intervenor attorneys or municipal advocates. ORES appears to have instead relied solely upon input from NYSERDA, renewable energy developers, and professional advocacy organizations. The lack of input from attorneys with intervenor and/or municipal experience in Article 10 proceedings is evident in the proposed rules, as the rules generally advance applicant economic interests to the detriment of local siting considerations. The principal purpose of the proposed rules appears to be to incentivize utility scale development through maximization of project profitability. The rules can only be viewed as the result of agency capture by the renewable energy industry and their advocates. The rules fail to account for all pertinent social, economic and environmental factors in the proposed siting process, as required by Article 94-c.

The rules also fail to recognize or address the enormous damage that renewable energy siting proceedings can do to local communities. This damage goes far beyond the environmental impacts of projects, but cuts to the core of communities by turning neighbor against neighbor, and poisoning local politics and discourse for years to come. By framing all concern over renewable energy as "NIMBY" (i.e., selfish) opposition that should be minimized and ignored, ORES, industry and certain environmental lobbyists seek to shield themselves from the reality that the harm to local communities is real. ORES could do far more to address the local conflict it will create, while also appropriately prioritizing corporate interests and the state's renewable energy goals. But under the proposed rules, the public is effectively excluded from the siting process, and meaningful municipal participation in the siting process is inhibited. Without substantial modification, ORES's proposal will only further sow the seeds of discord and rural intolerance to large scale renewables.

To meet the legislative intent stated in Article 94-c (1), and to help promote civil discourse in communities subject to siting proceedings, a more open, transparent, inclusive, and fair siting process is required. One such process already exists in Article 10 of the public service law, which although imperfect, is a model of fairness and justice ORES should embrace. ORES can do so without compromising its main mission, to expedite appropriate siting, by adopting the revisions proposed in this document. A complete rethink of the proposed ORES rules is essential to providing any hope that bridges of understanding and tolerance can be built between warring factions in local communities. CCRP therefore implores ORES to reverse course and restart its drafting process, this time allowing for input from outside the Albany bubble inhabited by NYSERDA, and renewable energy developers and their advocates. A fair rulemaking process requires nothing less.

In addition to the comments contained in this document, and the attached three appendices, CCRP adopts the all comments submitted by, or on behalf of, Save Ontario Shores, Inc.

Sincerely,

/s Benjamin E. Wisniewski

Benjamin E. Wisniewski, Esq.

Benjamin@zoglaw.com

cc: Concerned Citizens for Rural Preservation

**CONCERNED CITIZENS FOR RURAL PRESERVATION'S COMPREHENSIVE
PUBLIC COMMENT ON THE NEW YORK STATE OFFICE OF RENEWABLE
ENERGY DRAFT REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 –
900-5; 900-7 – 900-14)**

Document prepared by:

Benjamin E. Wisniewski, Esq..
The Zoghlin Group, PLLC
*Attorneys for the Concerned Citizens
For Rural Preservation*
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Rochester, New York 14614
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Benjamin@ZogLaw.com

Dated: December 7, 2020
Rochester, New York

I. **Introduction**

This Comprehensive Public Comment provides comments on the Draft ORES regulations necessary to implement Section 94-c of the New York State Executive Law on behalf of the Concerned Citizens for Rural Preservation (“CCRP”). The comments address the proposed Office of Renewable Energy Siting draft regulations, Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-14) (the “Draft Regulations”). The comments are submitted to the Office of Renewable Energy Siting on behalf of the Concerned Citizens for Rural Preservation. The comments are intended to supplement the separately filed JOINT COMMENT ON THE NEW YORK STATE OFFICE OF RENEWABLE ENERGY DRAFT REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 – 900-5; 900-7 – 900-14), which CCRP separately filed on behalf of more than 40 signatories.

The following commentary is broken into two parts. The first part, General Comments on Proposed Regulations, elaborates on the four comments contained in the separately filed Joint Comments, raises additional general concerns about the regulations, and suggests changes to the proposed regulations intended to address the general concerns.

The second part, Comments on Specific Proposed Regulations, provides specific commentary by section of the proposed regulations, and is organized by section number.

All comments in this document were drafted by legal counsel with extensive experience in renewable energy siting proceedings conducted pursuant to Article 10 of the public service. Legal counsel has participated, or is participating in, the following twenty-two (22) large-scale wind or solar energy siting proceedings:

1. Application of Lighthouse Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a 201 MW Wind Energy Facility;
2. Horse Creek Wind Farm, LLC, Petition for a Certificate of Environmental Compatibility and Public Need Pursuant to PSL Article 10 for a Major Energy Generating Facility;
3. Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Deer River Wind Energy Project in Lewis and Jefferson Counties;
4. Application of Canisteo Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Energy Project in Steuben County;
5. Application of Eight Point Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project;
6. Application of Baron Winds, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Facility;
7. Application of Number Three Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of a Wind Project Located in Lewis County; and
8. Application of Franklin Solar, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law

for Construction of a Solar Electric Generating Facility Located in the Town of Malone, Franklin County.

9. Application of Horseshoe Solar Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of Horseshoe Solar Farm, a 180 MW Solar Electric Generating Facility Located in the Town of Caledonia, Livingston County and the Town of Rush, Monroe County.
10. Application of High Bridge Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct an Approximately 100 MW Wind Powered Electric Generating Facility Located in the Town of Guilford, Chenango County.
11. Application of Bluestone Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction of the Bluestone Wind Farm Project Located in the Towns of Windsor and Sanford, Broome County.
12. Application of Bear Ridge Solar, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility in the Towns of Cambria and Pendleton, Niagara County.
13. Application of Excelsior Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility in the Town of Byron, Genesee County.

14. Application of Bull Run Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct a Wind Energy Project.
15. Application of Boralex, Inc. for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct the Approximately 120-Megawatt Greens Corners Solar Facility Proposed in the Towns of Hounsfield and Watertown, Jefferson County.
16. Application of EDF Renewables for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for Construction the Genesee Road Solar Energy Center in the Towns of Sardinia and Concord, Erie County.
17. Application of ConnectGen LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct the South Ripley Solar Project of 270-MW Solar Powered Electric Generating Facility, Located in the Town of Ripley, Chautauqua County.
18. Application of Hecate Energy Columbia County 1, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for Construction of a Solar Electric Generating Facility Located in the Town of Copake, Columbia County.
19. Application of Garnet Energy Center, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 to Construct and Operate a Solar Generating Facility and Energy Storage System in the Town of Conquest, Cayuga County.

20. Application of Alle-Catt Wind Energy LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for a Proposed Wind Energy Project, Located in Allegany, Cattaraugus, and Wyoming Counties, New York, in the Towns of Arcade, Centerville, Farmersville, Freedom, and Rushford.
21. Application of Atlantic Wind LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 of the Public Service Law for the Mad River Wind Farm Project in the Towns of Redfield and Worth in Oswego and Jefferson Counties.
22. Application of Heritage Wind, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10 for a Wind Energy Generating Facility in the Town of Barre, Orleans County, NY.

In addition to the comments contained in this document, and all other comments filed by the CCRP, the group adopts all comments submitted on behalf of Save Ontario Shores, Inc.

II. **Preliminary Statement**

In drafting these rules, ORES failed to consult with intervenor attorneys, and appears instead to have relied solely upon input from NYSERDA, renewable energy developers, and professional advocacy organizations. The lack of input from attorneys with intervenor and/or municipal experience in Article 10 proceedings is evident in the proposed rules, as the rules generally advance applicant economic interests to the detriment of local siting considerations. The principal purpose of the proposed rules appears to be to incentivize utility scale development through maximization of project profitability. The rules can only be viewed as the result of agency

capture by the renewable energy industry and their advocates. The rules fail to account for all pertinent social, economic and environmental factors in the proposed siting process, as required by Article 94-c.

The rules also fail to recognize or address the enormous damage that renewable energy siting proceedings can do to local communities. This damage goes far beyond the environmental impacts of projects, but cuts to the core of communities by turning neighbor against neighbor and poisoning local politics and discourse for years to come. By framing all concern over renewable energy as "NIMBY" (*i.e.*, selfish) opposition that should be minimized and ignored, ORES, industry and certain environmental lobbyists seek to shield themselves from the reality that the harm to local communities is real. ORES could do far more to address the local conflict it will create, while also appropriately prioritizing corporate interests and the state's renewable energy goals. But under the proposed rules, the public is effectively excluded from the siting process, and meaningful municipal participation in the siting process is inhibited. Without substantial modification, ORES's proposal will only further sow the seeds of discord and rural intolerance to large scale renewables.

To meet the legislative intent stated in Article 94-c (1), and to help promote civil discourse in communities subject to siting proceedings, a more open, transparent, inclusive, and fair siting process is required. One such process already exists in Article 10 of the public service law, which although imperfect, is a **model** of fairness and justice ORES should embrace. ORES can do so without compromising its main mission, to expedite appropriate siting, by adopting the revisions proposed in this document. A complete rethink of the proposed ORES rules is essential to providing any hope that bridges of understanding and tolerance can be built between warring factions in local communities. CCRP therefore implores ORES to reverse course and restart its

drafting process, this time allowing for input from outside the Albany bubble inhabited by NYSERDA, and renewable energy developers and their advocates. A fair rulemaking process requires nothing less.

The remainder of this document provides general and specific commentary on the rules.

III. General Comments on Proposed Regulations

a. General Comment 1: Inadequate Review of Environmental Impacts

The Draft Regulations do not allow for meaningful identification, assessment, or mitigation of the negative environmental impacts of individual renewable energy projects. The Rules do not required ORES to make any findings and determinations related to environmental impacts prior to issuing a permit. ORES should adopt the required findings and determinations made by the Siting Board pursuant to NY PSL 168, including but not limited to impacts on the following:

- a) ecology, air, ground and surface water, wildlife, and habitat;
- (b) public health and safety;
- (c) cultural, historic, and recreational resources, including aesthetics and scenic values; and
- (d) transportation, communication, utilities and other infrastructure.

Such findings should include the cumulative impacts on the local Community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact.

ORES should also be required to make the following specific determinations prior to issuing a permit:

- (a) the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable; and
- (b) if the office finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the permit is issued to the maximum extent practicable using verifiable measures; and
- (c) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the office may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, which would be otherwise applicable if it finds that, as applied to the proposed facility, such is unreasonably burdensome as defined by Article 94-c and the ORES regulations.

These findings and determinations must be based on evidence in the record. In the alternative, ORES should adopt a rule expressly requiring ORES to find the uniform conditions and standards are sufficient to address environmental impacts to the maximum extent practicable. This holding will require a review of local environmental impacts in tandem with local municipal and intervenor parties.

b. General Comment 2: Improper Reliance on Secrecy to Avoid Public Scrutiny

The Draft Regulations do not allow for meaningful public participation in the renewable energy siting process, and fail to provide open and transparent access to project details, applications, case documents, or docket lists. As further explained below, the rules do not allow for appropriate notice to the public, and do not allow public access to the application, hearing documents, or the administrative record online. The rules would also exclude unincorporated associations or groups of residents from obtaining party status or local agency funds, thus inhibiting their ability to obtain copies of studies and documents or litigate issues in the administrative hearing. Public comments cannot be made online, will not be available online, and will never be publicly published absent a FOIL request. Critical timelines for requesting party

status and funding are short, and as a practical matter may be impossible for intervenors to meet. A single pre-application mailing, followed by a meeting, as proposed by ORES, is grossly inadequate to fully inform the public about the project, the process, and the ability to participate. Required pre-application meetings with municipalities can be conducted behind closed doors. The only way the public would be notified is at the discretion of a single municipal official, since the proposal only requires an applicant to notify the town supervisor, county executive, or mayor, and does not required meetings to be public. Without major modification to the rules requiring adoption of a robust public information program, and an online case management system similar to the DMM system used by the Siting Board, ORES will operate in darkness and the public will remain unaware of application documents, study, results, litigated issues, or rulings, among other things. This is hardly a prescription for improving public support of renewable energy projects. Nor is there any reasonable basis for so restricting public information, since there is no time limit on pre-application project development. ORES should require robust public outreach by applicants during the pre-application period.

c. General Comment 3: Violation of Home Rule Principles

The Draft Regulations violate Article IX of the New York State Constitution and effectively strip local governments of legislative, zoning, and police powers. The Rules fail to precisely state under what circumstances ORES can execute its waiver power. Although Article 94-c identifies inconsistency with state energy policy as the basis for waiving local laws, the regulations to not elaborate on how inconsistency can be shown. Instead, the regulations rely on the technical standard required under Siting Board Regulations, which relate to whether a project is unduly burdensome in light of existing technology or the needs of the rate payers. It is unclear what findings and determinations ORES is required to make as prerequisite to waiver. Without a clear

standard for waiver or any internal limitations on the waiver power, ORES will be tempted to waive local laws indiscriminately and in a way wholly inconsistent with local powers granted directly by the state constitution. Neither ORES, nor the legislature for that matter, has the power to preempt local laws on a case by case basis.

d. General Comment 4: Elevation of Private Corporate Interest over Public Interest

The Draft Regulations improperly elevate project economics and profitability over local siting concerns. The draft regulations overemphasize the state’s energy goals and fail to account for the legislature’s express requirement that ORES consider all pertinent social, economic and environmental factors prior to awarding a permit. The rules should be redrafted, in consultation with municipal and intervenor attorneys with experience in Article 10 proceedings, to ensure local siting considerations are placed on an equal footing with corporate interests.

e. General Comment 5: The regulations Exceed ORES’s Authority

Section 94-C of the Executive Law states, “the purpose of this section to consolidate the environmental review and permitting of major renewable energy facilities in this state . . . **while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities** as more specifically provided in this section.” NY Exec Law 94-c, §1. The Draft Regulations improperly elevate the state’s renewable energy policy goals over the “pertinent” considerations identified by the Legislature. The CCRP encourages ORES to redraft its proposed procedural regulation in a

manner that allows for a robust, open, and meaningful review of the myriad impacts caused by large scale renewable energy development.

f. General Comment 6: the Rules fail to require ORES to make any requisite findings and determinations concerning project impacts prior to award of a permit.

Under analogous PSL Article 10 proceedings, the State Siting Board is required to make a variety of findings and determinations related to project impacts prior to awarding a permit. ORES should adopt the following regulations to ensure the following findings and determinations are made prior to the award of any ORES Permit:

- (1) ORES shall not issue an permit without making explicit findings regarding the nature of the probable environmental impacts of the construction and operation of the facility, including the cumulative environmental impacts of the construction and operation of related facilities such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities, communications and relay facilities, access roads, rail facilities, or steam lines, including impacts on:
 - (a) ecology, air, ground and surface water, wildlife, and habitat;
 - (b) public health and safety;
 - (c) cultural, historic, and recreational resources, including aesthetics and scenic values; and
 - (d) transportation, communication, utilities and other infrastructure.

Such findings shall include the cumulative impact on the local Community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact.

(2). The Office may not grant a permit for the construction or operation of a major electric generating facility, either as proposed or as modified by the office, unless the office determines that:

(a) the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable; and

(b) if the office finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the certificate is issued to the maximum extent practicable using verifiable measures; and

(c) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the office may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement, which would be otherwise applicable if it finds that, as applied to the proposed facility, such 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. The office shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

(3). In making the determinations required in subdivision 2 of this section, the Office shall consider:

(a) the state of available technology;

(b) the nature and economics of reasonable alternatives;

(c) environmental impacts found pursuant to subdivision two of this section;

(d) the impact of construction and operation of related facilities, such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities,

communications and relay facilities, access roads, rail facilities, or steam lines;

(e) the consistency of the construction and operation of the facility with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan;

(f) the impact on community character and whether the facility would affect communities that are disproportionately impacted by cumulative levels of pollutants; and

(g) such additional social, economic, visual or other aesthetic, environmental and other considerations deemed pertinent by the Office.

ORES should make findings quantifying local impacts regardless of whether it determines uniform standards and conditions are applicable. Prior to issuing a permit ORES should compile an evidentiary record sufficient to demonstrate that any uniform standards and conditions applicable to the project are sufficient to avoid or mitigate impacts to the maximum extent practicable.

g. General Comment 9: The Rules fail to account for review of the environmental impacts of any project pursuant to Article VIII of the Environmental Conservation Law.

Unlike Article 10 proceedings, ORES proceedings are not exempted from environmental review pursuant to SEQRA. The ORES regulations must be modified to incorporate SEQRA review, or in the alternative the Office could replace SEQRA review with the required findings and determinations set forth in PSL §168, as modified above. The state legislature did not authorize ORES to issue permits without review of environmental impacts, including impacts on community character, cumulative impacts, and aesthetic impacts.

h. General Comment 10: The Rules should require an ALJ be assigned to every application proceeding to review all evidence and make recommended findings and determinations similar to those required by PSL 168.

As drafted the rules do not clearly state whether the office of hearings and an ALJ will be assigned to administer every case, or whether a representative of the office will handle cases in a ministerial capacity unless and until an adjudicative hearing is required. Given the inherently adversarial and fact intensive nature of siting proceedings, ORES should require an ALJ to be assigned to all cases as soon as an application is filed. This ALJ would handle all party status and local agency find requests, determinations of significance, hearings, and public comment or hearing reports.

i. General Comment 12: Quasi-adjudicative Hearings should be conducted as of right.

It is not in the public interest to conduct siting proceedings as a ministerial action akin to a processing of building permits at the local level. Even in cases where no substantive and significant issues are identified for adjudication, siting proceedings should be conducted as an adjudicative hearing, resulting in a recommended decision by an ALJ describing the potential impacts of the facility, determining whether all substantive requirements have been satisfied, and making recommendations on all findings and determinations necessary to the award of a permit. ORES is not authorized to award a general permit for the construction of all potential renewable energy projects.¹ By definition, general conditions are incapable of addressing local siting

¹ Although Article 94-c clearly contemplates a set of uniform standards and conditions as a starting point for addressing potential project impacts, ORES has exceeded its mandate by drafting regulations amounting to a general state-wide permit obviating the need for adjudicative review of individual projects.

concerns on a case by case basis. Hearings are necessary to create a record sufficient to identify and address all relevant local siting issues.

IV. Comments on Specific Proposed Regulations

a. §900-1.1 Purpose and Applicability

- i. Proposed Rule **§900-1.1(a)**
- ii. Comment: The purpose of this Part cannot be to establish substantive requirements of major renewable energy facilities unless these rules are subject to the 4 public hearings required by Article 94-c.
- iii. Proposed revision: remove all substantive standards from Subparts 900-1 – 900-5; 900-7 – 900-14.

b. §900-1.2 Definitions

- i. Propose Rule **§900-1.2(ab)**, Local agency
- ii. Comment: This definition is overly broad and would allow industrial development agencies to participate in siting proceedings. The interest of an IDA is narrow, limited to creation of jobs and award of tax breaks, and does not extend to the siting considerations reviewed by ORES. The State Siting Board specifically held that IDA’s are not eligible for intervenor funds, which are analogous to local agency funds. *See* Ruling on Intervenor Funds, Application of Eight Point Wind, Case No. 16-F-0062 (available at: <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={7DE38E2B-D798-42BE-8DAD-EFC4CFA5A7DE}>)
- iii. Proposed revision: expressly exclude industrial development agencies from the definition of “Local Agency”, and/or expressly disqualify industrial

development agencies from receiving funds from the local agency account. Award of funds to an IDA would only dilute the scarce intervenor funding available and inhibit the ability of host municipalities and the public to participate in the siting proceedings.

c. §900-1.2 Definitions

- i.** Propose Rule **§900-1.2(be)**, Person
- ii.** Comment: the definition of “person” fails to include “unincorporated association or group”. This is important because “Party” is previously defined as a “person” by definition (bc). Similarly, the definition of “Potential community intervenor” is defined as a “person” by definition (bg). The proposed definition of Person, which differs from the normal definition under the law, would therefore exclude the most common class of potential intervenor parties from the proceeding and prohibit groups or unincorporated associations from receiving local agency account funds. If this rule is not modified, concerned residents who may wish to participate in the proceeding as group would need to form a legal entity in order to request party status. This requirement is unduly burdensome for local intervenors, likely impossible given the time constraints for party status and intervenor fund requests, and inconsistent with Article 10 precedent. The proposed rule would also likely result in a more disorderly proceeding as individuals who might otherwise have formed an unincorporated association or group will be forced to seek individual party status, thus dramatically increasing the number of potential parties.

- iii. Proposed revision: add “unincorporated associations and groups” to the definition of “Person”.

d. **§900-1.2 Definitions**

- i. Propose Rule **§900-1.2(bh)**, Potential Party
- ii. Comment: the definition of “Potential Party” should expressly include any person or agency with an interest in a participating property as defined by (ba). Otherwise, an Applicant may encourage participating landowners to seek individual or group party status in an attempt to bolster the applicant’s position. This is particularly concerning if, as has been common practice, landowner and/or HCA agreements require support for the project in any permitting proceeding. The legal agents of an applicant should be eligible for local agency funds.
- iii. Proposed Revision: exclude “any person with an interest in a participating property” from the definition of Potential Party.

e. **§900-1.2 Definitions**

- i. Propose Rule **§900-1.2(bq)**, Service
- ii. Comment: this definition fails to expressly allow service by email or other electronic means, as is standard procedure in Siting Board and Public Service Commission proceedings. Lack of electronic document management and service will lead to unwieldy administrative delays and serve to increase administrative and service costs for all parties and the Office.

- iii. Proposed revision: add “including service by electronic mail or other authorized means”. ORES should also maintain a web-based active and prospective party list publicly displaying the service information for all parties upon which service is required. The Public Service Commission’s DMM system accomplishes this, and ORES must adopt something similar, or preferably identical.

f. **§900-1.2 Definitions**

- i. Propose Rule §900-1.2(bv), study area
- ii. Comment: this definition unnecessarily and improperly restricts the impact study area. For example, when visual impacts are considered, the study area may need to extend beyond 20 miles. This definition as drafted will lead to an incomplete record and prevent ORES from considering all pertinent social, economic and environmental factors in its decision.
- iii. Proposed Revision: add the following to the end of the definition: “Study area may extend beyond 5 miles from all generating facility components if a larger study area is required for consideration of all pertinent social, economic and environmental factors in the decision to permit a facility.”

g. **§900-1.3 Pre-application procedures**

- i. Proposed Rule §900-1.3(a), consultation with local agencies.
- ii. Comment: this rule overemphasizes notification of the project to town supervisors, county executives, and mayors, while not requiring any notification whatsoever to municipal governments in general. The rule as drafted could be satisfied by a closed-door meeting between a single

municipal official and an applicant. If implemented, in many cases (*e.g.*, those where the notified municipal official would personally benefits from a project or is otherwise personally predisposed to support a project), this rule will shield the public from essential dialogue between municipal officials and an applicant, and will likely lead residents to assume the worst is happening behind closed doors, thus eroding public trust in ORES and local government.

- iii. Proposed Revision: the rule should be modified to require all meetings between the applicant and local agencies to be conducted in front of a quorum of the governing board, and all such meetings should be open to the public pursuant to the Open Meetings Law.

h. §900-1.3 Pre-application procedures

- i. Proposed Rule §900-1.3(b), meeting with community members
- ii. Comment: the rule as drafted replaces the 6 month long pre-application public information program plan required under Article 10 with a single public meeting. This is incomprehensible given the well-documented history of Article 10 applicants failure to provide adequate and meaningful public notice under the much more robust Siting Board PIP regulations. If ORES' goal is to ensure the public remains unaware of a project, then this rule will certainly have its intended effect. CCRP does not believe the Legislature intended for ORES proceedings to remain secret.
- iii. Proposed Revision: the entire rule should be stricken and redrafted in consultation with the Siting Board's public information coordinator, as well

as representatives of public interest groups who have raised serious concerns over inadequate public outreach in Article 10 proceedings. Such groups include the Tug Hill Rural Preservation Alliance, Citizens for Maintaining Our Rural Environment, Broome County Concerned Residents, and Save Ontario Shores. Again, a single meeting, after a single mailing based on an unverified mailing list, is unlikely to result in meaningful public education about a project, and does not comport with the requirements of Article 94-c or the intent of the legislature.

i. §900-1.3 Pre-application procedures

- i.** Proposed Rule §900-1.3(d)
- ii.** Comment: the notice required by this rule is inadequate to inform the public about the scope of the project, the Article 94-c process, or the availability of local agency funding. As drafted, this rule implies funding requests may only be made by regular mail, an inconvenient and outdated means of conducting and participating in siting proceedings. Article 10 proceedings, in contrast, are conducted online, with paper copies only required for certain specific filings.
- iii.** Proposed revision: The notice should also require website addresses for the Office of Renewable Energy Siting, the rules and regulations governing the proceeding, necessary forms for party status and agency funding requests, and directions for **electronic submission** of proceeding documents such as party status and funding requests.

j. §900-1.3 Pre-application procedures

- i. Proposed Rule §900-1.3(e), (f), (g), (h), relating to pre-application wetland delineation, water resources and aquatic ecology, NYS threatened or endangered species, and archaeological resources consultation
 - ii. Comment: these rules provide for pre-application study of certain environmental impacts by in applicant in consultation with the DEC, the Office, and OPRHP. However, **none** of this pre-application work is required to be carried out in consultation with local experts, groups, or municipalities. ORES cannot engage in review of local siting impacts while excluding all local involvement.
 - iii. Proposed revision: At a minimum, all of these rules should require consultation with, and involvement of, host municipalities, local environmental groups, and local historical societies or groups.
- k. **§900-1.4 General requirements for applications**
- i. Proposed Rule §900-1.4(a)(1)
 - ii. Comment: the rule fails to explain provide any details about the ORES application form.
 - iii. Proposed revision: the Rules shall include a copy of the proposed form for public comment.
- l. **§900-1.4 General requirements for applications**
- i. Proposed Rule §900-1.4(a)(3)
 - ii. Comment: the rule improperly shifts the burden of proof by implying an applicant must not demonstrate why uniform standard conditions should apply.

- iii. Proposed revision: the entire application should be framed as a request by an applicant, based on facts and analysis, for application of the uniform standard conditions.

m. §900-1.4 General requirements for applications

- i. Proposed Rule **§900-1.4(a)(4)**
- ii. Comment: this rule allows an applicant, not the state, to control all public information about the project and implies the applicant will control the only online resource for information about the project. ORES cannot outsource its responsibilities under the Open Meetings Law to make the entire administrative record available to the public in an online format, with the exception of any specific information for which an applicant seeks an exemption from public disclosure.
- iii. Proposed revision: In addition to a requirement the applicant host an informative website about the project, ORES must host a website such as the DMM system used by the Siting Board and the Public Service Commission to ensure the public has meaningful access to the entire administrative record.

n. §900-1.4 General requirements for applications

- i. Proposed Rule **§900-1.5, ORES Siting Review Fee**
- ii. Comment: the fee is excessive and the rule fails to provide any basis for the fee, or how the money will be spent by ORES.
- iii. Proposed revision: ORES should be required to provide a regular accounting of how the fee is used to offset the cost of application review.

Any portion of the ORES fee not used for permissible purposes should be refunded to an applicant at an appropriate time.

o. §900-1.6 General requirements for applications

i. Proposed Rule §900-1.6, Service and Publication of the Application

- ii.** Comment: The rule fails to require service of paper and electronic versions of the application on potential parties; fails to require public posting of all application documents online; and fails to require publishing or service of application amendments. Limiting service to a single library, if one exists, does not provide sufficient public access to complex project details. This rule appears to be designed to provide convenient application access to ORES and state agencies, while generally inhibiting the public's ability to easily access the application. The rule does not require applicants to consult with municipalities to obtain a mailing list sufficient to reach all residents, and fails to require the applicant to consult with municipalities concerning the content of the notice. Under these rules the notice is likely to be impenetrably dense to inhibit public understanding, or in the alternative may be a post card resembling yet another ESCO solicitation that will likely be discarded without review by residents. ORES should redraft this rule in tandem with attorneys and advocacy groups with experience in Article 10 proceedings, to design notice requirements with a chance of actually providing public notice. Although efforts have been improving within the past year, the renewable energy industry has a long track record in Article

10 proceedings that shows it is incapable, or unwilling, of engaging in good faith public outreach.

- iii. Proposed revision: Applicants should be required to upload the entire application to case management system maintained by ORES. All application materials should be available for public review online. ORES should redraft this rule in tandem with attorneys and advocacy groups with experience in Article 10 proceedings, to design notice requirements with a chance of actually providing public notice.

p. §900-2.6 Exhibit 5: Design Drawings

- i. Proposed Rule **§900-2.6(b) and (d)**
- ii. Comment: These rules improperly sets a highly contested substantive standard for wind turbine tower and solar panel facility setbacks. The rule fails to provide any basis for the proposed setbacks, with differ substantially for setbacks enacted by local governments around New York State
- iii. Proposed revision: The setback tables must be deleted, or four public hearings addressing the proposed uniform standard condition must be held in four locations around the state.

q. §900-2.6 Exhibit 5: Design Drawings

- i. Proposed Rule **§900-2.6(e)**
- ii. Comment: This rule improperly sets a substantive standard limit on solar panel height.

- iii. Proposed revision: This uniform standard condition must be deleted, or four public hearings addressing the proposed uniform standard condition must be held in four locations around the state.

r. **§900-2.9 Exhibit 8: Visual Impacts**

- i. Proposed Rule **§900-2.9 Exhibit 8: Visual Impacts**, in its entirety
- ii. Comment: This rule doubles down on many of the mistakes made in the equivalent Siting Board regulation, and will result in a visual impact analysis that will fail to provide a meaningful assessment of visual impact to host communities. The rules appear to have not been drafted with the assistance of a visual impact expert such as Dr. James Palmer². A copy of testimony by Dr. Palmer in an Article 10 proceeding is attaches as Exhibit 1 to this comment. The testimony provides criticism on how visual impact analysis is conducted by applicants in the Article 10 process, and the criticism is equally applicable to the rules and process proposed by ORES.
- iii. Proposed revision: ORES should strike this rule in its entirety and collaborate with an expert such as Dr. James Palmer in producing

² Dr. Palmer is a professor of landscape architecture for the SUNY College of Environmental Science and Forestry for more than 25 years. Dr. Palmer has researched and written extensively on the topic of visual assessment. He has been honored as a Fellow of the American Society of Landscape Architecture and named to the first class of Fellows of the Council of Educators in Landscape Architecture. Dr. Palmer earned his MLA in Landscape Architecture and PhD in Forestry/Natural Resource Planning from the University of Massachusetts, Amherst. More information about Dr. Palmer: <https://www.linkedin.com/in/james-palmer-0b5a0126> .

As sample of Dr. Palmer’s testimony in an Article 10 proceeding is available here: <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={C1E93571-922C-4F8B-A6DA-CC584BCEBD9D}> .

The testimony explains the key components of a meaningful visual impact review.

regulations that will result in meaningful visual impact assessment resulting in actionable mitigation plans.

s. **§900-2.9 Exhibit 8: Visual Impacts**

- i. Proposed Rule §900-2.9(b)(2)
- ii. Comment: This rule is vague and ambiguous and fails to require an approved methodology for visual impact assessment.
- iii. Proposed revision: ORES should strike this rule in its entirety and collaborate with an expert such as Dr. James Palmer in requiring a coherent and effective methodology, based on science, for quantifying and mitigating visual impacts.

t. **§900-2.9 Exhibit 8: Visual Impacts**

- i. Proposed Rule §900-2.9(b)(3), (4)
- ii. Comment: These rules require review of visual impacts from specific viewpoint and discuss the elements that factor into selection of viewpoints. The rules do not require public input in the selection of viewpoints, and afford an applicant too much discretion in selecting which viewpoints are truly sensitive or representative. This will result in selection of viewpoints by an applicant that will downplay and/or misrepresent the visual impact of facilities, as has been demonstrated in multiple Article 10 proceedings.
- iii. Proposed revision: Host municipalities, public interest groups, and residents living the project study area should be allowed to select 50% of the viewpoints chosen for additional study and simulation. Viewpoints should not be limited to particularly sensitive public spaces, but should include

views from residences on non-participating properties as a means of demonstrating the visual impact to local residents, while also proposing effective mitigation measures. At least one public open house should be conducted prior to visual impact analysis to solicit input from the public on areas and/or residences of highest concern.

u. §900-2.13 Exhibit 13: Water Resources and Aquatic Ecology

- i. Proposed Rule **§900-2.14**
- ii. Comment: This rule improperly sets numerous uniform standards and conditions.
- iii. Proposed revision: This uniform standard conditions must be deleted, or four public hearings addressing the proposed uniform standard condition must be held in four locations around the state.

v. §900-2.15 Exhibit 14: Wetlands

- i. Proposed Rule **§900-2.15**
- ii. Comment: This rule improperly sets numerous uniform standards and conditions.
- iii. Proposed revision: This uniform standard conditions must be deleted, or four public hearings addressing the proposed uniform standard condition must be held in four locations around the state.

w. §900-2.16 Exhibit 15: Agricultural Resources

- i. Proposed Rule **§900-2.15**, in its entirety
- ii. Comment: This rule fails to require a demonstration of whether a facility can comply with local or county Farmland Protection Plans, or whether the

facility is consistent with farmland preservation requirements in the state constitution.

- iii. Proposed revision: The rule should be redrafted to require consultation with host municipalities prior to filing of an application, and to allow for any specific studies necessary to determine compliance with local and state farmland preservation policies. The Rule should also include a review of economic impacts on the local farming/agricultural economy resulting in loss of farming or farmland.

x. **§900-2.18 Exhibit 17: Consistency With Energy Planning Objectives**

- i. Proposed Rule **§900-2.18**, in its entirety
- ii. Comment: This Rule fails to require essential information for ORES review by failing to ask for a precise study and quantification of any specific project' impact on decarbonation of the state's energy sector. It cannot be assumed that each new megawatt of renewable energy replaces an equal amount of energy generated by a process emitting carbon.
- iii. Proposed Revision: given that subsection (g) of this rule already requires, “(a) statement of the reasons why the facility will promote public health and welfare, including minimizing the public health and environmental impacts related to climate change”, an applicant must show precisely how much carbon emissions will be reduced by the facility, any predicted change in modeled global climate change, and any follow-on benefit attributable specifically to the proposed facility. This section should also explain why

distributed energy resources, if deployed throughout the state, are inadequate to meet the state's energy goals.

y. **§900-2.19 Exhibit 18: Socioeconomic Effects**

- i. Proposed Rule **§900-2.18**, in its entirety
- ii. Comment: This Rule exceeds ORES mandate by failing to quantify potential economic costs associated with a facility, including but not limited to losses in adjacent property value based on visual stigma; lower tax assessments and tax revenue resulting from loss of property value; loss of population; loss of other economic opportunities; impacts on tourism; conversion of farmland; and impacts on the agricultural economy, including farm services. The rule appears to be drafted to allow an applicant to provide evidence of supposed economic benefits without any meaningful analysis of potentially offsetting costs. This violates Article 94-c.
- iii. Proposed Revision: the rule should be stricken in its entirety and redrafted to require a comprehensive cost benefit analysis designed to quantify likely impacts on the local economy. A robust review of potential direct and indirect **costs** must be included.

z. **§900-2.24 Exhibit 23: Site Restoration and Decommissioning**

- i. Proposed Rule **§900-2.24(c)**
- ii. Comment: This rule permits an applicant to reduce the decommissioning and site restoration costs by subtracting potential salvage value, thus reducing the value of any associated letter of credit.

- iii. Proposed revision: This is a substantive uniform standard that should not be in this set of regulations. In addition, the standard itself represents a marked deviation from Article 10 precedent, where the Siting Board has routinely refused to subtract salvage value from decommissioning security.

aa. §900-2.25 Exhibit 24: Local Laws and Ordinances

- i. Proposed Rule §900-2.25, in its entirety
- ii. Comment: The Draft Regulations violate Article IX of the New York State Constitution and effectively strip local governments of legislative, zoning, and police powers. The Rules fail to precisely state under what circumstances ORES can execute its waiver power. Although Article 94-c identifies inconsistency with state energy policy as the basis for waiving local laws, the regulations do not elaborate on how inconsistency can be shown. Instead, the regulations rely on the technical standard required under Siting Board Regulations, which relate to whether a project is unduly burdensome in light of existing technology or the needs of the rate payers. It is unclear what findings and determinations ORES is required to make as prerequisite to waiver. Without a clear standard for waiver or any internal limitations on the waiver power, ORES will be tempted to waive local laws indiscriminately and in a way wholly inconsistent with local powers granted directly by the state constitution. Neither ORES, nor the legislature for that matter, has the power to preempt local laws on a case by case basis.
- iii. Proposed revision: this regulation should be stricken and all substantive local laws should be applied to any given project.

bb. §900-2.25 Exhibit 24: Local Laws and Ordinances

- i. Proposed Rule §900-2.25, in its entirety
- ii. Comment: The regulation is vague because it fails to address the timing issue encountered in Article 10 proceedings. Specifically, ORES does not provide guidance on how late in a proceeding a local laws can be duly adopted by a local government, and still be considered by ORES.
- iii. Proposed revision: this regulation should be modified to clearly state ORES shall apply any local law in force and effect at the time it renders a final decision on a permit application, or in the alternative waive such local law in accordance with Article 94-c and implementing regulations.

cc. §900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(a)
- ii. Comment: Experience in Article 10 proceeding indicates 30 days is not sufficient time for my community intervenors to become familiar with an application, identify and retain counsel, identify and retain experts, and submit a complete funding request.
- iii. Proposed revision: Requests for local agency funds should not be due until forty-five (45) days after the date on which a siting permit application has been filed.

dd. §900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(b)
- ii. Comment: This rule would prevent community intervenors from using agency funds to ensure compliance with applicable local laws and

regulations. There is no reasonable basis for depriving community intervenors of the opportunity to use agency funds to contribute to the record on the issue of local law compliance, as well as potential waiver. The interests of community members and local governments frequently diverge. Furthermore, evidence has been submitted in numerous Article 10 proceedings indicating the local government officials sometimes have institutional or personal pecuniary interests in energy projects, and thereby have an incentive to not seek compliance with potentially incompatible local laws.

- iii. Proposed revision: This section should be modified to remove the phrase “for local agencies” as indicated below:

“(b) Within thirty (30) days after the deadline for requests for funds from the local agency account, the ALJ shall award local agency funds, to local agencies and potential community intervenors whose requests comply with the provisions of subdivision (h) of this section, so long as use of the funds will contribute to a complete record leading to an informed permit decision as to the appropriateness of the site and the facility, and ~~for local agencies,~~ shall include the use of funds to determine whether a proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations.”

ee. **§900-5.1 Local Agency Account**

- i. Proposed Rule §900-2.25(c)
- ii. Comment: Although other language in rule 5.1 indicates agency funds can be used to pay legal counsel, this rule may cause ambiguity on that point by only stating funds can be used to defray expenses for experts.
- iii. Proposed revision: This section should be revised to state the local agency account may be used to defray the fees, costs, and expenses of attorneys and experts, and expert witnesses.

ff. §900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(c)
- ii. Comment: Although other language in rule 5.1 indicates agency funds can be used to pay legal counsel, this rule may cause ambiguity on that point by only stating funds can be used to defray expenses for experts.
- iii. Proposed revision: This section should be revised to state the local agency account may be used to defray the fees, costs, and expenses of attorneys and experts, and expert witnesses.

gg. §900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(f)
- ii. Comment: This rule replaces the requirement for quarterly intervenor fund reports in Article 10 proceedings with a requirement that such reports be submitted with every voucher request for payment. This is an inefficient, time-consuming requirement, and it will result in the waste of intervenor funds on an administrative task. Given that voucher payment requests

require submission of detailed invoices, the request for contemporaneous reporting on how the funds have been spent is duplicative and unnecessary.

- iii. Proposed revision: This rule should be modified to only require (1) an accounting of the monies that have been spent; and (2) detailed invoices for all work performed.

hh. §900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(g)
- ii. Comment: This rule does not set a time limit for payment after a satisfactory voucher request is received. In Article 10 proceedings delays between request and payment have lasted up to a year, which places a heavy financial burden on both municipal and intervenor attorneys and experts.
- iii. Proposed revision: This rule should be modified to require all payments be made by NYSERDA to community and municipal parties within 60 days of the date a voucher is requested is submitted.

ii. 900-5.1 Local Agency Account

- i. Proposed Rule §900-2.25(g)(2)
- ii. Comment: this rule arbitrarily, and without rational basis, reserves 75% of the local agency fund for municipal parties. This reservation is excessive, exceeds to 50% rule under Article 10, and will inhibit community intervenors' ability to participate in proceedings, thus depriving the record of an essential perspective and evidence necessary to award a permit. In Article 10 proceedings even the 50% reservation has frequently resulted in municipalities predisposed to supporting a project to squander fees while

underfunded intervenor groups are left with multiple substantive issues to litigate, but no funds with which to litigate them. At a minimum, ORES should adopt the same 50% reservation used under Article 10 cases. **This rule is a blatant attempt to deprive community intervenors of the funding necessary to participate in ORES siting proceedings.** ALJ's must have the discretion to award agency funds on an equitable basis, and should not be required to reserve so much money even for municipalities that have no intention of actually using the funds to develop issues on the record.

- iii. Proposed revision: This rule should be modified to reserve at least fifty (50) percent of the local agency account funds for each project to local agencies. ALJ's should be empowered to award funds on an equitable basis, taking into account numerous factors including the positions of the parties, the issues sought to be litigated, and the proposed uses of funds.

jj. §900-7.1 Amendment of Application

- i. Proposed Rule **§900-7.1 Amendment of Application**
- ii. Comment: This rule does not require an additional local agency fund payment in the event of a Major Amendment. In accordance with Article 10 precedent, majority changes to the application should be accompanied by additional funds for the agency account. Such funds are necessary for community intervenor and municipal parties to review the impact of the changes.

- iii. Proposed revision: This rule should be modified to require an additional local agency fund payment, on a dollar per megawatt basis, whenever a Major Amendment to an Application is filed.

kk. §900-8.3 Public comment hearing and issues determination.

- i. Proposed Rule §900-8.3, in its entirety
- ii. Comment: This rule does not appear to allow for adjudication of issues relevant to the findings and determination ORES must make before issuing a permit. It also limits substantive and significant issues to those that could result in major changes to a facility or denial of a permit. CCRP believes many other issues can and should be addressed during ORES adjudicative proceedings, and without the ability of intervenors and municipalities to raise those issues, project impacts will not be minimized.
- iii. Proposed revision: Adjudicative hearings should be required as of right, and all issues should be deemed substantive and significant if they are related to any finding or determination required to be made by ORES before issuing a permit.

ll. §900-8.4 Hearing participation

- i. Proposed Rule §900-84(c)
- ii. Comment: this rule raises significant and unnecessary barriers to party status, and will inhibit or prevent both municipal and public participation in administrative hearings. For example, there is no rational basis for requiring parties to make an offer of proof prior to being awarded party status. The very notion of requiring a party to prove its case before being offered party status

turns notions of due process on its head, shifts the burden of proof from the applicant to intervenors, and represents far more stringent standing requirement than is even required in a court of law. Again, these ORES regulations will have the effect of blocking public participation in the siting process, and will lead to an inadequate record. It is highly likely that very few parties will find legal counsel with the requisite experience to file the required “petition” for party status, and any attempt to do so pro se is doomed to failure.

- iii. Proposed revision: party status should be awarded to any person meeting the definition of a potential community intervenor as defined by definition (bg) in this part.

mm. §900-8.6 Disclosure

- i. Proposed Rule §900-8.6, in its entirety
- ii. Comment: improperly limits the scope of discovery by limiting both the subject and timing of available discovery. By preventing full discovery until after issues have already been identified, ORES will make it impossible for parties to develop evidence necessary to either seek party status or raise substantive and significant issues.
- iii. Proposed: the rule should be modified to permit any document requests and/or interrogatories seeking relevant information or information that may lead to relevant information.

nn. §900-8.7 Conduct of the Adjudicatory Hearing

- i. Proposed Rule §900-8.7, in its entirety

- ii. Comment: the proposed hearing rules violate SAPA and due process.
- iii. Proposed revision. The Rules should be redrafted with the assistance of counsel experienced in litigated Article 10 proceedings.

oo. **§900-8.8 Evidence, burden of proof and standard of proof**

- i. Proposed Rule **§900-8.8(a)**, in its entirety.
- ii. Comment: This rule is overly restrictive for administrative proceedings, fails to comply with SAPA, and deviates from the evidentiary rules applied by the Siting Board in analogous PSL Article 10 Siting Proceedings. Given the purpose of ORES is to, “ensur[e] the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities as more specifically provided in this section,” ORES regulations should be drafted in a manner that welcomes all potentially relevant evidence, even if such evidence would not normally be permissible in proceedings before a court.
- iii. Proposed Revision: **§900-8.8(a)** should be deleted in its entirety, and replaced with the analogous Siting Board regulation 16 NYCRR 1001.12(a), modified slightly to reflect use by ORES as follows:

(a) Evidence

(1) Issues and evidence are relevant if they assist the Office in making any required findings pursuant to Article 94-c of the Executive Law.

(2) All evidence submitted must be relevant and material. Evidence is material if it has the reasonable potential to affect the outcome of the Office's findings or determinations under Article 94-c of the Executive Law.

(3) Although relevant, evidence may be excluded if its value as proof is substantially outweighed by a potential for unfair prejudice, confusion of the issues, undue delay, or it is needlessly repetitious or duplicative. The ALJ's may also preclude irrelevant, repetitive, redundant or immaterial evidence and irrelevant or unduly repetitious cross-examination.

(4) All rules of privilege will be observed.

(5) Other rules of evidence need not be strictly applied. Hearsay evidence may be admitted if a reasonable degree of reliability is shown.

(6) Where a part of a document is offered as evidence by one party, any party may offer the entire document as evidence or the presiding examiner may require the entire document to be submitted as evidence.

(7) Any party may move that evidence, including records and documents, in the possession of the Office, or other public records, be received in evidence in the form of copies or excerpts or by incorporation by reference.

(8) Records or documents incorporated by reference will be available for examination by the parties before being received in evidence.

(9) Briefs and other documents that attempt to persuade through argument are not evidence and may not be entered into the evidentiary record of a proceeding.

(10) Any party may move that official notice be taken of:

(i) facts of which judicial notice could be taken pursuant to Rule 4511 of the Civil Practice Law and Rules; and

(ii) other facts within the specialized knowledge of the Office.

(11) When official notice is taken of a material fact of which judicial notice could not be taken and that does not appear in the evidence in the record, every party will be given notice thereof and will, on timely request, be afforded an opportunity to dispute such fact or its materiality prior to a decision granting or denying a certificate.

pp. §900-8.8 Evidence, burden of proof and standard of proof

- i.** Proposed Rule §900-8.8(b), Burden of Proof, in its entirety.
- ii.** Comment: This rule violates SAPA³ and attempts to improperly limit the introduction of hearsay evidence in administrative proceedings by applying

³ Hearsay evidence is admissible in SAPA hearings (such as ORES proceedings) and can be the basis of an administrative enforcement determination (see SAPA § 306[1](a)(agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law); Matter of Gray v Adduci, 73 NY2d 741, 742 [1988] (“Hearsay evidence can be the basis of an administrative determination”); Gray v. Adduci, 73 N.Y.2d 741, 742, 532 N.E.2d 1268 (1988); People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of

more stringent rules of evidence normally only applicable to court proceedings.

As stated by the Court of Appeals in *Matter of Gray v Adduci*, 73 NY2d 741, 742 1988, “Hearsay evidence can be the basis of an administrative determination.” In Article 10 proceedings, for example, hearsay evidence is routinely admitted and considered by the Siting Board.

It appears the only purpose of this proposed rule is to restrict the kind of evidence that municipalities and public intervenors may submit in either showing a substantive and significant issue, or during adjudicative hearings. Given the already onerous timing restrictions on any proposed party intending to show a substantive and significant issue, the inability to base arguments on hearsay evidence will likely deprive the administrative record of information necessary for a final determination, and prevent material issues from being reviewed and considered by ORES..

- iii. Proposed Revision: This rule should be deleted as unnecessary and contrary to SAPA, and the associated definition of “hearsay” in §900-1.2(y) should also be deleted.

qq. §900-8.9 Ex parte rule

- i. Proposed Rule §900-8.9, in its entirety.
- ii. Comment: as drafted this Rule only limits ex parte communications with ALJ’s, which may not be assigned in every proceeding. The rule should be

Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]).

modified to also govern ex parte communications with the Executive Director, Director, or any staff or agents of the Executive Director. This rule is essential given the Office's role as final arbiter over a permit application.

- iii. Proposed Revision: wherever the term "ALJ" or "Chief ALJ" is used in Rule 900-8.9, add the language or "Executive Director, Director, or their staff or agents."

rr. §900-8.10 Payment of hearing costs

- i. Proposed Rule §900-8.10, in its entirety.
- ii. Comment: the rule is vague and ambiguous and fails to state which parties to an adjudication are eligible for reimbursement of hearing costs by the applicant or ORES. At a minimum, local agency and intervenor parties' costs should be reimbursed by the applicant.
- iii. Proposed Revision: add the following language to the end of §900-8.10(a):
"All parties to the adjudication are eligible for reimbursement of the costs identified in this section, including but not limited to ALJs, ORES or other state agency representatives, experts, and staff, and Local Agency and public intervenor legal representatives and experts. ALJs shall have the discretion to award reimbursement of costs to additional attendees not listed in this section."

ss. §900-8.11 Record of the hearing

- i. Proposed Rule §900-8.11, in its entirety.
- ii. Comment: the rule fails to require ORES to make the entire record available on an online docket similar to the DMM system used in Article

10 proceedings. ORES should use the Siting Board's system as a model, and ensure all documents related to any application are publicly available online, and updated in real time. The rule, as drafted, appears to be designed to prevent the public from accessing application or hearing information online. The rule is contrary to the Open Meetings Law, SAPA, and due process. Even in cases where an adjudicative hearing is not conducted, all correspondence to and from the Office, rulings, applications, requests for party status, information requests, requests for local agency funding, deficiency notes, etc. should be available online for public review. It does a disservice to the public to hide the administrative record from public review. An example of a DMM docket for an Article 10 proceeding is available here:

<http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=56497>

- iii. Proposed Revision: the rule should require all documents related to any ORES application, including pre-application documents, the application, party status requests, issues statements, hearing documents, and any other document that would be included in an administrative record as defined by SAPA, be hosted on a public available docket similar to the DMM system used by the Siting Board and the Public Service Commission.

tt. **§900-8.12 Final Decision**

- i. Proposed Rule **§900-8.12**, in its entirety.

- ii. Comment: this rule is vague and ambiguous and fails to provide any detail or specificity about the contents of any recommended decision, hearing report, or final decision in an ORES proceeding. As drafted, this rule does not require Executive Director to make any specific findings or determinations whatsoever prior to issuing a permit. The rule directly contravenes the express requirements of Exec Law §94-c, which requires ORES to consider, “all pertinent social, economic and environmental factors in the decision to permit such facilities as more specifically provided in this section.” NY Exec Law 94-c, §1. This rule must be modified to set forth explicit findings and determinations that ORES must make, based on evidence in the Record, prior to issuing a permit.
- iii. Proposed revision: ORES should incorporate the findings and determinations set forth in PSL 168, in their entirety. No ORES permit should be issued absent careful consideration of the impacts listed in PSL 168, which closely mirror the concerns listed in of Exec Law §94-c(1). A section (e) should be added to Rule **900-8.12** stating the following:

(1) ORES shall not issue an permit without making explicit findings regarding the nature of the probable environmental impacts of the construction and operation of the facility, including the cumulative environmental impacts of the construction and operation of related facilities such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities, communications and relay facilities, access roads, rail facilities, or steam lines, including impacts on:

- (a) ecology, air, ground and surface water, wildlife, and habitat;

- (b) public health and safety;
- (c) cultural, historic, and recreational resources, including aesthetics and scenic values; and
- (d) transportation, communication, utilities and other infrastructure.

Such findings shall include the cumulative impact on the local Community including whether the construction and operation of the facility results in a significant and adverse disproportionate environmental impact.

(2). The Office may not grant a permit for the construction or operation of a major electric generating facility, either as proposed or as modified by the office, unless the office determines that:

- (a) the adverse environmental effects of the construction and operation of the facility will be minimized or avoided to the maximum extent practicable; and
- (b) if the office finds that the facility results in or contributes to a significant and adverse disproportionate environmental impact in the community in which the facility would be located, the applicant will avoid, offset or minimize the impacts caused by the facility upon the local community for the duration that the certificate is issued to the maximum extent practicable using verifiable measures; and
- (c) the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the office may elect not to apply, in whole or in part, any local ordinance, law, resolution or other action or any regulation issued thereunder or any local

standard or requirement, which would be otherwise applicable if it finds that, as applied to the proposed facility, such 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. The office shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation or other local action issued thereunder.

(3). In making the determinations required in subdivision 2 of this section, the Office shall consider:

- (a) the state of available technology;
- (b) the nature and economics of reasonable alternatives;
- (c) environmental impacts found pursuant to subdivision two of this section;
- (d) the impact of construction and operation of related facilities, such as electric lines, gas lines, water supply lines, waste water or other sewage treatment facilities, communications and relay facilities, access roads, rail facilities, or steam lines;
- (e) the consistency of the construction and operation of the facility with the energy policies and long-range energy planning objectives and strategies contained in the most recent state energy plan;
- (f) the impact on community character and whether the facility would affect communities that are disproportionately impacted by cumulative levels of pollutants; and
- (g) such additional social, economic, visual or other aesthetic, environmental and other

considerations deemed pertinent by the Office.

uu. §900-10.2 Pre-Construction Compliance Filings

- i. Proposed Rule §900-10.2, in its entirety.
- ii. Comment: the Rule appears to contain uniform conditions that should have been included in Draft Regulations Chapter XVIII Title 19 (Subpart 900-6). By including these uniform standards and conditions in the procedural regulations, ORES is violating state law by depriving the public of the opportunity for a hearing on all uniform standards and conditions, as required by NY Exec Law 94-c, §3(b). As an example of some of the uniform conditions and standards improperly included in this section:
 1. Standards applicable to site restoration upon decommissioning;
 2. Rules for vegetation management plans; and
 3. Rules for complaint management plans;
- iii. Proposed revision: All uniform standards and conditions improperly included in Draft Regulations Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15), should be deleted, and added to Draft Regulations Chapter XVIII Title 19 (Subpart 900-6), and additional public hearings must be conducted in four regions of the state as required by Article 94-c.

**NEW YORK STATE
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT**

In re the Matter of

**Application of Canisteo Wind Energy LLC for a
Certificate of Environmental Compatibility and
Public Need Pursuant to Article 10 for Construction of
a Wind Project Located in Steuben County.**

CASE 16-F-0205

PRE-FILED TESTIMONY OF:

JAMES F. PALMER, PHD, FASLA, PLA

T.J. BOYLE ASSOCIATES

301 COLLEGE STREET

BURLINGTON, VT 05401

1 **Q: Please state your name, employer, and business address.**

2 A: My name is James F. Palmer, I am employed by T. J. Boyle Associates,
3 located at 301 College Street, Burlington, Vermont, 05401.

4

5 **Q: Dr. Palmer, what position do you hold?**

6 A: I am a Senior Landscape architect.

7

8 **Q: On whose behalf is your testimony being offered?**

9 A: I am working for Mr. John Sharkey, an individual concerned about the
10 potential impacts of the Canisteo Wind Energy (“CWE”) project.

11

12 **Q: What is the purpose of your testimony?**

13 A: I was asked to review all testimony and Application documents relevant
14 to the Visual Impact Assessment (“VIA”) studies conducted by the
15 Applicant CWE, and to provide oral and written testimony regarding the
16 sufficiency of CWE’s visual impact analysis. I also present an
17 alternative visual sensitivity analysis that, if fully implemented, would
18 allow the Siting Board to weigh the relative visual impact of alternative
19 facility layouts. Finally, I present evidence of potential visual impact on
20 known Amish receptors within the CWE project area.

21

1 **Q: What is your background and what are your qualifications?**

2 A: I received a Master of Landscape Architecture in February 1976 and a
3 Doctor of Philosophy in February of 1979, both from the University of
4 Massachusetts. I was a member of the faculties of Landscape
5 Architecture and Environmental Studies at the State University of New
6 York, College of Environmental Science and Forestry from 1980 until
7 2006. I reached the rank of Professor and now hold the rank of
8 Professor Emeritus. During this time, I maintained an active research
9 program in visual impacts, community landscape values, and other
10 landscape aesthetics issues that resulted in numerous peer-reviewed
11 publications and several national awards.

12
13 I moved to Vermont in 2005 and established a consultancy focusing on
14 expert review, testimony, and other professional services related to
15 landscape visual assessment. After collaborating with T. J. Boyle
16 Associates on a couple of projects, I joined the firm in 2009. Additional
17 information about my experience is presented in my CV, attached to this
18 testimony as **Exhibit JP-01**.

19

1 I have been elected Fellow of the American Society of Landscape
2 Architects and hold Vermont Landscape Architect License Number
3 125.0080666.

4

5 **Q: Have you participated in legal or administrative proceedings in the**
6 **State of New York before?**

7 A: Yes. I testified before the Public Service Commission concerning the
8 aesthetic impacts from the New York Regional Interconnect, a proposed
9 200-mile 400 kV high voltage direct current transmission line (NYS
10 PSC Case 06-T-0650), and the construction of a 580-megawatt Natural
11 Gas-fired Electric Generating Plant in Brookhaven, New York (Case
12 00-F-0566).

13

14 I also provided testimony to the Siting Board concerning the visual
15 impact of the proposed Number Three Wind Project in the Article 10
16 proceeding for The Application of Number Three Wind LLC for a
17 Certificate of Environmental Compatibility and Public Need Pursuant to
18 Article 10 for Construction of a Wind Project Located in Lewis County,
19 Case No. 16-F-0328.

20

1 **Q: Have your opinions been accepted by adjudicators or other**
2 **government bodies familiar with the issues of aesthetics and the**
3 **visual impacts of large energy projects on the landscape?**

4 A: Yes. I have served as the aesthetic expert for Maine's Department of
5 Environmental Protection and the Land Use Regulation Commission on
6 a number of wind energy development and transmission line proposals.
7 I was a primary author of the Northern Pass Transmission Project Visual
8 Impact Assessment, prepared for the US Department of Energy, and
9 then served as the Counsel for the Public's aesthetic expert testifying
10 before the New Hampshire Site Evaluation Committee.

11

12 In addition, numerous publications I have authored or coauthored are
13 routinely relied upon by experts and government bodies and are
14 considered definitive in the field of visual impact assessment. I am a
15 coauthor of a 2013 study of visual impact assessment methodologies for
16 the National Transportation Research Board of the National Academies.

17 I also coauthored two standard texts on visual impact assessment: The
18 Renewable Energy Landscape in 2016, and Foundations for Visual
19 Project Analysis in 1986. I also coauthored the US Army Corps of
20 Engineers' Visual Resources Assessment Procedure in 1988. I am
21 currently working on tools for the National Park Service's Visual

1 Resource Program. Additional information about my experience is
2 presented in my CV, Exhibit JP-01.

3

4 **Q: Have you been qualified in any case to provide testimony on wind**
5 **turbine aesthetics and their visual impact on the landscape?**

6 A: Yes, I have provided testimony related to a number of projects in
7 Maine, which are listed in my CV, Exhibit JP-01. I also recently
8 provided testimony in The Application of Number Three Wind LLC for
9 a Certificate of Environmental Compatibility and Public Need Pursuant
10 to Article 10 for Construction of a Wind Project Located in Lewis
11 County, Case No. 16-F-0328.

12

13 **Q: What material did you consult prior to this review?**

14 A: I have reviewed the following documents describing the Canisteo Wind
15 Farm, some of which are referred to by abbreviated citations throughout
16 my testimony:

17 (1) Environmental Design & Research. 2018. Visual Impact

18 Assessment: Canisteo Wind Farm. Syracuse, NY: Environmental

19 Design & Research. DMM Item No. 124.

- 1 (2) Environmental Design & Research. 2018. VIA Appendix A.
2 Composite Overlay Map. Syracuse, NY: Environmental Design &
3 Research. DMM Item No. 124.
- 4 (3) Environmental Design & Research. 2018. VIA Appendix C.
5 Visually Sensitive Resources Visibility Analysis Table. Syracuse,
6 NY: Environmental Design & Research. DMM Item No. 124.
- 7 (4) Environmental Design & Research. 2018. VIA Appendix D. Visual
8 Simulations. Syracuse, NY: Environmental Design & Research.
9 DMM Item No. 125.
- 10 (5) Environmental Design & Research. 2018. VIA Appendix E. Visual
11 Impact Assessment Rating Forms. Syracuse, NY: Environmental
12 Design & Research. DMM Item No. 125.
- 13 (6) Environmental Design & Research. 2019. Figure 19-1: Noise
14 Contours – Rev 1. Syracuse, NY: Environmental Design &
15 Research. DMM Item No. 207.
- 16 (7) Invenergy. 2019. Article 10 Application Canisteo Wind Farm Case
17 16-F-0205 Steuben County, New York Supplemental Testimony
18 May 24, 2019. DMM Item No. 209.
- 19 (8) Invenergy. 2019. Article 10 Application Canisteo Wind Farm Case
20 16-F-0205 Steuben County, New York 1001.24 Exhibit 24 Visual
21 Impacts Revision 2. DMM Item No. 208.

1 (9) Miller, Eric. 2019. Canisteo Wind Energy LLC Response to
2 Sharkey-06 Interrogatory/Document Request. Dated July 9, 2019,
3 attached as **Exhibit JP-04** to my testimony. This information
4 request response was provided to me by legal counsel.

5 (10) Perkins, G., and J. Hecklau. 2019. Canisteo Wind Project Case No.
6 16-F-0205 Update to Portions of Appendix 24a - Visual Analysis.
7 (technical memorandum). Syracuse, NY: Environmental Design &
8 Research. DMM Item No. 208.

9

10 **Q: Did you rely on any references in preparing your testimony?**

11 A: Yes, I relied on the following references in preparing this testimony,
12 some of which are referred to by abbreviated citations throughout my
13 testimony:

14 (1) Blau, D., Everett, C., and Bronk, T. 2009. Visual Looming Effect in
15 the Landscape: Research, Analysis, and Case Study. Desert Claim
16 Wind Power Project Ellensburg, Washington. BLAU EXHIBIT
17 12.2. San Francisco, CA: EDAW.

18 (2) Buhyoff, G. J. and Wellman, J. D. 1980. The specification of a
19 nonlinear psychophysical function for visual landscape dimensions.
20 Journal of Leisure Research 12(3): 257-272.

- 1 (3) Feimer, N. R., Craik, K. H., Smardon, R. C., and Sheppard, S. R. J.
2 1979. Evaluating the effectiveness of observer based visual resource
3 and impact assessment methods." In *Our National Landscape*.
4 *General Technical Report*. PSW-35. Berkeley, CA.: USDA Forest
5 Service, Pacific Southwest Forest and Range Experiment Station.
- 6 (4) Gates, J. 2003. Guidance for Assessing Impacts to Existing Scenic
7 and Aesthetic Uses under the Natural Resources Protection Act.
8 Document Number DEPLW0541-A2003. State of Maine,
9 Department of Environmental Protection.
- 10 (5) Higuchi, T.. 1983. *The Visual and Spatial Structure of Landscapes*.
11 Translated by Charles Terry. Cambridge, MA: MIT Press.
- 12 (6) Hull IV, R. B., and Bishop, I. D. 1988. Scenic Impacts of Electricity
13 Transmission Towers: The Influence of Landscape Type and
14 Observer Distance. *Journal of Environmental Management* 27: 99—
15 108.
- 16 (7) Litton, R. B., Jr. 1968. *Forest Landscape Description and*
17 *Inventories: A Basis for Land Planning and Design*. USFS Research
18 Paper PSW-49. Berkeley, CA: Pacific Southwest Forest and Range
19 Experiment Station, Forest Service, US Department of Agriculture.

- 1 (8) Palmer, J. F. 2019. The Creation and Interpretation of Viewsheds
2 Divided into Distance Zones and its Application to Canisteo Wind.
3 Burlington, VT: T. J. Boyle Associates.
- 4 (9) Palmer, J. F. 2019. The contribution of key observation point
5 evaluation to a scientifically rigorous approach to visual impact
6 assessment. *Landscape and Urban Planning*, 183: 100-110.
- 7 (10) Palmer, J. F. 2019. The contribution of a GIS-based landscape
8 assessment model to a scientifically rigorous approach to visual
9 impact assessment. *Landscape and Urban Planning*, 189: 80-90.
- 10 (11) Palmer, J. F. 2016. Assigning a fixed height to land cover screen for
11 use in visibility analysis. *Journal of Digital Landscape Architecture*,
12 1-2016: 125-132.
- 13 (12) Palmer, J. F. 2015. Effect size as a basis for evaluating the
14 acceptability of scenic impacts: Ten wind energy projects from
15 Maine, USA. *Landscape and Urban Planning*, 140: 56-66.
- 16 (13) Shang, H. and Bishop, I. D. 2000. Visual thresholds for detection,
17 recognition and visual impact in landscape settings. *Journal of*
18 *Environmental Psychology*, 20:125-140.
- 19 (14) Sheppard, S. R. J., and Newman, S. 1979. *Prototype Visual Impact*
20 *Assessment Manual*. Syracuse, NY: SUNY College of
21 Environmental Science and Forestry.

- 1 (15) Smardon, R. C., Feimer, N. R., Craik, K. H., and Sheppard, S. R. J.
2 1983. Assessing the reliability, validity and generality of observer-
3 based visual impact assessment methods for the western United
4 States. In R. D. Rowe and L.G. Chestnut (Eds.) *Managing air*
5 *Quality and Scenic Resources at National Parks and Wilderness*
6 *Areas*. Boulder, CO: Westview Press. p. 84-102.
- 7 (16) Smardon, R. C., & Hunter, J. 1983. Procedures and methods for
8 wetland and coastal area visual impact assessment (VIA). In R. C.
9 Smardon (Ed.). *The Future of Wetlands: Assessing Visual-Cultural*
10 *Values*. Totowa, NJ: Allanheld Osmun.
- 11 (17) Smardon, R. C., J. F. Palmer and J. P. Felleman (eds.). 1986.
12 *Foundations for Visual Project Analysis*. New York: John Wiley &
13 Sons. 374 pp.
- 14 (18) Smardon, R.C., J.F. Palmer, A. Knopf, K. Grinde, J.E. Henderson
15 and L.D. Peyman-Dove. 1988. *Visual Resources Assessment*
16 *Procedure for U.S. Army Corps of Engineers*. Instruction Report
17 EL-88-1. Department of the Army, U.S. Army Corps of Engineers.
18 Washington, D.C.
- 19 (19) Sullivan, R., Kirchler, L., Roché, S., Beckman, K., and Richmond,
20 P. 2012. Wind Turbine Visibility and Visual Impact Threshold
21 Distances in Western Landscapes. *Proceedings of National*

1 *Association of Environmental Professionals, 37th Annual*

2 Conference, May 21-24, 2012, Portland, OR.

3 (20) U.S. Department of Agriculture, Forest Service. 1995. *Landscape*

4 *Aesthetics: A Handbook for Scenery Management*. Agricultural

5 Handbook Number 701.

6 (21) U. S, Department of Interior, Bureau of Land Management. 1986.

7 *Visual Resource Contrast Rating*. BLM Manual Handbook 8431-1

8 (available at

9 https://www.blm.gov/sites/blm.gov/files/program_recreation_visual

10 [%20resource%20management_quick%20link_BLM%20Handbook](https://www.blm.gov/sites/blm.gov/files/program_recreation_visual)

11 [%20H-8431-](https://www.blm.gov/sites/blm.gov/files/program_recreation_visual)

12 [1%2C%20Visual%20Resource%20Contrast%20Rating.pdf](https://www.blm.gov/sites/blm.gov/files/program_recreation_visual))

13 (22) United States Department of Transportation, Federal Highway

14 Administration. 2015. *Guidelines for the Visual Impact Assessment*

15 *for Highway Projects*. FHWA-HEP-15-029. (available at

16 https://www.environment.fhwa.dot.gov/env_topics/other_topics/VI

17 [A_Guidelines_for_Highway_Projects.aspx](https://www.environment.fhwa.dot.gov/env_topics/other_topics/VI))

18

19 **Q: Did you visit the site of the proposed project?**

1 A: I have not visited the site prior to preparing this written direct testimony,
2 but intend to do so before providing live testimony to the Presiding
3 Examiners in this proceeding.

4

5 **Visual Impact Analysis Pursuant to Article 10 of the New York State**
6 **Public Service Law and Siting Board Regulations**

7

8 **Q: Does Article 10 of the New York State Public Service Law and**
9 **associated Siting Board Regulations require a review of the visual**
10 **impact of a proposed energy facility?**

11 **A:** Yes. Section 168 of the Public Service Law describes the considerations
12 necessary for the New York State Siting Board (“Siting Board”). These
13 include:

14 2. The board shall not grant a certificate . . . without making
15 explicit findings regarding the nature of the probable
16 environmental impacts of the construction and operation of
17 the facility, including the cumulative environmental impacts
18 . . ., including impacts on: . . .

19 (c) cultural, historic, and recreational resources,
20 including **aesthetics and scenic values** . . .

1 3. The board may not grant a certificate . . . unless the board
2 determines that: ...

3 (c) the adverse environmental effects of the
4 construction and operation of the facility will be
5 minimized or avoided to the maximum extent
6 practicable; and

7 (d) if the board finds that the facility results in or
8 contributes to a significant and adverse
9 disproportionate environmental impact in the
10 community in which the facility would be located,
11 the applicant will avoid, offset or minimize the
12 impacts caused by the facility upon the local
13 community for the duration that the certificate is
14 issued to the maximum extent practicable using
15 verifiable measures;

16 4. In making the determinations required in subdivision three
17 of this section, the board shall consider: ...

18 (f) the impact on community character and whether
19 the facility would affect communities that are
20 disproportionately impacted by cumulative levels of
21 pollutants; and

1 (g) such additional social, economic, visual or other
2 aesthetic, environmental and other considerations
3 deemed pertinent by the board.

4 Public Service Law § 168 (2), (3), (4) (emphasis added).

5

6 The Siting Board also promulgated regulations governing the preparation
7 of visual impact assessments (VIAs). One of the more detailed sections
8 describes the preparation and presentation of the viewshed analysis.

9 According to Rule 1001.24:

10 (b) The viewshed analysis component of the VIA shall be
11 conducted as follows:

12 (1) Viewshed maps depicting areas of project visibility
13 within the facility study area shall be prepared and presented
14 on a 1:24,000 scale recent edition topographic base map. A
15 line of sight profile shall also be done for resources of
16 statewide concern located within the VIA study area. The
17 viewshed maps shall provide an indication of areas of
18 potential visibility based on topography and vegetation and
19 the highest elevation of facility structures. The potential
20 screening effects of vegetation shall also be shown. The
21 map(s) shall be divided into foreground, midground and

1 background areas based on visibility distinction and distance
2 zone criteria. Visually-sensitive sites, cultural and historical
3 resources, representative viewpoints, photograph locations,
4 and public vantage points within the viewshed study area
5 shall be included on the map(s) or an overlay. An overlay
6 indicating landscape similarity zones shall be included.

7 16 NYCRR § 1001.24(b).

8

9 **Q: Do you have any concerns over whether the viewshed analysis**
10 **included in Canisteo Wind's VIA is sufficient to provide the Siting**
11 **Board with the information it needs to make the findings and**
12 **determinations required by PSL 168?**

13 A: Yes, in my professional opinion the CWE VIA fails to meet the
14 requirement that "the map(s) shall be divided into foreground, midground
15 and background areas based on visibility distinction and distance zone
16 criteria." My criticism goes beyond simply noting that CWE's viewshed
17 maps fail to represent foreground, midground, and background; CWE
18 also fails to present information necessary to evaluate the "visibility
19 distinction" of turbines, and further fails to set forth appropriate
20 descriptive "distance zone criteria."

21

1 **Q: Did you prepare a study addressing whether the Canisteo**
2 **Wind VIA includes viewshed analysis sufficient to meet the**
3 **requirements of Article 10 regulations?**

4 A: Yes. Exhibit JP-02 to my testimony is a study I prepared for this
5 testimony, *The Creation and Interpretation of Viewsheds Divided into*
6 *Distance Zones and its Application to Canisteo Wind*. The entire contents
7 of Exhibit JP-02 are hereby incorporated into my testimony by reference.
8 I strongly encourage the Presiding Examiners and Siting Board members
9 to read the study in its entirety.

10

11 **Q: Please describe the purposes of your study and the issues you**
12 **address in the study.**

13 A: The study considers the traditional viewshed analysis, such as
14 prepared for Canisteo Wind project, and whether it fails to meet the
15 requirement that “the map(s) shall be divided into foreground, midground
16 and background areas based on visibility distinction and distance zone
17 criteria.” I propose a new approach to creating a viewshed analysis that is
18 structured around how a viewer perceives wind turbines when observed
19 in varying distance zones (e.g. foreground versus background) and in
20 varying amounts (e.g. tip of the blade or full rotor sweep).

21

1 A benefit of restructuring the analysis around distance zones and visibility
2 distinction is it supports an evaluation of the visual impact of individual
3 wind turbines. In general, a fully visible wind turbine in the foreground
4 will have a higher visual impact than a partly obscured turbine in the
5 background. Assessment of individual turbine impact would allow the
6 Siting Board to select a project layout that minimizes visual impact. The
7 ability to compare the visual impact of alternative project layouts would
8 be particular helpful where, as here, it appears more turbine locations are
9 proposed than are needed to meet the target electrical generation capacity.

10
11 **Q: Does the VIA presented by Canisteo Wind allow the Siting**
12 **Board to compare the relative visual impact of every wind turbine?**

13 **A:** No. The VIA provided by Canisteo Wind does not allow the Siting
14 Board to compare the relative visual impact of each turbine. Instead, it
15 relies on aggregated viewshed mapping that reveals the number of
16 turbines visible from any position without regard to the distance of the
17 turbine from the viewer, or the amount of the turbine that is visible. The
18 CWE VIA also relies on contrast ratings of suspect validity (more on that
19 to follow). The contrast ratings only provide an assessment of CWE's
20 visual impact on a select few visually sensitive resources. In my study
21 (Ex. JP-02) I show that neither CWE's viewshed mapping approach nor

1 its contrast rating approach are sufficient to meet the requirement for
2 viewshed analysis under Article 10, since CWE’s approach fails to
3 incorporate a review of visibility distinction and distance zone criteria.

4

5 **Q: What specific issues does your study (Ex JP-02) Address?**

6 **A:** The paper is organized as a response to eight questions:

- 7 1. What is a viewshed analysis?
- 8 2. What are distance zones and “distance zone criteria”?
- 9 3. What are reasonable distance zones for wind turbines?
- 10 4. What does “visibility distinction” mean?
- 11 5. Did the viewshed maps show distance zones for the
12 Canisteo wind turbines?
- 13 6. How can distance zones for the Canisteo wind turbines be
14 mapped?
- 15 7. How can the visibility distinction and distance zones be
16 used to evaluate the relative visibility impact of the
17 individual Canisteo wind turbines?
- 18 8. What is the relative visibility impact of the individual
19 Canisteo wind turbines to scenic resources?
- 20 9. What is the relative scenic impact of the individual
21 Canisteo wind turbines to visually sensitive resources?

1 10. How can the relative scenic impact of the individual
2 Canisteo wind turbines be used to create an optimal
3 alternative?
4

5 **Q: What is a viewshed analysis?**

6 **A:** Before defining “viewshed analysis”, it is helpful to first define a
7 “viewshed”. A viewshed is all the surface areas visible from an observer’s
8 viewpoint. As a practical matter, viewsheds are normally analyzed by
9 calculating the cumulative lines-of-sight from which a critical object,
10 such as a wind turbine, is seen throughout a study area. A viewshed can
11 take one of two forms: (1) topographic or terrain viewshed is “the area
12 which would be visible from a viewpoint based on landform alone,” and
13 (2) screened or vegetated viewshed which accounts for the screening
14 effects of landcover. *See* Smardon et al. 1986, p. 322.
15

16 Both the CWE VIA and my report represent the CWE viewshed, but in a
17 differing form. Canisteo Wind relies on a simple viewshed showing the
18 number of visible turbines without distinguishing visibility by distance
19 zone and the amount of turbine that is visible, and my report relies on
20 mapping and analysis that shows, from any given point, how much of a
21 turbine is visible (i.e., just the end of the blade tip, the turbine hub, or the

1 entire rotor sweep) and represents the distance of the turbine from the
2 viewer. Because my viewshed analysis incorporates visibility distinction
3 and distance zone criteria, and because these criteria are directly relatable
4 to the severity of visual impact on the observer, I am able to quantify the
5 visual impact of each proposed turbine site.

6

7 **Q: What are distance zones?**

8 **A:** A turbine's visual impact intensity decreases as the distance from the
9 viewer increases. For an individual turbine, the distance zones are
10 concentric bands or rings. It is possible to create a viewshed map for
11 multiple turbines within one distance zone, or to map the viewshed within
12 multiple distance zones for a single turbine. However, a single map
13 cannot portray the viewsheds of multiple turbines within multiple
14 distance zones. The distance lines included in CWE's viewshed mapping
15 simply do not represent the distance zones in which a viewer can see
16 individual wind turbines.

17

18 **Q: What are "distance zone criteria"?**

19 **A:** During the 1960s, the USDA Forest Service (USFS) was experiencing
20 significant public pressure to protect scenic resources from the visual
21 impacts of clearcutting. In response to this conflict, the USFS began a

1 research program to support the development of scenery management
2 procedures. An early publication was Litton's (1968) report, *Forest*
3 *Landscape Description and Inventories*, which introduced distance zones
4 as a significant factor affecting a viewer's experience of the landscape.
5 Higuchi (1975) used similar perceptual principles to describe distance
6 zones for the Japanese landscape.

7
8 The USFS continued to develop its scenery management system and its
9 current handbook, *Landscape Aesthetics*, is the most commonly cited
10 source for distance zone criteria. The USFS handbook defines distance
11 zones based on the landscape feature details that would normally be
12 perceptible to an observer in each zone. The Forest Service identifies four
13 distance zones (USFS 1995, p. 4.10-4.11) which are characterized as
14 follows:

15
16 **Immediate Foreground** (0 to 300 feet). At an immediate
17 foreground distance, people can distinguish individual leaves,
18 flowers, twigs, bark texture, small animals (chipmunks and
19 songbirds), and can notice movement of leaves and grass in light
20 winds.

1 **Foreground** (0 to 0.5 miles). At a foreground distance, people
2 can distinguish small boughs of leaf clusters, tree trunks and large
3 branches, individual shrubs, clumps of wildflowers, medium-
4 sized animals (squirrels and rabbits), and medium-to-large birds
5 (hawks, geese, and ducks). At this distance, people can also
6 distinguish movement of tree boughs and treetops in moderate
7 winds.

8 **Middleground** (0.5 to 4 miles). Middleground is usually the
9 predominant distance zone at which national forest landscape are
10 seen, except for regions of flat lands or tall, dense vegetation. At
11 this distance, people can distinguish individual treeforms, large
12 boulders, flower fields, small openings in the forest, and small
13 rock outcrops. Treeforms typically stand out vividly in silhouetted
14 situations. Form, texture, and color remain dominant, and pattern
15 is important. Texture is often made up of repetitive treeforms.

16 **Background** (4 miles to horizon). At a background distance,
17 people can distinguish groves or stands of trees, large openings in
18 the forest, and large rock outcrops. Texture has disappeared and
19 color has flattened, but large patterns of vegetation or rock are still
20 distinguishable, and landform ridgelines and horizon lines are the
21 dominant visual characteristics.

1

2 More complete descriptions of the USFS distance zones are included in
3 my report (JP-02). It is clear the USFS descriptions do not line-up with
4 the visible characteristics of wind turbines. As an example, at five to ten
5 miles a wind turbine can be observed with the level of detail characteristic
6 of the middle ground—individual turbines and the rotating blades can be
7 quite prominent. CWE should not have simply adopted the USFS distance
8 zones without assessing whether the distance thresholds are appropriate
9 for wind turbines. As I explained at length in Ex. JP-02, the USFS
10 distance zones are not adequate for characterizing the visibility of large
11 wind turbines.

12

13 **Q: How should distance zones be classified for the CWE project?**

14 **A:** The following distance zones are based on the application of criteria
15 articulated by the Forest Service (1995), the observed level of visibility
16 observed by Sullivan et al. (2012) study as discussed in my report (Ex.
17 JP-02), and my professional experience evaluating the visual impacts
18 associated with wind turbines. The outsized scale of the GE 5.3-158
19 turbines selected for this project in comparison with all other elements
20 in the surrounding landscape requires that the distance zones be adjusted
21 as follows:

1

2

Immediate Foreground (IM) (0 to 0.5 mile). The immediate

3

foreground extends to half a mile from the observer. Within this

4

distance zone, a turbine is the dominant object in the view, the

5

sound of the turbine blade passing the tower will create an

6

audible rhythmic whooshing sound (*See Environmental Design*

7

& Research. 2019. Figure 19-1: Noise Contours – Rev 1.

8

Syracuse, NY: Environmental Design & Research, DMM Item

9

No. 2017), and observers may have the sensation that a turbine is

10

“looming” over them (*see Blau et al. 2009*).

11

12

Foreground (FO) (0.5 to 2 miles). The foreground is

13

determined by the prominence of tree branches and trunks; the

14

analogous parts of wind turbines are the blades and tower. The

15

presence of individual turbines and the movement of the blades

16

attracts and holds an observer’s attention. Turbine sounds may

17

still be noticeable, though it will be substantially reduced as

18

distance increases. In the foreground, some other features in the

19

surrounding landscape may appear to have midground

20

characteristics, even though the wind turbines clearly retain

21

foreground characteristics.

1

2

Near-Midground (NM) (2 to 5 miles). Viewed in the near-midground, multiple visible turbines are perceived as part of a single whole. For instance, the Gestalt principles of similarity and continuity lead us to understand that wind turbines placed along a ridgeline are part of the same renewable energy development. At night, synchronized red flashing FAA warning lights will also be perceived as a single unit. At this distance it is possible that individual turbines may still have a dominant visual presence; blade movement may still hold a strong visual attraction.

12

13

14

15

16

17

18

19

20

Far-Midground (FM) (5 to 10 miles). In the near-midground, individual turbines become subordinate to the perception of the wind energy development as a whole. The number of turbines, and the degree to which they extend across the view, determines the visual dominance. When the major portion of a turbine is visible, blade movement is still apparent, but is less able to hold the observer's attention. In the far-midground, some other features in the surrounding landscape may appear to have

1 background characteristics, even though the wind turbines
2 clearly retain midground characteristics.

3

4 **Background (BA) (10 to 20 or more miles).** Individual turbines
5 and blade movement becomes less obvious, though the presence
6 of a wind energy project may still be visible as part of the overall
7 landscape.

8

9 **Q: What does “visibility distinction” mean, specifically as used in Rule**
10 **1001.24(b)(1)?**

11 **A:** Rule 1001.24.(b)(1) states the visibility based on topography and
12 vegetation maps shall be divided into foreground, midground and
13 background areas based on visibility distinction and distance zone
14 criteria. “Visibility distinction” is not recognized a term of art in the
15 academic or visual impact assessment communities. However, it is
16 reasonable to conclude the use of “visibility distinction” is intended to
17 invoke the common practice of preparing visibility maps based upon
18 how much of a wind turbine is visible—the upright blade tip, the turbine
19 hub, or the full sweep of the blades. The visibility maps should consider
20 how much of the wind turbine can be seen because the visual impact is
21 greater as more and more of the turbine is visible. Clearly, the visibility

1 of just the tip of a turbine has less impact on an observer than the
2 dynamic motion of a complete spinning rotor.

3
4 Visual impact intensity increases as more of the turbine becomes
5 visible. In the analysis presented in Ex. JP-02, three levels of visibility
6 distinction are used. First is the visibility of the tip end, or the last 10
7 meters of the upright blade. Setting minimum visibility to 10 meters is
8 important because the practice of using the “highest elevation of facility
9 structures” to calculate visibility does not assure that a sufficient amount
10 of the tip is visible to be recognized. Second, the turbine hub, set at the
11 height of the tower is used to represent a visual condition where the
12 nacelle and at least one blade are always visible, and when the structure
13 is clearly recognizable as a wind turbine. Third, the sweep of the blades,
14 or all but the last 10 meters of a downward blade, is sufficient to
15 represent the complete turbine. These visibility distinction viewsheds
16 overlap, as shown in Figure 4 of Exhibit JP-02. The tip end viewshed
17 has the greatest extent and encompasses the hub viewshed, which in
18 turn encompasses the sweep viewshed. In my study, the visual impact is
19 framed through the amount of the turbine that is visible to an observer,
20 which in turn allows an assessment of the visual impact of any given
21 turbine.

1

2 **Q: In summary, does the viewshed analysis provided by CWE**
3 **accurately assess distance zones and visibility distinction as**
4 **required by Siting Board regulations?**

5 **A:** No. For the forgoing reasons, the CWE viewshed analysis is inadequate
6 in its assessment of distance zones and visibility distinction. More
7 appropriate distance zones are suggested above and incorporated in the
8 viewshed analysis attached as Ex. JP-02 to this testimony.

9

10 **Results of T.J. Boyle's Alternative Visual Sensitivity Analysis**

11

12 **Q: Please explain how your analysis of distance zone and visibility**
13 **distinction allows you to assign a numerical rating quantifying the**
14 **impact of each turbine on the surrounding area.**

15 **A:** My study (Ex. JP-02) creates an index of each individual turbine's
16 visual impact based on the amount of the turbine that is visible, the
17 turbine's distance zone in relation to the viewer, and the number of
18 square miles where the amount of the turbine is visible in each distance
19 zone.

20

1 First, I determine the area in square miles where each visibility
 2 distinction (i.e., the tip end but not the hub, the hub but not the sweep,
 3 and the sweep) is visible in each distance zone, (i.e., immediate
 4 foreground, foreground, near-midground, and far-midground). Each area
 5 in square miles is then multiplied by the rating weight set forth in the
 6 following table, and all results are summed to create a single numerical
 7 index for each turbine. The weighting table follows:

Distance Zone	Distance Range (miles)	Blade End (10 m to tip)	Turbine Hub (tower ht.)	Blade Sweep (10 m from tip)
Immediate (IM)	0.0 – 0.5	4	7	10
Foreground (FO)	0.5 – 2.0	2	4	6
Near-midground (NM)	2.0 – 5.0	1	2	4
Far-midground (FM)	5.0–10.0	0	1	2
Background (BA)	10.0 – 20.0	0	0	1

8
 9 To be clear, the above table sets forth a rating weight that is multiplied
 10 by the distance zone viewshed area in square miles for each visibility
 11 distinction.

12
 13 As an example of how the index is calculated, if the total area where the
 14 “Blade End” but not the “Hub” is visible in the “Foreground” distance
 15 zone is 3 square miles, then the weighted score would be (3 square mile)
 16 x (2), which equals a weighted score of 6. A similar procedure is
 17 conducted for all 12 combinations of visibility distinction and distance

1 zone shown in the above table. The sum of these 12 results is the overall
2 visibility impact index.

3
4 The rating weights in the table (which are between 0 and 10) are
5 generally a logarithmic function of distance, a phenomenon known as
6 Fechner's Law. This relationship of visual evaluation and the logarithm
7 of distance has been established for some time in the literature (Hull &
8 Bishop 1988; Buhyoff & Wellman 1980; Shang & Bishop 2000).

9
10 My attached study, Ex. JP-02, contains an analysis of the visual impact
11 of each turbine. The results from the visual impact analysis of individual
12 turbines are listed in Appendix B Table B-1 of Ex. JP-02. The results
13 are represented visually in Map 5 in Appendix A of Ex. JP-02, which
14 divides these results into five roughly equal categories, using larger red
15 circles to locate the turbines with the greatest visual impact and smaller
16 green circles to locate the turbines with the least visual impact. In
17 general, the turbines to the north and west of the project area have a
18 lower visual impact than the turbines in the center of the project and to
19 the southeast.

20

1 **Q: Using the procedure you just described, is it possible to**
 2 **identify the 20% of proposed turbines with the highest visual**
 3 **impact to the surrounding area in general?**

4 A: Yes. The twenty percent of turbines with the highest visual
 5 impact index ratings are listed below. Please note this is a relative
 6 assessment of visual impact; I do not make an absolute assessment of
 7 whether some or all of the top 20% would create an adverse
 8 disproportionate visual impact on observers. The top 20% most
 9 offensive turbines follow:

Turbine	Area (sq mi)	Visual Impact Ratings
29	26.93	77.69
127	29.83	77.51
130	30.29	75.41
129	30.11	74.48
125	30.28	74.44
128	29.09	71.16
92	29.81	70.90
126	29.55	69.18
20	27.27	66.38
113	29.70	65.96
30	24.66	64.05
25	26.27	63.72
24	25.99	63.68
114	28.89	61.29
28	24.79	60.83
124	27.09	60.61
95	27.72	60.60
31	24.47	60.48
115	29.01	59.50
119	28.42	59.34

123	28.60	58.32
112	27.11	58.28
106	27.33	57.86

1

2

3 **Q: Can your procedure for determining visual impact also be used to**
4 **quantify the relative impact on visually sensitive resources?**

5 **A:** Yes. The purpose of my report is to demonstrate how to conduct a
6 visibility analysis according to 1001.24 standards, which includes an
7 evaluation of impacts on visually sensitive resources. That said,
8 independently identifying sensitive viewing areas and viewer groups, as
9 defined by 1001.24(b)(3) and (4) is beyond the scope of my work as set
10 forth in Ex. JP-02. Therefore, the below analysis uses the visually
11 sensitive resources identified by CWE for the VIA. Please note that
12 CWE did not identify the locations of known Amish residences or
13 businesses as visually sensitive resources, and therefore the below
14 analyses does not address the issue of visual impact on Amish receptors.

15

16 The scenic impact index for each turbine is the sum of the products of
17 the area if visibility in square miles from scenic resources identified by
18 CWE and the corresponding visibility distinction weights for each
19 distance zone. The results from the scenic impact analysis of individual

1 turbines are listed in Ex .JP-02, Appendix B Table B-1. In addition,
 2 Map 6 in Appendix A divides these results into five roughly equal
 3 categories, using larger red circles to locate the turbines with the
 4 greatest visual impact and smaller green circles to locate the turbines
 5 with the least visual impact. In general, the highest scenic impacts are
 6 from turbines just to the east of State Route 248 south of Greenwood, on
 7 either side of State Route 36 north of Jasper

8
 9 The twenty percent of turbines with the highest scenic impact index
 10 ratings are listed below. Please note this is a relative assessment of
 11 visual impact; I do not make an absolute assessment of whether some or
 12 all of the top 20% would create an adverse disproportionate visual
 13 impact on observers. The top 20% most offensive turbines as viewed
 14 from visually sensitive resources follows:

15

Turbine	Area (sq mi)	Scenic Impact Index
60	0.65	2.66
29	0.50	1.81
62	0.53	1.64
13	0.68	1.60
30	0.46	1.59
61	0.54	1.58
28	0.48	1.47
63	0.50	1.37
31	0.46	1.25

69	0.43	1.24
24	0.50	1.14
130	0.51	1.14
25	0.48	1.13
129	0.49	1.10
127	0.43	1.06
20	0.49	1.02
125	0.39	1.01
27	0.46	0.96
78	0.37	0.94
4	0.67	0.93
124	0.34	0.93
70	0.39	0.91
26	0.48	0.87

1

2

3 **Q: How can the relative scenic impact of the individual Canisteo wind**
4 **turbines be used to create an optimal alternative that minimizes**
5 **visual impact to the maximum extent practicable?**

6 **A:** As a threshold consideration, Rule 1001.24(b)(10) requires an analysis
7 of how relocation or rearranging of facility components can mitigate
8 visual impacts. CWE's VIA fails to address this kind of mitigation. *See*
9 *CWE VIA 2018*, p. 145-148. That said, the visual and scenic impact
10 indices described above provide a useful approach to develop or
11 compare alternative layouts. The following analysis compares the total
12 visual and scenic impact of the proposed project to two alternatives that
13 would meet the requested generating capability based on the turbines'

1 nameplate capacity. Data required for more sophisticated modeling was
2 not included in the application and is beyond the scope of the
3 investigation set forth in Ex. JP-02.

4
5 CWE's application is for a maximum generating capability of 290.7
6 MW, which is the size of CWE's interconnection service request
7 pending with the NYISO. It is proposed to use the GE 5.3-158 turbine.
8 As described above, the individual turbine's visual impact values range
9 between 20.34 and 77.69; the sum of these individual impacts is
10 5,365.07. The individual turbine's scenic impact values range between
11 0.11 and 2.66, the sum of these individual impacts is 71.01.

12
13 Canisteo Wind Farm has confirmed that fewer than the 117 sites in the
14 revised application will be used; if the preferred GE 5.3-158 turbine is
15 used then only 55 turbines are required to reach 290 MW (Miller 2019).
16 This situation was recognized but not evaluated in the CWE VIA
17 (relocation on p. 146, and downsizing on p. 147). The relative visual
18 and scenic impact of the individual Canisteo wind turbines can be used
19 to design an optimal alternative that includes only the number of
20 turbines necessary to generate the permitted amount of power and not
21 have idle, visually obtrusive turbines.

1

2 One obvious approach to minimizing visual impact would be to select
3 the 55 turbines sites with the lowest visual or scenic impact, as listed in
4 Appendix B. The visual impact values for these 55 individual turbines
5 range between 20.34 and 43.71; the sum of these individual impacts is
6 1,871.51 (as compared to 5,365.07 for CWE's proposed layout). The
7 individual turbine's scenic impact values range between 0.11 and 0.50;
8 the sum of these individual impacts is 16.64 (as compared to 71.01 for
9 CWE's proposed layout).

10

11 It is recognized that there may be many factors that go into designing a
12 project's layout, in addition to visual or scenic impact. For instance, it is
13 expected that all things being equal, a more compact project would be
14 less expensive to construct. Since the individual turbines with the lowest
15 visual or scenic impact are clustered at the northern end of the project, a
16 reasonable alternative might be to select 55 turbines around this area.

17 One possibility is shown in Appendix A's Map 7. The individual
18 turbine visual impact values for this alternative range between 20.34 and
19 64.05; the sum of these impacts is 2,114.47. The scenic impact values
20 range between 0.11 and 1.59; the sum of these impacts is 28.99. The 55
21 turbine locations in this layout are 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14,

1 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 35, 36,
2 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55,
3 57, 58, 59, 131, and 132.

4

5 **Further Critique of CWE’s Visual Impact Assessment**

6

7 **Q: How did CWE attempt to assess the visual impacts associated with**
8 **the Canisteo Wind project?**

9 **A:** On page 48 of the VIA, two methods to evaluate visual impacts are
10 identified: the visibility analysis and the evaluation of visual simulations
11 by a rating panel of three professionals. Neither method is sufficient to
12 investigate visibility of the project using “visibility distinction and
13 distance zone criteria”, as required by Rule 1001.24(b)(1). In my report
14 entitled “The Creation and Interpretation of Viewsheds Divided into
15 Distance Zones and its Application to Canisteo Wind,” I discuss how
16 CWE’s VIA failed to investigate the visibility of the project based on
17 “visibility distinction and distance zone criteria,” as required by
18 1001.24(b)(1). See Ex. JP-02.

19

1 **Q:** **Please explain why CWE’s VIA fails to assess the visibility of the**
2 **project based on visibility distinction and distance zone criteria as**
3 **required by Rule 1001.24(b)(1).**

4 **A:** The VIA cites the USDOT (2015) (*See* p. 6-3) as its authority for distance
5 zones (CWE VIA 2018, p. 24). However, CWE seems to misunderstand
6 the stated meaning and purpose of distance zones. Distance zones are
7 defined by the location of the viewer and establish a framework for
8 understand our perception of elements in the landscape. The Applicant’s
9 VIA only shows buffer or boundary lines at specified distances from the
10 project wind turbines. The end result is a map that purports to show as
11 many as 81 turbines being visible in the foreground distance zone just
12 north of Turbine 31. This absurd result indicates there is an error in the
13 analysis--it is physically impossible for that many turbines to be located
14 in a viewer’s foreground.

15
16 The VIA makes a further error by uncritically accepting the USDOT
17 FHWA (2015) distance zone thresholds. For instance, the USDOT (2015,
18 p. 6-4) defines the midground as providing “enough distance for the
19 viewer to relate individual elements to a larger visual landscape.” But in
20 the context of wind energy development, individual turbines are clearly
21 visible from 20 or more miles, as documented by Sullivan et al. (2012).

1 As Rule 1001.24(b)(1) makes clear, the viewer distance zones are to be
2 based on the “distance zone criteria”. It was arbitrary for CWE to adopt
3 thresholds established used for highway or forest management projects,
4 and that fail to capture the unique visual characteristics of a wind energy
5 facility.

6
7 Finally, the CWE viewshed analysis limits the visibility analysis to an
8 upright blade tip, but it does not consider additional levels of “visibility
9 distinction,” such as whether the turbine is visible from the hub upwards,
10 or for the complete sweep of the blades. Information about how much of
11 a turbine is visible is critical to determining the visual impact of the
12 turbine. The Siting Board requires such information to weight the relative
13 visual impact at various locations.

14

15 **Q: What methodology did CWE employ to assess the visual impact of**
16 **proposed turbines using photographic simulations?**

17 **A:** CWE’s consultant conducted a contrast rating analysis to compare
18 photographs from a subset of visual resources with edited photographs
19 containing simulations of the proposed turbines. The photographic
20 simulations were rated by a panel of qualified individuals using a
21 documented methodology, as required by 1001.24(b)(7). The VIA (p. 55)

1 claims to use a “modified version of the U.S. Bureau of Land
2 Management (BLM) contrast rating methodology (USDI BLM, 1980)
3 that was developed by CWE’s consultant (“EDR”) in 1999, (and
4 subsequently updated), for use on wind power projects.” However, there
5 is no citation for how the EDR procedure was developed, nor is there any
6 evidence that the procedure has “proven to be accurate in predicting
7 public reaction to wind power facilities” (VIA, p. 55). EDR has not
8 provided evidence to support the claim that its “modified” version of
9 accepted contrast rating methodology is likely to produce accurate results.
10 In addition, the description of the contrast rating procedure in USDI BLM
11 (1980) is a single page description in a 39-page introduction to BLM’s
12 Visual Resource Management Program. The Visual Resource Contrast
13 Rating manual currently in use is 27 pages long (USDI BLM 1986).

14
15 Under the modified method created by EDR evaluators rate the level of
16 contrast between the proposed structures and the existing view for six
17 components—landform, vegetation, land use, water, sky, viewer
18 activity—using a scale ranging from (0) Insignificant, though (4) Strong.
19 (CWE VIA Appendix E Visual Assessment Rating Forms). The
20 component “viewer activity” is to be inferred from information visible
21 within the simulation: “For instance, if the photo shows a residential or

1 concentrated settlement, check resident . . .if the viewpoint is a roadway
2 location, check traveler, and if the viewpoint is from an
3 aesthetic/recreational resource, check recreational.” (CWE VIA
4 Appendix E Visual Assessment Rating Forms). The raters used by EDR
5 did not have specific familiarity with the simulation locations, nor do their
6 credentials indicate any expertise in determining the role of scenery in the
7 enjoyment of these activities.

8

9 **Q: What specific concerns do you have about the way EDR**
10 **assessed the photographic simulations?**

11

12 A: The EDR procedure has little resemblance to BLM’s approach to
13 visual resource contrast rating (USDI BLA 1986).

14

15 The BLM approach deconstructs the view’s compositional elements:
16 forms, lines, colors and textures. The BLM approach characterizes
17 landscape features (i.e., land/water, vegetation, and structures) by
18 deconstructing them into their compositional elements. The description
19 of visual contrast is how a project’s compositional elements contrast with
20 the existing landscape’s compositional elements. The relevant assessment
21 is whether the proposed project meets visual resource management

1 objectives and there is an emphasis on identifying mitigation measures to
2 reduce form, line, color and texture contrasts. BLM does not employ
3 numeric ratings or use numeric thresholds. Rather the concern is with the
4 highest contrasts in form, line, color and texture; it is unimportant
5 whether the contrasts are with land/water, vegetation or structures.

6
7 In addition, EDR adds factors unrelated to how BLM evaluates contrast—
8 specifically sky and viewer activity. Sky is normally thought of as an
9 ephemeral atmospheric effect. The skyline or horizon is the most
10 sensitive part of the sky and it is normally considered as part of the
11 adjacent landscape factor (e.g., earth, water, vegetation of structure).
12 Information about viewer activity is not presented with the simulations
13 and the panel of raters have not presented credentials to indicate that they
14 have expert knowledge of the role scenery plays in various viewer
15 activities or the sensitivity of different viewer groups.

16 Finally, the BLM manual states that “the actual rating should be
17 completed in the field from the KOP(s) [i.e., simulation viewpoint]” since
18 it is recognized that the photographs are too limited for understanding the
19 surrounding landscape character and viewer activities. Here, it is apparent
20 the ratings were not conducted in the field as required by the BLM
21 manual.

1

2 **Q: Are you aware of any research to support a numerical contrast rating**
3 **approach?**

4 A: Yes, research was conducted in the late 1970s and early 1980s
5 investigating the reliability and effectiveness of rating scale to measure
6 visual impacts. This research found that visual impacts can be effectively
7 measured by three characteristics of roughly equal importance should be
8 evaluated: “scale contrast,” “spatial dominance,” and “landscape
9 compatibility” (i.e., the combined rating of form, line, color and texture
10 contrast) See Smardon et al. (1983) for a review of this research.

11

12 The approach to numerical contrast ratings referenced in USDI BLM
13 (1980) comes from research recommendations by Sheppard and Newman
14 (1979). This was simplified by Smardon and Hunter (1983) and adopted
15 for use by Maine’s Department of Environmental Protection (Gates
16 2003). It also served as the basis for the US Army Corps of Engineers
17 Visual Resources Assessment Procedure (Smardon et al. 1988). A recent
18 application of numerical contrast ratings to an existing transmission line
19 was found to have high correlations to visual impact ratings made in the
20 field (Palmer, J. F. 2019). EDR’s method does not resemble these
21 numeric approaches.

1

2

3 **Q: Is EDR's reliance on only three visual impact raters sufficient to**
4 **provide reliable contrast ratings, or should more raters have been**
5 **used?**

6 A: Research has consistently found that a panel of three raters is insufficient
7 to provide reliable contrast ratings. Quoting from the research summary
8 by Smardon:

9 "Nonetheless, even for direct ratings, the obtained
10 coefficients are clearly below acceptable standards
11 (generally coefficients of 0.70 and higher are desirable).
12 However, it must be stressed that these coefficients represent
13 reliabilities for a single rater, and while single raters are
14 often used in applied settings, higher reliability is generally
15 obtained when composite ratings from panels of independent
16 judges are employed (Craik and Feimer 1979; Feimer et al.
17 1981; Zube 1976). In the current context, for example,
18 applying the Spearman-Brown prophecy formula (Guilford
19 1954) to the average reliabilities of the respective rating
20 procedures reveals that a panel of ten independent judges

1 would increase the average reliability to above 0.70 for both
2 sets of direct ratings.” (Smardon et al. 1983. p. 93)

3 The “direct ratings” refers to BLM’s contrast ratings.. Based on this
4 research, EDR’s use of only three raters is clearly inadequate.

5

6 **Q: Did EDR find any visual impacts that they described as**
7 **unreasonable?**

8 **A:** The completed Visual Impact Rating Form in Appendix E of the VIA
9 (DMM Item No. 125) evaluate “the level of contrast between the
10 proposed structures and the existing view” for six components (i.e.,
11 landform, vegetation, land use, water, sky, and viewer activity). The
12 contrast ratings are (0) insignificant, (1) Minimal, (2) moderate, (3)
13 appreciable, and (4) strong. A mean rating is calculated using those
14 components that were evaluated—often water was not present so it was
15 not evaluated—and rounded to the nearest tenth decimal point. This
16 mean Contrast Rating is interpreted as follows (VIA p. 125):

17 0.0 - 0.2 Insignificant
18 0.3 – 0.7 Insignificant/Minimal
19 0.8 – 1.2 Minimal
20 1.3 – 1.7 Minimal/Moderate
21 1.8 - 2.2 Moderate

1	2.3 – 2.7	Moderate/Appreciable
2	2.8 – 3.2	Appreciable
3	3.3 – 3.7	Appreciable/Strong
4	3.8 – 4.0	Strong

5

6 These ranges used to interpret the mean contrast rating are divided into
7 equal segments, each having a width of half a point, except the ends of
8 the scale, which are only a quarter of a point wide. This effect is to make
9 it more difficult to achieve an overall rating of Strong (a mean rating of
10 3.75-4.00) than an overall rating of Appreciable (2.75-3.25) or
11 Appreciable/Strong (3.25-3.75).

12

13 The use of a smaller ranges for strong impact contributes to the VIA's
14 finding that of the 17 viewpoints that are evaluated, none were found to
15 have a Strong visual impact, not even viewpoint 93 which is so close that
16 the top of nearest turbine is not in the photosimulation. (VIA p. 125 Table
17 7, and 105 Insert 61). Similarly, only three views are rated as having an
18 Appreciable/Strong visual impact; and only four have an Appreciable
19 visual impact. The total average rating for the Hamlet and Rural Uplands
20 landscape similarity zones is Appreciable. There will be Canisteo Wind
21 turbines visible from 40.1 and 59.8 percent of the area of these two

1 landscape similarity zones (VIA, p. 65, Table 4), so the visual impact will
2 be “Appreciable” from a very large portion of these two landscape
3 character types.

4

5 **Q: How would the numerical contrast rating for CWE viewpoint 93**
6 **differ if the standard rating form proposed and evaluated by**
7 **Smardon and Hunter (1983) and adopted by Maine Department of**
8 **Environmental Protection (Gates 2003) is used instead of the rating**
9 **form used by CWE?**

10

11 A: The description of CWE’s Viewpoint 93 is on pages 104-106 of the VIA
12 and sheets 30-33 of Appendix D. A copy of CWE’s visual simulation for
13 Viewpoint 93 is attached as Ex. JP-05 to my testimony. This viewpoint is
14 in the Rural Upland landscape similarity zone; the nearest turbine is 0.2
15 miles from the viewer and two upright blades extend well beyond the top
16 of the simulation. This turbine is in the Immediate Foreground, which is
17 up to half a mile from the viewer, and would be a candidate for being
18 perceived by viewers as “looming” over them (Blau et al. 2009).

19

20 For this analysis I will use the form proposed and evaluated by Smardon
21 and Hunter (1983) and adopted by Maine Department of Environmental

1 Protection (Gates 2003). The following rationale describes the viewpoint
2 93 ratings for the turbine in the Immediate Foreground and does not
3 consider the other visible turbines:

4

5 COLOR Moderate (2). Light gray is a relatively
6 neutral color but it does have a moderate
7 contrast with the green vegetation and
8 brown fields. While there are two other
9 spots of white, the introduction of the
10 turbines makes it a major color.

11 FORM Severe (3). The rolling landscape is
12 covered with fields and woods. The tall
13 narrow tower with rotating blades is
14 completely alien to this landscape.

15 LINE Severe (3). The landscape has numerous
16 lines at or near ground level; the turbines
17 introduce a dominant vertical element that
18 breaks the horizon.

19 TEXTURE Moderate (2). The foreground harvested
20 field and woods have a moderate texture

1 which contrast with the smooth texture of
2 the turbine surface.

3 SCALE CONTRAST Severe (12). The turbine’s scale is far
4 beyond the vertical scale for any object in
5 the Rural Upland landscape.

6 SPATIAL DOMINANCE Dominate (12). This single turbine,
7 looming over the viewer, is the dominate
8 object in the view.

9

10 The Total Visual Impact Severity is 34 or “Severe,” which is near the
11 highest possible visual impact. The results of this analysis could be
12 generally extended to other Immediate Foreground views where the
13 sweep of a turbine’s blades is visible in the Rural Upland, not an
14 inconsiderable area.

15

16 In contrast, page 125 of the VIA indicates CWE only assigned viewpoint
17 93 a contrast rating of Appreciable/Strong, which is not the highest level
18 of visual impact provided by CWE’s contrast rating method.

19

1 **Q: Are the comments of EDR’s raters about how the turbines will**
2 **affect scenic quality at viewpoint 93 consistent with a contract rating**
3 **less than “strong”?**

4 **A: No.** The comments would be more consistent with the highest
5 possible visual impact rating. Comments by EDR’s raters about how the
6 turbines visible from viewpoint 93 will affect the scenic quality and
7 viewer enjoyment illustrate how CWE will change the landscape
8 character (VIA Appendix E).

- 9 • “The view transforms from a rolling rural expanse, likely seen by
10 a farmer in his field, to being in the center of a wind farm. It is
11 both awe inspiring and overwhelming on multiple sensory levels.
12 The view is significantly altered by the removal of vegetation and
13 addition of service roads.”
- 14 • “Due to the close proximity and large number of turbines in this
15 view, viewers will focus on their presence in the landscape.
16 Proposed turbines clearly dominate this landscape viewpoint.”
- 17 • “The scenic quality is significantly impacted due to the
18 overpowering size of the turbines.”

19

20 These comments are clearly inconsistent with a rating less than “strong”.

21

1 **Q: Would you walk us through a standard numerical contrast rating for**
2 **the viewpoint in the Foreground using the standard rating form**
3 **proposed and evaluated by Smardon and Hunter (1983) and adopted**
4 **by Maine Department of Environmental Protection (Gates 2003)?**

5
6 **A:** Viewpoint 184 is a good example. This view is also in the Rural Upland
7 landscape similarity zone. The simulation covers two “normal”
8 photographic frames from the northwest and northeast for a total
9 horizontal arc of perhaps 70-degrees. The closest visible turbines are 101
10 at 1.6 miles and turbine 100 at 1.8 miles; just past the 2-mile extent of the
11 Foreground is turbine 99—these are the three largest turbines on the right
12 half of the simulation. Looking at the simulation, there are more than 15
13 full turbine sweeps that are visible, plus other turbine hubs and tip ends.
14 A copy of CWE’s visual simulation for Viewpoint 184 is attached as **Ex.**
15 **JP-06** to my testimony.

16
17 As a starting point, it is helpful to explain why the visual simulation for
18 Viewpoint 184 is not fully representative of the visual impact of adding
19 wind turbines. The panoramic simulation is 5.3-by-15.25 inches and
20 would need to be held about 8 inches away to be seen with the turbines
21 in proper proportion—this simulation is poorly presented for making a

1 reasonable evaluation of the project's visual impact. It is possible to crop
2 the approximate area of the two single-frame views that were used to
3 create the simulation, but the resulting resolution is very poor—another
4 indication that this simulation is poorly presented. This simulation is
5 inadequate to make accurate visual contrast judgements because it is
6 impractical to view it at the proper distance and the image resolution is
7 inadequate (i.e., 2,294-by-805 pixels or 150 dpi as formatted) to
8 distinguish the detail that will be visible and is necessary to evaluate the
9 project's visual impact. This reduced resolution has the effect of making
10 the project appear much less prominent than it will appear in reality.

11

12 Nonetheless, I have conducted a contrast rating as best I can, focusing on
13 the right side of the panorama and the three turbines in the Foreground,
14 while also recognizing the contribution of the other turbines.

15 COLOR Moderate (2). Light gray is a relatively
16 neutral color but it does have a moderate
17 contrast with the green vegetation and sky.
18 While the flowers are whiteish they are not
19 solid white, but form a pointillist
20 composition in the green field.

1 FORM

Severe (3). The rolling landscape is covered with fields and woods. The tall narrow tower with rotating blades is completely alien to this landscape.

5 LINE

Severe (3). The landscape has numerous gently curving lines; the turbines introduce bold vertical elements that break the horizon.

9 TEXTURE

Moderate (2). At this distance there is little sense of the turbine's texture. Rather their irregular placement in the landscape creates a texture pattern that offers some contrast.

14 SCALE CONTRAST

Severe (12). The turbine's scale is far beyond the vertical scale for any object in the Rural Upland landscape. The turbines are visibly taller than the relative relief of the hills and very much taller than the woods. It is not considered Moderate because other than the CEW turbines there are no objects of this scale.

1 SPATIAL DOMINANCE Dominate (12). The turbines are the most
2 noticeable elements in the landscape,
3 drawing; holding the viewer's attention.
4 The turbines stand well above the horizon
5 line, and as simulated a condition that
6 extends across an approximately 70-degree
7 arc.

8
9 The Total Visual Impact Severity is 34 or "Severe," which is near the
10 highest possible visual impact. In contrast, EDR indicated that the visual
11 impact was only "Appreciable."

12
13 The results of this analysis could be generally extended to other
14 Foreground views where turbines are visible across a wide horizontal arc
15 and the sweep of a turbine's blades is visible in the Rural Upland, not an
16 inconsiderable area. It is therefore possible that the visual impact of other
17 foreground viewpoints have also been underestimated.

18
19 Comments by EDR's raters about how the turbines visible from
20 viewpoint 184 will be perceived show a recognition of contrast that is

1 inconsistent with a rating of “appreciable”, and indicate how insensitive
2 the raters are to the viewers:

- 3 • “Turbines populate ridgelines and hilltops and are quite visible or
4 they cover most of the horizon line in the viewpoint. Viewers will
5 notice the turbines.”
- 6 • “The visually interesting interplay of rolling, vegetated
7 mounds/knolls among the flat working landscape is muted by the
8 introduction of the turbines and tree clearing required to install
9 them. It goes from a unique view to a built view.”
- 10 • “The scenic quality will be significantly impacted by the
11 placement of the turbines in this view.”
- 12 • “It is assumed that local residents will get used to the turbines.
13 However, movement will draw attentions.”

14

15 VIA Appendix E.

16

17 **Q: Based on the forgoing, are CWE’s contrast ratings meaningful?**

18 A: No. For the reasons explained above, CWE’s contrast ratings are not
19 meaningful and do not provide the Siting Board with information
20 sufficient to quantify the visual impact of the project. EDR purports to
21 follow the BLM contrast rating methodology, but it assigns numerical

1 contrast ratings, while the BLM approach itself does not use numerical
2 ratings. To the extent academic research supports the incorporation of
3 numerical ratings into a contrast rating approach, EDR has failed to
4 explain why it significantly deviated from the tested approaches. In
5 addition, the contrast ratings were not conducted on site, and were
6 performed by an undersized panel of only three people. For all of these
7 reasons, the contrast ratings provided by CWE should be given little
8 weight.

9

10 **Q: Does CWE address whether the visual impact of project is**
11 **reasonable?**

12 **A:** No. Although the Canisteo VIA attempts to quantify the visual impact, it
13 does not propose a way to determine whether these impacts are
14 unreasonable. The same is true concerning my study (Ex. JP-02), as it is
15 beyond to scope of my paper to determine the threshold at which a visible
16 impact becomes an adverse and disproportionate environmental impact.
17 However, based on both the CWE VIA and my viewshed analysis (Ex.
18 JP-02), it is clear that the Canisteo wind project will have a major visual
19 impact to a large proportion of the study area.

20

21 **Q: Do you have any additional concerns?**

1 **A:** To date, wind energy development in the Southern Tier has been
2 scattered and modest in scale. However, several recently proposed
3 projects are much larger, both in the number and size of the wind
4 turbines. I believe that this is a harbinger of things to come. Because
5 these wind turbines are so tall and the movement of the blades demands
6 a viewer’s attention, these projects are going to cumulatively change a
7 rural landscape into one that will be seen as more industrial by viewers.
8 The expanse of this change is huge—the area of the Southern Tier is
9 larger than some states, and it has a population greater than some states
10 too.

11

12 I am concerned that an impact process tied to the permit approval for
13 individual projects means that this incremental, but expansive change is
14 creating a new Rural Industrial landscape. The existing practice to
15 consider cumulative impacts with a 5 or 10-mile study area is not going
16 to identify this landscape-scale change. It will affect a resident
17 population that lives here in part because of the proximity to Forest,
18 Rural Upland and Rural Valley landscapes.

19

20 I appreciate the need to change to a renewable energy economy, and I
21 support the general goals of the New York State Energy Plan. However,

1 some agency needs to consciously consider this larger landscape effect
2 and decide whether the specific implementation path being followed is a
3 just path. The Siting Board or Department of Public Service seem to be
4 among the few agencies in a position to draw attention to this change. If
5 every project followed the type of viewshed analysis demonstrated in
6 Ex. JP-02, the results could be gathered and displayed in a single
7 geographic database for the Southern Tier.

8

9

10 **Visibility of Turbines from Amish Receptors within the CWE Study Area**

11

12 **Q: Did your firm, T. J. Boyle Associates, conduct a viewshed analysis**
13 **for tax parcels known to be occupied by members of the Amish**
14 **community residing the CWE project area?**

15 **A: Yes. Exhibit JP-03** contains four viewshed maps showing the vegetated
16 visibility of blade tips and the location of tax parcels known to be
17 inhabited by members of the Amish Community, and a table showing
18 how many turbines would be visible in each distance zone for each
19 parcel. The Amish tax parcel information was provided to T.J. Boyle by
20 The Zoghlin Group PLLC, legal counsel to John Sharkey, a party in this
21 proceeding. The data depicting parcel boundaries on the maps was

1 purchased from the Steuben County planning department by the Zoghlin
2 Group at my direction. It is my understanding that Mr. Sharkey will
3 provide testimony relating to the accuracy of the assertion that the
4 parcel data we used in our analysis does reflect the location of Amish
5 receptors. Critically, I am informed that our maps only show the
6 location of roughly half of the Amish properties in the project area. I am
7 further informed that the location of remaining Amish properties is
8 unavailable. .

9

10 **Q: In addition to the maps, are you providing a viewshed analysis for**
11 **the Amish community in any other format?**

12 **A:** Yes. In addition to the maps provided as Ex. JP-03, I offer Exhibit JP-
13 04, which is a spreadsheet showing the property owner, address, and tax
14 parcel number for confirmed Amish receptors. The spreadsheet also
15 includes four columns showing the maximum number of turbines that
16 would be visible from Amish parcels in the Immediate Foreground (0 to
17 0.5 miles), Foreground (0.5 o 2 miles), Near-Midground (2 to 5 miles),
18 and Far-Midground (5 to 10 miles).

19

20 **Q: Did you conduct a visual sensitivity analysis for Amish receptors?**

1 **A:** No, the viewshed maps and spreadsheet only show visibility of blade
2 tips for various distance zones. An analysis of visibility distinction is
3 not included, and therefore a sensitivity analysis cannot be conducted.
4 Although such information would certainly be useful to the Siting
5 Board, a full analysis is premature given CWE's failure to identify
6 Amish receptors or provide any analysis of visual impact on Amish
7 receptors.

8

9 **Q: Did CWE conduct an analysis of visual impact on Amish**
10 **Receptors?**

11 **A:** Not to my knowledge.

12

13 **Q: Did CWE identify Amish receptors such as farms and residences,**
14 **Amish schools, or Amish places of worship?**

15 **A:** Not to my knowledge.

16

17 **Q: Did CWE classify any portion of the Amish community as a**
18 **sensitive visual receptor?**

19 **A:** Not to my knowledge.

20

1 **Q: Did CWE conduct a contrast rating for representative view points**
2 **from Amish receptors taking into account their viewer sensitivity?**

3 **A:** Not to my knowledge.
4

5 **Q: Does the CWE VIA appear to contain any analysis whatsoever of**
6 **visual impact on the Amish community residing in the project area?**

7 **A:** No.

8 **Q: In your professional opinion, does the CWE VIA contain sufficient**
9 **information for the Siting board to determine whether CWE will**
10 **have an adverse and disproportionate visual impact on the Amish**
11 **community?**

12 **A:** No, the CWE VIA fails to provide any analysis whatsoever of the
13 potential visual impact on the Amish community.
14
15

16 **Conclusions**

17 **Q: Please summarize the conclusions you make in both this testimony**
18 **and your accompanying study (Ex. JP-02)**

19 **A:** Based on the forgoing, and in my professional opinion, I offer the
20 following conclusions to a reasonable degree of scientific certainty:

- 1 1. Implementing Article 10's requirement to conduct a visibility
2 analysis that incorporates visibility distinction and distance zone
3 criteria provides necessary information for the Siting Board to make
4 an informed decision. The CWE VIA prepared a viewshed map, but
5 did not incorporate visibility distinction or distance zones.
- 6 2. The CWE VIA maintains that its approach to evaluating visual
7 impacts as portrayed by visual simulations "is a modified version of
8 the U.S. Bureau of Land Management (BLM) contrast rating
9 methodology (USDI BLM, 1980) that was developed by EDR in
10 1999, (and subsequently updated), for use on wind power projects"
11 (VIA p. 55). However, the method used bears little resemblance to
12 the Contrast Rating method described in the BLM Manual and in
13 use since 1986 (USDI BLM 1986). The CWE VIA claims that the
14 method has "proven to be accurate in predicting public reaction to
15 wind power facilities" without providing any substantive support for
16 the claim (VIA p. 55).
- 17 3. There are further problems with the implementation of the
18 evaluation method. The panel incorporated only three raters, while
19 research has found that to reach "acceptable standards" a "panel of
20 10 independent judges" is needed (Smardon et al 1983, p. 93). In
21 addition, the CWE VIA did not comply BLM's directive that the

1 actual rating should be completed in the field from the KOPs” (key
2 observation points) used for the simulations (USDI BLM 1986, p.
3 3). It is unreasonable to expect that the panel of raters can
4 understand the scope and scale of a project and the experience of
5 people living, working or visiting the area without some direct
6 familiarity.

7 4. Article 10 has incorporated the list of scenic resources long
8 specified for consideration by DEC, but it has extended this by
9 recognizing that “sensitive viewing areas and locations of viewer
10 groups ... shall include recreational areas, residences, businesses,
11 historic sites (listed or eligible for listing on the State or National
12 Register of Historic Places), and travelers (interstate and other
13 highway users).” These additional scenic resources are not qualified
14 as requiring designation, intensive use, or statewide significance.
15 My review identifies a sensitive viewer group that was not identified
16 or considered by CWE—the Amish community. The identification
17 of local “sensitive viewing areas and locations of viewer groups”
18 requires sincere engagement with the affected community, and not
19 just administrative officials.

20 5. Finally, if constructed this and other large wind projects will change
21 the landscape character of the Southern Tier. Recognition of this

1 change can be seen in comments by the panel of raters.
2 Consideration of cumulative visual impacts within a 5- or 10-mile
3 study area is inadequate to expose the impact of this change. While
4 acknowledging the need to shift to renewable sources of energy, it is
5 unjust to the affected population to not even consider the full
6 impacts they will bear or ways to include them in determining
7 appropriate mitigation.

8

9 **Q: Does this conclude your testimony?**

10 A: Yes.

**JOINT PUBLIC COMMENT ON THE NEW YORK STATE OFFICE OF RENEWABLE
ENERGY DRAFT REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 –
900-5; 900-7 – 900-14)**

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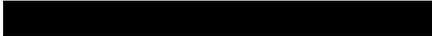
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I. Introduction

This Joint Public Comment provides consolidated public comment on the Draft ORES regulations necessary to implement Section 94-c of the New York State Executive Law. The comments address the proposed Office of Renewable Energy Siting draft regulations, Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-14) (the “Draft Regulations”). The comments are submitted to the Office of Renewable Energy Siting by following officials, interest groups, and municipalities, as indicated by the signatures at the end of this document:

- A. Concerned Citizens for Rural Preservation
- B. Save Ontario Shores, Inc.
- C. Broome County Concerned Residents
- D. Town of Copake, New York
- E. Guilford Coalition of Non-Participating Residents
- F. Concerned Citizens for the Cassadaga Wind Project
- G. Ginger Schroder, Esq., Cattaraugus County Legislator, Legislative District 3
- H. Town of Farmersville, New York
- I. Prattsburg Preservation Alliance Inc.
- J. Town of Yates, New York
- K. Town of Rush, New York
- L. [REDACTED]
- M. Rural Preservation and Net Conservation Benefit Coalition
- N. Freedom United
- O. Town of Malone, New York
- P. Lake Hiram Club

- Q. Farmersville Citizens United
- R. Tug Hill Alliance for Rural Preservation
- S. Residents United to Save Our Hometown
- T. Clear Skies Above Barre, Inc.
- U. Town of Moriah, New York
- V. Town of Ashford, New York
- W. Town of Ischua, New York
- X. Town of Solon, New York
- Y. Sensible Solar for Rural New York
- Z. Sardinia Rural Preservation Society
- AA. Town of Somerset, New York
- BB. Town of Cambria, New York
- CC. Town of Ripley, New York
- DD. Town of Byron, New York
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- II. John Syracuse, Vice-Chairman, Niagara County Legislature
- JJ. Richard Updegrave, County Manager, Niagara County Legislature
- KK. Town of Wilson, New York

II. Specific Comments on Proposed Regulations

The signatories to this document provide the following comments to the Office of Renewable Energy Siting as if they were their own:

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The Draft Regulations do not allow for meaningful identification, assessment, or mitigation of the negative environmental impacts of individual renewable energy projects.

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The Draft Regulations do not allow for meaningful public participation in the renewable energy siting process and fail to provide open and transparent access to project details, applications, case documents, or docket lists.

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The Draft Regulations violate Article IX of the New York State Constitution and effectively strip local governments of legislative, zoning, and police powers.

Comment 4: Elevation of Private Corporate Interest over Public Interest

The Draft Regulations improperly elevate project economics and profitability over local siting concerns.

III. Signatories to Joint Public Comment

We, the undersigned, hereby agree with the foregoing comments and direct the Concerned Citizens for Rural Preservation, through their legal counsel the Zoghlin Group, PLLC, to submit these comments to the Office of Renewable Energy Siting:

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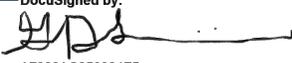
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**JOINT PUBLIC COMMENT ON THE NEW YORK STATE OFFICE OF RENEWABLE
ENERGY DRAFT REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 –
900-5; 900-7 – 900-14) – Part 2**

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- B. River Residents Against Turbines
- C. [REDACTED]
- D. Byron Association Against Solar, Inc.
- E. Town of Hopkinton, New York
- F. Town of Ancram, New York
- G. Jefferson County Land Preservation Alliance
- H. [REDACTED]
- I. Town of Willing, New York
- J. Town of Milan, New York

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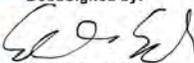
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**CONCERNED CITIZENS FOR RURAL PRESERVATION’S MEMBER COMMENTS
ON THE NEW YORK STATE OFFICE OF RENEWABLE ENERGY DRAFT
REGULATIONS CHAPTER XVIII TITLE 19 (SUBPARTS 900-1 – 900-5; AND 900-7 –
900-15)**

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I. Introduction

This Additional Public Comment provides comments drafted by members of the Concerned Citizens for Rural Preservation (CCRP) on the Draft ORES regulations necessary to implement Section 94-c of the New York State Executive Law. The comments address the proposed Office of Renewable Energy Siting draft regulations, Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15) (the “Draft Regulations”). The comments are submitted to the Office of Renewable Energy Siting by the Concerned Citizens for Rural Preservation. The comments represent further commentary and questions submitted by members of the Concerned Citizens for Rural Preservation and are intended to supplement all other comments filed by the group. These comments have been drafted by members Lucia Dailey and Richard Hayes Phillips. Brief statements by Sandy Hayes and Dr. Phillips do not necessarily represent the opinions of CCRP.

Members of CCRP have numerous questions, concerns and objections to the draft regulations, which they request be submitted, recorded, and answered before any are enacted.

II. Specific Comments, Questions, and Concerns Related to Draft Regulations

900-1.1 Purpose and Applicability

This provision allows an applicant previously defeated under the prior law to try again under the new law and is unreasonably burdensome to local governments and citizen interveners who played by the rules existing at that time and were victorious. Basically, this amounts to a “do-over” for the defeated applicant.

(b)(3) "except where an applicant elects to be subject to this Part as authorized by Public Service Law Section 162;" This is not clear-Shouldn't PSL 162 should be footnoted? Does this basically

allow the applicant to change the ground rules on the application process, anywhere in the process, even if a permit has already been made or granted under Article 10, or only in the case where a pre-application public involvement plan has been filed? How does this expedite siting?

(b)(4) "renewable energy system" is not in the definitions. Shouldn't Section 66(p) of the New York State Public Service Law be footnoted here? Doesn't allowing systems with 20-25 MW, "opt-in renewable energy systems" blur and confuse the line between minor and major facilities, and leave the door open to problems?

(b)(5) "any stand-alone battery energy storage system." Why isn't 'Battery energy storage system' in the definitions, and why isn't 'stand-alone battery energy system', either?

900-1.2 Definitions

(b) Administrative Law Judge- will ALJ's in hearings associated with ORES proceedings be employees of NYS ORES, NYS Department of State, the NYS Department of Public Services, or the NYS Public Service Commission? Since they will be designated by "the Executive Director" (of ORES), doesn't this seem like a slight conflict of interest, if they are ORES employees?

(j) If "commencement of construction" does not include "staging, limited tree-cutting activities related to testing or surveying (such as geotechnical drilling and meteorological testing), together with such testing, drilling and similar pre-construction activities to determine the adequacy of the site for construction and the preparation of application materials or compliance filings" what are these activities defined as, and what hours and regulations cover them?

(ac) What is a "census block group", and what is "the poverty threshold" by dollar amount and household size?

(az) "Opt-in renewable energy facility" Doesn't this completely throw the definitions of major and minor facility into question?

(bd) Pending Article 10 facility- Why does a 'draft public involvement program plan' qualify a proposed project as a pending Article 10 facility? Absolutely no important studies or investigations have been performed, and no public outreach has been performed.

(bg) "Potential community intervenor"- The definition is not clear as written. After the exceedingly long sentence, needing commas, describing who qualifies, another sentence is confusing. "For purposes of this definition, the term "residing" shall include individuals occupying a dwelling within the geographical limitations described above." Some properties are "occupied" part-time but would be severely impacted by a facility. "Why is "dwelling" not defined? In previous Article 10 applications, applicants tried to exclude properties not on public water, sewer, electricity, etc. as dwellings or residences, which they most certainly are. To simplify, why not define "Potential community intervenor" as "any resident or owner of property within the geographical limitations listed", because many properties are purchased with the intent to build a home, camp, or cottage at a later time? To exclude these property owners from the process could deny them the right to protect the use, enjoyment, and value of their property.

(bl) Public Service Commission or PSC- Is this different from the New York State Department of Public Service? How does it differ, and what are their separate roles in this process?

(bo) "Repurposed site"- What level of remediation would permit the siting of a major renewable energy facility?

(bv) "Study area"- Once again, unclear because of long, unseparated sentences. What is a highly urbanized area? Because the definition of "interconnections" includes "off-site electric

transmission lines less than 10 miles in length, water supply lines, waste water lines, communication lines, steam lines, storm water drainage lines, appurtances thereto" wouldn't this extend the study area out from these also?

(bx) "Transfer application"- Isn't it illegal to change the rules to advantage an applicant and disadvantage intervenors in an ongoing Article 10 process, by allowing the applicant to "transfer out" of that process to this "applicant friendly" office and these lenient draft regulations? Once again, how does a "draft public program plan" qualify this change?

900-1.3 Pre-application procedures

(a) Consultation with Local Agencies. “Why is 60 days before filing an application considered adequate time for consultation with local officials on a facility that would affect and change the community forever? Why wouldn't 120 days be more appropriate on such far-reaching issues? Why just consult with the chief executive officer, and not the entire board? Why not allow the public to attend and learn what the applicant intends? Why should a transfer application for a pending Article 10 application that has been deemed complete, be exempt from this consultation, since transfer to this ORES process changes the ground rules?

(a)(3) and (4) This is the whole purpose of the law pursuant to which these regulations are being proposed. The idea is to revoke the ability of local governments to enact zoning measures intended to control or restrict industrial development within their jurisdictions. A newly created state agency has been empowered to exempt applicants from the laws that apply to ordinary citizens, merely because the applicants find them “unreasonably burdensome”.

(a)(7) Will the designated contact person be required to answer questions posed on the website, email, or on the phone? Will there be a required time limit set for answers to the public? Will there be a process if the answer is inadequate?

(b) Meeting with community members. As above, don't these facilities' profound and permanent effects on a community, warrant more time for those who would have to live with them to become informed and involved in the process? Considering the requirements for requests for funds from the local agency account, at 900-5.1(h) items (8)(9)(10), isn't 30 days an 'unreasonable burden' for potential community intervenors and local agencies to find experts, line out the studies, and draw up contracts, especially for those with no expertise in these matters? Why wouldn't 60 days within the date of the date of application filing be more appropriate and reasonable? In addition, why can't the applicant provide notice of the meeting 28, 21, 14 and 7 days prior to the meeting in accordance with the publication requirements?

(c) This is nothing more than a presentation wherein the applicant announces its intentions. The local citizens in attendance are not allowed to oppose the project, but can only ask questions. There is no requirement that the meeting be recorded or transcribed. The applicant is allowed to summarize, in their own words, the questions raised and the responses provided.

(d) Why shouldn't the notice of intent to file an application include, as part of (1), A brief summary of the proposed facility and location, AND a list and map of properties with signed leases, easements, and "good neighbor agreements"? Many property owners have been duped into signing leases by applicants, being told "all your neighbors have signed, so you might as well, because you're going to be surrounded." This was told to me by a gentleman from Clinton County, at a gun show.

(e) Wetland delineation

(1) Would only "regulated" wetlands be delineated? Shouldn't the delineation include notation of wetland downslope/ down/gradient from the facility or the area to be disturbed by construction? A steep slope could cause damage and disturbance to a wetland more than 100 feet from the area of disturbance.

(3) Would the draft wetland delineation report be available to the public on the project website, so any omissions could be noted by those in the vicinity?

(4) Why shouldn't the applicant consult with both the Office AND the DEC, not just "as necessary", as stated in the regulations, as ORES is not familiar with wetlands, and DEC is?

(5) "At the request of the Office, the NYSDEC shall review the draft wetland delineation..."As above, if the Office does not request, why leave DEC out of a process with which they are familiar, and ORES is not? "The Office, with a copy to the NYSDEC, shall provide a final approved jurisdictional determination to the applicant..." Does this mean that ORES is now deciding on wetlands? "In the event that weather or ground conditions prevent the Office" shouldn't there be added "or NYSDEC" "from making a determination...."

(f)Water Resources and Aquatic Ecology

(1) Why would only "regulated" waters be in the stream delineation? At least here, there is mention that waters beyond the limit of disturbance may be hydrologically or ecologically influenced by development, why not include that in the wetlands delineation?

(2) Would NYSDEC make a simplified summary or map available to the public on the project website for feedback?

(4) "At the request of the Office, the NYSDEC shall review the draft delineation..." Once again, is it the option of the Office to request DEC review? Also, shouldn't the last sentence read, "In the event that weather or ground conditions prevent the Office 'OR NYSDEC' from making a determination...?"

(g) NYS threatened or endangered species

(1) Why does the Office trust applicants to conduct or construct an accurate wildlife characterization, when some applicants, still operating in New York, have mischaracterized reports or actually attempted to harass wildlife in order to deny their presence at a site? Why doesn't the Office require that wildlife site characterization be prepared by a third-party professional in that field, at the applicant's expense?

(2) "A meeting shall be held by these agencies and the applicant within four (4) weeks of delivery of the draft wildlife site characterization, unless otherwise agreed upon by the applicant and the Office." Why was DEC not included in those who need to agree? "unless otherwise agreed upon by the applicant, the NYSDEC, and the Office."

(2)(ii) Why is a non-disclosure agreement needed here?

(3) Why are applicants conducting habitat assessments, instead of third-party professionals in that field, at the applicant's expense?

(5) Why are the applicants conducting surveys, instead of third-party professionals in that field, at the applicant's expense?

(6) Why is the public not allowed to comment, correct, and add information to the habitat assessments and surveys, after they are completed and submitted and before the Office provides

its draft determination regarding whether occupied habitat for one or more NYS threatened or endangered species exists within the facility site? Why is the Office leaving those who are most familiar with the site out of the information gathering process?

(i) Consultation with the Office

(1) Why are "Applicants seeking a siting permit for a major renewable energy facility other than a solar facility or wind facility required to consult with the Office at least one when (1) year prior to submitting an application", when there seems to be no such requirement for wind or solar facilities?

(2) What is intended by "Any applicant" may request a pre-application meeting with the Office? Any applicant for a wind, solar, battery energy storage system, or a major renewable energy facility other than a solar facility or a wind facility? Will the request be granted or denied based on the type of facility?

900-1.4 General requirements for application

(a)(4)(ii) Would the map at a size and level of detail...inform the public of the location of the proposed facility site, and all associated project components, access roads, transmission lines, inverters, and battery energy storage systems? Would another website map include the location of all signed "participating properties", easements, "good neighbor agreements" and other real properties for which the applicant may consider filing eminent domain motions? If not, why not, since all these would affect adjoining and nearby neighbors' future use and property values?

(iii) The persons who drafted these proposed regulations seem unaware that a global pandemic is presently raging. The local libraries are closed. There are no "normal business hours". The applicant is required to have a website, but is not required to post the application in digital format

on that very website, in which case the application would be readily available to all persons with internet access in the homes in which they are presently quarantined.

(iv) Would the explanation of the application review process include an explanation of why any local agency or potential community intervenor must file a request for initial funding within 30, instead of 60, days of application filing?

(viii) Would the website include a list of "participating property owners" (leaseholders, "good neighbors", easement granters), including their name, physical address, mailing address, and location of the leased property, so that adjoining and nearby neighbors are aware of future use of those properties? What authority grants ORES the power to vary health and safety protections based on the presence or absence of a property owner's land use contracts? Do participants understand the protections they are waiving—in advance of any project review?

(8) Why is the fee to be deposited in the local agency account by the applicant only one thousand dollars (\$1000) for each 1000 kilowatts, when the experience in Article 10 proceedings has shown the legal and expert expenses for intervenors to be twice or three times that amount? Applicants are getting production tax credits, investment credits, subsidies, PILOTS, priority power sales, and transmission line upgrades to move their power to the market, all at taxpayers' expense, so why can't intervenors get appropriate amounts to bring their concerns to light? Why shouldn't the Office adjust the amount now to account for the inflation of these projects in our state?

(b) Water Quality Certification (1) Why does an applicant's "statement of a plan for making such a request" suffice for a federal license or permit? (2) Why does ORES intercede on the part of the applicant with the Army Corps of Engineers or other federal agency on time limits required to

obtain certification?(3) Why would the Office issue a siting permit before the applicant files a request for a Water Quality Certification? (4) Hasn't DEC been delegated exclusive authority to determine WQCs?

900-1.6 Filing, Service, and Publication of an Application

(a)(1) So the applicant is required to provide an electronic copy to pretty much everybody but the quarantined general public. There is no denying that electronic copies will exist in cyberspace. At least twelve entities will receive them by electronic mail. But the applicant doesn't have to post it on their website.

(6) Why is the applicant required to file one electronic copy and one paper copy each on "a" library serving the district of each member of the state legislature in whose district any portion of the proposed facility is to be located or could be adversely impacted", but not on libraries in the actual communities where the project would be located?

(8) Is the Office considering siting major renewable energy facilities, transmission lines, or battery energy storage systems in the Adirondack Park? Is that why "an electronic copy on the APA" should be filed "if such proposed facility is located in the Adirondack Park"?

(9) Why is the applicant not required to provide electronic and paper copies to intervenors, adjoining landowners to proposed facilities, or other residents who could be adversely impacted by the proposed facility?

(c) Why is three days before filing an application considered adequate time for publication, wouldn't 30 days before filing be more appropriate?

(c)(3) Because a facility would profoundly and permanently affect the entire area where it would be sited, why shouldn't the applicant provide written notice to all LANDOWNERS, not just persons residing, within 1 mile of a proposed solar facility or within 5 miles of a wind facility?

(d)(3) Shouldn't the notice of availability of local agency account funds be that requests for initial funding be submitted within 60 days of the date of application funding, to enable local agency or potential community intervenors adequate time to meet the many requirements of that request?

Subpart 900-2 Application Exhibits

900-2.1 Filing Instructions

(a) Who will decide if an exhibit is not relevant to the particular facility's technology or proposed location; the applicant or the Office? And if another agency or an intervenor does feel it is relevant, what is the process to bring up this issue?

900-2.3 Exhibit 2: Overview and Public Involvement

Exhibit 2 shall contain (a) "A brief description of the major components of the facility"- Along with "collection lines, transmission lines, interconnections, access roads," will this include inverters, transformers, stand-alone Battery Energy Storage Systems, and other Battery Energy Storage Systems?

900-2.4 Exhibit 3: Location of Facilities and Surrounding Land Use Exhibit 3 shall contain:

(a)(3) Will the USGS map show the proposed limits of clearing and disturbance for construction of all facility components and ancillary features, as well as the proposed limits of clearing and disturbance for transport of the components, access roads, and collection and transmission lines? If there are changes to the proposed location, limits of clearing, etc., will a new map be prepared

and made available to the public? Will local agencies, participating and non-participating landowners be notified of the changes to the proposed locations and limits of clearing?

(f) Will the map of the properties described here also include the name, address, and contact information of the owner of record of each? If not, where in the application will this information be found?

(l) Considering the profound and permanent effects of these facilities on the communities where they may be sited, why shouldn't "the compatibility of the facility and off site staging and storage with existing, proposed and allowed land uses and local and regional land use plans" within a five mile radius be considered, instead of just a two mile radius?

(m) Would "the qualitative assessment of the compatibility of proposed transmission, lines, collection lines, interconnections and related facilities with existing, potential and proposed land uses" include inverters, transformers, stand-alone Battery Energy Storage Systems and other Battery Energy Storage Systems?

(q) Would the overlays on the aerial photographs also clearly identify other changes to the hydrology, along with the other features noted?

(s) As part of this exhibit, shouldn't a survey of residents, landowners, business owners and stakeholders (example hunting club members) be included, to gauge the effect that a facility would have on community character?

900-2.5 Exhibit 4: Real Property- Exhibit 4 shall contain:

(a) Will "A map of the facility site showing property boundaries with tax map sheet, block and lot numbers; the owner of record of all parcels included in the facility site and for all adjacent

properties; also show the owner of record for all easements, grants, deed restrictions, and related encumbrances on the parcels comprising the facility site? Will the proposed areas of permanent or temporary clearing and disturbance be shown for all private and public roads on or adjoining or planned for use as access to the facility site? This is important, because landowners in the Clinton/Franklin industrial wind facility area were told by the applicant that the access road would be a certain width, but then the clearing was twice that to accommodate the transport of the components, wiping out a considerable planting of roadside maple syrup-producing trees to their horror and dismay.

(b) Will "the property/right-of-way map of all proposed transmission lines and interconnection facilities and off-property right-of-way access drives and construction lay-down or preparation areas for such interconnections" ALSO include the name, mailing and physical address of the owner of record?

(c) If "the applicant is registered as a transportation corporation and plans to acquire necessary lands for generating or transmission line or other facility-related infrastructure pursuant to New York State Eminent Domain Procedure Law," shouldn't that be included in the public notices required for the project? Shouldn't the applicant be required to specifically notify all property owners, both participating, and non-participating whose land may be affected?

900-2.6 Exhibit 5: Design Drawings

(b) Why does the Office encourage "trespass zoning" by including these setbacks that measure from the centerline or midpoint of a wind turbine tower to various features, including residences and structures, rather than from the farthest outer reach of the turbine blades to property lines?

Will these setbacks allow a wind turbine so close to a property borderline that the neighbor is

only a few yards away and is still on his own land? Why does the Office promulgate setback distances that have been shown to be inadequate in existing wind facilities, as in Clinton County, where Amish residents cutting wood on an adjoining property in winter had to literally "run for their lives" to avoid ice throw from a wind turbine? Will the Office take responsibility for property or physical damages that occur from inadequate setbacks, such as these? How can the Office assert that these setbacks are "protective of the health, safety, and wellbeing of the citizens and the 'quiet enjoyment of their property', which is stated in most deeds from the State of New York? Why does the Office choose to ignore the World Health Organization's most recent recommendations?

Further, After years of struggle, the citizens of the Towns of Hopkinton and Parishville, St. Lawrence County, New York, succeeded in enacting setback requirements of five times the total height of any wind turbines. A 500-foot wind turbine would have a 2500-foot setback requirement, a 600-foot wind turbine would have a 3000-foot setback requirement, and so on. These, under existing duly enacted law, would be the distances from the property lines of the nearest non-participating landowners. The proposed regulations, pursuant to retroactive legislation imposed upon local governments by the State Legislature, would reduce these setback requirements to 1000 feet and 1200 feet, respectively. Fair warning: There is an existent body of law on the subject of retroactive legislation, with which this writer¹ is thoroughly familiar.

It is interesting to note that, under the proposed regulations, more stringent setback requirements may be enacted by the manufacturers of the wind turbines, but not by the towns and municipalities that would have industrial wind turbines imposed upon them.

¹ Richard Hayes Phillips, Ph.D.

For the record, the proposed regulations would enact these setback requirements for solar facilities adjacent to non-participating landowners.

(f) Exhibit 5 shall contain: (1) Site plans of the proposed facility, including the following:

(f)(1)(i)(j) Will the site plan include any local requirements, including lot coverage?

(ii)(a) Although the general site plan drawings shall include "the extents of proposed access roads, existing roads to be utilized; turn-around areas/temporary road improvements for components, will the limits of disturbance and clearing ALSO be indicated for travel routes to the facility area? Or should (ii)(g) and (h) specifically mention the routes for delivery of facility components?

(b) Shouldn't the site plan drawings include the extents of wind turbine blades also?

(c) Will "proposed trenchless collection line installations" be entirely on the facility site, or will any be off-site? Couldn't these be a serious hazard?

(f) Would the site plan show the proposed route of additional transmission or collection lines around any non-participating properties, or would this be in the drawings below in (2)? Shouldn't property owners be made aware if they are in the path of these lines? Will the applicants be authorized to exercise Eminent Domain?

(f)(4) How does a summary of correspondence with local fire department representatives, especially non-professional, volunteer squads ensure their safety and that of the public, in dealing with emergencies involving exotic, toxic, and unfamiliar materials and components?

(i) Shouldn't there be a separate site plan drawing of proposed wind turbine setbacks, represented by radii, (setback circles), showing locally adopted setbacks, in case of lawsuits that uphold these laws?

(j) Why are there no suggested setbacks for Battery Energy or other energy storage systems?

(k) Would local ordinances and requirements, including lot coverage restrictions be included here or elsewhere?

900-2.7 Exhibit 6: Public Health, Safety, and Security

Why shouldn't this section, first of all, inform the public of the applicants', contractors', and/or operators' records of accidents, violations, convictions, and lawsuits where they were found to be negligent, fraudulent, or engaged in bribing or corrupting local officials? Wouldn't this be important for performance of due diligence by county, town, or other municipalities?

(a)(1) Shouldn't soil runoff be included in the wastes anticipated to be released from the facility? Although there are discussions of this in relation to wetlands, streams, and water bodies, it can also cause problems for stormwater control, drainage ditches, and other private and public infrastructure.

(4) Would the ultimate disposal of decommissioned and/or damaged facility components be addressed here, as many parts of solar panels, wind turbines and Battery energy storage systems are hazardous or toxic? Shouldn't those special components be addressed specifically, not in a general way? Shouldn't it note that the applicant or operator, not the municipality or leaseholder, is responsible for legal disposal of these specialized materials? Doesn't the prospect of thousands of tons of crushed wind turbine blades going into New York landfills waste valuable landfill space?

(5) Shouldn't the maps of the study area include the relation of the facility site AND associated off-site ancillary components to: public AND private water supply sources within 1 mile of these, to the extent locations are available or made known to those preparing the maps? Is there any reason why information on the water supply sources could not be requested from local governments and the general public?

(b)(2) In order to ensure privacy of adjoining properties, participating or non-participating, shouldn't the electronic security and surveillance features restrict coverage to the facility property only?

(3) In avoiding off-site light trespass, would all lighting be certified "dark-sky friendly"?

(4) As mentioned later, are Aircraft Detection Lighting System(s) the preferred method of ensuring aircraft safety?

(c) Who would participate in developing the Safety Response Plan?

(7) Shouldn't the training drills with emergency responders be required twice a year, once each in winter and summer, because in New York, the conditions are so different in those two seasons?

900-2.8 Exhibit 7: Noise and Vibration

General comments: Doesn't setting noise limits at a residence, whether participating, or non-participating, deprive the landowner of the "quiet enjoyment " of their property between the residence and the property line? Don't most deeds from the state mention this "quiet enjoyment" of our properties? Mine does!

I do not have professional understanding of noise standards, decibel levels, or most of the discussion of sound or its effects in these regulations. However, at the invitation of residents of

Franklin and Clinton Counties, I have visited homes and properties there and witnessed the conditions that are negatively impacting their lives- everyday! To add injury to insult, after being coerced, coaxed, or cajoled into signing leases or "good neighbor agreements", some learned that they have signed away their right to complain, or seek any relief from the company. Others never signed any agreement, but are suffering the effects of others' poor decisions, especially those of elected officials. Complaints to the operators go unanswered and unresolved.

GK's in-laws guilt tripped her into signing a good neighbor agreement, pleading poverty and a dire retirement. Now they have left the area, and she has giant wind turbines a few hundred feet from the cabin behind her home, and some malfunction produces a clanging sound every 30 or 40 seconds, like a metal cable hitting a flagpole, or an elevator in a shaft. The camp was built as a family project, where they used to spend every weekend and holiday. Her daughters cannot even spend time at her home anymore because they get terrible migraine headaches there. This never happened before the turbines began operating.

A couple on their farm on the highway nearby have two border collies that will not go outside alone, because of the noise from the nearby wind turbines. Not far away, a high school teacher, KS, whose small house was surrounded by wind turbines, was unable to sleep because of the constant noise and vibration. He finally gave up and moved away. Another house down the road has a big sign out front, pleading to stop the 24/7 noise from the turbines. There are other homes in the area that have been abandoned, including my friend Noni's beautiful cabin that had a 180 degree view of mountains to the east, and now looks out on a seeming endless horizon of flashing red lights at night and spinning turbines by day. These are not mere "annoyances", these are peoples' lives being destroyed.

What I do know is that noise is the major problem with wind facilities, inverters, and potentially at Battery Energy Storage Systems, and the noise limits in the draft regulations will not protect the public at all. The experts tell you that, and the residents that I have met and visited with, will tell you that. The World Health Organization's updated studies tell you that, and the doctors treating entire families in Franklin and Clinton County tell you that. There is an entire department at Lewis County General Hospital dedicated to vestibular disorders. Can the Office explain how they came up with the noise limits?, In addition, what is the logic behind allowing noise limits right up to a residence? Why don't landowners have the right to peace and quiet all over their property? Don't participating landowners have the right to protect their health and hearing also? I know a person who rents their residence, and the owner of the property signed a "good neighbor agreement", so that person, who has built up a small engine repair shop at that location, and works for the landowner, is put into a very difficult situation with uneven regulations like these.

(b)(1)(i) As a matter of high school physics, sound intensity will decrease by the inverse square of the distance. This was one of the reasons why the setback requirements lawfully enacted by the Towns of Hopkinton and Parishville (five times the height of the wind turbine) are 2.5 times more stringent than the setback requirements in the proposed regulations. For every doubling of distance, the sound level reduces by 6 decibels (dB). Thus, if the decibel level would be 45 dB at 1000 feet, it would be 39 dB at 2000 feet, and about 36 dB at 3000 feet. (ref. <https://www.schoolphysics.co.uk> or <https://www.acoustical.co.uk> – or google: decibel level decrease over distance)

(b)(1)(vi), what are the proposed noise limits across portions of non-participating properties delineated as NYS-regulated wetlands?

(c) Radius of Evaluation: Shouldn't "sensitive sound receptors" be included here or in the definitions, as it has not appeared earlier?

(1) Would this evaluation just be a "modeling", or would it be from an actual wind turbine and substation? Wouldn't the sound and noise be affected by humidity, temperature, wind speed, topography, model and number of turbines and other factors? Should this really be considered a valid measurement of the maximum noise level to be produced during the operation of a facility, when it appears that it would be measured in relation to one wind turbine, or isn't that what is written here?

(2) Also needs definition of "sensitive sound receptors". Where are the noise limits for "stand alone" or other Battery Energy Storage Systems, should that be included in this category, the evaluation of wind facility noise, or should it have its own evaluation?

(d) Modeling standards, input parameters, and assumptions. How closely does modeling relate to reality? Has ORES considered information and reports on the actual noise readings at existing facilities of a similar size and using similar equipment?

(h)(1) Would cabins and hunting camps have to be identified by property tax codes to be shown as sensitive sound receptors? Why would other seasonal residences be required to have septic systems/running water to qualify or be included on the map?

(i) Shouldn't the evaluation of ambient pre-construction baseline noise conditions be performed in a secure area where it cannot be tampered with? In our community, the testing site was set up on a snowmobile trail on a leaseholder's property, and the very first night, a monster truck showed up and attempted to drive down the trail. Could this be considered an attempt to skew the ambient pre-construction baseline noise measurement? Shouldn't sound surveys be conducted by a third-

party, not the applicant? Isn't there a generally accepted acoustic standard specifying the proper method for determining baseline sound levels? Shouldn't the regulations state that no applicant, leaseholder, other person, or organization shall interfere with, or cause any activity that skews the baseline sound survey, under penalty of law? Why not simply require all noise assessments to comply with generally accepted and applicable acoustic standards? This would avoid all the details of the proposed protocol, which may not comply with such standards and, because of the complexity, open the door to gamin by developers' experts.

900-2.9 Exhibit 8: Visual Impacts.:

(b)(1) and (4) The array of industrial wind turbines once proposed for the Towns of Hopkinton and Parishville would all have been visible from the summit of Azure Mountain (elev. 2518 feet), a popular hiking destination located entirely within the Adirondack Forest Preserve. The nearest wind turbine site (elev. 1030 feet) was 13 miles from the summit, and the farthest wind turbine site (elev. 675 feet) was 19 miles from the summit. Scenic viewsheds must be protected no matter how distant from the scenic viewpoints the industrial wind turbines are located. Five miles is nowhere near enough.

(b)(1) Shouldn't this section specifically state "as well as any potential visibility from significant visual resources beyond the specified study area, such as nearby mountains? Would it be a good idea to break up the sentence there? The map shall be prepared and presented....

(4) Shouldn't there be an addition to this paragraph: In developing the application, the applicant shall confer with LOCAL OFFICIALS, RESIDENTS, municipal planning representatives , the Office, and where appropriate, OPRHP, and/ APA in its selection of important or representative viewpoints.

(d) Visual Impacts Minimization and Mitigation Plan. Is there any way to "minimize" the visual impact of a 500', 600' or 700' tower with blades extending out in all directions?

(2) Shouldn't the electrical collection system be located underground to the FULLEST extent possible, not just to the extent practicable? And yes, "structures shall only be constructed overhead for PORTIONS where necessary..." However, this doesn't seem to cover the transmission lines, which are the major eyesore, does it? What will be done to minimize or mitigate those?

(6) Why would any shadow flicker be allowed at any non-participating residence (which is not anywhere in the definitions) at any time? When it happens on property without a shadow flicker easement or good neighbor agreement, shadow flicker is a nuisance and a trespass. The regulation read, "Shadow flicker shall not be allowed at any non-participating PROPERTY. (PERIOD!)"

(v) This should read "Shielding or blocking measures (such as landscape plantings and window treatments) may ONLY be implemented at receptor locations with the approval by the resident receptor AND THE PROPERTY OWNER."

(9)(iii) This should read, "ONLY if FAA/DOD determine that ADLS or dimmable lighting options are not appropriate for the project, or if the applicant PROVES installation of ADLS or dimmable lighting options are not technically feasible, the applicant shall seek local approval of other means of minimizing lighting effects?"

900-2.10

It should be noted that cemeteries are cultural and historic resources deserving protection.

900-2.11 Exhibit 10: Geology, Seismology, and Soils- Exhibit 10 shall contain:

(a)(1) Couldn't this map delineating existing slopes, also be used to determine possible impacts to waters and wetlands from construction activities or operations at sites uphill, upslope. or upgradient and at a significant angle, but outside of the estimated limit of disturbance?

(4) In fact, there should be another map prepared, showing subsurface hydrologic characteristics, groundwater levels, watersheds, and their recharge areas.

(5) The plan for blasting operations should include measures to protect "nearby structures, groundwater wells, AND groundwater recharge areas.

(6) Similarly, the assessment of potential impacts of blasting should include "environmental features, above-ground structures and below-ground structures, such as pipelines, PUBLIC AND PRIVATE WELLS, WATERSHEDS AND THEIR RECHARGE AREAS.

(13)(b)(3) The identification of mitigation measures regarding pile driving impacts should include limits on the number of hours per day, and times of day that it can occur, in addition to a plan and financial assurances, such as a bond, for securing compensation for damages that may occur.

900-2.16 Exhibit 15: Agricultural Resources

(a)(6) This should include agricultural homesteads, and forest-based businesses, including "stands" of maple trees, and "woodlots" whether presently active or not. Just because these resources are not presently being used does not diminish their value or indicate they will not be used in the near future.

(b)(1) Again, this should take into account that not all land is used all the time for agriculture. What about forest or brushland that is being gradually cleared in order to be used for crops when it is ready? This can take many years to accomplish, would that be included? Protections should

include potential farmland, consistent with the State Constitution. Applicants should demonstrate that the proposed site has not potential use as farmland.

(b)(3) This should include a map showing temporary or permanent impacts to agricultural production within the study area. Doesn't the disruption of these large facilities impact more than just the facility site?

(b)(4) As future land uses are taken into account, acreage proposed to be put into agricultural production should be considered here.

(b)(7) USDA soil mapping for the facility site AND ADJACENT AREAS, at a minimum, within a one-mile radius, should be included. Some agriculture requires large amounts of various types of land, and not all is in one small area, e.g. the facility site, shouldn't this be considered?

(b)(8) Similarly, this should include areas adjacent to and in an area beyond the facility site, as roads, transmission lines, collection lines, and ancillary off-site components will definitely impact agriculture.

(c) The agricultural plan should include NYS Agriculture and Markets Land Classified (?) Mineral Soil Groups, other than 1-4, if in present agricultural use.

(f) There should be an estimate of the total amount of land, in acres, that will be permanently unavailable for agricultural use, if the facility and all ancillary on site and off site components- access roads, transmission lines, collection lines, substations, cleared right of ways, stand alone and other Battery Energy Storage Systems are permitted and constructed.

900-2.17 Exhibit 16: Effect on Transportation- Exhibit 16 shall contain:

(a)(2) For wind facilities, the conceptual site plan should show access roads locations and widths, including TEMPORARY AND PERMANENT CLEARANCE WIDTHS, and characterizations of road intersection suitability FOR TRANSPORT OF COMPONENTS.

(b) This review should include the entire travel route, not just "in the vicinity of the proposed facility", as traffic, roads, bridges, and culverts along the entire route would be affected during transport and construction.

(c) Although these trip generation estimates may be useful to predict the traffic impacts on the area, can the "Office" or the applicant make any claim that they are accurate or adequate for the requesting of permits by NYSDOT? A landowner, living next to an access road to a gravel pit, told me that there were at least double, and sometimes, triple the number of trips as were permitted by the NYSDOT down that road during the construction of a wind facility nearby, but, as a "participating" property owner, he had no recourse. In addition, he said that the access road also created a big problem with trespassing by "hunters from Vermont, where the season ended earlier than in New York. They just drive right around the gates that the company put up."

(c)(4) The applicant should also have parking and litter control plans for all areas where construction will be occurring. Especially during winter, roadside parking can interfere with snow plowing and cause visibility and traffic hazards.

(d)(4) The mitigation measures should include the repair of not just local, but also COUNTY AND STATE roads, bridges, culverts, drainage infrastructure, and other features damaged by heavy equipment, TRANSPORTATION OF COMPONENTS, or construction activities during construction or operation of the facility construction.

900-2.18 Exhibit 17 Consistency with Energy Planning Objectives

(f) Considering the present NEGATIVE impacts of industrial scale renewable energy on: state reliability (b); fuel diversity (c); regional requirements for capacity (d); and electric transmission constraints (e); why is the Office trying to accelerate the construction of these facilities? Shouldn't the Office be rethinking their approach and considering "reasonable and available alternative locations" and SCALE of PROJECTS, INCLUDING SMALL, COMUNITY OWNED PROJECTS INSTALLED ON THE BUILT ENVIRONMENT IN AREAS WHERE THE ELECTRICITY NEED IS GREATEST?

(h) What is the actual estimated efficiency of the proposed facility, (production vs. nameplate capacity),based on the meteorological information for the location in question?

(i) What is the estimated efficiency of the facility (h), compared to alternative fuel sources?

(j) What is the true carbon footprint of the proposed facility, accounting for the production of all components, transportation to the site from the place of production, average life of the components, and transportation of the construction workforce? Do you account for the fact that one ton of cement creates one ton of carbon?

900-2.19 Exhibit 18: Socioeconomic Effects

(a) Will the applicant include in the estimate information about the probable hiring source and home location of the construction workforce, since many of the tradespeople are highly specialized, and not from the community where the project is proposed?

(f) What are "benefit assessment districts" or "user fee jurisdictions"? They are not in the definitions.

(g) What are "host community benefits", "benefit charges", and "user charges"? None are in the definitions.

(i) Shouldn't the applicant be responsible for hiring and providing professional trainers for local emergency responders, most of whom are volunteers, with no experience with these facilities?

900-2.20 Exhibit 19: Environmental Justice- Exhibit 19 shall contain:

(a) Will the identification and evaluation include information about the economic data used, the impact area studied, the evaluator, their credentials, and the investigations and methods used to determine whether or not there is a qualifying Environmental Justice designation?

900-2.21 Exhibit 20: Effect on Communications

(f) Will the applicant be including information on why these facilities interfere with communications, their experience with interferences, what the reasons were, and how and if they actually remedied the problems?

One of our Franklin/Clinton County hosts, LC, had constant interference with his radio, tv, and cell phone after a wind facility began operating in his area. Those of us visiting experienced the same, no one could get a cell signal, or if they did, it was off and on, dropping calls. I do not know if his problem was ever resolved , but the facility had been in service for many years when we met him.

900-2.22 Exhibit 21: Electric System Effects and Interconnections

Why are there no clear definitions for "collection line" or "transmission line" in this document?

How can the public discriminate between all these connections, especially when the definition

for 'interconnections' includes "water and waste water lines, communication lines, steam lines, stormwater lines, and appurtenances thereto"?

(b)(c)(d) How can/ why would the Office accelerate the siting process when there are already unresolved problems in terms of reliability, "interconnections", and the entire state transmission system, all due to existing renewable energy facilities?

900-2.23 Exhibit 22: Electric and Magnetic Fields

It would be helpful to know what these interim standards are. The proposed regulations do not offer a citation. This is a serious matter. In 1974 and 1975, Robert O. Becker and Andrew A. Marino, medical investigators at the Veterans' Administration hospital in Syracuse, New York, testified at length before the Public Service Commission in regard to 765-kV (765,000-volt) transmission lines. They stated that persons living near the right-of-way, and chronically exposed to a field strength of 1.5 volts/cm or higher, would run the risk of some biological effect due to this exposure. At the edge of the right-of-way proposed by the Power Authority of the State of New York (PASNY), 125 feet distant from the centerline, the electromagnetic field would be 25 volts/cm. Becker regarded this as "human experimentation."

Marino, in addition to his own studies exposing rats and mice to electromagnetic radiation, cited thirty-two others that showed a wide range of biological effects upon a variety of species, outlined here:

MARINO'S OWN STUDIES²:

² Ref. <https://www.andrewamarino.com> – Publications – Prepared Testimony, November 1975.

150 volts/cm, 60 Hz, one month exposure: depressed body weights, serum corticoids, and water consumption in rats 150 volts/cm. 60 Hz, continuous exposure, three generations: decreased body weight and increased mortality rate in mice MARINO'S LITERATURE REVIEW:

70 volts/cm, 3 Hz and 30 Hz, 2 hrs/day for 28 days: 5 of 5 rats @ 30 Hz, and 2 of 6 rats @ 3 Hz, developed tumors

4 volts/cm, 2 to 12 Hz: affected response times in humans

200 volts/cm, 50 Hz: affected rates of cell division in mice

0.02 volts/cm, 65 Hz, 28 days of continuous exposure: augmented bone repair in dogs

16 volts/cm, 60 Hz, 16 weeks: short-term reduction in egg production in hens

3.1 to 4.2 volts/cm, 60 Hz: altered regeneration in flatworms

6000 volts/cm, 60 Hz, one week: killed all mammalian cells in culture

10 volts/cm, 1 to 100 Hz: altered shapes of amoeba, perpendicular to electric field

1000 volts/cm, 1 Hz: altered growth of chick embryos

1000 volts/cm, 50 Hz, 1000 hours (9 hours on, 3 hours off): altered distribution of white blood cells in mice

0.4 volts/cm, 640 Hz: altered brain activity in rats

110 volts/cm, 50 Hz: caused grossly abnormal behavior in bees

500 to 700 volts/cm, 50 Hz: affected drinking behavior of trained rats

5000 volts/cm, 50 Hz, several hours of exposure: killed mice and insects

0.007 volts/cm, 45 to 75 Hz: delayed cell mitosis

0.002 volts/cm, 45 to 76 Hz: disrupted orientation of gull chicks

0.01 to 0.10 volts/cm, 60 to 75 Hz: affected growth rates of chick embryos

0.000007 to 0.0007 volts/cm, 60 Hz to 75 Hz: slowed heart beat of eels

0.0035 to 0.35 volts/cm, 7 to 75 Hz: affected response times in trained monkeys

1.55 volts/cm, 60 Hz, 40 minutes exposure: complete loss of biochemical function in brain mitochondria

0.025 volts/cm, 10 Hz: influences circadian rhythms in humans

Why doesn't this regulation also require including the most recent information available on the hazards of Electromagnetic Fields to human health? Don't adjoining landowners have the right to know, and don't the applicant and the Office have the responsibility to inform them?

900-2.24 Exhibit 23: Site Restoration and Decommissioning

(b) "For facilities to be located on lands owned by others", would the "description of all site restoration, decommissioning, and security agreements between the applicant and the landowner, municipality, or other entity", include provisions for REMOVAL AND PROPER DISPOSAL of all components and ancillary equipment- towers, blades, nacelles, guy wires, foundations, solar panels, supports, inverters, stand alone or other Battery Energy storage Systems, and electrical

collection, transmission, and interconnection facilities? Since the Office is issuing permits for these installations, are they willing to take responsibility for removing them, if no "responsible party" can be found if and when it becomes necessary? The taxpayers of New York are still paying for other hazardous, toxic, and environmental remediation projects where industries have failed, or abandoned sites of former activities, is it fair to risk more?

(c) Why, nowhere in this section does it specify that the applicant would actually put money into any fund to insure future cleanups? Would a "transfer application" remove that responsibility, since the conditions of the Article 10 process would supposedly, no longer apply? Why does this section only mention "estimates", and even state "the net amount shall be allocated between Cities, Towns, or Villages based on the estimated cost associated with the removal and restoration of the facilities located in each City, Town, or Village? Isn't this rather confusing? The cities, towns and villages would certainly not be responsible to pay for decommissioning, shouldn't this be clarified?

900-2.25 Exhibit 24: Local Laws and Ordinances

Also, the Office of Renewable Energy Siting has the autocratic power to decide that an applicant need not comply with local laws (or ordinances, resolutions, regulations, standards and other requirements – making sure everything is covered). They can elect to do this. All they have to do is “find” that such requirements are “unreasonably burdensome.” It appears that the only consideration is economics. There is no appeal from their decision.

(a)(b)(c) In all these sections, the applicant is allowed to request from the Office, that "local substantive requirements" not apply. In (c) the proposed regulations state "Pursuant to Executive

Law 94-c, the Office may elect to not apply local substantive requirements if it finds that, as applied to the facility, such requirements are unreasonably burdensome in view of the CLCPA (Climate Leadership and Community Protection Act) targets and environmental benefits of the facility." Isn't this rather oxymoronic, taking away protections from a community and calling it a community protection act?

(c)(1)(2)(3) This is where the regulations attempt to justify ignoring local ordinances for the reasons of technological limitations, costs to consumers, and needs of consumers, because they outweigh the compliance, protection or impacts on the community.

900-2.26 Exhibit 25: Other Permits and Approvals

(b) Calls for "a statement as to whether the applicant knows of others who have any pending federal, state, or local applications OR FILINGS which concern the facility". Would 'filings' in this case include lawsuits, injunctions, investigations, bankruptcies, or other civil or criminal proceedings? These may actually concern the developers, contractors, or operators, but they should certainly concern the public and their elected representatives.

Subpart 900-3 Transfer Applications from PSL Article 10 or alternative permitting procedure

900-3.1 Transfer Applications for Opt-In Renewable Energy Facilities

(1) Why is there no requirement that the original lead agency conducting the environmental impact review agree to this change? What changes would result from a transfer, if granted by the Office? Would the lead agency conducting the environmental impact review lose that responsibility, and be replaced by the Office? What changes would occur as a result of the

change from a minor to a major project? What changes would the applicant be allowed to make to the original project or application?

(6) Shouldn't the fee to be deposited in the local agency account be two thousand dollars (\$2000) for each 1000 kilowatt of capacity, to more accurately reflect the cost of expert guidance and legal expenses?

900-3.2 Transfer Applications for Pending Article 10 Facilities

(a)(1)(i) Why is there no requirement that the Secretary of the PSC agree to this transfer?

(vi) Shouldn't the fee to be deposited in the local agency account be two thousand dollars (\$2000) for each 1000 kilowatts of capacity, to more accurately reflect the cost of expert guidance and legal expenses?

(2) Shouldn't this part be reworded to avoid confusion about what the Office will actually do? "the Office will DEVELOP the necessary site-specific CONDITIONS to avoid, minimize and mitigate significant adverse environmental impacts to the maximum extent practicable, including requirements for additional compliance filings beyond those set forth in Subpart 900-10 of this Part, as necessary." Will the Office be doing the actually be doing site work? Will the Office be writing the rules to adapt to the needs of the applicant and the project? This sentence doesn't make it clear, does it?

(b)(6) Again, shouldn't the fee to be deposited in the local agency account be two thousand dollars (\$2000) for each one thousand (1000) kilowatts of capacity, to more accurately reflect the cost of expert guidance and legal expenses?

Subpart 900-4 Processing of Applications

900-4.1 Office of Renewable Energy Siting Action on Applications

(c) and (h) To prevent the Office from getting "sandbagged" or stamped by a deluge of applications, and thus, failing to protect the "health, safety, well-being" or property rights of residents, shouldn't the Office have a "queue" for applications, just as the NYSISO does? Could an application received also be assigned a number in the queue, to prioritize them? Wouldn't (h) open the Office to legal liability for dereliction of duty for failure to perform the duties for which the Office was created, if they were unable to review a large number of applications? Who wrote these rules anyway?

(j) Why shouldn't the extension be able to be extended for more than 30 days?

(k) Why shouldn't the Office add to these regulations, the ability for public review of the application AND include in those who may request, and whose consent is considered, in the right to request extension of the time period for determination of completeness or incompleteness by any entity, agency, person, group, or organization listed at 900-1.6(a) (1-8) with the addition of, any local agencies, potential intervenors, or property owners in the proposed facility study area? Don't all these have a legitimate interest in an accurate and complete application and all the required exhibits? Wouldn't section (h) above, be an illegal override of this right?

Subpart 900-5.1 Local Agency Account

All of these requirements, among others, need to be met by prospective intervenors within thirty days after the date on which the application is filed – which, of course, is on the applicant’s timetable. The intervenors may be caught totally off guard, need to drop everything else they are doing, review a voluminous document, line up all their expert witnesses, and describe their studies and methodology . . . One might say that this time frame is “unreasonably burdensome.”

(a) Considering all the requirements listed at (h) in this part, wouldn't it be more reasonable to allow a longer period, 60 days, for local agencies and potential community intervenors seeking funds from the local agency account to submit requests? Most of these entities have no experience or background in these areas, and need more than 30 days to find experts, outline work needs, and execute contracts, as required.

(b) As the local agencies and potential community intervenors are tasked with contributing "to an informed permit decision as to appropriateness of the site and the facility" and "to determine whether a proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations", is there any reason why the agencies and potential intervenors should not be allowed to request and be granted an extension of the period for the determination of completeness or incompleteness of the application?

(h)(2) The requirements for proof of residency are discriminatory and impossible for some residents to meet. There are members of our rural communities that do not have any of these

items that prove residency. These hard working people should have equal access to community intervenor funds, with other proofs to be considered.

900-7.1 Amendment of an Application

(a) Does this part give the applicant the ability to change the application after the entire pre-application process has been completed, with no review or consultation with local agencies, community members, other interested organizations, or regional, state or federal agencies?

(b) Why is the Office the only entity that determines whether the changes requested constitute a minor or a major amendment? Why doesn't it mention the process or ability of any others to contest the decision?

(c)(2) Considering that this includes proposals to increase the nameplate capacity of the facility, which would increase the noise output, as well as other impacts, why doesn't this section mention any notice to, review of, or approval by local officials, community members, other interested organizations, or regional, state or federal agencies? Why doesn't it mention the process or ability of any of these entities to contest the change?

Subpart 900-8 Hearing process, 900-8.1 Publication of draft siting permit

(b) Is there, back there in the beginning of these regulations somewhere, any requirement for the publication in 2 local papers, one being free, that an application has been deemed complete by the Office, and that the items mentioned in this part are available on the ORES website? If not,

why not? If an application has been deemed complete, isn't it important that all potentially affected and interested parties be made aware of the fact?

Thus, prospective intervenors have only thirty days after the filing of an application in which to meet the numerous requirements for applying for approval and funding, and thirty days later there will be a draft permit to review in addition to the initial application.

900-8.2 Notice of hearing

(a) Why does this section state that persons who wish to participate in a public hearing have to make a written request to do so? Does that mean that they just have to sign in when they arrive and check a box indicating that they wish to speak? Can you site the law that requires this, and show where it passes muster in terms of the open meetings laws? Shouldn't the last sentence read "Nothing herein shall authorize the ALJ to delay the commencement of the hearing beyond the deadlines established in this Part, without the applicant's consent, except for natural disasters, pandemics, emergencies, and dangerous weather conditions", or be struck completely?

(d)(1) This should read," The deadline and instructions for filing public comments on the draft permit conditions or statement of intent to deny by mail or at a in-person, non-virtual public comment hearing, and of the provisions for their review. The period for filing public comments shall be a minimum of sixty (60) days from the date of issuance of the combined notice, with the right of any interested party to request and receive an extension of 30 to 60 additional days." Doesn't it seem Draconian that the Office has already refused to extend the public comment period on these regulations, as residents of this state struggled to protect their health, restart

schools, participate in a challenging election process, save their jobs and businesses, AND prepare for what is predicted to be a very difficult winter? Can transparency be expected from an agency that refused to post the comments on these regulations from agencies, organizations and the public?

(e) Which "other persons" will "the Office deem to have an interest in the application"? Shouldn't the municipality also publicize the hearing and collect the contact information from those who wish to be "served"?

900-8.3 Public comment hearing and issues determination.

(a) Public comment hearing (1)- Why would" A stenographic transcript of such statements" "be made but shall not be part of the record of the hearing"? And, if, in section 900-8.11, the applicant, rather than the ALJ, made arrangements to produce a stenographic record, would it require a certified reporter?

(c) Standards for adjudicable issues.

(iv) Why do public comments and those by a potential party have to be both substantive AND

significant to be adjudicable? (2) If a substantive issue shows sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to a project, isn't that

(3) significant because it should have the potential to result in denial of a siting permit, a major modification to the proposed project, or the imposition of significant permit conditions to those proposed in the draft permit, including uniform standards and conditions?

(6) Why shouldn't the completeness of an application, as defined in this Part be an issue for adjudication? If an applicant leaves out, or does not provide accurate information, they have not met the requirements of the application, have they?

900-8.4 Hearing Participation

(d) It is not clear whether private citizens or community intervenors will be allowed to contest any lack of compliance with “local ordinances, laws, resolutions, regulations, standards and other requirements.”

900-10.2 Pre-Construction Compliance Filings

(b) Final Decommissioning and Site Restoration Plan- If the permittee could install components more than 4 feet below grade in agricultural land and 3 feet below grade in non-agricultural land, why shouldn't they remove them from that depth?

(e) Construction Management (3)(i)or(ii) There is no mention of Battery Energy Storage Systems here, are they considered part of the facility, if they are called "stand alone", or are they part of the electric collection, transmission, and interconnections?

(6) Would the environmental monitor be a permanent employee/ subcontractor/ independent consultant or a temporary one? If temporary, for which components of the project?

(7) A Complaint Management Plan

(iii) Shouldn't it require a time limit, perhaps less than 4 hours, for a response from the permittee/ operator? Isn't "timely" very vague, for these regulations that are loaded with time limits?

(iv) Logging and tracking of all complaints

(e) This should include "Current status, DATE AND TIME of response and description of measures taken to resolve complaint."

(v)(vi)(vii) the complaint resolution tracking reports should be filed quarterly, so that growing problems at the facility don't go too long without being noticed by the Office and NYSDPS.

(8) Traffic Control Plan

(ii) Shouldn't there be a limit to the number of trips allowed per day, a traffic monitor and traffic control contractors, and special instructions to drivers about unusual situations, unexpected conditions, and hazardous locations in the area, or along the route?

(iv) The road use and restoration agreements include "local, STATE AND COUNTY roads, bridges, culverts, drainage features and other roadway infrastructure damaged by heavy equipment, construction, TRANSPORTATION OF COMPONENTS, or maintenance activities during construction and operation of the facility."

Subpart 900-11 Modifying, transferring, or relinquishing permits, 900-11.2 Transfers of Permit and Pending Applications

(b) This should read "Applications for the transfer of permits in effect, or pending permit applications, to a different permittee or applicant, or to change the name of the permittee or applicant, shall be submitted to the Office AND THE LOCAL MUNICIPALITIES, and shall contain:"

(g) Similarly, this should read "Any noncompliance by the existing permittee, associated with a permit proposed to be transferred, shall be resolved to the Office's satisfaction AND THAT OF THE LOCAL MUNICIPALITIES prior to the transfer of such permit."

Statements from individual members:

*Note: Comments from the following CCRP members do not necessarily represent the opinions of CCRP.

1. Sandy Maine:

I am a local entrepreneur involved in running two companies in St. Lawrence County within the blue line and on the outskirts of the Adirondack Park. One of my companies is a low tech manufacturing company that employs as many as 18 people during peak season. My other business is a short term rental business. I rent cabins in natural settings to tourists who wish to spend time enjoying the natural beauty of our area and thereby renew themselves physically and mentally.

A lot of my revenue comes from recreational tourists who either rent cabins or own second homes in my area. These people visit my factory outlet store and then order on line when they go back to their home bases. Over the past ten years this tourism revenue stream has grown for me and many other local businesses.

Our location is becoming more and more attractive to tourists who enjoy time hiking, boating fishing, camping and being in natural settings. (One popular short term rental platform called Airbnb has documented that searches for short term rentals have increased 165% in the past 18 months in SLC.) Tourists also value being among the many AMISH farms and farm stands where they enjoy buying fresh foods and baked goods from farm stands as well as seeing the Amish at work in their fields. Our area is beginning to look like a happy place and tourists love to visit happy places...and small business thrives when they do.

This change of landscape has been a hard won and welcome one from a previous travesty of the 1970's where **big business** factory dairy farms put hundreds of North Country small farmers and their offspring out of work, out of life style, and out of business. Hundreds of beautiful small farms and livelihoods were left in abandoned status making our area very desolate, poverty struck and miserable. Not only was that a terrible problem on so many levels with ripple effects into subsequent generations of displaced farmers, it also caused our natural ability to have a working rural economy to be turned on its head. Our milk, cheese and hay and corn profits are now going to the large farm conglomerates and silent investors instead of local folks working so hard to create that value. The old order Amish have bought up the smaller farms in SLC and are

helping to regenerate the land, farm houses and community wealth. My point here is that protections from big business were largely non-existent in the 70's and our area was unfair game for corporate farm developers. There have been devastating effects for two generations of residents because of this. And now....here we are again with the renewable energy multi national corporations.

I have grave concerns that the Office Of Renewable Energy Siting is in the talons of a process engineered by the lawyers and lobbyists of multinational corporations to once again silence the voices of rural residents. We do not want our landscape and valuable farm lands co-opted for the sake of massive scale wind and solar energy projects. Its hard to imagine any economic upside to this for us and easy to imagine devastating downsides for rural residents.

Collectively we have made progress regenerating our region since its ruination 50 years ago by corporate marauders. Let us not make the same mistake again! Any renewable energy projects should be **locally owned** and appropriately sized and sited. Over ruling the rights of rural citizens and communities to effect their own destiny denigrates our guaranteed constitutional right to life liberty and the pursuit of happiness.

The St Lawrence County Farm Bureau and others have submitted explicit lists of problems with your draft rules. Please listen to our wisdom and spare us. The future is not about the "1 % take all" model of greed and destruction, but rather it's about the equitable and just ownership and sharing of resources and responsibilities.

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2. Richard Hayes Phillips, Ph.D.

These proposed regulations are as tyrannical as the legislation to which they are pursuant. The whole purpose is to facilitate the approval of large-scale industrial wind and solar facilities by overriding local zoning laws and making public opposition meaningless. I am familiar with both the draft and the final versions of the legislation. It is obvious when examining the differences between the two that the concerns of state agencies defending their turf were addressed, and the concerns of citizens and local governments whose zoning powers would be stripped away were dismissed.

The New York State Constitution, Article IX, Section 2, Paragraph (c), states that "every local government shall have power to adopt and amend local laws not inconsistent with the provisions

of this constitution or any general law relating to property, affairs or government.” (emphasis added).

A “general law” is a statute that applies equally, across the boards, statewide, to all municipalities, as does the law pursuant to which these regulations have been proposed.

Courts at the state level have held that the encroaching governmental unit (such as the Office of Renewable Energy Siting in the instant case) is subject to the zoning laws of the host community unless exempted by state legislation, in which case a local law governing the same subject matter must yield. However, courts at the federal level have held that, in the interest of fairness, state legislation and administrative regulations must not be construed to be retroactive unless the wording is so clear that no other interpretation is possible, or unless the intent of the state legislature cannot otherwise be satisfied.

The lawful enactment of setback requirements in the towns of Hopkinton and Parishville (and elsewhere) establishes a vested property right for all non-participating landowners whose property lines are within the setback distance. Any violation of these rights by the applicant or by the encroaching government agency would constitute a “taking” under the Fifth Amendment of the United States Constitution, in which case, upwards of three hundred non-participating landowners would have to be compensated.

The proposed regulations would negate previous administrative victories by citizen opposition; would exempt the applicant from any zoning laws deemed “unreasonably burdensome”; would fail to make the application readily available to the public; would establish minimal setback requirements for wind turbines (and substations); would fail to require graphs of electromagnetic field strength at any distance from substations; would allow for no challenge to the completeness of the application, even if “deemed complete” by default; would impose unreasonably burdensome requirements on short notice upon prospective citizen intervenors; and would make a charade of “public hearings” wherein oral testimony “shall not constitute evidence” and “shall not be part of the record of the hearing.” Only a cynic would consider this to be “due process” under the Fourteenth Amendment of the United States Constitution.

Seneca Nation of Indians

Section 900-1.2: The definition "Person" should include "federally/state recognized Indian Nation."

Section 900-1.3(a): Where a proposed project lies within the original aboriginal territory of a federal/state recognized Indian Nation, the pre-application procedures should require pre-application meetings with that Indian Nation to determine whether the proposed site may affect a tribal historical site or the cultural resources of that Indian Nation.

Section 900-1.3(f): All references to the regulation of "waters" should explicitly recognize and include tribal regulation of certain water resources pursuant to Section 518 of the Clean Water Act.

Section 900-1.3(h): Applicants should be required to conduct a Phase IA archeological/cultural resources study for the project impact area if the area falls within an area of archaeological sensitivity as determined by the Indian Nation which claims the area within its original aboriginal territory.

Section 900-2.10: The proposed study required by Exhibit 9 should include, in the event of an unanticipated discovery of a cultural, historical or archaeological importance, consultation with the Indian Nation which claims the proposed project area within its original aboriginal territory.

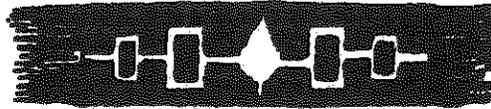
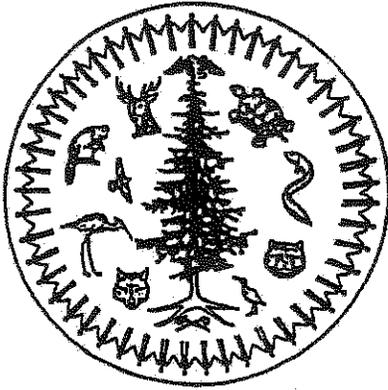
Section 900-2.12: Exhibit 11 should reflect and require that the applicant consult with the Indian Nation which claims the proposed project area within its original aboriginal territory in order to determine best practices for management of the terrestrial ecology, recognizing the long history of environmental stewardship conducted by Indian Nations.

Section 900-2.14(b): This section should explicitly recognize and include the right of Indian Nations to regulate surface waters located within its territories, as well as the right to regulate certain off-reservation waters pursuant to the Clean Water Act.

Section 900-2.25: In order to recognize the sovereign regulatory authority of federally/state recognized Indian Nations, Exhibit 25 to an application should also list any tribally required permit, consent, approval or license required for the construction or operation of the facility, as well as a statement of whether the applicant knows of others who have any pending tribal applications or filings which concern the facility.

Section 900-8.4(b): Indian Nations should be full parties to any proceeding where they were consulted during the pre-application or application process, or where issues related to the jurisdiction or authority of the Indian Nation are implicated in any manner.

Section 900-10.2(g): The Cultural Resources Mitigation and Offset Plan should be revised in consultation with the Tribal Historic Preservation Officer (THPO) for the Indian Nation which has rights to the cultural resources impacted by the construction and operation of the proposed facilities, in the event that the National Historic Preservation Act, Section 106, does not require implementation of a mitigation plan.



HAUDENOSAUNEE

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December 7, 2020

Houtan Moaveni
Deputy Executive Director
New York State Office of Renewable Energy Siting
99 Washington Avenue
Albany, New York 12231-0001
RE: Chapter XVIII Title 19 (Subparts 900-1 – 900-5; 900-7 – 900-15)

Nya:wēh Sgē:nō', Mr. Moaveni;

On behalf of the Tonawanda Seneca Nation, Council of Chiefs, I'd like to extend greetings to you and your associates and give thanks that all are enjoying good health.

We understand your office is developing regulations to govern the siting of large electric generating facilities in New York. These regulations must ensure that the sovereign rights and interests of Indian Nations are respected. We request that the State of New York require, at a minimum, that Section 900-1.3 require an applicant to conduct pre-application meetings with Indian Nations whose ancestral territories may be affected by the project, just as meetings are required with local governments. Early consultation can help avoid situations in which an applicant unknowingly seeks to construct a project in a particularly sensitive area, such as an area where ancestors are buried or a location with particular spiritual significance. As a point of reference, applicants could use the "Areas of Interest" map developed by the Office of Parks, Recreation and Historic Preservation (OPRHP) in consultation with the Haudenosaunee and other Indian Nations. In pre-application meetings, applicants should provide Indian Nations with the full range of information provided to local governments, as laid out in Section 900-1.3(a).

In addition, Section 900-1.3(h)(2) should require that an applicant submit all Phase 1A surveys to Indian Nations and OPRHP when the surveys are submitted to ORES, to ensure the Nations and OPRHP are informed prior to decision-making regarding Phase 1B analysis.

Finally, we recommend your office establish a position with responsibility for consulting with Indian Nations. Consultation must be done properly and successful consultations require time, effort, and

education. Only by building relationships with Indian Nations will your office be able to ensure renewable energy projects help and do not harm Indian Nations and their traditional territories. We thank you for your attention to this matter.

Da:h ne'hoh,

A handwritten signature in cursive script that reads "Christine G. Abrams".

Christine G. Abrams
On behalf of the Council of Chiefs
TSN Office Administrator
Tonawanda Seneca Nation