STATE OF NEW YORK
SUPREME COURT ALBANY COUNTY

TOWN OF COPAKE, AMERICAN BIRD CONSERVANCY, SAVE ONTARIO SHORES, INC., CAMBRIA OPPOSITION TO INDUSTRIAL SOLAR, INC., CLEAR SKIES ABOVE BARRE, INC., DELAWARE-OTSEGO AUDUBON SOCIETY, INC., GENESEE VALLEY AUDUBON SOCIETY, INC., ROCHESTER BIRDING ASSOCIATION, INC., TOWN OF CAMBRIA, TOWN OF FARMERSVILLE[1], TOWN OF MALONE, TOWN OF SOMERSET, AND TOWN OF YATES,

DECISION, ORDER And JUDGMENT
Index No.: 905502-21

Petitioners/Plaintiffs,

vs.

NEW YORK STATE OFFICE OF RENEWABLE ENERGY SITING, HOUTAN MOAVENI AS ACTING DIRECTOR OF THE OFFICE OF RENEWABLE ENERGY SITING, NEW YORK STATE, NEW YORK STATE DEPARTMENT OF STATE, AND JOHN DOES 1-20,

Respondents/Defendants,

and

ALLIANCE FOR CLEAN ENERGY NEW YORK, INC.,

Intervenor-Respondent.

INTRODUCTION

By corrected Decision and Order dated September 21, 2021, incorporated herein and made a part hereof by reference, this Court denied Petitioner's motion for a preliminary injunction.[2] As a combined CPLR Article 78 and a Declaratory Judgment action pursuant to

[1] See NYSEF Doc. No. 58.- Town of Farmersville has withdrawn from the proceeding.
[2] See NYSEF Doc. No. 149.

CPLR §3001, the relevant facts are in the record and are not in dispute. Accordingly, a summary determination is appropriate (CPLR R 409 (b)).

COMPARISON TO PSC ARTICLE 10

Petitioner compared an PSC Article 10 review to an ORES review, to support its claim that ORES failed to take a hard look at the relevant environmental impacts when it adopted the regulations. For example, Petitioner claims the Article 10 regulations are merely procedural, while the ORES regulations impose substantive uniform standards and conditions, with a default provision.[3] Whether the regulations are classified as procedural or substantive, however, no specific project has been approved by the adoption of the regulations. Moreover, a default approval in the absence of uniform standards would have evidenced a failure of the hard look test, i.e., it was necessary to establish uniform standards and ORES did so.

Petitioner also cites the PSC Article 10 scoping process, and the lack thereof under ORES, to support its claim that ORES failed to take a hard look at the lack of public input. [4] In this Court's view, the exhaustive exhibit mandate imposed by the regulations effectively renders the lack of a scoping process reasonable. Notably, Petitioner has not cited any deficiency in the required application exhibits which would establish a need for scoping. Petitioner also fails to account for the required public input in advance of the filing of an application in the first instance.

Petitioner also compared the waiver standards attendant an Article 10 proceeding, to the ORES waiver process.[5] Petitioners assert that the PSC standard to allow a waiver if a local law unduly burdens the project from a technology, cost, or consumer impact standpoint is acceptable.

[3] NYSEF Doc. No. 167. MOL p. 2. See also See § 900-6.
[4] NYSEF Doc. No. 167. MOL p. 6-7.
[5] NYSEF Doc. No. 167. MOL p. 30-32.

Yet, Petitioner claims that the ORES standard to allow a waiver if a local law unduly burdens the environmental benefits of a renewable energy project from a technology, cost, or consumer impact standpoint is not a sufficiently objective standard, and results in improper delegation of authority. In this Court's view, the regulation is not vague and does not impart limitless discretion to ORES.

REVIEW OF PETITIONER'S ARGUMENTS

In the prior Decision, the Court determined that with due diligence, the regulatory structure is workable to accomplish a determination by the Director. Absent due diligence, however, it is likely that default approvals may occur, especially if the ALJ determines that an adjudicatory hearing is necessary in addition to the public comment hearing more fully discussed below.[6]

Petitioner also claims that defaults are "anticipated" and "likely."[7] In turn, Petitioner claims that the rigors of the regulatory structure were designed to eliminate public input, that public input is "illusory," and the conduct of public hearings would be "virtually impossible," citing by way of example ORES's recent review of the Heritage Wind Project.[8] Petitioner's claim assumes bad faith and regulatory non-compliance by ORES in the conduct of project review.[9] At this juncture, however, it is the adoption of the regulatory structure, not its implementation, that is at issue.

This public illusion claims are belied by the regulatory structure. By design, the regulations mandate public participation from the inception of the process. Before filing an

[6] NYSEF Doc. No 149 Decision p. 8, 13.
[7] NYSEF Doc. No. 167. MOL p. 4, 7.
[8] NYSEF Doc. No. 167. MOL p.3, 6, 9. ORES 's determination in the Heritage Project is not before this Court but is subject to judicial review.

[9] There is no basis in the record for the Court to make any such assumptions.

application, the applicant is required to meet with local officials, identify the local laws they seek waivers on, hold a public hearing, and submit the transcript thereof as part of the application.[10] Once the application is filed and draft permit conditions prepared, ORES must seek public comment, either by public comment hearing or adjudicatory hearing.[11]

The regulations mandate a public comment hearing on the draft permit conditions, to wit:

> "Not less than 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…
>
> 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."[12] (emphasis added)**

If the ALJ determines that there are no substantive or significant 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.**"[13] (emphasis added)

[10] See 900-1.3 (a) (4), (b) and (d).
[11] See 900-8.1 which provides: "No later than 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." (emphasis added). See also 900-8.2 (a)
[12] See § 900-8.3 (a) (1) (3).
[13] See § 900-8.3 (c) (5).

If the ALJ determines that there are substantive or significant issues, party status applications must be determined, and an adjudicatory hearing shall be conducted.[14]

Once the ALJ had made a final decision,

> "Office staff has 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**."[15]

Thus, public comments reach the Director in advance of and prior to the issuance of a final determination.[16] Contrary to Petitioner's claim, the regulations seek and provide a full opportunity for public input. If ORES violates the regulations during any project review, such violation is subject to judicial review beyond the scope of this proceeding.

Petitioner claims that ORES did not take a hard look at public comments as evidenced by the fact that it did not credit a single comment.[17] By way of illustration, Petitioner claims that the response to setback comments were demonstrative of an unauthorized after-the-fact attempt to comply with SEQRA.[18] I think not.

The relevant comment and response are set forth below:

> "Comment
>
> Multiple commenters raised concerns regarding, and requested increased, property **boundary setbacks requirements** for wind and solar facilities set forth in Table 1 in §900-2.6(b) and Table 2 in §900- 2.6(d), respectively…
>
> Discussion

[14] See § 900-8.3 (b) (5) and 8.4. see also, EL§ 94-c (5) (d).

[15] See § 900-8.12 (a) (3).
[16] See § 900-8.12 (c).
[17] NYSEF Doc. No. 167. MOL p.12.
[18] NYSEF Doc. No. 167. MOL p.14, 18.

> The Office's primary concern is the health and safety of all New Yorkers, and the Office will continue to consider that paramount concern in its decisions. To protect public health and safety as well as property owners' rights, the regulations set **forth minimum setback requirements** based on careful consideration of the best practices for siting renewable energy projects, engineering guidelines, past precedents for Article 10 cases and typical local law requirements in New York State. Section 900-2.6(f)(5) requires that applicants submit manufacturer information regarding the design, safety, and testing information and Section 900-2.6(b) requires wind facilities meet the setback requirements in Table 1 or manufacturer setbacks, whichever are more stringent. **The setbacks will be determined for each permit application based on site-specific factors and may need to be increased beyond these minimum distances in order to address regulatory requirements regarding potential public health and safety concerns as well as other potential siting impacts such as noise, visual, environmental, cultural, etc**. …
> **The Office will evaluate all the above listed concerns and factors on a case-by-case basis for each impact category prior to determining if proposed setbacks are acceptable.** No change is warranted."[19]

The response was reasoned, not demonstrative of kicking SEQRA analysis down the road. The response simply reflects that no specific project is at issue herein. Moreover, the regulations set minimum setback standards, which are subject to review and adjustment to reflect individual project concerns. Thus, the minimum setback issue was identified, and ORES proffered a reasoned basis to support its determination that no change is warranted.

Petitioner claims that the ORES failed to take a hard look at the regulatory impact on noise,[20] asserting, "ORES in response ignored the science and concluded that, because noise annoyance can be accompanied by negative opinions about a wind farm, noise annoyance is caused by negative opinions and does not affect health. R0107".[21] Searching the record, the

[19] NYSEF Doc. No. 91 Vol. I, R 0142-0143.
[20] NYSEF Doc. No. 167. MOL p.15.

[21] NYSEF Doc. No. 167. MOL p. 15.

Court did not find any such response. Rather, review of the actual comments and responses evidences that Petitioner's claim is grossly misleading, to wit:

> "Comment
>
> Several commenters expressed their concerns about public health and **noise,** vibration, infrasound, radiation, electromagnetic fields, and stray voltage associated with wind turbines. For instance, a commenter raised concerns regarding wind turbine noise, noting that the health of rural communities was not being considered and that the state could disregard local laws protecting the health and safety of residents during the approval process. Such potential health concerns that were raised includes migraines, dizziness, nausea, anxiety, ear pressure, heart palpitations, sleep disturbances, vertigo, and tinnitus. Additional concern was raised regarding the lack of research around the health effects on people in the vicinity of wind farms, including suffering from Wind Turbine Syndrome.
>
> Discussion
>
> The health and safety of nearby residents is of paramount concern to the Office. The Office developed the wind noise regulations to protect public health and safety and considered varied environments including those of rural communities in their development. A 45 A-weighted decibel (dBA) Leq (8-hour) noise limit was found to be safe by the New York State Board on Electric Generation Siting and the Environment after analyzing the World Health Organization (WHO) guidelines, the Health Canada studies, the Lawrence Berkeley National Laboratory studies, and other studies presented under Article 10 cases. In 2016, the Ministry of the Environment of Japan issued a report evaluating wind turbine noise and its effects, based on the review of an expert review panel, which echoed similar studies conducted in other jurisdictions including but not limited to Canada, Australia, Massachusetts, and Oregon. After careful assessment of the evidence obtained from peer reviewed research results from around the world, **it was concluded that wind turbine noise likely has no negative effects on human health; however, wind turbine noise can lead to annoyance**. No clear association is seen between infrasound or the low-frequency noise of wind turbine noise and human health. **Some research results suggest that wind turbine noise related annoyance is also affected by other issues such as visual aspects or economic benefits**. No change is warranted…

> Comment
>
> A commenter recommended that "participants" and "non-participants" be treated similarly regarding public health and safety, specifically with respect to **noise** limits. As such, it was recommended that the Office delete the references to non-participants at §§900-2.8(b)(1)(i), 900-2.9(d)(6), and 900-10.2(h)(3).
>
> Discussion
>
> Based on past precedents and scientific literature, **annoyance for participating residents receiving compensation is lower than for non-participating residences when exposed to the same noise levels.** Further, the evidence also shows that at a 55 dBA noise level annoyance for participating residents receiving compensation is not greater than annoyance for non-participating residents when exposed to a lower 45 dBA noise level. In addition, review of the evidence discussed in the WHO's 2009 guidelines showed a zero risk for cardiovascular disease for people exposed to long-term noise levels between 50 dBA L night and 55 dBA L night) during the nighttime period. Therefore, the Office does not see a reason to modify precedents and apply the same limits to both participating and non-participating receptors. No change is warranted."[22]

The point made is that ORES did not, as Petitioner implied, issue a flippant response to the noise comments. Rather, ORES engaged in a reasoned analysis of the noise issue and determined its proposed regulation was appropriate.[23]

Petitioner claims the determination of a 1-year default period was arbitrary and capricious and not science based relative to impact on threatened and endangered birds, to wit:

> "Save Ontario's Shores comments pointed out that "[h]abitat assessments and/or field surveys" are limited to one year under the ORES program, depart from "established guidelines", **"one year is arbitrary and lacks scientific basis, a**nd compliance with the time limit "mak[es] it impossible to adequately review applications

[22] NYSEF Doc. No. 91 Vol. I R0146-0147.
[23] See 19 NYCRR § 900-6.5 – minimum noise standards.

> within the time allowed." R5674 (citing 900-1.3 (g) (2) (iv))".[24] (emphasis added)

The fundamental flaw with Petitioner's analysis is that an extensive endangered and threatened species study is mandated to take place before the application is filed, i.e., before the 1-year review period commences.[25] The regulations provide:

> "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…[26]

The regulations also require ORES and DEC review before the study will be accepted as part of the application, to wit:

> "The applicant shall provide the **approved** wildlife site characterization report, habitat assessment and/or survey reports, and Net Conservation Benefit Plan (if required) in the siting permit application as provided in section 900-2.13 of this Part."[27] (emphasis added)

In context of the extensive and sophisticated pre-application requirements, there is a rational basis for the 1-year application review period.

[24] NYSEF Doc. No. 167. MOL p. 17.
[25] See 19 NYCRR § 900-2.12.
[26] See 19 NYCRR § 900-1.3 (g) (1).

[27] See 19 NYCRR § 900-1.3 (g) (8).

Petitioners claim that ORES was required to issue a positive declaration "because promulgation of the new Regulations has the **potential to result indirectly, but inevitably**, in at least one potentially significant adverse environmental impact…"[28] (emphasis added) SEQRA Regulation §617.7 (a) (1) provides:

> "**(a)** The **lead agency must determine the significance** of any Type I or Unlisted action in writing in accordance with this section.
>
> **(1) To require an EIS** for a proposed action, the lead agency must determine that the action **may include the potential for at least one significant adverse environmental impact**." (emphasis added)

The SEQRA regulations do not include the cited phrase "**indirectly, but inevitably,"** with good reason, for such terminology is wholly speculative in the absence of a specific project undergoing review.

Petitioner's claim,

> "for projects that receive a Default Approval, **any site-specific permit conditions ORES proposes, or USCs without any site-specific conditions will be adopted without any opportunity for a hearing.** In such cases ORES's approach to mitigating adverse impacts is ineffective, and in fact irrational."[29] (emphasis added)

I disagree. There is simply no correlation between the 1-year default period and the conduct of a hearing. As aforementioned, a public comment hearing must be convened within 180 days of the filing of the application.[30] While the determination of whether an adjudicatory hearing is required is subject to the determination of the ALJ, public comment is not restricted during the public comment hearing.[31]

[28] NYSEF Doc. No. 167. MOL p. 19-20.
[29] NYSEF Doc. No. 167. MOL p. 21.
[30] See § 900-4.1 (c), 900-8.1, 8.2 and 8.3.

[31] See § 900-8.4 (a).

With respect to Petitioner's claim that a default approval will not account for necessary site-specific conditions, Petitioner fails to recognize the site-specific consequences of a default approval. Upon a default approval,

> "such siting permit shall be deemed to have been automatically granted for all purposes set forth in this section and **all uniform conditions or site specific permit conditions issued for public comment shall constitute enforceable provisions of the siting permit…"** [32](emphasis added)

Notably, the "site specific permit conditions issued for public comment" are issued after the public has already had an opportunity to give public comment in advance of the filing of the application. Moreover, the uniform conditions provide,

> "The **permittee shall implement** any impact avoidance, minimization and/or mitigation measure**s identified in the exhibits, compliance filings and/or contained in a specific plan required under this Part 900**, as approved by the office."[33] (emphasis added)

Exhibit "6" provides, inter alia:

> " **(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:
>
> **(**7) Any measures proposed by the applicant to minimize such impacts;
> (8) Any measures proposed by the applicant to mitigate such impacts; and

[32] EL§ 94-c (5) (f).
[33] See § 900-6 (1) (a).

(9) Any monitoring of such impacts proposed by the applicant."[34]

The point made is that Exhibit "6" goes into effect upon a default, incorporating all the minimum standards in See § 900-6, and all the minimization/mitigation site-specific measures identified in the exhibits i.e., it is not a vanilla approval. Even a default approval will have the benefit of pre-application public comment.

Petitioner's claim that,

> "at least one potentially significant adverse environmental impact would result" and cited examples: "**threatened or endangered birds and bats and their habitats…would not be identified**", "unhealthy **noise levels amounting to a legal nuisance** are allowed", and "local setbacks deemed necessary to protect existing community character will be overridden and replaced by the **developer-friendly** setbacks mandated in ORES's regulations."[35] (emphasis added)

Such claim is belied by the regulatory procedures mandating that studies for endangered species, noise, and setbacks be included in any application.[36] Petitioner's claim that noise standards are the equivalent of a "legal nuisance," is entirely unpersuasive.

The objectivity of the setbacks, as distinct from the developer friendly label, is indicated by the required manufacturer approval for the site use, in accord with the following regulations:

> "**(b)** Wind facilities shall meet the setback requirements in Table 1 **or manufacturer setbacks, whichever are more stringent**.
> **(f) (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**)."[37]

[34] See § 900-2.7.
[35] NYSEF Doc. No. 167. MOL p. 21
[36] See § 900-2.13 -Exhibit 12 -endangered species; 2.8 Exhibit "7" -noise, and 2.6 Exhibit "5" – design and setbacks.

[37] See § 900-2.6 Exhibit "5"

Mandating strict compliance with manufacturer's standards is hardly "developer-friendly" and it is manifest that the setback mandates are not arbitrary and capricious.

Petitioner objects to the claimed reliance on any prior GEIS, which did not consider siting.[38] I agree. That is why Respondent was required to and did conduct a distinct SEQRA review in accord with 6 NYCRR § 617.10 (d) (3).

Petitioner goes to great lengths to debunk the "environmental collapse" claim, and cites challenges connecting to the electric grid.[39] Petitioner fails to account for the mandate that an electric systems effects and interconnection report be made part of the application.[40] While development of solar and wind farms as a source of electricity may have its challenges, the regulatory structure to review these renewable energy projects is reasonable.

Petitioner challenges ORES's ability to grant waivers on a case-by-case basis, relieving project applicants from the obligation to comply with local law, as a special law violative of municipal home rule power, and as an improper delegation of authority due to the lack of appropriate standards.[41] Petitioner's argument fails to distinguish between the authority to issue a waiver, which applies to every application, and the implementation of that authority. Clearly, the authority to issue a waiver is a general law applicable to all municipalities, not a special law. To assess any waiver application, however, there must be a specific project to identify the local laws

[38] NYSEF Doc. No. 167. MOL p. 22-24

[39] NYSEF Doc. No. 167. MOL p. 24-26.

[40] See § 900-2.22 Exhibit "21" which includes the following: "**(b)** A **system reliability impact study**, performed in accordance with the Federal Energy Regulatory Commission-approved Open Access Transmission Tariff (OATT) of the New York Independent System Operator, Inc. (NYISO), available at WWW.NYISO.COM, 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." (emphasis added)

[41] NYSEF Doc. No. 167. MOL p. 27-32.

of the relevant municipality. Of course, the implementation of the authority must be made on a case-by- case basis!

CONCLUSION

For the reasons set forth above, it is the finding of the Court that (1) Respondent complied with the SEQRA hard look test when it issued a negative declaration upon adopting the challenged regulations; (2) that Respondent conducted public hearings and issued substantive responses to comments, all in accord with SAPA; and (3) due to the State's preemption relative to the siting of major renewable energy facilities, adoption of the challenged regulations did not violate Article IX, §1 (a) of the New York State Constitution, nor the provisions of the Municipal Home Rule Law (see MHRL§ 50 (1)).

Accordingly, the Petition/Complaint is dismissed. This memorandum constitutes both the decision and order of the Court.[42]

Dated: Albany, New York
October 7, 2021

Peter A Lynch
PETER A. LYNCH, J.S.C.

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.

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[42] Notice of Entry and service in accord with CPLR R 2220 is required.

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