To be Argued by:
GARY A. ABRAHAM
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Third Department

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 MALONE, TOWN OF SOMERSET, AND TOWN OF YATES,

Petitioners/Plaintiffs-Appellants,

and

TOWN OF CAMBRIA, and TOWN OF FARMERSVILLE,

Petitioners/Plaintiffs,

– against –

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-Respondents,

and

ALLIANCE FOR CLEAN ENERGY NEW YORK, INC.

Intervenor-Respondent-Respondent,

(for continuation of caption, see inside cover)

Docket Nos.:
534318
534413

BRIEF FOR PETITIONERS/PLAINTIFFS-APPELLANTS

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Albany County Clerk's Index No. 905502-21

and

NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, NEW YORK LEAGUE OF CONSERVATION VOTERS, SCENIC HUDSON, NEW YORKERS FOR CLEAN POWER NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF FLINT MINE SOLAR, WIN WITH WIND, CARRIE AND WILLIAM MCCAUSLAND, SCOTT AND DONNA GRIFFIN, KENNETH ROBERTS, KAROL TOOLE, JOHN OHOL, AND FRIENDS OF COLUMBIA SOLAR, INCORPORATED,

Amici Curiae-Respondents.

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PRELIMINARY STATEMENT

The Accelerated Renewable Energy Growth and Community Benefit Act, 2020 N.Y. Laws 58 (Part JJJ), created the Office of Renewable Energy Siting ("ORES") to expedite the siting of renewable energy facilities—while taking all pertinent social, economic, and environmental factors into account. *See* N.Y. Executive Law § 94-c ("§94-c"). We show below that ORES violated its enabling statue and the State Environmental Quality Review Act ("SEQRA") by neglecting one-half of its statutory mandate – environmental protection.

ORES has promulgated Regulations establishing uniform substantive standards and conditions governing all renewable energy projects. Its regulatory process is subject to SEQRA. ORES concluded, however, that its Regulations could not possibly have any adverse impact on the environment because the Regulations themselves do not approve any particular energy project. It therefore refused to prepare an Environmental Impact Statement ("EIS"). The Supreme Court accepted that rationale.

It defies common sense to think that uniform substantive standards applicable to all projects cannot themselves have adverse environmental impacts. ORES's repeated suggestion that it may be more rigorous at the actual approval stage is hard to take seriously because, as ORES knows, the actual approval process is exempt from SEQRA. *See* N.Y. ECL § 8-0111(5)(b).

More importantly, ORES's rationale for refusing to do a full EIS is expressly forbidden by SEQRA, which required ORES at the regulatory stage to consider not only its Regulations but also "reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are . . . included in [the] long-range plan of which the [Regulations are] a part [and] likely to be undertaken as a result thereof [and] dependent thereon." 6 NYCRR 617.7(c)(2). ORES did not comply with that procedure. Without considering the impact of related, subsequent project approvals, ORES declared that the Regulations could not possibly have an adverse impact on the environment. Many cases have invalidated similar agency decisions to postpone environmental impact review to the permit application stage, holding that the refusal to prepare an EIS at the initial regulatory stage violates SEQRA.

ORES's "deferral" rationale also violates § 94-c, which requires that the Regulations *themselves* must "be designed to avoid or minimize, to the maximum extent possible, any potential significant adverse environmental impacts." § 94-c(3)(c).

ORES also acted arbitrarily by adopting regulations allowing waiver of local law for reasons beyond the scope of the legislature's delegation. The Supreme Court erred in ruling that ORES may waive local laws for reasons not permitted by statute.

It is important to state that Appellants do not challenge § 94-c, nor seek a return to the earlier siting process governed by Article 10 of the Public Service Law. We recognize the threats posed by climate change and the importance of alternative energy sources. The Court should not heed suggestions from Respondents or Intervenors that Appellants are obstructionists who would interfere with climate change mitigation policies. We challenge the ORES Regulations—written entirely by an industry consultant—because they demonstrably disregard the Legislature's mandate to protect the environment, and to waive local laws only upon a factual showing that doing so will avoid significant harms to the environment and meaningfully advance the state's energy goals.

Accordingly, the Court should reverse the decision below and (a) remand with directions to annul ORES' regulations and require ORES to engage in a new rulemaking process that takes all pertinent social, economic, and environmental factors into account, pursuant to SEQRA, and (b) require ORES to promulgate new regulations that comply with the standard for waiver set forth in § 94-c.

STATEMENT OF QUESTIONS

1. Did ORES violate SEQRA by classifying its Regulations as "Unlisted" rather than a "Type I" activity, which presumptively requires preparation of an Environmental Impact Statement ("EIS"). Answer below: No (R50, Sept 22, 2021, Order, pp. 26- 27).

2. Did ORES violate SEQRA in finding that its substantive standards for energy facility siting had no potential to result in an adverse environmental impact, issuing a Negative Determination of environmental significance, and refusing to prepare an EIS? Answer below: No (R19, Oct. 7, 2021, Order, p. 14).

3. Did ORES violate SEQRA by failing to take a "hard look" at the potential its Regulations pose for significant adverse impacts on the environment? Answer below: No (R19, Oct. 7, 2021, Order, p. 14).

4. Did ORES violate N.Y. Exec. Law § 94-c finding that its substantive standards for energy facility siting had no potential to result in an adverse environmental impact? Answer below: No (R57, Sept 22, 2021, Order, pp. 3) (R19, Oct. 7, 2021, Order, p. 14).

5. Are ORES's regulations governing waivers of local laws arbitrary and unconnected to its statutory mandate? Answer below: No (Sep 22, 2021, and Oct 7, 2021, Orders, R13-R14; R45-R47).

STATEMENT OF THE CASE

The facts relevant to this case are not in dispute. R7, Oct 7, 2021, Order, p. 2.

I. Background of State Regulation of Power Plant Siting

Section 94-c's predecessor is the Power New York Act of 2011, which created Article 10 of the Public Service Law, governing the siting of large power plants, including renewable energy facilities, and establishing the New York State Board on Electrical Generation Siting and the Environment ("Siting Board"). R70.

The Siting Board promulgated *procedural* regulations governing the consideration of power plant siting applications, but did not set across-the-board substantive standards. R71. Applications to the Article 10 Siting Board are exempt from review under SEQRA, although the Siting Board must make findings related to the avoidance and mitigation of adverse environmental impacts of a particular project. *See* N.Y. PSL §168(2), (3).

In 2019, the State enacted The New York Climate Leadership and Community Protection Act (CLCPA), which seeks to strike a balance "between the encouragement of large-scale renewable development and the preservation of the rural character and local economies of our communities" and "promises equality between climate-smart advances and the values of our local communities in this Home Rule state." R71-72 (quoting Assemblyperson Didi Barrett). The CLCPA

establishes as a matter of state policy "targets" that address emissions reductions compared to 1990 levels. The CLCPA targets include achieving 100% zero-emission electricity by 2040, and a reduction of greenhouse gas emissions economy-wide at least 85% by 2050. CLCPA § 4(2). To ensure the targets are achieved the CLCPA adds a new Article 75 to the Environmental Conservation Law that creates a "New York state climate action council". ECL § 75-0103. The Council is charged with, among other things, planning measures that would achieve, in the electricity sector, the addition of 6,000 MW of solar capacity by 2025 and 9,000 MW of offshore wind capacity by 2035. ECL § 75-0103(13)(3). There is no numerical goal for additional onshore wind energy capacity. Renewable energy technologies identified in the CLCPA include "solar photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells which do not utilize a fossil fuel resource in the process of generating electricity." CLCPA § 4(1)(b).

The next year, the State enacted the Accelerated Renewable Energy Growth and Community Benefit Act – at issue here – to further the climate and community protection goals of the CLCPA. New York L.2020, c. 58, pt. JJJ, eff. April 3, 2020. The Act charges the Environmental Conservation Department to establish the CLCPA's emissions reduction targets, and charges the Public Service Commission

to achieve the CLCPA's power section emissions reduction targets. *Id.* §§ 2(1)(a), (b). The Act also created ORES and authorized it to develop a more expedited siting-approval program than Article 10. *See id.*, § 4 (adding Exec. L. § 94-c). Section 94-c required ORES to adopt its implementing regulations by April 1, 2021, including setting forth substantive uniform standards and conditions applicable to all renewable energy projects. N.Y. Exec. L.§ 94-c(3)(g). Because the statute was proposed as a Governor's Budget Amendment following the end of debate on the proposed annual state budget, there is no legislative history.

II. Section 94-c

For present purposes, three aspects of § 94-c are particularly important – its emphasis on environmental protection, its requirement of across-the-board substantive standards for proposed projects, and its default approval provision.

A. *Environment Protection*

Recognizing the potential of large-scale renewable energy projects to harm communities, birds, other wildlife, and the environment, the statute requires ORES to establish uniform standards and conditions, applicable to all projects, that "*shall* be designed *to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts* related to the siting, design, construction and operation of a major renewable energy facility." N.Y. Exec. L. § 94-c(3)(c) (emphasis added). This provision is especially important because actual

project applications to ORES are not subject to SEQRA review. *See* N.Y. ECL § 8-0111(5)(b).

Similarly, §4(c) of the Accelerated Renewable Energy Growth and Community Benefit Act said that ORES's uniform standards and conditions would "address common conditions necessary to *minimize impacts to the surrounding community and environment*." New York L.2020, c. 58, pt. JJJ, § 4(c), eff. April 3, 2020 (Emphasis added) (available at https://ores.ny.gov/resources).

B. Substantive Standards and Conditions

Unlike the Article 10 Siting Board, which established only procedural requirements for applicants, § 94-c required ORES to adopt minimum *substantive* "uniform standards and conditions" ("USCs") to govern all renewable energy projects. N.Y. Exec. L. § 94-c(3)(b). ORES has in fact promulgated standards relating to visual impacts, noise impacts, bird protection, blasting, water supply protection, setbacks, construction in wetlands areas, construction hours, decommissioning, etc. *See* 19 NYCRR § 900-6.1 *et seq*.

C. The Default Provision

Speed of review is important under § 94-c: ORES must determine whether an application for a permit is complete within 60 days of its submission; must propose any additional permit conditions within 60 days of the completeness determination; and must make a final decision on the application within 12 months of the

completeness determination. N.Y. Exec. L. §§ 94-c(5)(b), (5)(c)(i), (5)(f). Failure to make a final decision within that 12 month period results in a default approval of the application *Id.* at § 94-c(5)(f).

But speed is not everything under the statute: as we have seen, ORES must ensure that its regulations avoid and minimize potential adverse impacts on the environment. § 94-c(3)(c). ORES must, "ensur[e] protection of the environment" and consider "all pertinent social, economic and environmental factors" in the permitting process, and "afford meaningful involvement of citizens affected by the facility". §94-c(1) and § 94-c(5)(g)(ii)(F). Pet 41. The USCs that ORES has promulgated do not include any measures to minimize impacts to the surrounding community and environment.

III. The ORES Rulemaking Process

A. ORES Hired An Industry Consultant To Draft Its Regulations

ORES hired a private consulting company, Tetra Tech, to draft its procedural regulations and its USCs, and to review and respond to the public comments on the draft regulations. R74. ORES has also relied on Tetra Tech to review individual project applications. *Id.* Tetra Tech's website earlier stated that it "offers the full range of management and technical services to support the siting and licensing of complex energy projects" and that, as of March 2015, it had "successfully permitted over 50,000 MW of power plants." R74-75. Its current website says:

"We streamline project planning, siting, permitting, and compliance through our international experience and trusted regulatory relationships."[1]

In its response to a Request for Proposals for the ORES contract, Tetra Tech disclosed numerous material conflicts of interest arising from its representation of renewable energy developers in New York State. R75. Tetra Tech provided and/or was currently providing project design and siting services in New York to at least 25 renewable energy developers and projects.[2] Tetra Tech also drafted the Wind Siting Guidelines for the American Wind Energy Association, a Washington, D.C.-based national trade and lobbying association representing wind power project developers, now merged into the American Clean Power Association, a board member of Intervenor Alliance for Clean Energy New York. The Alliance is a lobbying organization for large-scale renewable energy developers. It is no small wonder that Tetra Tech concluded, speaking for ORES, that not a single one of the regulations it drafted might have any significant adverse impact on the environment.

To our knowledge, during the period the ORES Regulations were being

[1] https://www.tetratech.com/en/markets/energy/solutions/onshore-wind (last visited 4/23/22.
[2] Acciona, AES, Apex Wind Energy, Boralex (Green Corners LLC), Bow Renewables, Clean Choice Energy, CS Energy, Cypress Creek Renewables, Distributed Sun (including Sun 8 PDC, LLC), Distributed Solar Development LLC, Dyna Solar LLC, EDP Renewables, Engie, Geronimo Energy, Greenwood Energy, Hecate Energy, Marble River Wind, Novis (Falck Renewables of North Americas), Omni Navitas Holdings, LLC, OYA Solar NY LP, Signal Energy, NextEra Energy Resources (DG New York CS, LLC), RWE (formerly Innogy), SunEdison/ForeFront Power, Whiteface Mountain Solar LLC. R.75.

drafted by Tetra Tech, ORES had a single employee, Respondent Houtan Moaveni, who worked simultaneously as ORES's Deputy Executor Director and as Director of Facility Certification & Compliance at the New York State Department of Public Service. R.75. Thus, virtually the entire regulatory process was outsourced to an energy industry consultant.

B. ORES Classified its Action as "Unlisted" Under SEQRA

SEQRA requires agencies to initially classify their actions as either Type I, Type II, or Unlisted. An action must be classified as Type I if, among other things, it, "authorizes standards for projects greater than 2.5 acres in size, a non-agricultural use, wholly or partially within agricultural districts." 6 NYCRR § 617.4(b)(8)). Type II actions are those expressly excluded from SEQRA review and are not at issue here. Unlisted actions are those that are neither Type I nor Type II actions. 6 NYCRR § 617.2(al).

A Type I action "carries with it the presumption that it is likely to have a significant adverse effect on the environment and may require an EIS." 6 NYCRR § 617.4(a)(1).

Large-scale solar projects commonly exceed 2,000 acres and are commonly proposed on agricultural land. Large-scale wind energy projects commonly involve project areas in excess of 100 square miles which, in a rural area, unavoidably require the use of land within agricultural districts. Given their large scale, the

ORES regulations cannot avoid the Type I threshold for standards applicable "wholly or partially within agricultural districts" Nonetheless, ORES classified its Regulations as "Unlisted" rather than as a Type I action. R.8660.

C. ORES Issued a Negative Declaration: No Significant Environmental Effect

For both Type I and Unlisted actions, including the promulgation of regulations, an agency must determine whether its action "may have a significant adverse impact on the environment." 6 NYCRR § 617.7(c)(1); *see also* §§ 617.1(e)(3), 617.4 (a)(1). Section 617.7(c)(1) of SEQRA sets out an illustrative list of potential environment consequences that if present, require a "Positive Declaration" and a full Environment Impact Statement ("EIS"). § 617.2(ad).

In making its adverse impact determination, ORES was required by § 617.7(c)(2) to consider "reasonably related . . . subsequent actions which are . . . included in [the] long-range plan of which the [Regulations are] a part [and] likely to be undertaken as a result thereof [and] dependent thereon." 6 NYCRR § 617.7(c)(2). For "an entire program or plan having wide application or restricting the range of future alternative policies or projects", SEQRA allows the EIS requirement to be met with a "Generic EIS," which "may be based on conceptual information". 6 NYCRR §§ 617.10(a), (a)(4).

On September 15, 2020, ORES issued a Negative Declaration of Environmental Significance, *i.e.*, a finding that its regulations would not have even one potential adverse impact on the environment. R.205. It therefore relieved itself of the duty to file an EIS and instead prepared only a Short EAF ("SEAF"). *Id.* Later, in an Amended SEAF, ORES again issued a Negative Declaration. R.8668.

D. ORES Justified The Negative Declaration On The Ground that Its Regulations Themselves Do Not Approve Any Specific Project

Part 2 of the Short Environmental Assessment Form poses 11 Yes or No questions. R. 8667. For example, question 9 asks, "[w]ill the proposed action result in an adverse change to natural resources (e.g., wetlands, waterbodies, groundwater, air quality, flora and fauna?" *Id.* Question eleven asks, "[w]ill the proposed action create a hazard to environmental resources or human health?" *Id.* Modern wind farms are significant causes of bird and bat deaths. Many wetlands and streams must be crossed, forests cleared, and roads built. Substantive standards for wind and solar farms, such as noise and physical proximity standards, are necessary to protect public health. ORES nevertheless checked the "No" box for each question, and determined no moderate to large impact may occur. R.8667.

ORES's justification for its "No" answers to questions involving impacts on the environment, in its entirety, was this: "The proposed action of promulgating regulations does not include any direct approval of applications for the siting of major renewable energy facilities." R.8683.

ORES offered the same justification for rejecting concerns raised by commenters about environmental impacts. See e.g., R9022, R9039, R13175, and R13340.

E. Public Comments

The day after issuing the Negative Declaration, ORES released its draft USCs, and thereafter conducted public hearings and accepted written comments. R.77.

Over 5,000 comments were submitted, and nearly 200 individuals spoke at the public hearings. R.77. Many of the comments (a) raised serious concerns over the direct and indirect adverse environmental impacts of the regulations, including impacts to birds; (b) pointed out inconsistencies in the regulations; and (c) raised potential violations of the State and Federal constitutions. R.77.[3] One comment in particular, noting that the Regulations limit preconstruction habitat assessments and/or field surveys to one year, said that this standard departs from "established guidelines," that "one year is arbitrary and lacks scientific basis," and that one year is "impossible to adequately review applications." R13552 (commenting on § 900-

[3]Copies of all public comments received by ORES, and transcripts of all public hearings, are included in the Record on Appeal. See R.8370 to R.16117. A table of contents for the Administrative return filed in the proceeding below can be found on R.8372 of the Appellate Record. Please note the bates numbers in table of contents for the certified administrative return do not correspond to page numbers in the Appellate Record. Conversely, individual Volumes I through XVII of the Administrative Return are listed in the table of contents for the Appellate Record.

1.3 (g)(2)(iv)). Moreover, many Petitioners filed timely comments noting the adverse environmental impacts of the regulations: health and safety of nearby residents (noise, shadow flicker, nighttime visual impacts, ejection of turbine blade ice); conflicts with existing State policies for preservation of agricultural and natural resources; and failure to align siting of large-scale projects with existing and new transmission capacity. *See* R.10160-16118 (all public comments in certified administrative return, excluding hearing transcripts); R.77-80 (summary of some concerns raised in public comments filed by Petitioners). In addition, commenters emphasized the absence of an opportunity for meaningful public participation provided by the regulations; Home Rule violations; and the elevation of private corporate interests over the public interest. *See id.*

Bird conservation Petitioners filed comments about the adverse impacts of the ORES regulation on birds and other wildlife; lack of consideration for non-listed wildlife species; unrealistic and inappropriate timelines and automatic project approvals; inappropriate restrictions on public input and lack of data transparency; lack of post-construction wildlife mortality monitoring; and lack of required pre-application field studies to determine the presence of birds and/or important bird habitat at the proposed site. R78.

ORES promulgated its final regulations on March 3, 2021. R.80. On the same day, it published a memorandum written by Tetra Tech summarizing the 5,000-plus

public comments it received and acknowledging that in response it had not made a single substantive change to any draft regulation: "[a]fter careful consideration of all of the comments received, the Office made several *non-substantive* changes to address the comments and to clarify the proposed regulations . . ." R.7041-7042 (emphasis added).

IV. The Petition and the Decision Below

The Petition alleges that ORES violated 94-c, SEQRA (by issuing a Negative Declaration and failing to prepare a full EIS), the State Administrative Procedure Act, and the Home Rule Provisions of the State Constitution. R.61-106.

The Supreme Court issued two decisions, one on September 21, 2021, denying Petitioners' motion for a preliminary injunction (R.21), and the other on October 7, 2021, denying Petitioners' motion for summary judgment and granting ORES's cross motion (R.3).

In the first, lengthier decision, the Court rejected Petitioners' SEQRA claim. R.49. It ruled that none of the criteria for a Type I action were met because the regulations themselves do not approve any "municipal land use plan, change of a zoning district, zone change or specific project." R.50. The Court then noted that "classification of an action as [U]nlisted still necessitates an . . . evaluation of the potential for a significant adverse environmental impact, also necessitating review through the EIS process if a

positive declaration is made", *id.,* but it upheld ORES's Negative Declaration that none of its Regulations would have any significant environmental impact. R.56.

The Court ruled that the ultimate question was whether ORES had taken the SEQRA-required "hard look" at its actions. R.52. In considering that question and ruling in ORES's favor, however, the Court *cited no evidence* other than this: "the record is expansive, incorporating public hearings, as well as the receipt and evaluation of over 5,000 public comments." R.54.

The Court then purported to consider the specific question of whether ORES had taken a "hard look" at what would happen if a project was not completed within one year and therefore received a default approval, subject only to the USCs in the Regulations and no additional, site-specific environmental protection measures. R.54. But rather than address whether ORES had considered the sufficiency of USCs for protecting the environment in the default approval scenario, the Court addressed a question not before it: whether ORES had sufficiently considered changing the statutory requirement. In addressing the wrong question, the court concluded ORES had taken the SEQRA required "hard look" because ORES had "concluded no change to the one-year default regulation was warranted" and had "stated a reasoned basis for its determination to keep the provision intact." R.56. The real issue, which

remained unaddressed, is whether ORES was required to take a hard look at the environmental impact of applying USCs in the default approval scenario.

In its shorter, second decision, on cross-motions for summary judgment, the Court incorporated its earlier decision by reference, addressed and rejected several of Petitioners' specific arguments about the regulations, and ruled that, "due to the State's preemption relative to the siting of major renewable energy facilities," the regulations do not violate Article IX, §1 (a) of the New York State Constitution or the Municipal Home Rule Law. R.19.

STANDARD OF REVIEW

SEQRA prescribes "an elaborate procedural framework" which agencies must follow "to 'the fullest extent possible' (N.Y. ECL 8-0103 [6])," and "it is clear that strict, not substantial, compliance is required." *King v. Saratoga Co. Bd. Of Supervisors,* 89 N.Y.2d 341, 347 (1996). An agency must comply with both the letter and the spirit of SEQRA. *Matter of Schenectady Chems. v. Flacke*, 83 A.D.2d 460 (3d Dept. 1981).

SEQRA challenges are decided according to the test set out in the Fourth Department's decision in *H.O.M.E.S v. New York State Urban Development Corp.*, 69 A.D.2d 222 (4th Dept. 1979). Thus, courts consider:

1. Whether the record shows that the agency identified the relevant areas of environmental concern;

2. Whether the agency took a "hard look" at areas of environmental concern; and

3. Whether the agency made a "reasoned elaboration" of the basis for its determination.

Id. at 232. Failure to complete each step renders the agency action arbitrary and capricious. See also *Shawangunk Mountain Environmental Ass'n v. Planning Bd. of Gardiner*, 157 A.D.2d 273, 275, 557 N.Y.S.2d 495, 496 (3d Dep't 1990) (noting the "relatively low threshold for requiring an EIS") (citing H.O.M.E.S.).

Courts determine de novo whether the agency took the requisite "hard look" and made a "reasoned elaboration" regarding potentially adverse environmental impacts. *See New York City Coalition to End Lead Poisoning, Inc. v. Vallone*, 100 N.Y.2d 337, 348 (2003).

The environmental impacts subject to a hard look are very broad. *See* 6 NYCRR § 617.2(l); *Ginsburg Dev. Corp. v. Town Bd. of Cortlandt*, 150 Misc. 2d 24, 565 N.Y.S.2d 371, 1990 N.Y. Misc. LEXIS 667 (Albany Co. 1990); *Kravetz v. Plenge*, 102 Misc. 2d 622, 631, 424 N.Y.S.2d 312, 1979 N.Y. Misc. LEXIS 2914 (Monroe Co. 1979). Where "the answers in the EAF do not provide a 'rational basis to support a determination that the requisite "hard look" was undertaken'" and where "the answers provided in the EAF in this case were in many (if not all) respects factually inaccurate and misleading" "the SEQRA analysis [is] patently

inadequate." *Corrini v. Vill. of Scarsdale*, 1 Misc. 3d 907(A), 781 N.Y.S.2d 623, 2003 N.Y. Misc. LEXIS 1658, *36 (Westchester Co. 2003) (citations omitted).

The Supreme Court in this case said that SEQRA review is "deferential" and stressed "the limited scope of judicial review." R51; R56. It also misconstrued Petitioners' point about Tetra Tech's drafting of the Regulations and responding to public comments. Petitioners' argument is that the deference normally afforded an agency should not apply when an agency outsources its work to the very industry it is regulating. R.57. The Court dismissed Petitioners' concern over Tetra Tech's involvement by only considering whether a conflict of interest was present, and concluding that "no member of ORES has any financial interest in Tetra Tech." R. 58. It cited cases involving Town Board members accused of conflicts when voting on proposals before them. R.57-58. But Petitioners never suggested that anyone at ORES had a financial conflict of interest, and the Court never addressed Petitioners' point that traditional notions of deference are not warranted when the fundamental task of drafting regulations designed to protect against adverse environmental impacts are outsourced to the very industry posing the threats in the first place.

ARGUMENT

I. THE SUPREME COURT ERRED IN HOLDING THAT ORES COMPLIED WITH SEQRA

ORES's regulatory action was subject to SEQRA, as all agree. Its initial task was to determine how to classify its action, and here is where ORES first violated SEQRA.

A. The Supreme Court Erred in Upholding ORES's Determination That Its Regulations Are Not A Type I Action

As shown above, SEQRA requires agencies to initially classify their actions as either Type I, Type II (not at issue here), or Unlisted. Type I actions are identified, nonexclusively, in 6 NYCRR § 617.4. They are presumed to "likely [ ] have a significant adverse effect on the environment" and therefore "are more likely to require the preparation of an EIS than Unlisted actions." 6 NYCRR § 617.4(a), (a)(1). Unlisted actions are those that are neither Type I nor Type II. 6 NYCRR § 617.2(al).

SEQRA lists, nonexclusively, eleven actions that "are Type I if they are to be directly undertaken, funded, or approved by an agency." ORES's Regulations meet at least two criteria expressly identified for mandatory designation as a Type 1 action.

First, they will approve "the adoption of changes in the allowable uses within any zoning district, affecting 25 or more acres of the district. 6 NYCRR §

617.4(b)(2). Wind and solar projects routinely cover 25 or more acres[4], and the procedural and substantive standards set forth in ORES regulations change the uses that would be allowable under local zoning and land use laws. Second, the ORES Regulations will approve "a nonagricultural use occurring wholly or partially within an agricultural district . . . and exceed[ing]" 2.5 acres. § 617.4(b)(8)).[5]

Notwithstanding that its Regulations meet at least two criteria identified for mandatory designation as a Type 1 action, ORES classified its Regulations as Unlisted. R.8660.

The Supreme Court upheld that classification on the ground that the Regulations themselves did not approve any "municipal land use plan, change of a zoning district, zone change or specific project." R.50. As we will address further below, such a deferral of environmental impact review unlawfully permits evasion of the environmental protections built into both SEQRA and § 94-c. It is an especially egregious violation of SEQRA where, as here, during specific project reviews, SEQRA does not apply at all.

Accordingly, the Supreme Court erred in holding that ORES's Regulations were not a Type I activity, and thus not presumptively subject to a full EIS.

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[4]See https://ores.ny.gov/permit-applications . All approved projects and projects under review fit this description.

[5]2.5 acres is "25 percent of [the 10-acre] threshold established in this section." § 617.4(b)(8).

B. The Supreme Court Erred in Upholding ORES's "Deferral" Theory that its Regulations Have No Environmental Impact Because They Do Not Approve A Project

Even if the ORES Regulations had been properly classified as Unlisted, they still had to be tested for their impact on the environment pursuant to 6 NYCRR § 617.7, "Determining Significance." *See also* 6 NYCRR §§ 617.1(e)(3), 617.4 (a)(1), (e)(3). If the ORES regulations "*may* have a significant adverse impact on the environment," 6 NYCRR § 617.7(c)(1) (emphasis added), ORES was required to issue a "Positive Declaration" for its regulations and prepare an EIS. 6 NYCRR § 617.2(ad). As noted by the Second Department,

> It is well settled that because the operative word triggering the requirement of an EIS is "may", there is a relatively low threshold for impact statements (*see*, *Matter of Group for S. Fork v Wines*, 190 A.D.2d 794; *Matter of Holmes v Brookhaven Town Planning Bd.*, 137 A.D.2d 601, 603; *Chinese Staff & Workers Assn. v City of New York*, 68 N.Y.2d 359, 364-365).

West Branch Conservation Ass'n v. Planning Bd., 207 A.D.2d 837, 838-839, 616 N.Y.S.2d 550, 1994 N.Y. App. Div. LEXIS 8861 (2d Dep't 1994), app. dismissed, 84 N.Y.2d 1019, 622 N.Y.S.2d 912, 647 N.E.2d 118 (1995).

In addition, regulatory "programs" that reorder policy priorities require review of their potential impacts under SEQRA. 6 NYCRR §§ 617.10, 617.5(c)(20). Major regulatory programs having a potential for significant impacts have routinely required an EIS. *See*, *e.g.*, the Final Supplemental Environmental Impact Statement for the Clean Energy Standard. R9671. *See also Schulz v. New*

York State Dep't of Envtl. Conservation, 188 A.D.2d 854, 591 N.Y.S.2d 588 (3d Dep't 1992), app. denied, 81 N.Y.2d 704, 595 N.Y.S.2d 398, 611 N.E.2d 299 (1993), app. denied, 81 N.Y.2d 707, 597 N.Y.S.2d 937, 613 N.E.2d 969 (1993) (adoption of 1989-1990 update to State Solid Waste Management Plan would not require an EIS because it did not reorder recommendations or priorities contained in the state's previous State Solid Waste Management Plan, or in previous updates, and did not propose new solid waste programs or initiatives); *Desmond-Americana v. Jorling*, 153 A.D.2d 4, 550 N.Y.S.2d 94, app. denied, 75 N.Y.2d 709, 555 N.Y.S.2d 691, 554 N.E.2d 1279 (1990) (EIS was required where NYSDEC was repeatedly informed that proposed regulations concerning application of pesticides would have adverse environmental effect on integrated pest management program, and it nevertheless issued negative declaration after only cursory examination); *Marino v. Platt*, 104 Misc. 2d 386, 428 N.Y.S.2d 433, (Onondaga Co. 1980) (EIS required for annual pesticide spraying to determine whether a program of repeated spraying of the pesticide over a period of years has a significant environmental impact or poses a hazard to public health and safety).

SEQRA § 617.7(c)(1) sets out criteria that an agency must consider in making its determination whether to prepare a full EIS. The following, nonexclusive listed criteria (among others) "are considered indicators of significant adverse impacts on the environment":

> (i) a substantial adverse change in . . . noise levels;
>
> (ii) the removal or destruction of large quantities of vegetation or fauna; substantial interference with the movement of any resident or migratory fish or wildlife species; impacts on a significant habitat area; substantial adverse impacts on a threatened or endangered species of animal or plant, or the habitat of such a species; or other significant adverse impacts to natural resources;
>
> (iv) the creation of a material conflict with a community's current plans or goals as officially approved or adopted;
>
> (v) the impairment of the character or quality of important . . . resources or of existing community or neighborhood character;
>
> (vi) a major change in the use of either the quantity or type of energy;
>
> (vii) the creation of a hazard to human health; [and]
>
> (viii) a substantial change in the use, or intensity of use, of land including agricultural, open space or recreational resources, or in its capacity to support existing uses . . . .

6 NYCRR 617.7(c)(1).

Although SEQRA requires ORES to determine whether its Regulations "may" have any of the § 617.7(c)(1) consequences, and to consider "related . . . subsequent actions," § 617.7(c)(2), ORES issued a Negative Declaration and prepared only a Short Environmental Assessment Form. R.8661. As shown above, its justification was that "The proposed action of promulgating regulations does not include any direct approval of applications for the siting of major renewable energy facilities." R.8683. *See also* R8408 (ORES Notice of Adoption of procedural requirements, "Each siting permit application will undergo an individualized, site-

specific review by ORES to ensure avoidance or minimization of adverse environmental impacts to the maximum extent practicable.").

Deferral of analysis is the same justification ORES offers for rejecting the concerns raised by multiple commenters about setbacks from energy projects to private properties. *See, e.g.*, R9022, R9039, R13175, and R13340. ORES adopted shorter, less protective setback standards than commenters requested and admitted that its choice could result in adverse impacts. R0143. However, ORES declined to look at the significance of those impacts, saying instead: "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." *Id.*

ORES' failure to take a hard look at the potential for adverse impacts did not stop with regulations for physical setbacks. Indeed, resort to deferred review of adverse impacts is so common in ORES' response to public comments that it should be considered a hallmark of ORES' purported "hard look" under SEQRA. The following is a non-exhaustive list of additional instances where ORES improperly deferred environmental impact review:

> -Rule 900-2.8. In response to comments addressing whether limits for noise exposure at specific sensitive sound receptors are sufficiently protective, ORES stated: "The regulations allow additional noise limits at other sensitive sound receptors on a case-by- case basis."

R.8528.

-Rule 900-2.13(e). In response to comments raising concern over impacts to NYS Threatened or Endangered Species, and specifically impacts to species other than grassland birds, ORES stated: "[I]mpacts to other NYS threatened and endangered species will be evaluated . . . on a case-by- case basis . . . to ensure impacts are avoided and minimized to the extent practicable." R.8553. Confusingly, ORES also stated that concerns over impact on T&E species are unwarranted because permit applicants are expected to minimize project impacts: "[s]hould applicants avoid and minimize project impacts to other NYS threatened and endangered species such that there will be no anticipated adverse impact to the species, the Office, in collaboration with the NYSDEC, has determined that no additional conditions are necessary." R.8553.

-Rule 900-2.14. In response to comments raising concern over impacts to potable water sources, ORES stated: "[t]he Office will evaluate on a case-by- case basis if coordination with NYSDEC, NYSDOH, and/or NYCDEP is required for any project to address any potential impacts to water resources within their respective jurisdictions." R.8555.

-Rule 900-2.16. In response to comments raising concern over impacts on agricultural resources, ORES stated: “The Office is genuinely appreciative of the many comments and expects that the ideas put forth will be of great value in addressing potential impacts to agricultural resources in individual applications. This section of the proposed regulations, as written, is adequate to address the issues raised on a case-by- case basis. No change is warranted.” R. 8568. In addition. ORES state: “Section 900-2.16 will provide the information necessary for the Office to evaluate impacts on a case-by- case basis and make balanced decisions about the farmland and agricultural impacts. No change is warranted.” R.8569.

-Rule 900-2.25. In response to concern over whether the regulations address whether local laws adopted after an ORES application is filed, and therefore whether the environmental impacts of applying or not applying those laws have been reviewed, ORES stated: “[a]s to the consideration of local laws or ordinances adopted after the submission of an application, the Office will have to consider that matter on a case-by- case basis and reserves the right to make any such decision in the context of a specific permit application based upon a record containing specific facts and circumstances.” R.8588.

-Rule 900-6.4. In response to comments addressing whether construction hours of 7 a.m. to 8 p.m. Monday through Saturday and 8 a.m. to 8 p.m. on Sunday and national holidays are sufficient to avoid impacts to the public, ORS stated: "Any potential issue regarding construction hours will be addressed on a case-by- case basis. No change is warranted." R.8607.

-Rule 900-6.4(k). In response to comments addressing whether construction noise limits are sufficiently protective of the public, ORES stated: "[a]ny potential issue regarding construction noise emissions will be addressed on a case-by- case basis. No change is warranted." R.8612.

-Rule 900-6.4(k). In response to comments raising concerns the regulations fail to address potential damage to structures from construction vibration, ORES stated: "[t]he Office considers that potential structural damage should be evaluated in the application in conjunction with any local laws on vibration limits. The need for permit conditions with vibration limits from construction activities will be evaluated on a case-by- case basis. No change is warranted." R.8612.

-Rule 900-6.4(r). In response to comments raising concern over construction work in trout streams during specific time periods, ORES stated: "[t]he Office . . . will continue to collaborate with the NYSDEC to assess if an exemption of construction work during the seasonal timing restrictions is warranted on a case-by- case basis." R.8626.

-Rule 900-6.5(a). In response to comments raising concern that noise limits for wind facilities fail to account for cumulative noise from adjacent facilities, ORES responded: "[f]or projects where the cumulative noise impacts exceed any design goal or may exceed a cumulative sound limit during operation, a decision on whether the facility should conform with design goals and sound limits on a cumulative basis will be made on a case-by-case basis." R. 8627.

In responding to public comments ORES acknowledged that the potential for adverse impacts exists. Yet, in issuing a negative declaration of environmental significance, ORES said that there is *no* possibility that any ORES Regulation "*may*" have any of the § 617.7(c)(2) consequences – *e.g.,* may lead to "significant adverse impacts to natural resources" or "a substantial change in the use, or intensity of use, of land" (§ 617.7(c)(1)(i) and (viii) – simply because the Regulations by themselves "do[] not include approval for the siting or

constructions of any facilities." R.8668 (SEAF).

SEQRA expressly prohibits what ORES has done.

After listing in § 617.7(c)(1) the criteria that an agency must consider in deciding whether a full EIS is needed, SEQRA in § 617.7(c)(2) requires the agency in making its decision to consider related, subsequent actions – like energy siting permit applications:

> (2) For the purpose of determining whether an action may cause one of the consequences listed in paragraph (1) of this subdivision, the lead *agency must consider reasonably related long-term, short-term, direct, indirect and cumulative impacts, including other simultaneous or subsequent actions which are*:
>
> *(i) included in any long-range plan of which the action under consideration is a part;*
>
> *(ii) likely to be undertaken as a result thereof, or*
>
> *(iii) dependent thereon.*

6 NYCRR § 617.7(c)(2) (emphasis added).

ORES was required by that provision to consider the consequences of approving projects under its regulations, at least on a conceptual basis, (*see* 6 NYCRR § 617.10), which fall squarely within the statutory language as "reasonably related . . . subsequent actions which are . . . included in [the] long-range plan of which the [Regulations are] a part [and] likely to be undertaken as a result thereof [and] dependent thereon." *See id.* ORES violated that provision by failing to consider the impact of subsequent dependent actions and instead

declaring that the Regulations alone couldn't possibly have an adverse environmental impact. This conclusion is strongly reinforced by one of SEQRA's "General Rules," namely, § 617.3(g), which provides:

> Actions commonly consist of a set of activities or steps. The entire set of activities or steps must be considered the action, whether the agency decision-making relates to the action as a whole or to only a part of it.

6 NYCRR § 617.3(g). Thus, "[c]onsidering only a part or segment of an action is contrary to the intent of SEQR[A]." 6 NYCRR § 617.3(g)(1).

These express provisions of SEQRA, disabling ORES from refusing to prepare an EIS on the ground that it could postpone more serious environmental review to a later date (when SEQRA would not apply), serve "[t]he basic purpose of SEQR," which "is to incorporate the consideration of environmental factors into the existing planning, review and decision-making process of State, regional and local government agencies *at the earliest possible time."* 6 NYCRR § 617.1(c).

Citing these SEQRA provisions, many courts have invalidated efforts like ORES's to postpone environmental impact review to later review of overall projects.

Thus, in *Eggert v. Town Bd.*, 217 A.D.2d 975, 976-977, 630 N.Y.S.2d 179, 181, app. denied, 86 N.Y.2d 710, 635 N.Y.S.2d 947, 659 N.E.2d 770, 1995 N.Y. LEXIS 4384 (1995), the Town Board decided that zoning amendments to allow new industrial uses would not have a significant environmental impact and issued a

Negative Declaration on the ground that SEQRA review of potential impacts could be addressed when permit applications were submitted. *Id.*, 217 A.D.2d at 975. The Court held that the Town should have prepared an EIS and could not comply with SEQRA "by a finding that environmental review is premature because no specific project is involved, or by a statement that SEQRA review would be undertaken when applications for special use permits are received." *Id.* Rather, "[t]o comply with SEQRA, the Town Board must consider the environmental concerns that are reasonably likely to result from, or are dependent on, the amendments." *Id.*

In another case similar to this one, the court noted that the agency's deferral theory was actually *an acknowledgement* that its actions "may" have an impact on the environment. The Town Planning Board in that case used the deferral rationale to justify its refusal to prepare an EIS regarding a proposed housing development. The court reversed, saying:

> In discussing [future] mitigation techniques and manners in which to protect the environment, the Planning Board inherently acknowledged that the project may cause significant environmental impacts.

West Branch Conservation Ass'n v. Planning Bd., *supra,* 207 A.D.2d at 838-839. The court also noted that:

> The heart of SEQRA is the Environmental Impact Statement process. SEQRA mandates the preparation of an EIS when a proposed development project "may have a significant effect on

> the environment" (ECL 8-0109). It is well settled that because the operative word triggering the requirement of an EIS is "may", there is a "relatively low threshold for impact statements".

Id.(citations omitted).

Other cases have cited *Eggert, supra,* for the principle that deferral of impact review under SEQRA is impermissible. *See Matter of Defreestville Area Neighborhoods Association, Inc. v. Town Board of the Town of North Greenbush*, 299 A.D.2d 631, 634, 750 N.Y.S.2d 164 (3d Dept. 2002) ("[S]egmented review runs the risk of obscuring potentially contentious issues until they surface much later in the review process, a situation which may ultimately interfere with meaningful environmental review."); *Matter of John Fisher v. Giuliani*, 280 A.D.2d 13, 22, 720 N.Y.S.2d 50 (1st Dept. 2001) (subsequent chance for environmental review does not "obviate the [agency's] obligation to consider possible environmental impact at the time it enacts the zoning changes"); *Matter of Citizens Concerned for the Harlem Valley Environment v. Town Board of the Town of Amenia*, 264 A.D.2d 394; 694 N.Y.S.2d 108 (2d Dept. 1999) (agency "improperly segmented the SEQRA review process.") ; *accord Kravetz v. Plenge*, 102 Misc. 2d 622, 632-634, 424 N.Y.S.2d 312, 318-319 (Monroe Co. 1979) (citing the SEQRA provisions set out above in rejecting a town's argument that it could amend its zoning laws without an EIS because it could postpone environmental review until the later permit application stage); *Corrini v. Vill. of Scarsdale*, 1

Misc. 3d 907(A), 781 N.Y.S.2d 623 (Westchester Co. 2003) (deferral of impact review to later project reviews violates SEQRA).

The courts in these cases hold that deferral violates SEQRA even when the later stages to which the agencies wished to defer consideration of environmental impacts would be subject to SEQRA. Here, deferral is even more damaging to SEQRA's basic goals because the ORES permit approval process is not subject to SEQRA. *See* N.Y. ECL § 8-0111(5)(b).

C. The Supreme Court Erred in Holding That ORES Took A "Hard Look" at the Environmental Impacts of its Regulations

New York courts often use the telling term "hard look" to describe an agency's duty to consider the environmental impacts of its actions under SEQRA. *E.g., Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 417 (1986).

We have already shown that ORES has failed to take the necessary "hard look" by using its deferral theory to avoid preparing an EIS. The cases cited above, at pp. 29-31, hold either expressly or by necessary implication that SEQRA does not permit a piecemeal approach and that agencies postponing environmental impact review to later stages have ipso facto failed to take the necessary SERQRA hard look.

The Supreme Court held to the contrary but cited no actual evidence that would have supported ORES's Negative Declaration. Rather, it's full analysis was

only this: "the record is expansive, incorporating public hearings, as well as the receipt and evaluation of over 5,000 public comments." P.I. Op.. 31. But an expansive record is no substitute for lawful analysis. *See Jackson v. New York State Urban Development Corp.*, 67 N.Y.2d 400, 422 (1986) (environment review must "be analytical, not encyclopedic.").

The Supreme Court also held that ORES had taken a "hard look" at what would happen if the ORES review of an application was not completed within the statutory one-year period and the project received a default approval. It's analysis, however, went seriously sideways. It ruled that the "hard look" question was whether ORES had sufficiently considered whether to *change the statute,* and concluded that ORES had taken the required "hard look" because it had "concluded no change to the one-year default regulation was warranted" and had "stated a reasoned basis for its determination to keep the provision intact." R.56. That ruling, on the question whether ORES by regulation could amend its enabling statute (a point never raised below, with good reason), is no support for ORES's decision.

The Supreme Court was correct, however, that the record was expansive. What it shows is that ORES repeatedly rejected scientific evidence and legitimate concerns from commenters without sufficient reasoning or justification, and that *at least* one potentially significant adverse

environmental impact *may* result, directly or indirectly, alone or cumulatively, from ORES's regulations. *See* 6 NYCRR § 617.7(c)(2). A full catalog would be impracticable, but examples abound.

ORES (with the help of Tetra Tech) rejected thousands of public comments and made no substantive changes to its draft regulations. R.7041-7042. Many of these comments were technical, well-reasoned, and empirically supported. As noted above, for example, ORES dismissed "numerous specific concerns about setbacks from energy projects to private properties" (*e.g.*, R9022, R9039, R13175, and R13340), even though it admitted that its shorter standards could result in adverse impacts. R0143.

For another example, Robert Rand, a member of the Acoustical Society of America and the Institute for Noise Control Engineering (emeritus) submitted scientific evidence that ORES's noise limits for wind turbines would result in adverse public health impacts, noting that ORES's 45-dBA (Decibel A Scale) "is unreasonably high for quiet rural areas and breaches American National Standards Institute ("ANSI") and International Organization for Standardization ("ISO") standards for rural land use compatibility." R13473. *See also* R.13167, R13177, R13182. The cited standards, based on years of data and health studies, find that noise sources harm public health when more than 10% of receptors become "highly annoyed." R8744-R8746, R13471, R13481-R13484. ORES ignored the

science and concluded that *negative opinions* about a wind farm cause or add to noise annoyance and therefore that the annoyance does not affect health. R8525. But the ANSI and ISO scientific findings have nothing to do with the effect of subjective opinions on the source of noise; they rest on noise levels that are simply so high that they adversely affect the hearer's ability to sleep, performance, sense of well-being, and health. They are also objective, being based on a community survey conducted by the USEPA. R13472-13473; R13481 (Attachment C to Rand Comments: US EPA Noise Impact Assessment). By importing the irrelevant concept of subjective opinions about wind farms, ORES ignored the science and failed to take a hard look at the potential for significant health impacts of wind farms noise levels allowed by its Regulations.

Another example of ORES's failure to take a hard look at environmental impacts concerns birds and bats.[6] Ducks Unlimited noted evidence that wind turbines "can lead to significant bird mortality" (R13421) and the New York Department of Environmental Conservation has noted that wind energy facilities in the United States and Canada killed between 1,175 and 2,433 Northern Long Eared Bats from 2000 to 2011. R14340. Post-construction monitoring for dead birds and bats near wind turbines has become standard practice, and commenters urged

[6]Among listed threatened or endangered species potentially affected by wind turbines are Northern Long-Eared Bat (on a verge of extinction in New York, R9712), Indiana Bat, Upland Sandpiper, Bald Eagle (delisted federally but protected under Part 182), Least Bittern, Pied-billed Grebe, Spruce Grouse, Short-Eared Owl, Piping Plover, Black Rail, King Rail, and Roseate Tern. See R9713-9716 (PSC 2016 GEIS).

ORES to include monitoring in its Regulations. *See* R13758 (comments of Audubon NY); R13576-13577, 5702 (joint comments of American Bird Conservancy, New York State Ornithological Assoc., Inc., and others): R13238 (comments of Alice Sokolow).

ORES declined, taking the illogical position that the Regulations are sufficient to address adverse environmental impacts to birds while also maintaining there is no possibility for such impacts. *See* R8668; R8551-8553.

For another example, Petitioner American Bird Conservancy ("ABC") commented that siting is critical to minimizing impacts on birds because little can be done to mitigate the harm caused by a constructed bird-killing or habitat-destroying turbine, and accordingly recommended science-based setbacks from areas of identified importance. R13575. ORES rejected the recommendation on the ground that project applicants are expected to consult with other agencies and stakeholders about adverse environmental impacts, which will somehow "further ensure responsible project design" (R8491) – another postponed and uncertain review.

Petitioner ABC also noted that, while the Regulations require *mitigation* of impacts to state-listed threatened and endangered birds, they do nothing to avoid collisions in the first place, nor provide any protection of any kind for State-designated species of Special Concern or High Priority Species of Greatest

Conservation Need – *i.e.*, the particularly at-risk species in the State. R13575. Petitioner Save Ontario Shores pointed out that habitat assessments limited to one year under the Regulations depart from "established guidelines", "making it impossible to adequately review applications within the time allowed." R13552 (citing 900-1.3(g)(2)(iv)).

ORES offered no justification for not adding the requested protections for endangered and threatened species, other than that such concerns would be reviewed in association with specific applications. *See* R8551-R8553.

Accordingly, because ORES did not identify its Regulations as a SEQRA "Type I" activity presumptively requiring an EIS, and did not prepare an EIS, but instead relied on a deferral theory that violates the express terms of SEQRA and has been condemned by many New York courts, ORES failed to take the required "hard look" at environmental impacts. Hence the Supreme Court erred in holding that ORES complied with SEQRA and its decision should be reversed.[7]

II. THE SUPREME COURT ERRED IN HOLDING THAT ORES COMPLIED WITH SECTION 94-c

As shown above, ORES's fundamental, governing statute was designed to expedite the construction of renewable energy sources "while ensuring protection

[7]ORES cannot excuse its failure to take a hard look by relying on a Negative Declaration issued in 2012 by the Article 10 Siting Board. The Article 10 Siting Board's regulations are purely procedural and impose no substantive conditions or standards. Not even the Supreme Court agreed with ORES's position that it properly relied on prior environmental impact reviews for other actions. R.18 ("Petitioner objects to the claimed reliance on any prior GEIS, which did not consider siting. I agree.")

of the environment." N.Y. Exec. L. § 94-c(1). That was not a throwaway line: concern for the environment runs throughout the statute. ORES must "consider[] all pertinent social, economic and environmental factors in the decision to permit such facilities" (*id.*); it must establish uniform standards and conditions "to avoid, minimize or mitigate potential adverse environmental impacts" (§ 94-c(3)(b)); and the uniform standards and conditions "*shall* be "designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts" (§ 94-c(3)(c)). *See also* § 2.4(c) of the Accelerated Renewable Energy Growth and Community Benefit Act (stating that ORES's uniform standards and conditions will "address common conditions necessary to minimize impacts to the surrounding community and environment").

Accordingly, ORES's kick-the-can-down-the-road rationale violates not only SEQRA but also the express language of § 94-c, which requires that "[t]he uniform standards and conditions shall be designed to avoid or minimize, to the maximum extent possible, any potential significant adverse environmental impacts." N.Y Exec. L. §§ 94-c(3)(c) (emphasis added); *see also* § 94-c(3)(b).

In addition to that express language, there is yet another, practical reason why ORES's deferral theory is unacceptable, and that lies in the default approval provisions of N.Y. Exec. L. § 94-c. If ORES fails to make a final decision on the application within 12 months of the completeness determination, the permit "shall

be deemed to be automatically granted." N.Y. Exec. L. §§ 94-c(5)(b), (5)(c)(i), (5)(f). If ORES by then has not imposed any additional conditions, only the default USCs set forth in the Regulations will apply. There is every reason to believe, given the large number of anticipated permit applications, that ORES will in fact miss the deadline in a meaningful number of cases, emphasizing the need for the USC themselves to carry the day in protecting the environment.

For all these reasons, this Court should reverse the decision below, nullify the existing Regulations, and remand with instructions that ORES should draft new Regulations after preparing an EIS.

III. THE SUPREME COURT ERRED IN HOLDING ORES REGULATIONS GOVERNING WAIVER OF LOCAL LAWS DO NOT VIOLATE THE STATE CONSTITUTION.

Both PSL Article 10 and Executive Law Section 94-c expressly supersede a host town's *procedural* permitting requirements for large renewable energy projects. *See* N.Y. PSL Art. 10 §§ 172(1), 173(13); Exec. L. § 94-c(6)(a). But neither PSL Article 10 nor Section 94-c expressly preempt the *substantive* land use restrictions imposed by local laws. Instead, both Article 10 and Section 94-c require that local substantive laws be applied in permit proceedings. Both also authorize a case-by-case waiver of local zoning and land use laws provided there is a finding that such provisions are "unreasonably burdensome" in light of specific

standards for waiver. N.Y. PSL § 168(3)(e); Exec. L. § 94-c(5)(e).[8] However, the standards for waiver differ substantially between the two laws. ORES regulations governing waiver of local laws fail to account for the change in standard for waiver, and therefore violate the State Constitution and the plain language of the statute by ignoring the Legislature's directives.

A. ORES' Regulations Governing Waiver Ignore the Legislature's Directives.

First, ORES regulations governing the process and standard for waiver of local law are illegal because they rely entirely on the Legislature's mandate to streamline the siting procedures while ignoring Legislature's mandate to also consider substantively whether local laws reasonably protect the environment or harm the state's ability to achieve the CLCPA targets. In other words, while the Legislature's mandate is two-fold (expedited siting *and* environmental protection), with no indication that one consideration should prevail over the other, ORES' regulations permit waiver of local laws before gathering or considering evidence in opposition to waiver, or considering the reasonability of specific local laws.[9]

[8]Another important distinction between Siting Board and ORES proceedings is that the one-year time limit for final decision under Article 10, (PSL § 165(4)(a)), has been changed under Section 94-c to a "deemed" approval if a decision is not made within that time frame. Exec. L. § 94-c(5)(f). Article 10 includes no automatic approval and provides that the siting board may take additional time, up to six months, to render a final decision. PSL § 165(4)(a).

[9]Indeed, ORES has already recommended waiver of local laws over the objections of at least three municipalities, even going so far as to deny the municipalities party status, and to deprive them of the opportunity to submit evidence in support of full application of their laws. *See* Applications of Heritage Wind, and Horseshoe Solar. Available at https://ores.ny.gov/permit-

Second, ORES' regulations governing waiver of local law are unconstitutional because they are untethered to the legislature's directive to consider whether local laws hinder the state's energy goals and reasonably protect the environment. *See Finger Lakes Racing Ass'n, Inc. v. New York State Racing & Wagering Bd*., 45 N.Y.2d 471, 480, 382 N.E.2d 1131, 1136 (1978). "It is elementary that '[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists; they have no authority to create a rule out of harmony with the statute . . ..'" *McNulty v. New York State Tax Comm'n*, 70 N.Y.2d 788, 791, 516 N.E.2d 1217, 1218 (1987) (citing *Finger Lakes Racing Ass'n.*, 45 N.Y.2d at 480). "Courts are constitutionally bound to give effect to the expressed will of the Legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern." *Finger Lakes Racing Ass'n,* 45 N.Y.2d at 479–80, 382 N.E.2d at 1135 (1978).

"There are limits, of course, on what an agency may do even when it operates under a valid grant of authority from the Legislature." *Consol. Edison Co. of New York v. Dep't of Env't Conservation*, 71 N.Y.2d 186, 191–92, 519 N.E.2d 320, 322 (1988). Here, in granting a discretionary power to ORES, the legislature specifically limited use of the waiver power to circumstances where a local law is

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applications This never happened under PSL Article 10.

"unreasonably burdensome in view of the CLCPA targets and the environmental benefits of the proposed major renewable energy facility." Exec. L. § 94-c(5)(e). This unreasonably burdensome standard is not to be taken lightly, as the legislature is required to carefully circumscribe the kind of discretionary power delegated here. *See City of Utica v. Water Pollution Control Bd.*, 5 N.Y.2d 164, 168-69 (1959) ("The Legislature may constitutionally confer discretion upon an administrative agency only if it limits the field in which that discretion is to operate and provides standards to govern its exercise"); *Redfield v. Melton*, 57 A.D.2d 491, 495 (3d Dept. 1977) (Whenever the Legislature delegates a power to an executive branch agency, "the Legislature is constitutionally required to furnish the agency with 'rules and principles' to guide its exercise of discretion and to set the outer bounds of such discretion.")

Critically, the standard for discretionary waiver of a local law enacted under 94-c differs from the prior standard for waiver contained in Article 10 of the Public Service Law. Under Article 10, the Siting Board was delegated the power to waive any provision of a local law it finds "unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers whether located inside or outside of such municipality." PSL § 168(3)(e). *See also* 16 NYCRR § 1001.31 (quoted below). This standard was consistently interpreted by the Siting Board to require a showing by the project sponsor, during a full evidentiary hearing, that

compliance with local law would make the project too costly or technologically infeasible as a practical matter. *See e.g.* New York State Siting Board, Case No 15-F-0122, *Application of Baron Winds, LLC for a Certificate of Environmental Compatibility and Public Need Pursuant to Article 10*, Order Granting Certificate, pp. 146-165 (available by searching the case number at <https://www.dps.ny.gov/>).

Although the legislative standards for waiver under Article 10 and Section 94-c are substantively different, ORES adopted the Article 10 regulations governing the Siting Board's waiver power. In drafting Rule 900-6.3, ORES reproduced Siting Board Rule 1001.31, providing the elements of proof for the Siting Board's unreasonably burdensome standard. The Siting Board's rule requires three fact-based demonstrations to support waiver:

> (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 local substantive requirement outweigh the benefits of applying such provision; 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 local substantive requirement.

16 NYCRR § 1001.31(e) (emphasis added). These are the standards for showing that a local law is "*unreasonably burdensome in view of the existing technology or the needs of or costs to ratepayers.*" PSL § 168(3)(e).

Yet, without explanation, and despite the Legislature's adoption of a new and different standard for waiving local laws, ORES adopted verbatim the PSL Article 10 regulation. *See* 19 NYCRR §900-2.25.

The ORES regulations for waiving local law thus have no bearing on the standard for waiver under 94-c. The Legislature mandates that ORES undertake a factual determination as to whether a local law is unreasonable in light of a project's contribution to the CLCPA targets or its benefits for the environment. The Legislature did not ask ORES to determine the reasonability of local laws "in view of the existing technology or the needs of or costs to ratepayers". This disharmony is fatal to the ORES rule. *See McNulty v. New York State Tax Comm'n*, 70 N.Y.2d 788, 791, 516 N.E.2d 1217, 1218 (1987)*; Finger Lakes Racing Ass'n, Inc., op. cit.*

Finally, ORES Rule 19 NYCRR § 900-2.25(c) is unconstitutionally vague because it does not identify how ORES (or anyone else) might evaluate whether a specific project at issue advances the CLCPA targets, or how those specific benefits should be weighed against the countervailing environmental costs of waiving a

local law, such as the effect of waiver on community planning objectives that may be tied to environmental amenities. "An administrative regulation, legislative in character," that "grant[s] an exception to the applicability of the sections stated, conditioned 'upon such reasonable requirements as the commissioner may specify if he finds that such determination is in the community interest and does not adversely affect the health or safety of the inhabitants' [is] vague and subjective." *Levine v. Whalen*, 349 N.E.2d 820, 825, 39 N.Y.2d 510, 518-519, 384 N.Y.S.2d 721, 725-726 (1976). A regulation is unconstitutionally vague when it is "so drawn that men of common intelligence must necessarily guess at what conduct is prohibited". *Quintard Associates, Ltd. v. New York State Liquor Authority*, 57 A.D.2d 462, 465, 394 N.Y.S.2d 960, 963 (4th Dep't 1977) (citations omitted); *Prusky v. Webb*, 134 A.D.2d 718, 720, 520 N.Y.S.2d 975, 976 (3d Dep't 1987) ("the vagueness doctrine applies to administrative regulations") (citing *Quintard Associates, Ltd.*). Under the ORES regulation, applicants for a permit have no guidance on how to justify a request that ORES waive in whole or in part a substantive local law under the new standard, and municipalities have no guidance on how to defend the reasonability of their local land use laws. Without clear guidelines for determining what is unreasonably burdensome, ORES's discretion to override local laws is, in effect, unlimited. The result is no guidance at all.[10]

[10]Indeed, since it began operating ORES has never utilized the three regulatory balancing tests

ORES has in fact operated with no guidance in a recent permitting case. This demonstrates that the Petitioner's concern is more than theoretical. In *Matter of the Application of Horseshoe Solar*, ORES recently issued a ruling denying party status to a host municipality opposing waiver of its local laws, holding an applicant need not demonstrate any of the regulatory bases in requesting waiver:

> [The Town of] Rush's argument that 19 NYCRR 900-2.25(c) requires an applicant to provide the demonstrations required in paragraphs (1), (2), or (3) of that subdivision is misplaced and an incorrect reading of the regulation. *An applicant can demonstrate that a local law is unreasonably burdensome* in view of the CLCPA targets and the environmental benefits of the proposed Facility *without discussing technology, cost, or the needs of consumers*. If a local law, for example, reduces the available acreage for a proposed Facility and likewise reduces the MW production, ORES may determine the local law is unreasonably burdensome in view of the CLCPLA targets and the environmental benefit of carbon emission reductions without the need for further analysis. As a matter of law, we reject Rush's reading of the regulation.

ORES Case 21-02480, *Application of Horseshoe Solar Energy LLC for a 94-c Permit for Major Renewable Energy Facility*, Ruling on Issues and Party Status and Order of Disposition, 67-68 (June 13, 2022) (emphasis added).[11]

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found at 19 NYCRR § 900-6.3. It has even stated that application of its own regulatory test is optional, and unnecessary to demonstrate a local law is unreasonably burdensome. *See* ORES Case 21-02480, *Application of Horseshoe Solar Energy LLC for a 94-c Permit for Major Renewable Energy Facility*, Ruling on Issues and Party Status and Order of Disposition, 67-68 (June 13, 2022)

[11] Available at <https://www.dps.ny.gov/> by searching on the case number. The case is listed under a PSC case number because ORES uses the PSC's Document Matter Master docketing

The ORES regulations fail to require any relevant standards for local law waivers. Without any regulatory requirement to analyze whether local law waivers are warranted, ORES could arbitrarily ignore the environmental benefits of setbacks needed to protect the community's interest in its character, zoning, and plans for development; the community's interest in protecting the health and safety of residents; the community's interest in protecting prime agricultural land; and the community's interest in protecting forests from clearcutting, among other considerations.[12]

In addition, ORES could arbitrarily ignore a community's choice about how to best support the state in achieving its energy policy goals. For example, a local law may disfavor large projects while incentivizing smaller community-solar projects subject to local permitting authority. Such a law would not be inconsistent with state energy policy.

The Court overlooked "the lack of appropriate standards" (R13) by holding Section 94-c impliedly preempts local laws, but that holding contradicts the plain language of 94-c, which requires compliance with substantive local laws by

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system, which is used for a variety of proceedings.

[12]And ORES has done so. *See e.g.* ORES Case 21-00026, *Application of Heritage Wind LLC for a 94-c Permit* (permit awarded including waiver of local laws)*;* ORES Case 21-01069, *Application of Watkins Glen Solar Energy Center, LLC for a 94-c Permit* (permit awarded including waiver of local laws)*. See also* ORES Case 21-02480, *Application of Horseshoe Solar Energy LLC for a 94-c Permit* (Permit not yet issued, ORES considering host municipality's administrative appeal of party status denial as of July 28, 2022).

default. *See* N.Y. Exec Law 94-c(5)(e); R13-14. It also fails to address the disharmony between statute and regulations, or explain how ORES' power to waive local laws on a case by case basis, for reasons not permitted by the statute, does not run afoul of Home Rule powers granted by Article IX of the New York State Constitution.

For these reasons, ORES should be required to promulgate new rules for waiver of local laws tied to the relevant standard for waiver, and that fall within the narrow scape of the waiver power actually delegated by the State Legislature.

B. ORES Regulations Governing Waiver Have Not Been Authorized by the Legislature.

The preemptive effect of Executive Law Section 94-c requires close attention. The Court below held that the ORES regulations for waiver are legislatively authorized because the waiver provision of Section 94-c is a general law thus making delegation of a discretionary waiver power permissible. R13-R14; R45-R47. This holding misses the mark, as we are not dealing with only an impermissible delegation of legislative authority, but rather with "inferior levels of government [that] have attempted to regulate despite pronouncements on the same subject at a higher governmental level". *Boreali*, 71 N.Y.2d at 14-15, 517 N.E.2d at 1357 (citing *New York State Club Assn. v. City of New York*, 69 N.Y.2d 211; *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99; *Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, 51 N.Y.2d 679). Across New York

hundreds of municipalities have enacted general land use laws. Here, regardless of whether the Legislature properly delegated the power to waive local laws, in promulgating regulations that exceed the scope of the Legislature's delegation, ORES claims a power to effectively preempt local laws that has not been granted.

Where local land use laws are consistent with Section 94-c, there can be no conflict between the state law and the local law. Where "there is no express conflict and, moreover, the State Legislature expressly provided for localities to have a role in the approval process for [specified] projects", a local law or ordinance is not preempted. *Landmark Colony at Oyster Bay v. Board of Supervisors*, 113 A.D.2d 741, 742, 493 N.Y.S.2d 340, 342, 1985 N.Y. App. Div. LEXIS 52435 (2d Dep't 1985).

In this instance, the Legislature provided for a role for municipalities in the ORES approval process. Applications to ORES must be served on proposed host municipalities. Exec. L. § 3(g). "[P]roof of consultation with the municipality or political subdivision where the project is proposed to be located" is required before ORES can deem an application complete. Exec. L. § 5(b). "A final siting permit may only be issued if the office makes a finding that the proposed project, together with any applicable uniform and site-specific standards and conditions would comply with applicable laws and regulations", subject to an "unreasonably burdensome" finding by ORES. Exec. L. § 5(e). "Thus, it is clear that [the Act]

was not intended to preempt local governments from playing a role in the regulation of [energy project] development." *Landmark Colony at Oyster Bay*, 1985 N.Y. App. Div. LEXIS 52435, at *4. *Cf. also* 1968 Ops. St. Compt. File #334.

Additionally, nothing in the Act prohibits municipalities from adopting reasonable land use restrictions. "For a local law to be invalid pursuant to the conflict preemption doctrine, the State must specifically permit the conduct the local law prohibits or provide 'some other indication that deviation from state law is prohibited'". *People v. Torres*, 37 N.Y.3d 256, 268, 177 N.E.3d 973, 981 (2021) (quoting *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601, 617-618, 81 N.Y.S.3d 827, 106 N.E.3d 1187 (2018)). *See also People v. Cook*, 34 N.Y.2d 100, 356 N.Y.S.2d 259, 312 N.E.2d 452 (1974) (to prohibit a municipality from exercising its police power, the state legislature must restrict the adoption of local laws). While case-by-case waiver of local laws is authorized under the Act, the Act specifically protects reasonable local laws and requires compliance with applicable local laws. Exec. L. § 5(e).

Nowhere in the Act are the *substantive* provisions of local land use laws expressly or impliedly preempted. The Act addresses in one provision local laws that are substantive in nature, (N.Y. Exec. Law § 94-c(5)(e)), and otherwise the Act establishes a permitting office charged with siting projects. The Act expressly

preempts procedures for permitting renewable energy facilities on the local level, but requires that ORES-approved projects comply with reasonable substantive provisions of local law. *Id.* Local laws may be more stringent than ORES's uniform standards or permitting conditions provided that the local laws are not unreasonable. *Id.* This determination requirement shows that the Legislature's approach to local laws does not impliedly preempt local laws. The Legislature limits preemption to local approval procedures; requires ORES, in the absence of a contrary factual determination, to apply local laws; and requires project sponsors to conform to reasonable local laws. *Id.*

The statute does not withdraw from local governments the power to restrict the construction and operations of facilities covered by Section 94-c. In this regard, the siting law should have the same effect on local land use restrictions as the Court of Appeals has concluded results from the state Mined Land Use Reclamation Law and the state Solution and Mining Law. Those general laws were found not to preempt local substantive restrictions on construction and operation of facilities, up to an effective ban on construction, because the general laws that were at issue address a siting process. *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987); *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014). Similarly, nothing in the text of Section 94-c explicitly prohibits towns from imposing land use restrictions relating to subjects outside the siting process.

The legislation delegates rule-making power to ORES without expressly withdrawing power from political subdivisions. This has been the law governing predecessors to Section 94-c's siting scheme.

"Public Service Law article X was enacted in 1992 to provide 'a comprehensive framework for developing and implementing sound energy policy for the State that integrates energy planning with consideration of environmental quality and [to provide] a one-stop process for the siting of major electric generating facilities'". *Matter of New York Inst. of Legal Research v. New York State Bd. on Elec. Generation Siting & Envt.*, 295 AD2d 517, 518, 744 NYS2d 441 (2002) (quoting Governor's Mem. approving L. 1992, ch 519, 1992 NY Legis Ann, at 323. Public Service Law article X expired on December 31, 2002). Article X applied to electric generating facilities with an output of 80,000 kilowatts (80 MW) or more and required, among other things, a full Environmental Impact Statement as a precondition to the siting of the facility. Fmr. N.Y. Pub. Serv. Law §§ 160(2), 162.

Art. 10 was enacted in 2011 and reduces the threshold for applicability to 25,000 kw (25 MW). Exec. L. 94-c adopts the same threshold. Otherwise, PSL Art. 10 in structure and substance is identical to former Art. X, except that it adds renewable energy facilities to the type of power plants requiring a state certificate of environmental compatibility and public need.

Executive Law Section 94-c is limited to the siting of renewable energy facilities. The applicability threshold of 25 MW applies to permitting by ORES. However, compared to its predecessors, the "unreasonably burdensome" standard for waiving local laws has been altered.

It is true that comprehensive state regulatory schemes relating to the siting of public utilities have been found to qualify as a "general law" preempting local zoning ordinances. *See Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 107 (siting of major steam powered generating facility); *Matter of Skyview Acres Coop. v. Public Serv. Commn.*, 163 A.D.2d 600, 603-604, appeal dismissed 76 N.Y.2d 1017, lvs denied 77 N.Y.2d 805, 806 (siting of natural gas pipeline)). However, because they do not supply electricity to users, renewable energy facilities are not public utilities. *See* P. Salkin, N.Y. ZONING AND LAND USE L. 4th § 11:18.

More importantly, as previously noted, New York courts distinguish the scope of state siting laws from the scope of local land use regulation, holding that local regulation of the construction and operation of industrial facilities survives state laws expressly preempting local approvals relating to siting. Although a general state law expressly "preempted all local laws relating to the extractive mining industry," (*see* ECL § 23-0302(2)), the Court of Appeals upheld the Town of Carroll's decision to prohibit extractive mining in the Town's AR-2 Zoning

District. *Frew Run Gravel Products, Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987). The Court's decision was based at least in part on its plain meaning interpretation of the statute's scope "relating to the extractive mining industry," and its conclusion that the purpose of the Town's Zoning Ordinance is "regulating the location, construction and use of buildings, structures, and the use of land in the Town". Relying on *Frew Run*, in *Wallach v. Town of Dryden*, 23 N.Y.3d 728 (2014) the Court upheld a local zoning law that prohibited hydrofracking despite statutory language that expressly preempts local restrictions on the natural gas extraction industry. Similarly, there is no inconsistency between Not-for-Profit Corporation Law Article 15 (the cemetery law) and "zoning ordinances relating to the land use by cemeteries" because the state law concerns the management of cemetery corporations whereas the zoning ordinance concerns the land use aspect of cemeteries. *Oakwood Cemetery v. Town/Vill. Mount Kisco*, 115 A.D.3d 749, 981 N.Y.S.2d 786 (2d Dep't 2014). *See also Huntley & Huntley v. Borough Council of Borough of Oakmont*, 964 A.2d 855 (2009) (Section 602 of Pennsylvania's Oil and Gas Act, relating to the siting of gas and oil infrastructure does not preempt municipal land use restrictions on the same activities). PSL Article X did not delegate to the state siting agency the authority to grant licenses to use "public ways and public places", as this authority was retained by the city that would host the plant. *Matter of TransGas Energy Sys., LLC*, 65 A.D.3d at

1250, 887 N.Y.S.2d at 105 (interpreting identical language found at Exec. L. § 6(a)).

In addition to ORES' illegal expansion without limitation of the agency's power to waive local laws, ORES seeks illegally to preempt the Home Rule powers of local governments. There is no evidence that the Legislature conferred upon ORES such preemptive power. Where local land use restrictions are consistent with the Act, there is nothing in the Act that impliedly curbs Home Rule powers.

The State Constitution's Home Rule provision states: "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 its property, affairs or government . . ." N.Y. Const., Art. IX § 2 [c] [i]. Thus, Home Rule is limited to what is consistent with everything else in the Constitution or any "general"[13] law. The term "inconsistent" is not to be construed as meaning merely "different" when determining validity of local law. *Sherman v. Rhinebeck*, 133 A.D.2d 77, 518 N.Y.S.2d 424, 1987 N.Y. App. Div. LEXIS 49603 (N.Y. App. Div. 2d Dep't 1987). However, consistency "shall be liberally construed." N.Y. Const., Art. IX § 3 [c]. *And see* Municipal Home Rule Law Section 51 ("[t]his chapter shall be

[13] A general law is, "[a] law which in terms and in effect applies alike to all counties, all counties other than those wholly included within a city, all cities, all towns or all villages." N.Y. Const. Art. IX, § 3(d)(1) (emphasis added). Conversely, a special law is, "[a] law which in terms and in effect applies to one or more, but not all, counties . . . cities, towns or villages." N.Y. Const. Art. IX, § 3(d)(4).

liberally construed"); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428-429, 547 N.E.2d 346, 348-349 (1989) (analyzing the constitutional and statutory bases for the "affirmative grants of power to local governments" in New York); *ILC Data Device Corp. v. County of Suffolk*, 182 A.D.2d 293, 297-98, 588 N.Y.S.2d 845, 847-848 (2d Dep't 1992) (the same as to "broad grants of legislative powers" conferred on local governments).

Local land use laws are in general meant to protect the environment, or public health and safety. The environment includes "community character" under SEQRA. ECL 8-0105(6); 6 NYCRR 617.2(l). The power to preserve the community character is granted to rural towns by Article IX § 2 of the New York Constitution. *See DJL Rest. Corp. v. City of New York*, 96 N.Y. 2d 91, 96-97, 749 N.E.2d 186, 725 N.Y.S.2d 622 (2001); *Riverhead v. New York State Dep't of Envtl. Conservation*, 193 A.D. 2d 667, 598 N.Y.S.2d 14 (2d Dept. 1993); *Matter of Town of Verona v. Cuomo*, 136 A.D. 3d 36, 41-42, 22 N.Y.S.3d 241 (3d Dept. 2017). The preservation of community character may be legitimately achieved with setbacks from industrial facilities for sensitive properties; restrictions on the use of prime agricultural land; and the protection forests from clearcutting. In the short time it has operated, ORES has ignored these subjects and waived local laws without any analysis of their reasonability.[14]

[14]*See above*, footnote 12.

The ORES regulations governing local law waivers lack any logical connection to the Legislature's standard for waiver. *Cf.* Exec. L. § 94-c(5)(e). *Compare* 19 NYCRR §900-2.25. As previously noted, the Legislature authorized ORES to develop standards for determining whether waiver will advance the CLCPA targets, and will result in environmental benefits. Exec. L. § 94-c(5)(e). The regulations issued by ORES do not address those standards in any way. *See* 19 NYCRR §900-2.25. ORES has freed itself to disregard either set of standards in practice. ORES's waiver of local laws is unconstrained by any intelligible standard as a matter of both law and practice. The waiver provision in the ORES regulations thus bears no rational relation to state energy objectives. Among other things, the state's objectives place a high priority on considering the environmental effects of waiving local laws. Exec. L. § 94-c(3)(c). *See also* Exec. L. §§ 1, 3(b); L.2020, c. 58, pt. JJJ, § 4(c).

For these reasons, the Court erred in citing implied preemption as a legal basis for ORES to enact regulations unrelated to the Legislature's standard for waiver. ORES regulations violate Home Rule by allowing the agency to waive local laws that are consistent with the Constitution and general laws, and that are not otherwise expressly preempted by Exec. L. 94-c.

CONCLUSION

For the forgoing reasons, the Court should reverse the decision below and (a) remand this matter with directions to annul ORES' regulations and require ORES to engage in a new rulemaking process that takes all pertinent social, economic, and environmental factors into account, and (b) require ORES to promulgate new regulations that stay within the narrow standard for waiver set forth in § 94-c.

Dated: August 2, 2022

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