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,

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.

DECISION AND ORDER
Index No.: 905502-21

INTRODUCTION

This is a hybrid proceeding pursuant to CPLR Article 78 and a Declaratory Judgment action pursuant to CPLR §3001.

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 No. 58.- Town of Farmersville has withdrawn from the proceeding.

Pursuant to the Accelerated Renewable Energy Growth and Community Benefit Act, enacted April 3, 2020 ("the Act"), the Executive Law was amended to add Executive Law (EL) § 94-c, creating the New York State Office of Renewable Energy Siting (hereinafter ORES). Petitioners challenge the lawfulness of the regulations adopted by ORES in accord with EL§ 94-c, as violative of the State Environmental Quality Review Act (SEQRA), the State Administrative Procedures Act (SAPA), Article IX of the New York State Constitution, and further claim the ORES regulations are ultra vires.

In a nutshell, Petitioner's object to the legislative determination to remove the permitting authority of major renewable energy facilities from the Public Commission (PSC) under Article 10 of the Public Service Law to ORES. Interestingly, Petitioner's object to the fact that an ORES review is exempt from SEQRA and it has the authority to waive local laws, yet, so too, is the PSC Article 10 review subject to the same exemption and waiver authority.[2] Petitioner's object to the "speed" of an ORES review, presumptions and default provisions necessitating approval within one (1) year.[3]

Petitioners moved for a preliminary injunction. A hearing took place on September 21, 2021. The parties elected to rely on the papers submitted, and no further witness testimony was presented. Oral argument of the motion took place on the record.

FACTS

Following the adoption of Executive Law (EL) § 94-c on April 3, 2020, ORES took the requisite steps to promulgate rules and regulations thereunder as of March 3, 2021 (19 NYCRR § 900-1 to 5, 900-6, and 900- 7 to 15).[4]

[2] NYSDEF Doc. No. 1 – Complaint ¶ 42-43, 119.
[3] NYSDEF Doc. No. 1 – Complaint ¶ 51-58.

[4] NYSEF Doc. No. 91 Vol. I, R0004, R 0028-R0032.

The Town of Copake (hereinafter Copake) is opposed to the development of the Shepard's Run Solar Project in its community.[5] Petitioners allege

> "The Town of Copake's solar energy zoning law sets express limits on the conversion of farmland to solar energy facilities, while the Uniform Standards and Conditions provide no limit on the amount of farmland that can be converted to non-agricultural uses."[6]

Petitioner's also object to the fact that ORES relied on an outside vendor, Tetra Tech, to draft the regulations, due to alleged conflicts of interest arising out of its design and siting services in New York for 25 renewable energy developers and projects.[7]

ORES utilized an Environmental Assessment Form (EAF) dated September 15, 2020 to commence its SEQRA review.[8] The intent of the action was set forth in the EAF as follows:

> "The proposed action will be the promulgation of regulations to implement Section 43-0112.5 of the Accelerated Renewable Energy and Community Benefit Act (the Act) by the Office of Renewable Energy Siting to accelerate the growth of renewable energy facilities to meet critical state energy policy goals. The regulations are intended to fulfill the statutory responsibility of the agency as set forth in Section 43- 0112.5 of the Act which, in order to achieve the Climate Leadership and Community Protection Act (CLCPA) targets, requires appropriate action to ensure that new renewable energy generation projects can be sited in a timely and cost effective manner that includes consideration of local laws concerning zoning, the environment or public health and safety and avoids or minimizes, to the maximum extent practicable, adverse environmental impacts."[9]

[5] NYSDEF Doc. No. 1 – Complaint ¶ 13. The other municipal Petitioners also have specified solar/wind projects that they oppose – See Complaint ¶ 16-20. See also, NYSEF Doc. NO. 31 – 40, 42.
[6] NYSDEF Doc. No. 1 – Complaint ¶ 100. Petitioners also lists local setback and noise restrictions that are more protective of the environment that the ORES regulations – See Complaint ¶ 97-104.
[7] NYSDEF Doc. No. 1 – Complaint ¶ 60-64.
[8] NYSEF Doc. No. 93 Vol. III, R1220-1229.
[9] NYSEF Doc. No. 93 Vol. III, R 1225.

The action was identified as "Promulgation of regulations to implement Section 43-0112.5 of the Accelerated Renewable Energy Growth and Benefit Act" and classified as "unlisted."[10] Notably, the negative declaration was completed as of September 15, 2020, in advance of the public hearing and comment process.[11]

Following the conduct of seven (7) public hearings, and receipt of public comments from September 16, 2020 through December 7, 2020, ORES issued written responses to approximately 5,000 comments received from the public.[12] Copake, along with the other Petitioners, filed comments in opposition to the proposed regulations, and claim there was no meaningful response by ORES.[13]

ORES prepared an Amended EAF dated February 23, 2021.[14] The title of the action was amended to" Promulgation of regulations to implement Executive Law Section 94-c (Section 4 of the Accelerated Renewable Energy Growth and Benefit Act)" and its classification as unlisted remained intact.

ORES issued a negative declaration (6 NYCRR § 617.7 (a) (2) and (b)) on February 23, 2021, finding,

> "Based upon the Office's review of the record, including prior SEQRA proceedings referenced in the Environmental Assessment Form and incorporated herein, the Office finds that the proposed action of promulgating the EL §94-c regulations would not result in any significant adverse environmental impacts. The proposed action of promulgating regulations does not include any direct approval of applications for the siting of

[10] 6 NYCRR §617.2 (al) and 617.6 (a) (1) (iv) and (3).
[11] NYSDEF Doc. No. 1 – Complaint ¶ 70-74; NYSEF Doc. No. 5. While the premature adoption of the negative declaration is fundamentally at odds with the SEQRA "hard Look" standard, the error was effectively inconsequential and the adoption of the Amended EAF upon the completion of the public hearings and response to public comments was not a mere afterthought (c.f. Chinese Staff & Worker's Ass'n v. New York, 68 N.Y. 2d 359, 369 [1986]; Tri-County Taxpayers Asso. v. Town Bd. of Queensbury, 55 N.Y.2d 41 [1982]).

[12] NYSEF Doc. No. 91 Vol. I R-0108-0281.
[13] NYSDEF Doc. No. 1 – Complaint ¶ 78-87.
[14] NYSEF Doc. No. 91 Vol. I R-0283-0322.

> major renewable energy facilities. Any application for a specific project submitted to the Office, will undergo the necessary site-specific regulatory and environmental reviews pursuant to Executive Law §94-c, the accompanying regulations and other applicable federal and state laws, in a manner that avoids or minimizes, to the maximum extent practicable, significant adverse environmental impacts."[15]

Petitioners claim the negative declaration was not supported by the record, alleging:

> "Without basis or serious consideration, ORES determined that promulgation of uniform statewide standards for setbacks, noise limits, shadow flicker exposure and other physical effects of wind and solar energy facilities, some spanning thousands of acres or entire counties, could not result in a single significant adverse impact on the environment, birds, bats, other wildlife, rural persons, or their local government's police powers or local land use plans."[16]

Petitioners allege a GEIS should have been accepted in advance of the regulation approval.[17] Petitioners failed to account, however, for the record demonstration that the negative declaration was not issued in a vacuum. Rather, the EAF referenced extensive environmental reviews conducted by the Public Service Commission as follows:

> "…**the Office, in completing this review, has evaluated and incorporated the prior SEQRA determinations in the 2015 GEIS, 2016 FSEIS, 2020 FSEIS and related prior SEQRA proceedings, and concurs with the findings**. Those findings identified potentially significant adverse cumulative impacts related to the development of major solar and wind facilities (including without limitation, land use and land cover, visual resources and aesthetics, threatened or endangered species and their habitat including grassland birds, noise pollution and air resources impacts assessed therein), and determined that they would not be expected to result in significant adverse cumulative impacts given the variety of measures to avoid or minimize permanent or other impacts to resources." (emphasis added)[18]

[15] NYSEF Doc. No. 91 Vol. I R-0305, 0290.
[16] NYSDEF Doc. No. 1 – Complaint ¶ 95.
[17] NYSDEF Doc. No. 1 – Complaint ¶ 120-122.
[18] NYSEF Doc. No. 91 Vol. I R-0303-0304. (see 6 NYCRR § 617.10 (d) (3)).

While the amended EAF referenced the cited environmental studies, the subject negative declaration was made in accord with 6 NYCRR § 617.10 (d) (3).

Petitioners allege there was a "demonstrable failure to take a "hard look" at the potential adverse environmental impacts of the ORES regulations and process."[19]

EXECUTIVE LAW§ 94-c

Executive Law (EL) § 94-c provides, inter alia:

> **"1. Purpose.** It is the purpose of this section to consolidate the environmental review and permitting of major renewable energy facilities in this state and to provide a **single forum** in which the office of renewable energy siting created by this section may undertake a coordinated and timely review of proposed major renewable energy facilities to meet the state's renewable energy goals while ensuring the protection of the environment and consideration of all pertinent social, economic and environmental factors in the decision to permit such facilities as more specifically provided in this section…
>
> **3. Office of renewable energy siting; responsibilities.**
> **(a)** There is hereby established within the department an office of renewable energy…
>
> **(b)** The **office shall within one year of the effective date of this section establish a set of uniform standards and conditions… Prior to adoption of uniform standards and conditions…**
>
> **(c) The uniform standards and conditions established pursuant to this section shall be designed to avoid or minimize, to the maximum extent practicable, any potential significant adverse environmental impacts…**
>
> **(d)** In its review of an application for a permit to develop a major renewable energy facility, the office, in consultation with the department of environmental conservation, shall identify those **site-specific environmental impacts…** provided, however, that the office shall require that **the application of uniform standards and conditions and site-specific conditions shall achieve a net conservation benefit to any impacted endangered and threatened species**.

[19] NYSDEF Doc. No. 1 – Complaint ¶ 91.

(e) To the extent that environmental impacts are not completely addressed by uniform standards and conditions and site-specific permit conditions proposed by the office, and the office determines that mitigation of such impacts may be achieved by off-site mitigation, **the office may require payment of a fee by the applicant to achieve such off-site mitigation…**

(g) The office shall within one year of the effective date of this section promulgate rules and regulations…"

4. Applicability.

(a) On and after the effective date of this section, no person shall commence the preparation of a site for, or begin the construction of, a major renewable energy facility in the state, or increase the capacity of an existing major renewable energy facility, without having first obtained a siting permit pursuant to this section…

5. Application, municipal notice and review.

(b) Notwithstanding any law to the contrary, the office shall, within sixty days of its receipt of an application for a siting permit determine whether the application is complete and notify the applicant of its determination. If the office does not deem the application complete, the office shall set forth in writing delivered to the applicant the reasons why it has determined the application to be incomplete. **If the office fails to make a determination within the foregoing sixty-day time period, the application shall be deemed complete**; provided, however, that the applicant may consent to an extension of the sixty-day time period for determining application completeness. **Provided, further, that no application may be complete without proof of consultation with the municipality or political subdivision where the project is proposed to be located, or an agency thereof, prior to submission of an application to the office, related to procedural and substantive requirements of local law.**

(c)

(i) No later than sixty days following the date upon which an application has been deemed complete and following consultation with any relevant state agency or authority, **the office shall publish for public comment draft permit conditions prepared by the office…**

(d) If public comment on a draft permit condition published by the office pursuant to this subdivision, including comments provided

> by a municipality or political subdivision or agency thereof, or members of the public **raises a substantive and significant issue,** as defined in regulations adopted pursuant to this section, that requires adjudication, the office shall promptly fix a date for an **adjudicatory hearing** to hear arguments and consider evidence with respect thereto.
> **(e)** Following the expiration of the public comment period set forth in this subdivision or following the conclusion of a hearing undertaken pursuant to this subdivision, the office shall, in the case of a public comment period, **issue a written summary of public comment and an assessment of comments received, and in the case of an adjudicatory hearing, the executive officer or any person to whom the executive director has delegated such authority, shall issue a final written hearing report. 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...**
>
> **(f) Notwithstanding any other deadline made applicable by this section, the office shall make a final decision on a siting permit for any major renewable energy project within one year from the date the application was deemed complete...**Unless the office and the applicant have agreed to an extension, with such extension limited to thirty days, **and if a final siting permit decision has not been made by the office within such time period, then 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..." (emphasis added)**

The record demonstrates that the challenged regulations (19 NYCRR § 900-1 to 5, 900-6[20], and 900-7 to 15) were timely promulgated within the one-year period mandated by the statute.

As more fully appears below, the one-year statutory default approval provision under paragraph 5 (f) stands in potential conflict with the challenged regulations for it potentially undermines a complete hearing and review process.[21] While Petitioners did not challenge the validity of EL § 94-c and have limited their challenge to the validity of the regulations adopted to

[20] Uniform standards and conditions (USCs)
[21] See also NYSEF Doc. NO. 1 Complaint ¶ 117.

implement the enabling authority, Petitioners do seek relief "tolling the Default Approvals set forth in Exec. L §§94-c(5)(b), 5(c)(i), 5(f)."[22]

THE REGULATIONS

Petitioners object to the claimed speed of the review process and have challenged the default provisions, that an application shall be deemed complete 60 days after its submission, and the project must be approved within 1 year.[23] Not so fast!

The regulations require significant review and evaluation of environmental impacts in advance of applying.[24] Not less than 60 days before filing an application, the applicant is required to meet with the affected local officials, describe the project, and make "An identification of such substantive local law provisions for which the applicant will request that the office make a finding that compliance therewith would be unreasonably burdensome," i.e., an advance notice of the local restriction that the applicant will seek a waiver on.[25] After that meeting, upon at least 14 days' notice, the Applicant must hold a public meeting inviting local input; again, at least 60 days before applying, and must submit a transcript thereof as part of the application.[26] Applicant must also publish notice of its intent to apply and provide copies to all local officials who attended the pre-application meeting at least 60 days before applying.[27]

[22] See NYSEF Doc. No. 2. See Also NYSEF Doc. No. 1 – Complaint ¶ 51, and the Wherefore clause at page 37 thereof.
[23] NYSEF Doc. No. 1 – Complaint ¶ 51. See also NYSEF Doc. NO. 78 – Petitioner's Memo of Law p. 2 where Petitioner's claim "the Regulations give renewable energy developers a **speed pass** to rush projects to construction with **barely a nod** to the very real and substantial impacts they will have on citizens and communities throughout the State." (emphasis added) The "barely a nod" comment reflects an unfortunate misrepresentation of the regulatory process.
[24] See 19 NYCRR § 900-1.3.
[25] See § 900-1.3 (a) (4).
[26] See § 900-1.3 (b).
[27] See § 900-1.3 (d).

The application for a solar or wind facility must contain a wetland delineation, a surface water delineation, a wildlife site characterization and an archeological/cultural resources study (starting at Phase IA and leading up to a Phase II study depending on the site).[28] Applications for other than solar and wind facilities must meet with ORES at least one (1) year before applying to determine the scope and extent of the application requirements.[29]Clearly, this is a pre-application process which contemplates significant work, resources, commitment, and time. By way of contrast, even a SEQRA Type I action can be commenced on the basis of a long form EAF, without any supporting technical reports.

The general requirements for an application are set forth in § 900-1.4.[30] Expansive requirements are made for public input and access, including a Website for public access, as well as a provision requiring a Water Quality Certification, as appropriate.[31] The requirements for application exhibits are set forth in § 900-2, including noise impacts for wind and solar facilities,[32] visual impacts,[33] cultural resources,[34]geological/seismic/soils studies,[35]terrestrial ecology studies,[36]NYS threatened or endangered species report,[37]water resources and aquatic ecology report,[38]wetlands report,[39]agricultural resources report,[40]traffic and transportation

[28] See § 900-1.3 (d) (5), (f) (5), (g) (8), h (4)

[29] See § 900-1.3 (i).
[30] Filing and publication requirements are set forth in § 900-1.6.
[31] See § 900-1.4 (b).
[32] See § 900-2.8 Exhibit "7".
[33] See § 900-2.9 Exhibit "8," inclusive of a viewshed analysis.
[34] See § 900-2.10 Exhibit "9" Phase 1A to Phase II studies.
[35] See § 900-2.11 Exhibit "10."
[36] See § 900-2.12 Exhibit "11."
[37] See § 900-2.13 Exhibit "12."
[38] See § 900-2.14 Exhibit "13."

[39] See § 900-2.15 Exhibit "14."

[40] See § 900-2.16 Exhibit "15."

report,[41] consistency with energy planning objectives report,[42] socioeconomic impact report,[43] Environmental justice report,[44] communication effects report,[45] electric systems effects and interconnection report,[46] electric and magnetic fields report,[47] site restoration and decommissioning report,[48] local laws and ordinance report,[49] and other permit approvals report.[50] Upon review of the foregoing, it is manifest that the sophistication level of the application is akin to but far more comprehensive that submitting an SEQRA application with a full DEIS.[51]

On receipt of the application, ORES must decide "completeness or incompleteness" within 60 days.[52] Considering the expansive pre-application and application content mandate, a determination of completeness can be readily made within that period.[53] Significantly, the regulations specifically give ORES the ability to determine the application is incomplete. The regulations contain a default provision, to wit:

> "If the office fails to provide notice of its determination of completeness or incompleteness within the time period set forth in subdivision (c) of this section, the application shall be deemed complete. **Nothing in this section waives** any applicable statutory requirements to obtain other permits that may be required, including, but not limited to, Federal and Federally-delegated permits, **or precludes the office from requesting additional information as set forth in this Part.**"[54] (emphasis added)

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[41] See § 900-2.17 Exhibit "16."
[42] See § 900-2.18 Exhibit "17."
[43] See § 900-2.19 Exhibit "18."
[44] See § 900-2.20 Exhibit "19."
[45] See § 900-2.21 Exhibit "20."
[46] See § 900-2.22 Exhibit "21."
[47] See § 900-2.23 Exhibit "22."
[48] See § 900-2.24 Exhibit "23."
[49] See § 900-2.25 Exhibit "24." Applicant must include "a statement that the location of the facility as proposed conforms to all such local substantive requirements, except any that the applicant requests that the office elect not to apply."
[50] See § 900-2.26 Exhibit "25."
[51] See 6 NYCRR 617.9 (b).
[52] See § 900-4.1 (c).
[53] By was of comparison, the determination of whether to accept a DEIS must be made within 45 days (6 NYCRR 617 (a) (2)).
[54] See § 900-4.1 (h).

Clearly, determination that an application is complete by default, does not foreclose ORES from requiring further submissions, nor does it mean that the application will be ultimately approved.

Within 60 days of completeness, ORES is required to issue "draft permit conditions prepared by the office or a statement of intent to deny and seek public comment thereon."[55] (emphasis added) The hearing must be "convened" within 60 days of the statement of intent and notice thereof must be published at least 21 days prior thereto.[56] There is also a 60-day period for public comments, applications for party status, and local municipal comments, running from the date of the notice.[57]

While the hearing procedures regulate participation, "Non-parties who wish to have their comments recorded shall be permitted to submit oral or written comments during the public comment portion of the proceedings…"[58] Notably, "The applicant has the burden of proof to demonstrate that its proposal shall be in compliance with all applicable laws and regulations administered by the office."[59]The regulations do not limit the time period that the hearing is conducted, but requires the ALJ to issue its recommendation within 45 days of the close of the record.[60] The record is not officially closed, however, until "the receipt of the stenographic record by the ALJ, the receipt of additional technical data or other material agreed at the hearing to be made available after the hearing, or the submission of briefs and reply briefs, conclusions of law, memoranda, and exceptions, if any, by the various parties, whichever occurs last", all without any defined time limit.[61] Last, "The **final decision** of the Executive Director shall be

[55] See § 900-8.1.
[56] See § 900-8.2 and 8.3.
[57] See § 900-8.2 (d) (1) (4) and 8.4 (d).
[58] See § 900-8.4 (a).
[59] See § 900-8.8 (b) (1).
[60] See § 900-7 and 8.12 (a) (1).
[61] See § 900-7 (5)

issued within 30 days after receipt of all comments on the recommended decision and hearing report."[62] Significantly, the regulations establish a framework to provide financial assistance to local government or intervenors to enable them to seek expert services.[63]

The foregoing time sequence corresponding to the conduct of the hearing and the close of the record may readily take place within one-year. Let's consider a review process running from January 1 to December 31 as an example to see if the process is reasonable. If the application is filed on January 1, a determination of completeness must be made on or before March 1. The statement of intent must be issued on or before May 1. The hearing must commence on or before July 1, with a 21-day advance notice. There is no time limit set for the length of the hearing. Comments may be received, and party status applied for within 60 days of the 21-day notice. Backing out the 45-day ALJ decision period and the 30-day Director final decision period from December 31, the hearing record would have to close by October 15. Thus, with due diligence, the one-year framework is workable. As a practical matter, however, considering the potential for discovery and motion practice, as well as the delay, attendant receipt of the hearing transcripts, the process may exceed a one-year period. In such event the entire process runs into conflict with the statutory mandate that a final determination to either grant or deny the permit must be made within one (1) year of the application completion date, or the application will be deemed approved by default.[64]

[62] See § 900-8.12 (c).
[63] See § 900-5.1.
[64] See § 900-9.1 (a) (2).

STATEMENT OF LAW

To determine the propriety of injunctive relief, the Court will necessarily address the substantive issues raised in the Complaint, and the sheath of defenses raised by the Defendants. First, let's look at the technical defenses raised by the parties.

FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

The record clearly evidences that there will be ongoing administrative proceedings corresponding to specific projects undergoing ORES review, but the administrative review process corresponding to the adoption of the challenged regulations is complete. Defendant asserts, however, that Petitioner has failed to exhaust its administrative remedy and seeks dismissal of the action.

In Watergate II Apartments v. Buffalo Sewer Authority, 46 N.Y. 2d 52, 57 [1978], the Court held,

> "It is **hornbook law** that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.
>
> The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either **unconstitutional** or **wholly beyond its grant of power, or** when resort to an administrative remedy would be **futile** or when its pursuit would cause irreparable injury". (emphasis added)

Here, it is manifest that the continuance of the administrative proceeding before ORES would be futile.

Based on the foregoing, it is the finding of this Court that Petitioner did not fail to exhaust its administrative remedies.

CAPACITY

In City of New York v. State of New York, 86 N.Y. 2d 286 [1986] and its progeny, including Mtr. of World Trade CTR LITIG, 30 N.Y. 3d 377 [2017], the court recognized "the traditional principle throughout the United States has been that municipalities and other local governmental corporate entities and their officers lack capacity to mount constitutional challenges to acts of the State and State legislation" (City of New York, supra. at 289; World Trade, supra. at 384) (underscored emphasis added). Here, Petitioner Town of Copake seeks to protect its zoning powers to preserve the community character as a relevant area of environmental concern through compliance with SEQRA under § ECL 8-0107. Petitioner has the right to do so under article IX §2 of the New York Constitution (see DJL Rest. Corp. v. City of New York, 96 N.Y. 2d 91, 96-97 [2001], where Court recognized local zoning power to regulate land use; Riverhead v. New York State Dep't of Envtl. Conservation, 193 A.D. 2d 667 [2d Dept. 1993]; Village Law §1-102 (5)).

In Black Brook v. State, 41 N.Y. 2d 486 [1977], the Town sought a declaration that the enactment of the Adirondack Park Agency violated the home rule provisions of article IX of the State constitution. While the court found that local zoning was subordinate to the APA comprehensive plan, it recognized the Town's capacity to sue. In Matter of Blue Line Council, Inc. v. Adirondack Park Agency, 86 A.D. 3d 756 [3d Dept. 2011], appeal dismissed 17 N.Y. 3d 947, the Court recognized that "a municipality lacks capacity to challenge a state agency's interpretation of statutes and regulations where…the result impacts the municipality in its governmental capacity" (id. at 758). The Court held, however, that the Petitioners "do have capacity to raise their claims insofar as they argue that the 2008 amendments violated the home rule protections contained in article IX of the NY Constitution" (id. at 759), albeit the Court

dismissed the proceeding on the merits (see also, Matter of Town of Verona v. Cuomo, 136 A.D. 3d 36, 41-42 [3d Dept. 2017], where Court recognized home rule power exception to the capacity issue, but held Town failed to prove settlement agreement impinged on home rule powers).

Petitioner Town of Copake has the capacity to sue.[65] Clearly, the private entities named as Petitioners also have the capacity to sue.

STANDING

In Matter of Town of Amsterdam v. Amsterdam Indus. Dev. Agency, 95 A.D. 3d 1539, 1541 [3d Dept. 2012], the Court held, inter alia: "in order to establish standing to challenge a SEQRA determination, a **municipality** must demonstrate how its personal or property rights, either personally or in a **representative capacity**, will be directly or specifically affected apart from damage suffered by the public at large…that it will suffer an injury that is environmental and not solely economic in nature" (emphasis added; internal citations omitted). In Matter of Vil. Of Chestnut Ridge v. Town of Ramapo, 45 A.D. 3d 74 [2d Dept. 2007], lv dismissed 12 N.Y. 3d 793 [2010], the Court held a Village had standing to raise a SEQRA challenge, holding,

> "…**a municipality is more than the collection of pavement, pipes, and other improvements that make up its infrastructure**. Rather, a village is a local governmental unit with broad powers, conferred not just by legislative grant, but as a matter of constitutional entitlement. It "is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the state and federal Constitutions." **In the furtherance of this authority, municipal officials exercise a broad array of powers with respect to the nature of the community, including the powers to protect and enhance the "physical and visual environment",** and to enact zoning regulations. **It is through the exercise of**

[65] Correspondingly, all of the municipal Petitioners have capacity to sue.

> **these powers that they define the character of the community for the benefit of its residents.**
>
> **Community character is specifically protected by SEQRA.** SEQRA requires the preparation of an environmental impact statement with respect to any action that "may have a significant effect on the environment" (ECL 8-0109 [2]). "Environment," for this purpose, includes, significantly, "existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character" (ECL 8-0105 [6]). The criteria by which the significance of a project is determined include "the creation of a material conflict with a community's current plans or goals as officially approved or adopted" and "the impairment of the character or quality of important historical, archeological, architectural, or aesthetic resources or of existing community or neighborhood character" (6 NYCRR 617.7 [c] [1] [iv], [v]). "The impact that a project may have on … existing community character, with or without a separate impact on the physical environment, is a relevant concern in an environmental analysis."
>
> **The power to define the community character is a unique prerogative of a municipality acting in its governmental capacity…** Thus… **the Villages sue here not to assert a claim that belongs to their residents individually but, rather, to protect their unique governmental authority to define their community character. The Villages have thus established a "demonstrated interest in the potential environmental impacts" of the adult student housing law, and they therefore have standing to seek judicial review of the SEQRA process** that resulted in its adoption." (internal case citations omitted; emphasis added) (id. at 93-95)

; see also, Matter of Village of Woodbury, 154 A.D. 3d 1256, 1259 [3d Dept. 2017].

Here, the Town of Copake has challenged solar development, claiming its visual impact is incompatible with its rural community character. In so doing, the Town of Copake has established that it will suffer direct injury and has standing to bring this proceeding (see In the Matter of Town of Waterford et al v. NYSDEC, 2020 N.Y. Slip Op. 06180 [3d Dept. 2020] where the court found visual impact form the challenged landfill presented distinct environmental harm).

Since Petitioner Town of Copake clearly has standing, the Court need not address whether the remaining Petitioners have standing (see Matter of Wooster v. Queen City Landing, LLC, 150 A.D. 3d 1689, 1690 [4th Dept. 2017]). Nevertheless, the Court notes that the private entities named as Petitioners have alleged sufficient facts to establish standing to sue (see Matter of Save the Pine Bush, Inc. v. Common Council of the City of Albany, 13 N.Y. 3d 297, 305 [2009]).

STATUTE OF LIMITATIONS/JUSTICIABLE ISSUE/RIPENESS

Respondents argue the proceeding is not ripe for review but is also barred by the statute of limitations.

It is manifest that this Court does not have jurisdiction to issue an advisory opinion (see In Re Workmen's Compensation Fund, 224 N.Y. 13 [1918] [Cardozo, J.] where the Court held, "The function of the courts is to determine controversies between litigants…They do not give advisory opinions"). CPLR 3001 requires a justiciable issue.

In Church of St. Paul & St. Andrew v. Barwick, 67 N.Y. 2d 510 [1986], cert. denied 479 U.S. 985 [1986], the Court identified the ripeness review standard as follows:

> "**The particular ripeness question before us arises in a declaratory judgment action where it is claimed that constitutional harm has resulted from the application of a statute by an administrative agency.** In a trilogy of decisions in declaratory judgment actions brought by drug companies to review the validity of certain administrative regulations the Supreme Court used a **two-part analysis** for determining whether a pre-enforcement challenge to an administrative regulation is ripe for judicial review. It is necessary, the court stated, first to determine whether the issues tendered are **appropriate** for judicial resolution, and second to assess the **hardship** to the parties if judicial relief is denied. We find this two-part analysis apt and particularly helpful in resolving the question here.

> The **appropriateness** inquiry looks to whether the administrative action being reviewed is final and whether the controversy may be determined as a purely legal question. **The concept of finality requires an examination of the completeness of the administrative action and a pragmatic evaluation of whether the decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury…** Even if an administrative action is final, however, it will still be **inappropriate for judicial review and, hence, unripe, if the determination of the legal controversy involves the resolution of factual issues or consideration of extraneous problems or factors beyond the legal question presented…** The second part of the inquiry requires an evaluation of the **hardship** to the parties of withholding [or granting] court consideration. The effect on the administrative agency and its program and the need for judicial economy should be taken into account as well as the degree of hardship to the challenging party. Essentially, this inquiry, from the standpoint of the challenging party, entails an examination of the certainty and effect of the harm claimed to be caused by the administrative action: whether it is sufficiently direct and immediate and whether the action's effects [have been] felt in a concrete way. If the anticipated harm is insignificant, remote or contingent the controversy is not ripe. **A fortiori, the controversy cannot be ripe if the claimed harm may be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.** (id at 519-520) (internal quotations and citations have been omitted) (emphasis added).

Under the two-part analysis established in Church of St. Paul, the subject action is ripe for review. Here, ORES has taken a definitive position by promulgating the regulations to transfer siting authority to ORES pursuant to EL 94-c. This is a fait accompli. Moreover, it is manifest that effective administrative relief is simply not available through the individual permitting process, and, in any event, pursuit thereof would be futile as aforementioned. The action is ripe for review.

SEQRA challenges are subject to a 4-month limitations period (see CPLR §217 (1) and 304 (a)). To the extent that Petitioner's seek declaratory relief, the applicable limitations period is 6 years (CPLR 213 (1)). Which limitations applies?

In Matter of Save the Pine Bush v City of Albany, 70 NY2d 193 [1987], a hybrid proceeding containing a SEQRA challenge and a declaratory action, the Court held,

> "In order to determine the Statute of Limitations applicable to a particular declaratory judgment action, the court must examine the substance of that action to identify the relationship out of which the claim arises and the relief sought. If the court determines that the underlying dispute can be or could have been resolved through a form of action or proceeding for which a specific limitation period is statutorily provided, that limitation period governs the declaratory judgment action. Here, the question is whether the four-month Statute of Limitations period applicable to article 78 proceedings should be invoked.
>
> The general rule is that an article 78 proceeding is unavailable to challenge the validity of a legislative act such as a zoning ordinance. However, when the challenge is directed not at the substance of the ordinance but at the procedures followed in its enactment, it is maintainable in an article 78 proceeding.
>
> With the exception of the challenge to the first ordinance based upon vagueness and an overbroad delegation of authority, regardless of the form in which Petitioners-petitioners have chosen to couch their action, **their challenges to the three ordinances primarily involve the City's failure to follow SEQRA. As such, those causes of action were maintainable in an article 78 proceeding and should have been commenced within four months."** (id. at 202-203) (internal quotations and citations omitted; emphasis added)

Here, crux of the challenge is the alleged failure to comply with SEQRA. Accordingly, the 4-month limitations period applies to this hybrid proceeding.

When did the 4-month limitations period begin to run? The issue distills to whether the action was ripe for review when the negative declaration was filed, or when the regulations were adopted. The negative declaration was adopted on February 23, 2021. The regulations were adopted on March 3, 2021. The action was filed on June 29, 2021, commencing the action (CPLR § 304 (a)). Thus, if ripe for review when the negative declaration issued on February 23,

2021, the action would not have been timely commenced. If the action was not ripe for review until the regulations were adopted on March 3, 2021, however, the action was timely commenced.

Since there was no specific project being approved, adoption of the negative declaration was not the last act of ORES, for the regulations could have been further amended prior to adoption, or not adopted at all; accordingly, the limitations period did not begin to run upon the issuance of the negative declaration (see Matter of Save the Pine Bush v City of Albany, supra. at 203, where the Court held, inter alia: "Inasmuch as consideration of possible detrimental effects of this action should have been given at the earliest possible time (ECL 8-0109 [4]; 6 NYCRR 617.1 [c]), **the time to complain of SEQRA violations in the enactment of this ordinance was within four months of the date of the enactment";** c.f. Stop-The-Barge v Cahill, 1 NY3d 218 [2003]) (emphasis added). Since adoption of the regulations charted an immediate and final impact by effectively transferring the siting authority for major renewable energy facilities to ORES, Petitioners need not await ORES approval of a specific project to establish a justiciable issue (see Matter of Save the Pine Bush v City of Albany, at 203, where the Court held,

> "the action attacking the alleged SEQRA violations in the classification of C-PB Commercial-Pine Bush was not commenced in a timely manner. Common Council's creation of this classification, with its concurrent announcement of a policy to commercially develop the Pine Bush in an ecologically sound manner, constituted an "action" within the meaning of SEQRA, in that **it committed the City to future commercial** development of the Pine Bush (6 NYCRR 617.2 [b] [2]). SEQRA review was required **before any specific applications** were needlessly studied…") (emphasis added)

This Court finds that the matter was ripe for review once the regulations were adopted, commencing the limitations period, and there is no necessity to await any specific project approval (see Matter of Eadie v. Town Bd. of Town of N. Greenbush, 7 N.Y.3d 306 [2006]). Here, the action was commenced within four months of the regulation adoption date, and it is timely.

HOME RULE/PREMPTION

Article IX, §1 (a) of the New York State Constitution provides, inter alia: "every local government …shall have a **legislative body elective by the people** thereof. Every local government shall have the power to adopt local laws…" (emphasis added) Article IX, §2 provides, inter alia:

> **(a)** The legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution.
> **(b)** Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:
>
> **(4)** Shall enact, and may from time to time amend, **a statute of local governments granting to local governments powers including but not limited to those of local legislation and administration in addition to the powers vested in them by this article…**

To implement this constitutional grant, Municipal Home Rule Law was enacted (see MHRL§ 50 (1)). The Court also notes that Statute of Local Governments §10 (6) specifically provides, inter alia: **"In the case of a city…the power to adopt, amend and repeal zoning regulations"** (see DJL Rest. Corp. v. city of New York, 96 N.Y. 2d 91, 94 [2001]).

Home rule is not unlimited. As aforementioned, Petitioner's acknowledge the state's preemption rights under PSL Article 10 but object to same here. Such argument is entirely unpersuasive.

In Consol. Edison Co. v. Town of Red Hook, 60 N.Y.2d 99, 105 [1983], the court held,

> "Local Law No. 2 is invalid because the Legislature has pre-empted such local regulation in the field of siting of major steam electric generating plants."

(see Albany Area Builders Ass'n v. Guilderland, 74 N.Y.2d 372. 377 [1989], where the Court held,

> "The **preemption doctrine represents a fundamental limitation on home rule powers.** While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammeled primacy of the Legislature to act with respect to matters of State concern. Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field." (internal quotations and citations omitted; emphasis added)

; see also, Matter of TransGas Energy Sys., LLC v New York State Bd. on Elec. Generation Siting & Envt., 65 A.D.3d 1247 [2009 2d Dept.].)

Here, the Legislature has enacted a comprehensive scheme to create a "**single forum**" giving ORES exclusive jurisdiction over the siting of major renewable energy facilities, pre-empting local legislation (EL § 94-c (1)). Moreover, ORES recognized the following protections for local government, to wit:

> "Section 900-2.25(c) of the regulations includes this requirement in the EL §94-c review process, and requires the applicant to submit a statement justifying any waiver request to "show with facts and analysis the degree of burden caused by the requirement, why the burden should not reasonably be borne by the applicant, that the request cannot reasonably be obviated by design changes

> to the facility, that the request is the minimum necessary, and that the adverse impacts of granting the request are mitigated to the maximum extent practicable consistent with applicable requirements set forth in the regulations." Additional details are required for waiver requests based upon technological limitations, cost or economics and the needs of consumers (§§900-2.25(c)(1)–(3)). The applicant has the burden of justifying any request for such a determination, and the relevant local agencies are required to submit to the Office a statement indicating whether the proposed facility is designed to be sited, constructed and operated in compliance with applicable local laws and regulations, if any, concerning the environment, or public health and safety. **If the Office determines compliance with a particular provision of a local law or ordinance to be unreasonably burdensome, it may elect not to apply it.** This requirement has its genesis in the statute and is **required to balance local needs with State policy that new major renewable energy generation projects be sited in a timely and cost-effective manner that includes consideration of local laws concerning zoning, the environment or public health and safety, and avoids or minimizes, to the maximum extent practicable, adverse environmental impacts**."[66] (emphasis added)

Thus, while preemption stands, it is wholly mindful of local interests.

NECESSARY PARTIES

Defendants raised the affirmative defense that Petitioner failed to name necessary parties to the action. CPLR § 1001 (a) provides:

> "Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might equitable be affected by a judgment in the action shall be made Petitioners or defendants."

I can think of none. In fine, issue has been joined by the proper parties.

[66] NYSEF Doc. No. 91 – Amended EAF @ R0303.

LACHES

In Blinds To Go (U.S.), Inc. v. Times Plaza Dev., L.P., 45 A.D.3d 714, 715 [2d Dept. 2007], where the Court held,

> "The doctrine of laches, "which bars recovery where a Petitioner's inaction has prejudiced the defendant and rendered recovery inequitable, has no application in actions at law". (internal citations omitted)

Petitioners have timely commenced this action, and there is absolutely no basis to deny recovery under a claim of laches.

FAILURE TO STATE A CAUSE OF ACTION

Petitioners allege that adoption of the regulations was an action under SEQRA, and that the Respondent failed to take a hard look at the relevant environmental impacts when it issued the negative declaration. That is sufficient to state a cause of action.

SEQRA

The project involves the adoption of regulations to implement the provisions of Executive Law (EL) § 94-c. Accordingly, the project is an action necessitating SEQRA compliance (6 NYCRR § 617.2 (b) (3)).

The purpose of SEQRA is set forth in ECL § 8-0101, and 6 NYCRR 617.1 (b) (c) and (d) which provides:

> **"(b)** In adopting SEQR, it was the Legislature's intention that all agencies conduct their affairs with an awareness that they are stewards of the air, water, land and living resources, and that they have an **obligation to protect the environment for the use and enjoyment of this and all future generations.**

> **(c)** The basic purpose of SEQR is to incorporate the consideration of environmental factors into the existing planning, review and decision-making processes of state, regional and local government agencies at the earliest possible time. To accomplish this goal, SEQR requires that all agencies determine whether the actions they directly undertake, fund or approve may have a significant impact on the environment, and, if it is determined that the action may have a significant adverse impact, prepare or request an environmental impact statement.
>
> **(d)** It was the intention of the Legislature that the protection and enhancement of the environment, human and community resources should be given appropriate weight with social and economic considerations in determining public policy, and that those factors be considered together in reaching decisions on proposed activities. Accordingly, it is the intention of this Part that a suitable balance of social, economic and environmental factors be incorporated into the planning and decision-making processes of state, regional and local agencies. It is not the intention of SEQR that environmental factors be the sole consideration in decision-making." (emphasis added)

Clearly, actions taken to with "goals of fighting climate change by achieving 70% of statewide electrical generation from renewable energy sources by 2030 and reducing the statewide electrical demand system to zero emissions by 2040" fall squarely within the fundamental purpose of SEQRA to protect the environment for future generations.[67]

SEQRA ACTION CLASSIFICATION

Petitioner's claim that the project should be classified as Type I (6 NYCRR § 617.4 (b)) is fundamentally flawed (c.f. Niagara Recycling, Inc. v. Town Bd. 83 A.D. 2d 335, 338, Aff'd 56 NY 2d 859, where respondent Town "conceded" the adoption of an ordinance to regulate the siting of waste facilities was a Type I action).[68] Simply put, upon adopting the regulations, no

[67] NYSEF Doc. No. 91 R 0295 – SEAF Attachment B.
[68] NYSDEF Doc. No. 1 Complaint ¶ 127-139.

municipal land use plan, change of a zoning district, zone change or specific project was approved, and, as such, it does not meet any of the criteria set forth in 6 NYCRR § 617.4 (b).

It is important to note that a Type I classification carries a presumption that the action may have a significant adverse environmental impact, necessitating review through the EIS process, but it is not a mandate. In turn, classification of an action as unlisted 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. In fine, classification does not end the inquiry!

NEGATIVE DECLARATION

Petitioner has challenged the negative declaration adopted herein. A negative declaration is defined as follows:

> "Negative declaration means a written determination by a lead agency that the implementation of the action as proposed will not result in any significant adverse environmental impacts." (6 NYCRR 617.2 (z))

The issuance of a negative declaration must comply with SEQRA Regulation §617.7 (a) (2) and (b), which 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.
>
> **(2) To determine that an EIS will not be required for an action, the lead agency must determine either that there will be no adverse environmental impacts or that the identified adverse environmental impacts will not be significant.**

> **(b)** For all Type I and Unlisted actions the lead agency making a determination of significance must:
>
> **(1)** consider the action as defined in section 617.2(b) and 617.3(g) of this Part;
> **(2) review the EAF**, the criteria contained in subdivision © of this section and any other supporting information to identify the relevant areas of environmental concern;
> **(3) thoroughly analyze the identified relevant areas of environmental concern to determine if the action may have a significant adverse impact on the environment**; and
> **(4) set forth its determination of significance in a written form containing a reasoned elaboration and providing reference to any supporting documentation."** (emphasis added)

In Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y. 3d 416, 430 [2017], the Court recognized the limited scope of review of a SEQRA action as follows:

> "**Judicial review of SEQRA findings is limited** to whether the determination was made in accordance with lawful procedure and whether, substantively, the determination was affected by an error of law or was arbitrary and capricious or an abuse of discretion. This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively. Courts review an agency's substantive obligations **in light of a rule of reason**. Importantly:
>
> Not every conceivable environmental impact, mitigating measure or alternative must be identified and addressed before a FEIS will satisfy the substantive requirements of SEQRA. **The degree of detail with which each factor must be discussed obviously will vary with the circumstances and nature of the proposal**. . .. [T]he Legislature in SEQRA has left the agencies with considerable latitude in evaluating environmental effects and choosing among alternatives. Nothing in the law requires an agency to reach a particular result on any issue or permits the courts to second-guess the agency's choice.
>
> In short, we review the record to determine whether the agency **identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the**

> **basis for its determination.**" (internal quotations and citations omitted; emphasis added)

; see also, Chinese Staff & Worker's Assn v. New York, 68 N.Y. 2d 359, 363 [1986]; Jackson v. New York State Urban Dev. Corp., 67 N.Y. 2d 400, 416-417 [1986]; In the Matter of Arthur M. Cady et al v. Town of Germantown Planning Board et al, 184 A.D.3d 983 [3d Dept.2020]; Matter of Brunner v Town of Schodack Planning Bd., 178 A.D.3d 1181 [3d Dept. 2019]; Matter of Troy Sand & Gravel Co., Inc. v. Town of Nassau, 82 A.D.3d 1377, 1379 [3d Dept. 2011]; Matter of Anderson v. Lenz, 27 A.D. 3d 942, 944 [2006]).

Petitioner claims that the PSC will provide better environmental protection for the siting of major renewable energy facilities.[69] Petitioners even seek an order directing that the PSC resume the processing of pending applications, even though such applications are also exempt from SEQRA as a Type II action, albeit Petitioner has not provided authority for such an order.[70]

ORES claimed.

> "A comparison of the environmental analysis conducted pursuant to the EL §94-c regulations and SEQRA finds that the two processes are comparable, and that the assessment and analysis of potential adverse environmental impacts required by the EL §94-c regulations are as prescriptive and comprehensive as would be required by SEQRA. SEQRA requires that significant adverse impacts must be avoided and minimized to the maximum extent practicable, and where impacts cannot be avoided, mitigation must be provided. As discussed above, the EL §94-c regulations contain the same requirements with regard to avoiding and minimizing impacts."[71]

The issue distills to whether ORES took a "hard look" at whether any significant adverse environmental impact would arise from adopting the regulations, to implement its siting

[69] See Public Service Law Article 10, § 164. See NYSEF Doc. No. 1 – Complaint ¶ 3.
[70] See 6 NYCRR 617.5 (c) (44).
[71] NYSEF Doc. No. 91 Amended EAF @ R0301.

authority in place and instead of a PSC Article 10 review. This begs the question of how you measure a "hard look". That determination rests on a true evaluation of the facts in the record, and the magnitude of the relevant environmental impacts. Notably, ORES correctly limited its review as follows:

> "EL §94-c is only applicable to **major renewable energy facilities that do not utilize a fossil fuel resource** in the process of generating electricity and the 94-c application requirements are, therefore, **limited to the potential impacts associated with the construction and operation of such facilities**."[72]

Yet, application of the "hard look" test can be elusive. Let's illustrate.

In Matter of Hart v. Town of Guilderland, 2021 N.Y. App. Div. LEXIS 4367 [3d Dept. 2021], the Court held that the lead agency satisfied the "hard look" test. In relevant part, the project included the construction of three (3), 5-story apartment buildings near the Rapp Road Historic District (RRHD), which had been added to the National Register of Historic Districts to reflect the 1930 migration of African American sharecroppers from Shubuta, Mississippi to Albany, NY in hopes of building a life free of debt and racial violence. Recognizing that the RRHD was comprised of one-story homes, a public comment was made that a viewshed analysis should be required to assess the visual impact. Notwithstanding the heighted historical and cultural impact at issue, that comment was not even addressed, let alone implemented. In stark contrast, the challenged regulations mandate the inclusion of a viewshed analysis as part of any application. Clearly, a viewshed analysis would provide for a more objective evaluation of visual impacts. In fine, the regulations arguably provide a more comprehensive and objective review than SEQRA.

[72] NYSEF Doc. No. 91 Amended EAF @ R0300.

In response to the need to mitigate climate change, establishing electrical generation through wind and solar renewable energy systems is of great significance, and necessitates an objective and intellectually honest evaluation. Here, the record is expansive, incorporating public hearings, as well as the receipt and evaluation of over 5,000 public comments. Moreover, as aforementioned, the regulatory scheme is highly sophisticated, mandating that an application include extensive expert reports to assess the relevant impacts, all subject to public hearings and comments, review by an ALJ, and ultimate determination by the Commissioner. The regulatory scheme also mandates that ORES avoid, minimize or mitigate potential adverse environmental impacts from the siting, design, construction and operation of a major renewable energy facility.

The SEQRA elephant in the room is whether ORES took a hard look at whether any significant adverse environmental impacts may arise from a default approval, where an ongoing administrative review is incomplete as of the one-year default date under EL § 94-c (5) (f). The response to comments included the following:

> "Comment Several commenters were **concerned about automatic approvals,** and that the timelines associated with threatened and endangered species review would lead to the automatic approval of projects that deserve stricter scrutiny. Commenters asserted that **automatic approval of projects after one year of threatened and endangered species consultation may result in harm to species and suggested that this timeline be flexible.**
>
> Discussion Executive Law §94-c specifies that if the Office fails to make a final determination within the required time frame, then the draft siting permit will become final. **The draft siting permit will include the relevant uniform standards and conditions and any required site-specific conditions necessary to achieve a net conservation benefit to any impacted endangered or threatened species and a provision requiring the permittee to provide a host community benefit. No change is warranted."**[73] (emphasis added)

[73] NYSEF Doc. No. 91 R0273.

In its impact assessment, ORES found that EL § 94-c,

> "advances…State public policy for **expediting** the regulatory review of applications for siting of major renewable energy facilities necessary to meet the Climate Leadership and Community Protection Act (CLCPA) targets, in recognition of the importance of these facilities to lowering carbon emissions…"[74]

A one-year default provision effects that policy.

In the EAF, ORES concluded,

> "Each application for a siting permit would be **individually reviewed by ORES** in accordance with the consolidated, balanced, timely and cost-effective process required by EL §94-c and the proposed regulations while ensuring the protection of the environment and **consideration of all pertinent social, economic and environmental factors (including Environmental Justice areas)** in the decision to permit (or not permit) any particular facility." [75](emphasis added)

So, what happens if the review process is incomplete within the one-year period and approval is based on a default?

The regulations provide that a default approval is subject to the following:

> "The **permittee shall implement any impact avoidance, minimization and/or mitigation measures identified in the exhibits, compliance filings and/or contained in a specific plan required under this Part 900**, as approved by the office."[76] (emphasis added)

As a practical matter, the project would effectively be subject to "any impact avoidance, minimization and/or mitigation measures identified in the exhibits, compliance filings and/or contained in a specific plan required under this Part 900", and not subject to any modification

[74] NYSEF Doc. No. 91 Amended EAF @ R0291.
[75] NYSEF Doc. No. 91 Amended EAF @ R0292.
[76] See § 900-6 (1) (a).

that may otherwise have been approved by ORES, i.e., the restrictions may be greater upon a default, than a final approval issued by the Executive Director. The project is still subject to any other required approvals and the applicant must provide community host benefits.[77] The project construction and operation is also subject to local laws, except as stated in the siting permit, and federal laws.[78] Wind facility operation is still subject to noise restrictions.[79] The facility is still subject to decommissioning and restoration restrictions.[80]

The point made is that ORES addressed the impact of a default in the response to comments and concluded no change to the one-year default regulation was warranted.[81] In context of the regulatory framework defining the conditions of a default approval, ORES stated a reasoned basis for its determination to keep the provision intact.

Within the limited scope of judicial review and the rule of reason, the record supports a finding that ORES identified the relevant areas of environmental concern, including the default provisions, took a hard look at them, and made a reasoned elaboration of the basis for its determination that the adoption of the challenged regulations will not result in any significant adverse environmental impacts. As a single purpose governmental entity acting with objective criteria and standards, it is manifest that ORES is in a far better position than the PSC to engage in timely and thoughtful siting procedures.

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[77] See § 900-6 (1) (d) – (f).

[78] See § 900-6.3
[79] See § 900-6.5
[80] See § 900-6.6
[81] In Appendix-1 of the amended EAF [NYSEF doc. No. 91 – Amended EAF Appendix 1 @ R0311], ORES included an overview of the regulations, but did not address the one-year default provision of § 900-9.1 (a) (2). While that omission is troubling, the default impact had been addressed in the response to comments and is fully addressed in the regulations.

At this juncture of the proceeding, there is little likelihood of success on the merits of Petitioner's challenge to the issuance of the negative declaration. Notably, determination of the motion is not, however, a final determination on the merits (see Meyer v. Stout, 45 A.D. 3d 1445 [4th Dept. 2007]).

SAPA

Petitioners allege that ORES failed to meaningfully engage in the public comment and review process required by SAPA §202(5)(b).[82] The fact that ORES conducted seven (7) public hearings, provided written responses to over 5,000 comments, identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination that the adoption of the challenged regulations will not result in any significant adverse environmental impacts, evidences SAPA compliance.

ULTRA VIRES

Clearly, ORES has acted within the scope of its authority to adopt regulations pursuant to EL§ 94-c, and this defense lacks merit on its face.

CONFLICT OF INTEREST

Petitioner claims that ORES has a conflict of interest with its consultant Tetra Tech, which "disclosed numerous material conflicts of interest based on its representation of renewable energy developers with existing projects in New York State."[83]There is nothing in the record to evidence that any member of ORES has any financial interest in Tetra Tech, and the fact that Tetra Tech has experience in the field does not disqualify it from participating in the process.

[82] NYSDEF Doc. No. 1 Complaint ¶ 168-187.
[83] NYSDEF Doc. No. 1 Complaint ¶ 62.

(c.f. Matter of Troy Sand & Gravel, Inc. v. Fleming, 156 A.D. 3d 1295 [3d Dept. 2017]; Matter of Pittsford Canalside Props., LLC v Village of Pittsford, 137 A.D.3d 1566, 1568 [4th Dept. 2016]; Byer v. Town of Poestenkill, 232 A.D. 2d 851, 853 [3d Dept. 1996]; Segalla v. Planning Board, 204 A.D. 2d 332, 333 [2d Dept. 1994]).

PRELIMINARY INJUNCTION

Pursuant to CPLR §6301, "a preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do…an act in violation of the Petitioner's rights respecting the subject action, and tending to render the judgment ineffectual, or in any action where the Petitioner has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the Petitioner" (see also CPLR § 6311 and CPLR Rule 6312 (a)).

The movant must demonstrate: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (see c.f. Doe v. Axelrod, 73 N.Y. 2d 748, 750 [1988], where Court set review standard but held Petitioner failed to meet its burden of proof). The grant or denial rests in the sound discretion of the Court.

Under the ***first prong*** of the preliminary injunction test, for the reasons more fully stated above, there is not a likelihood of ultimate success on the merits.

Under the ***second prong*** of the preliminary injunction test, this Court recognizes that the unregulated siting, construction, and operation of solar and/or wind farms can result in irreparable injury, including but not limited to adverse impact to the rural character of those portions of a community which incur direct visual/noise impact from the facility. Given the

regulatory structure, the adoption of uniform standards and conditions, and the absence of any specific project approval, however, the record does not support a finding of irreparable harm at this juncture.

Under the ***third prong*** of the preliminary injunction test, the equities do not balance in Petitioner's favor, for it is manifest that development of major renewable energy facilities based on wind and solar resources to provide electrical generation is a reasoned means to combat climate change, and wholly compatible with the public interest to **"protect the environment for the use and enjoyment of this and all future generations."** (6 NYCRR 617.1 (b); emphasis added)

CONCLUSION

For the reasons set forth above, Petitioner's motion for a ***preliminary injunction is denied.***

This memorandum constitutes both the decision and order of the Court.[84]

Dated: Albany, New York
September 21, 2021

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

PAPERS CONSIDERED:

All e-filed pleadings, with exhibits.

09/21/2021

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

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